



European Trade Union
Confederation (ETUC)
Confédération Européenne
des Syndicats (CES)

BUSINESSEUROPE



Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases

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Introduction

In the course of 2007 and 2008, the European Court of Justice gave its judgement and interpreted existing European rules in several cases regarding the mobility of workers and companies/service providers in the framework of cross border provision of services (Laval, Rüffert and Commission vs. Luxembourg cases) and cross border establishment (Viking case). In these judgments, the European Court of Justice gave in particular its interpretation of the relationship between the fundamental social rights of collective bargaining and collective action and economic freedoms in the internal market.

These judgements have sparked controversy on the adequacy of existing EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment.

In October 2008, the European Commission and the French Presidency of the Council invited the European Social Partners to jointly develop an analysis of the consequences of the ECJ cases and of the challenges related to increased mobility in Europe, and to help re-establish confidence in the further development of the internal market.

The European social partners agree that the impact of the four ECJ cases, which goes beyond the specific national situations which were at stake, deserves a reflection at EU level.

Accepting the invitation to do joint work on this matter, employers and trade unions met four times in a full group - 30 March, 5 June and 26 October, and 19 January - and four other times in a smaller group - 18 May, 29 September, 14 December and 18 January.

European social partners acknowledge the important role and legitimacy of the European Court of Justice in interpreting existing EU rules. They engaged in this work from a critical perspective trying to find points of convergence. However, on those issues where no agreement was reached, the text reflects the respective positions of employers and trade unions.

They agreed that the following are the most relevant points for their reflection:

1. Context of the single market and impact of the ECJ rulings;
2. Relationship between economic freedoms and fundamental (social) rights;
3. Challenge of respecting the diversity of industrial relations systems and models;
4. Responses to the challenges raised by the judgments

This report has three sections. The first includes the shared observations of European employers and trade unions. The second encompasses two separate contributions from employers and trade unions. The two contributions address the items which employers and trade unions regard as the main issues raised by the cases and on which no shared views could be reached. They follow the same structure in order to make the document easier to read. The third section includes some final remarks by European social partners.

The idea behind the joint work has not been to undertake a case by case analysis of the ECJ rulings but rather to reflect on a number of cross-cutting issues. European social partners agreed to focus their work, in the context of the above mentioned points, on the following issues: fair competition in the internal market; obstacles to be removed and/or conditions to be put in place for free movement of services and workers; transparency and legal certainty; the principle of non discrimination, the role of public authorities.

Section I: Shared observations

The internal market has been a key factor in improving living standards throughout the EU. The internal market is not an end in itself but an instrument to achieve economic and social progress. In the context of EU enlargement, the single market has proven to be an instrument of economic and social convergence. An example of this phenomenon is the rapid catching-up observed in the Central and Eastern EU Member States in the last few years following their accession to the EU, although the economic crisis could slow down this trend in some of these countries.

European social partners are concerned about the rise of protectionism and xenophobia observed in Europe recently. Part of the answer is a well-functioning single market, particularly in times of economic crisis. Social partners recognise the importance of improving confidence in its benefits and addressing concerns that its social dimension is lagging behind its economic dimension.

Economic freedoms and social fundamental rights are essential features of European economic and social systems. Through its rulings in the Viking and Laval cases, the European Court of Justice ruled on the extent to which the exercise of workers' fundamental social rights can be legitimate to justify restrictions on economic freedoms, in particular the freedom of establishment and the freedom to provide services.

The European social partners agree that economic freedoms and fundamental social rights interact within their own field of competence. They have different views on the concrete implications of this interaction and especially what this would mean in terms of setting limitations on the right to take collective action and/or the freedom of establishment and the freedom to provide services.

The 'four freedoms' regarding the free movement of people, goods, services and capital need to be safeguarded and properly developed with a view to enabling higher levels of prosperity and social development in Europe.

European social partners are committed to the full implementation of the free movement principles to the extent that this takes place in a context of fair competition. To that end, accompanying measures have to be in place both at national and at European level.

Mobility of workers and companies in the single market is a key element in the further building of Europe from an economic, social as well as cultural point of view. The positive impact of mobility on the living and working conditions of mobile workers has led to a broad support for mobility in Europe. However, the negative perception of mobility and its consequences for a part of workers and citizens both in sending and receiving countries cannot be ignored.

The European social partners recall that the principle of non-discrimination and equal treatment is a key principle in the internal market, applying to workers and companies alike. Article 45 TFEU (ex Art 39 EC) provides that free movement of workers entails the abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment. Article 57 TFEU (ex Art 50 EC) regulates that the person providing a service may temporarily pursue his activity in the host Member State under the same conditions as are imposed by that State on its own nationals.

The concept of cross border worker mobility covers both free movement of workers and the temporary mobility of workers (posting) in the framework of the cross border provision of services. In this context, article 56 TFEU (ex article 49) , according to which restrictions on the freedom to provide services within the Union shall be prohibited, is relevant.

As mobility in the framework of the freedom to provide services through posting of workers is at the heart of three of the four ECJ rulings, the report of the joint work reflects the discussions held by employers and trade unions on this issue.

In order to preserve a climate of fair competition, all companies and service providers in a comparable situation should be subject to the same rules and regulations without discrimination.

The Posting of Workers Directive provides for minimum standards which must be observed to ensure respect for the rights of workers and a climate of fair competition. Although the European social partners agree on this, they have different views on whether these aims are achieved by the Posting of Workers Directive following its interpretation by the European Court of Justice. Whilst both sides recognise the need to compel service providers to comply with a nucleus of rules as defined in the host country, they disagree on the definition of this nucleus as well as on the possibility for trade unions and/or Member States in the host country to go beyond this nucleus of rules.

The diversity of industrial relations systems should be respected. In line with the subsidiarity principle, working conditions are and should continue to be determined primarily according to the national rules applicable to a given market, as laid down in national law, collective agreements or practices, taking into account European laws and regulations regarding minimum standards.

According to the latest available data¹, posted workers represent 0.4% of the EU's working age population but this figure might be rising.

¹ European Commission communication *"Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers"*, June 2007

European social partners recognise the existence of some problems when implementing the Posting of Workers Directive in different national contexts, but have different views regarding what the main problems are and how and at which level they should be solved. One of the problems jointly recognized is the abuse of letterbox companies, using their artificial structure with the sole intention of avoiding the labour and social laws and regulations of the host country.

National and European social partners could play a role in addressing some of the issues mentioned in this section.

With respect to the Posting of Workers Directive, employers providing services across borders and posted workers must be well informed about their obligations and their rights. Improving information is a precondition to ensure good compliance.

Public authorities have an important role to play in this respect.

European social partners therefore support the work of the European Commission to facilitate the access to information and improve administrative cooperation between the Member States on posting of workers. The European social partners recognise the importance of better monitoring and enforcement of the Posting Directive, but have different views about the degree to which this may solve the key problems arising from the ECJ cases.

Although the European social partners agree that public procurement rules provide possibilities for pursuing social aims, which are used differently by Member States, they do not agree about the question if and to which extent the ECJ judgement in the Rueffert case has made it more difficult for public authorities and social partners to integrate into public contracts respect for social considerations - especially related to respect for industrial relations and collective bargaining in situations of cross border service provision.

Section II: Separate contributions

A/ Employers

1. Context of the single market

The Single Market is a key tool driving economic growth in Europe as barriers to the free circulation of people, goods, services and capital are progressively dismantled. With a market which now comprises 30 countries and around 500 million citizens², cross-border investment flows of 430 billion euros per annum and 70% of Member States' exports being destined for other EU countries, the benefits from closer integration are undeniable.

However, there is still a long way to go before the Single Market functions optimally and citizens and enterprises, especially SMEs, benefit from its advantages to the full. There are still many remaining barriers to the Single Market that represent in total an unfulfilled economic potential of 275 to 350 billion euros³.

² In 1994, the Internal Market was extended through the EEA Agreement to include the three EFTA countries Norway, Iceland and Liechtenstein.

³ BUSINESSEUROPE calculations based on the European Commission's report "Steps towards a deeper economic integration: the Internal Market in the 21st century".

Notwithstanding a possible negative impact of the economic crisis on wages in some Member States, wage developments in Central and Eastern European Member States in the last years clearly illustrate the rapid pace at which these countries are catching up in terms of living standards following their accession to the EU. In 2007, wage increases amounted to 33.2% in Latvia; 26.5% in Estonia; 20.2% in Romania; and 17.9% in Bulgaria⁴. Wage increases were 3.6 times higher in EU12 than in EU15 in 2007 and 2.7 times higher in 2008⁵. **This trend towards economic and social convergence shows the positive effects of the internal market.**

With respect to the social dimension of the internal market, the EU social *acquis* consists of the combination of highly developed national systems and laws with, at the European level, more than 70 directives in the employment and social policy field.

In this regard, **EU citizens have a positive perception of the impact of the EU** as regards employment and social policies. According to a EUROBAROMETER survey published in September 2009⁶, more than 70% of Europeans feel the EU has had a positive impact on: combating discrimination based on gender (76%) and other forms of discrimination (73%); creating new job opportunities and fighting unemployment (72%); and fighting against social exclusion and poverty (70%).

Worker mobility in the single market also offers attractive opportunities for better working conditions and living standards, in particular for workers coming from poorer EU regions. In another EUROBAROMETER survey published in October 2006, the possibility to work in another Member State and for other EU citizens to work in the respondent's country has been seen to have a positive effect by 70% of Europeans⁷.

According to the European Commission, the economic impact of recent intra-EU mobility since the 2004 enlargement has been on balance positive and it is not leading to serious disturbances on the labour market, even in Member States that have seen a relatively large inflow of migrants from new Member States⁸.

2. Relationship between economic freedoms and fundamental (social) rights

Employers' organisations consider that the ECJ rulings have not affected the relationship between social fundamental rights and economic freedoms, not making either of them subordinate to the other.

A European enterprise providing services in another Member State has to respect four levels of social regulations :

- **More than 70 EU directives in the field of social affairs:** These directives address a wide range of issues in the remits of the competences foreseen in the EU Treaty. They have to be implemented at national level. One of the aims of European social legislation was precisely to assure a ground of fair competition.
- **Social fundamental rights recognised at European level:** They also act as limits on the interpretation of European rules. The recent ratification of the Lisbon Treaty confers a binding power on the Charter of Fundamental Rights. This reinforces the status of social fundamental rights in the EU.

⁴ European Commission DG ECFIN's annual report on labour and wage developments in the EU, October 2008

⁵ EUROFOUND annual report on pay developments 2008, September 2009

⁶ EUROBAROMETER 316 – "European Employment and Social Policy", September 2009

⁷ EUROBAROMETER 254 – "Internal Market - Opinions and experiences of Citizens in EU-25", October 2006

⁸ Employment in Europe 2008 Report", November 2008

In addition, the mission of the European Court of Justice is to ensure that the law is observed in the interpretation and application of the EU Treaty, including legal instruments deriving from it such as directives and regulations. In the Viking and Laval cases, the ECJ has recognised that the protection of workers is in principle a legitimate aim, which can constitute an overriding reason of public interest. Where collective action is used proportionately, the protection of workers may therefore be invoked to justify further limitations on economic freedoms.

- **The social and labour laws of its own country:** The EU Member States have developed comprehensive social and labour laws which address issues that are national competences and often go beyond the minimum requirements foreseen in EU directives.
- **The nucleus of labour provisions of the host country:** Article 3 of the Posting of Workers Directive imposes on foreign service providers the observance of a hard core of labour standards of the host country.

In the same way as there are numerous limitations on economic freedoms, there can also be limits on the exercise of social fundamental rights such as the right to take **collective action**. This is also the case with other fundamental rights such as, for example, the freedom of expression. According to ECJ's settled case law, unlike other fundamental rights such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly appears to be absolute.⁹

Limitations on economic freedoms based on fundamental rights are often foreseen in national regulations. However, **the fact that regulation of some fundamental social rights is the competence of the Member States does not mean that their exercise cannot experience some limitations due to its interaction with EU fundamental freedoms**. Therefore, it is coherent and fair to recognise the existence of mutual limitations.

It is important in the debate to underline that the ECJ has recognised the trade unions' right to take **collective action** as a fundamental right for the first time. However, it acknowledged a basic and logical limitation related to its interaction with the freedoms of services: collective action needs to be used in a proportionate manner. Imposing limits on the right to take collective action, including through a proportionality requirement, is not a novelty. It is in fact recognised by many Member States, including some of the Member States which were affected directly by the ECJ rulings. **Moreover, such limitations are fully compatible with international standards, including those set by the ILO.**

A proportionality requirement is necessary to ensure that exercise of this right does not unfairly hollow out enterprises' right to establish or provide services in another Member State and/or exclude foreign service providers from any national market.

Fair competition - non-discrimination

Employers acknowledge the role of fair competition between national and foreign enterprises as part of a well-functioning internal market. However, a climate of fair competition can be achieved even though workers are not subject to the exact same working conditions.

⁹ ECJ judgment C-112/00 of 12 June 2003, "Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich" § 80

Different wage levels or working conditions are a reality both in a cross-border context and at national level. Enterprises compete on the basis of a number of factors. Different wage levels or other working conditions have not been and should not per se be regarded as unfair competition. Also at national level, enterprises compete even though wage and working conditions of their workers are not identical.

European employer organisations represent enterprises in all the EU countries, and hence enterprises that compete with each other in the single market, but also suppliers and users of labour. Therefore, they are the organisations with the most legitimacy and with the highest level of sensitiveness towards the need to preserve a fair level of competition between enterprises at EU level. In this sense, when they defined and updated their position on the Posting of Workers Directive, **European employers from all Member States and sectors clearly expressed their firm belief that this directive constitutes a balanced and adequate level playing field for all enterprises.**

The Posting of Workers Directive aims to encourage enterprises to provide services in another EU Member State in a climate of fair competition. In order to do so, it allows them to post their workers in that country for a temporary period of time, while ensuring an adequate level of protection for posted workers. In this respect, the directive coordinates rather than harmonises national laws.

There are two main reasons why employers believe that the Posting of Workers Directive secures a climate of fair competition between foreign and national enterprises.

First, **the Posting of Workers Directive imposes on foreign service providers the observance of a hard core of labour standards of the host country** – e.g. working time, rest periods, holidays, minimum rates of pay, health and safety and non-discrimination. The directive therefore ensures fair competition in the internal market by safeguarding fair working conditions for posted workers.

By contrast, the Directive was not drafted with the intention to impose “equal conditions” as posted workers face different circumstances than workers of the host country. **Imposing on foreign enterprises the observance of the entire labour law framework of the host country would distort the aim of the Directive.** It would in practice close national markets to many foreign competitors, in particular for enterprises coming from countries which joined the EU after the last rounds of enlargement. It would be counterproductive in terms of growth and jobs.

Secondly, the Directive foresees that **the nucleus of mandatory rules can only be binding on foreign service providers if it also applies to all enterprises in the host country.** It would be unfair to require from the foreign provider the fulfilment of rules that are not mandatory for some enterprises in the host country. That being said, there is no reason why countries with no generally applicable collective agreements should change their system. It is also worth noting that, for the issues listed in article 3 of the Posting of Workers Directive, generally applicable collective agreements which are in line with the provisions of the Directive sometimes go beyond national minimum rules.

Finally, in addition to the application of the nucleus of rules of the host country, article 3.7 of the Posting of Workers Directive opens the possibility of applying terms and conditions of employment which are more favourable for posted workers. It is worth underlining that this provision intends to avoid that the working conditions to which posted workers are entitled in the country of origin worsen as a consequence of the posting. This situation is completely different from the circumstances of the ECJ rulings.

Obstacles to be removed and/or conditions to be put in place, transparency and certainty

The ECJ rulings add to legal certainty as to how economic freedoms and social fundamental rights should be reconciled and regarding the conditions which must be observed by enterprises with respect to their posted workers.

Employers do not always agree with ECJ rulings. However, they consider that the ECJ's interpretation of the Posting of Workers Directive in the Laval, Rüffert, and Luxembourg cases is helpful to avoid uncertainty, e.g. need to take into account collective agreements in the country of origin; and to assure a ground of fair competition.

In this respect, employers welcome the ECJ's interpretation of the concept of **public policy** in the Luxembourg case. This is a well-established concept of international law by which States can impose compliance with national provisions which are really crucial for the protection of the political, social or economic order as to justify an extraordinary exemption of the engagements agreed or the rules applicable.

In view of the derogatory nature of a public policy provision, it is logic that its scope is not determined unilaterally or applied too widely by governments; otherwise this would hollow out its purpose, which is to deal with exceptional situations. A restrictive interpretation of the public policy provision therefore needs to be ensured.

When it comes to posting of workers, the notion of public policy therefore does not allow Member States to impose their labour regulations on foreign service providers without limits. Exhaustive lists of labour provisions applying to a wide range of topics (e.g., in the Luxembourg case, wage indexation, rules specific to part-time and fixed-term work, etc) are not only in contradiction with article 3 of the Posting of Workers Directive but do not respect the restrictive scope of derogations that can be justified for public policy reasons.

Even though the ECJ rulings have increased certainty, many enterprises continue to struggle to find adequate information with regard to the working conditions which apply to posted workers.

The challenge is therefore to ensure that service providers have the necessary information so that they can meet, in all EU member states, their legal obligation to guarantee clearly defined terms and conditions of employment of the host country with respect to their posted workers.

Effective control measures can also help achieving a better enforcement of the provisions of the Posting of Workers Directive. However, it is essential to ensure that such measures do not constitute unjustified restrictions to the freedom of establishment and the freedom to provide services.

3. Challenge of respecting the diversity of industrial relations systems and models

There is a wide diversity of practices in the Member States as to the way in and the level at which working conditions are determined.

In practical terms each EU country has established its own way of securing minimum working conditions for posted workers, taking into account their different models of industrial relations.

Regardless of the existence or otherwise of minimum wages and/or generally binding collective agreements as part of their system of labour relations, Member States can maintain the traditions which have developed over decades. The same is true in relation to the validity of their collective action practices and regulations.

Nevertheless, **the necessary respect for the diversity of national industrial relations systems has not and should not prevent adjustments where needed to ensure appropriate transposition and enforcement of the Directive.** It is not the first time that an EU directive or its interpretation by an ECJ judgment has an impact on industrial relations systems in some Member States. What matters is that this impact does not call into question these systems fundamentally. Employers believe that the impact of the Posting of Workers Directive, as interpreted by the ECJ, does not undermine the basic pillars of any national industrial relations system in a European country.

Likewise, employers believe that the Ruffert case did not undermine the use of public procurement rules to pursue social objectives where it exists. Without questioning this practice in Germany, the European Court of Justice simply inferred that the provisions of a collective agreement which are not applicable for some host enterprises in the private sector cannot be imposed through public procurement on a foreign service provider.

4. Responses to the challenges raised by the judgements

The ECJ rulings have raised a number of issues regarding the relationship between economic freedoms and social fundamental rights in the single market and implementation of the Posting of Workers Directive.

Even though their impact is essentially at national level, they have not provoked a disruption of industrial relations in the Member States. The limited number of Member States where some problems have been identified by the ECJ rulings are finding solutions. This may involve the adaptation of existing national rules where they disrespect EU law. However, the involvement of the social partners in shaping effective solutions in these countries is essential to minimise the risks that the needs of employers and trade unions are not taken into account.

Following the ratification of the Lisbon Treaty, the transversal social clause has now entered into force. In addition, the EU fundamental rights charter includes an explicit recognition of the “right to collective bargaining and action” (article 28), which is binding for all but three EU Member States. In this context, there is no need to add a social progress protocol in the Treaty.

There is also no need to revise the Posting of Workers Directive, which fulfils its mission to facilitate the cross-border provision of services in a climate of fair competition. The problems which occurred in the ECJ rulings were due to shortcomings in the implementation of the directive at national level. The priority is therefore to improve its enforcement and implementation in the Member States.

In this regard, information on the diversity of national regulations applicable to posted workers in the Member States should be made more widely accessible to enterprises. Employers support the action taken by the European Commission to improve administrative cooperation between the Member States, in particular the development of an electronic information exchange system. More accessible information is an important condition to encourage more enterprises to provide services in other Member States than their country of establishment.

Social partners may also play a role to provide information to service providers and workers. For example, the European social partners of the construction sector, FIEC and EFBWW, have developed jointly a website containing information on applicable national regulations for posted workers in the construction sector¹⁰.

B/ ETUC

1. Context of the single market and the impact of the ECJ rulings

The ETUC is committed to the development of the single market and to the full implementation of the four freedoms that are attached to it, in particular the free movement of workers, which is a right highly valued by EU citizens.

However, the ETUC is concerned that the social impact of the increased mobility of workers, companies and services is not sufficiently addressed by the EU institutions and the Member States.

In the sending countries, brain drain and youth drain are generally understood as negative side effects of the increased mobility. Expectations of a higher household income and better working conditions are the most important factors that tend to encourage Europeans to move to another country. However, there is considerable evidence in the receiving countries of big differences in living conditions of new immigrants as compared to host-country nationals and these include higher risks of poverty, and difficulties in accessing housing, health care and other social services. The failure to create the conditions for mobile workers to integrate in the society can result in serious social problems and a waste of economic benefits of mobility. These problems could be at the root of negative attitudes towards intra-EU mobility¹¹.

In this context, the ETUC is of the opinion that **the four ECJ cases have further exposed the weaknesses of the current EU legal framework dealing with mobility** of companies and service providers. The judgments have increased concerns over social dumping and made it even more difficult to solve the problems in this respect in several countries. This has had a **negative impact on the level of confidence among workers and citizens in the benefits of the internal market**, has increased Euroscepticism, and feeds into the trends of rising protectionism and xenophobia, in the context of the current economic and financial crisis. Moreover, the cases are **endangering social partnership models and national industrial relations systems**. These weaknesses should therefore be urgently addressed.

In ETUC's view, there are two dimensions of weakness:

- a weakness at the level of the European Treaties, because the **ECJ confirmed a hierarchy of norms, with market freedoms highest in the hierarchy** and the fundamental rights of collective bargaining and action in second place. Although the ECJ refers to a balance between economic and social rights, it treats in fact the fundamental rights to collective bargaining and to collective action primarily as potential restrictions to economic freedoms;

¹⁰ See www.posting-workers.eu

¹¹ 2008 Employment in Europe report. Furthermore, in relation to the economic crisis Europeans have seen their financial situation worsened compared to five years ago. The largest proportions of negative evaluations are observed among the Central and Eastern European Member States. In addition, about a third of the respondents from Bulgaria, Latvia and Slovakia expect their household finances to deteriorate over the coming year (EUROBAROMETER 315 – Social climate)

- a weakness in the legal framework applicable to posted workers, as the **ECJ interpreted the Posting Directive in a very restrictive way**, limiting the scope for Member States and trade unions to adequately protecting posted workers against unfair competition on wages and employment conditions

2. The relationship between economic freedoms and fundamental (social) rights

The ETUC is very concerned about the alleged balance introduced by the ECJ between economic freedoms and social fundamental rights. In ETUC's view, the ECJ judgments limit the right to take collective action significantly but leave the economic freedoms untouched.

The right to take collective action is recognised in international standards, EU law and national constitutional laws. **EU law should not be interpreted as imposing restrictions on fundamental rights** which have the effect of **undermining Member States' duty to comply with their obligations under international law** as recognised by the ILO, Council of Europe and national Constitutional law.

The ETUC considers that setting limitations with reference to EU internal market rules is unacceptable. Furthermore, such restrictions or limitations cannot result from an economic test. The ETUC recalls that international norms of for instance the ILO do not allow the application of such economic tests and do not accept the concept of proportionality.

Moreover, the ETUC believes that preserving the capacity of unions to take collective action is also in the interest of employers who need strong negotiating partners to agree on working conditions collectively. Likewise, the existence of strong trade unions is essential to steer individuals' expectations and to channel social unrest. **The Viking case, however, has created major legal uncertainty, which puts into question the exercise of the fundamental right to collective action. The sustainability of industrial relations systems is therefore at risk. In addition, there is a real risk of juridification of industrial conflict**, with companies tempted to use interim injunctions to stop industrial action - even before it has been taken- in any case with a potential cross border dimension, and the trade union facing potential liability for huge damages in such cases. This can have the – unwanted and undesirable – consequence of promoting wild-cat strikes, as organised collective action is becoming extremely difficult to execute in a lawful manner.

Fair competition - non discrimination

The ETUC is of the opinion that the **principle of 'equal treatment' is a key principle in the internal market**, taking as a starting point that all actors on the internal market, workers as well as companies, should not be discriminated against because they come from another Member State. Upholding this principle is of the utmost importance for the acceptance among workers and citizens of the internal market.

As a result of the ECJ rulings, the general principle of non discrimination between local and foreign companies/service providers is no longer respected. This has resulted in unequal treatment of workers. When a foreign subcontractor can only be held liable for minimum levels of pay and working conditions in the host country, whereas domestic (sub)contractors will have to or are expected to apply higher (collectively agreed) standards, there is a clear incentive for 'social dumping'. Instead of creating a level playing field for foreign and domestic companies/service providers, it may lead to reverse discrimination (i.e. discrimination against local companies).

Where in such situations trade unions propose to take action in favour of workers, they are limited by the restrictive judgements of the ECJ, conditioning the validity of collective action to the need to respect for the Posted Workers Directive, and assimilating trade unions to emanations of the State, thereby severely limiting their scope to fight for the improvement of

the living and working conditions of workers, including demanding equal treatment of workers in the place where the work is done.

Obstacles to be removed and/or conditions to be put in place for free movement of services and workers

In the ETUC's opinion, **labour law standards, collectively agreed working conditions**, and other measures designed to secure workers' protection, should be regarded as **preconditions for a sound development of mobility** of companies and workers in the internal market and **not as obstacles to free movement** in the Union.

The increasingly European labour market(s) requires a framework of firm and fair 'rules of the game', combining open borders with a level playing field for companies and adequate protection of workers. This means that:

- at national level, measures should be taken to ensure that social and industrial relations systems are **'mobility proof'**, i.e. capable of dealing with the increased mobility of workers and companies in a way which prevents unfair competition on wages and working conditions and safeguards national systems and traditions of collective bargaining;
- at EU level, such national measures should be recognized and accepted as **legitimate** when they are based on the principle of non-discrimination of companies and workers, instead of challenged as potentially incompatible with the internal market.

Transparency and certainty/ applicable labour standards

The ETUC acknowledges that transparency was one of the issues raised in the Laval judgement but strongly disagrees with the employers that the four ECJ judgments have added to legal certainty. Moreover, the ETUC considers that the **argument of 'legal certainty' cannot be used as an excuse to interfere with the essential features of national labour law and industrial relations systems**. It must be underlined that it is common knowledge that the national (Swedish) model in question relies very much on collective bargaining at the workplace, and that depriving the trade unions from the essential tools they need to entice meaningful negotiations with local and foreign companies on the same footing undermines the very functioning of this system.

In the Ruffert case, the issue of legal (un)certainty or lack of transparency for companies was not at stake as the local public procurement law clearly pointed out the applicable collective agreement. Furthermore, since companies would contractually undertake to respect the relevant labour standards, they could hardly pretend not to have been informed about them. As a consequence of the Ruffert case, the clauses on 'Tariftreue' (i.e. respect of wage levels as laid down in the relevant collective agreement) in existing public procurement laws in German federal states have been disapplied, to the detriment of workers (both local and posted workers) and of local employers and companies in situations of competition with foreign service providers.

The Luxembourg judgment has also further increased the uncertainty for posted workers and employers alike. The Court has ruled that the notion of public policy must be interpreted strictly and that its scope cannot be determined unilaterally by each Member State. As a result, the validity of national provisions of a public policy nature will have to be assessed on a case by case basis, by the ECJ itself. Considerable uncertainty as to the applicable labour standards therefore arises. In parallel, as there is no clear guideline as to when a public policy measure can be regarded as legitimate, the ETUC is concerned that the Luxembourg case law constitutes a strong incentive for litigation.

Finally, the ETUC stresses that **companies, workers and trade unions need to be able to determine in advance the applicable regime not only to the actual labour standards but also to the rules governing collective action.**

By suggesting the need for a general proportionality test which is to be applied on a case by case basis by national jurisdictions, the Viking judgment has created tremendous uncertainty in this regard.

The role of public authorities

Having regard to the European employment strategy's goal of more and better jobs, the ETUC emphasises the importance of social criteria in public procurement as a clear driver for achieving these joint aims. **Socially responsible public procurement is an essential element of fair competition in the internal market.** This should ensure that free competition does not result in downward pressure on wages and working conditions, and at the same time ensure the improvement of social, living and working conditions and protections in line with Article 151 TFEU. This is particularly important in the current economic crisis.

As a result of the excessively rigid conditions introduced by the Ruffert judgment, public authorities are effectively discouraged from making application of local collective agreements conditional for the acceptance of tenders by service providers. The relation between the Ruffert case, the Public Procurement Directive and ILO Convention 94 needs to be clarified. The approach taken in ILO C 94 is that conditions under public procurement contracts should not be less favourable than those established for the same work in the same area by collective agreement or similar instrument. 10 EU Member States have ratified this convention and the EU Commission and Council of Ministers included it in their call for ratification of all up-to-date conventions in 2006.

3. The challenge of respecting the diversity of industrial relations systems and models

The **ECJ rulings have an enormous impact on national industrial relations systems.** In particular:

- Proportionality tests to assess the validity of collective actions have until now been an unknown concept in most jurisdictions. The involvement of the judge in national industrial relations systems will trigger unpredictable consequences throughout the Union
- the ECJ rulings display a rigid vision of collective bargaining and collective action, which is not compatible with a number of existing traditions. This is the case in particular for the criteria used to define collective agreements under the terms of the Posted Workers Directive.
- the criteria imposed by the Ruffert judgment for the recognition of collective agreements in public procurement procedures annuls this national practice of sustaining collective bargaining and disregards the specific responsibility of national public authorities to guarantee decent work
- an ECJ assessment on a case by case basis of public policy notions, as a result of a rigid justification test, infringes Member States' prerogatives to determine which aspects of their labour law are so essential to the public interest that they must be respected by all undertakings operating on their territory

Furthermore, whilst the diversity of industrial relations systems should be fully respected, the ETUC recalls that **one of the objectives of the Union is the promotion of social dialogue** (Art 151 and 152 TFEU). The ETUC considers that the Viking, Laval and Ruffert judgments

fail to take into account this objective as the role and prerogatives of trade unions have been severely curtailed. The **sustainability of industrial relations has been threatened. This should be an issue of general concern.**

4. Responses to the challenges raised by the judgments

Whilst the ETUC fully respects and values the role of the ECJ within the EU institutional framework, it wants to emphasise that other legal interpretations, more respectful of the social dimension of the internal market, would have been possible under the Treaties. The impact of the four cases on the respect for fundamental social rights and on the protection of workers throughout the Union cannot be ignored. The responses to the challenges raised by the judgments necessitate urgent intervention by the EU legislator. The ETUC proposes 3 major lines of responses:

- The EU legislator must **clarify in non-ambiguous terms at the level of the Treaties that the exercise of the economic freedoms must respect fundamental social rights, as being in line with the aims of social progress and the improvement of living and working conditions** recognized by the EU Treaties. Accordingly, the ETUC is demanding the adoption of a **“Social Progress Clause”**, taking the form of a legally binding Protocol to be attached to the Treaties¹².
- It is of major importance to **widen the scope for social criteria in public procurement procedures**. In addition, the **EU must ensure that all Member States can continue to adhere to ILO Convention 94**, promote its ratification and implementation, and solve any ambiguities in EU legislation that might stand in the way
- A revision of the Posting of Workers Directive, in terms of strengthening and improving its provisions, is indispensable to restore its original objectives, i.e. to ensure protection of workers and to guarantee a climate of fair competition in the internal market. In particular, the minimum character of the Directive must be restored, i.e. the notion that the Directive provides ‘minimum-protection’ (the core of rights that must be applied), which does not prevent legal or collectively agreed standards to provide the workers concerned with more favourable conditions (the standards that can be applied), as long as equal treatment and non-discrimination of local and foreign companies is ensured. The Directive should more clearly respect the different industrial relations systems in Member States as well as collective bargaining as a flexible and dynamic instrument to accompany and manage socio-economic developments and change.

¹² ETUC proposal for a Social Progress clause can be downloaded at : <http://www.etuc.org/a/5175>

Section III: Final remarks

The European social partners accepted at the end of 2008 to engage in a reflection on the consequences of the ECJ cases in the context of the challenges related to increased mobility in Europe and to help re-establish confidence in the further development of the single market.

The present report is the result of these discussions. With it, the European social partners consider that they have responded to the request of the European Commission and the Council.

The European social partners might, in future work, address some of the issues mentioned in this report.

In this respect, they would like to refer to their commitment to address the issues of mobility and economic migration in their 2009-2010 EU Social Dialogue Work Programme.
