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on Challenges to collective agreements in the EU
(2008/2085(INI))

Committee on Employment and Social Affairs

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on Challenges to collective agreements in the EU (2008/2085(INI))

The European Parliament,

- having regard to Article 2,, first indent, Article 2 and Article 3(j) of the Treaty on European Union,
- having regard to Articles 136, 137, 138, 139 and 140 of the EC Treaty,
- having regard to Articles 12, 39 and 49 of the EC Treaty,
- having regard to the Treaty of Lisbon of 13 December 2007, in particular Article 3,
- having regard to Article 152 of the Treaty of Lisbon which recognizes the importance of social dialogue and collective bargaining for development,
- having regard to Articles 27, 28 and 34 of the Charter of Fundamental Rights of the European Union,
- having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms, especially Article 11,
- having regard to the European Social Charter, especially Articles 5, 6 and 19,
- having regard to the European Convention on the Legal Status of Migrant Workers,
- having regard to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹ (the PWD),
- having regard to the Commission's services report on the implementation of Directive 96/71/EC (SEC(2006)0439) (Services Report),
- having regard to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,
- having regard to the so-called 'Monti' clause of Council Regulation (EC) No. 2679/98,
- having regard to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,
- having regard to the judgments of the Court of Justice of the European Communities of 27 March 1990 in Case C-113/89 Rush Portuguesa Ltda v. Office Nationale

¹ OJ L 18, 21.1.1997, p. 1.

d'Immigration¹,

- having regard to the judgments of the Court of Justice of the European Communities of 9 August 1994 in Case C-43/93, Vander Elst², of 23 November 1999 Joined cases C-369/96 and 376/96, Arblade³, of 25 October 2001 in Joined cases C-49/98, C-50/98, C-52/98, C-54/98, C-68/98 and C-71/98, Finalarte⁴, of 7 February 2002 in Case C-279/00, Commission v Italy⁵, of 12 October 2004 in Case-C-60/03, Wolff & Müller GmbH⁶, of 21 October 2004 in Case C-445/03, Commission v Luxembourg⁷, and of 19 January 2006 in Case C-244/04, Commission v Germany⁸,
- having regard to the judgment of the Court of Justice of the European Communities of 11 December 2007 in Case C-438/05, International Transport Workers' Federation and Finish Seamen's Union⁹ (the Viking Case),
- having regard to the judgment of the Court of Justice of the European Communities of 18 December 2007 in Case C-341/05, Laval un Partneri Ltd¹⁰,
- having regard to the judgment of the Court of Justice of the European Communities of 3 April 2008, Case C-346/06, Rüffert¹¹,
- having regard to the following ILO conventions: ILO-94 Labour Clauses (Public Contracts); ILO87 Freedom of Association and Protection of the Right to Organize; ILO98, Right to organise and collective bargaining; ILO-117 Basic Aims and Standards of Social Policy, especially Part IV; ILO-154 Collective Bargaining,
- having regard to its resolution of 26 October 2006 on the application of Directive 96/71/EC on the posting of workers¹²,
- having regard to its resolution of 15 January 2004 on the implementation of Directive 96/71/EC in the Member States¹³,
- having regard to the Common principles of Flexicurity, endorsed by the European Council on 12/13 December 2007 as well as Parliament's resolution of 29 November 2007 on Common Principles of Flexicurity¹⁴,

¹ [1990] ECR I-1470.

² [1994] ECR I-3803.

³ [1999] ECR I-8453.

⁴ [2001] ECR I-7831.

⁵ [2002] ECR I-1425.

⁶ [2004] ECR I-9553.

⁷ [2004] ECR I-10191.

⁸ [2006] ECR I-885.

⁹ OJ C 51, 23.2.2008, p.11.

¹⁰ OJ C 51, 23.2.2008, p. 9.

¹¹ not yet published in OJ.

¹² OJ C 313 E, 20.12.2006, p. 452.

¹³ OJ C 92 E, 16.4.2004, p. 404.

¹⁴ Texts adopted, P6_TA(2007)0574.

- having regard to Article 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Employment and Social Affairs and the opinions of the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection (A6-0000/2008),
- A. Whereas the ECJ recognizes the right to take collective action as a fundamental right that is an integral part of the general principles of Community law; this right will also become primary law with the ratification of the Lisbon Treaty,
 - B. Whereas the Commission’s report on industrial relations in Europe 2006 shows that highly developed collective bargaining has a positive influence on social inclusion,
 - C. Whereas, according to the preamble of the PWD, the promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers,
 - D. Whereas the objective of the PWD – to provide for a climate of fair competition and measures guaranteeing respect for the rights of workers – is more important than ever; in an economic era in which transnational provision of services is expanding, the PWD is expected to play a key-role in protecting the workers concerned, while respecting the framework of labour law and industrial relations of Member States,
 - E. Whereas according to the PWD the laws of the MS must lay down a nucleus of mandatory rules for minimum protection of posted workers to be observed in the host country without preventing application of terms and conditions of employment more favorable to workers,
 - F. Whereas Article 3(8) of the PWD gives the possibility to implement the directive either through legislation, generally applicable collective arrangements or through other collective agreements which are considered the most representative; the ECJ also affirms that other methods, e.g. the autonomous collective bargaining model, may be used,
 - G. Whereas the nucleus provisions in Article 3(1) of the PWD consists of international mandatory rules which the MS have commonly agreed upon; the public order provisions in Article 3(10) also consist of international mandatory rules but in such a way that MS themselves can define them; the use of Article 10 is important for MS to be able to consider a variety of labour market, social policy and other concerns including protection of workers,
 - H. Whereas for the free movement of goods the following clause (known as the “Monti clause”) was included in Council Regulation (EC) No. 2679/98; Article 2: “This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States”,
 - I. Whereas Article 1(7) of the Services Directive provides that: “This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by

Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law”,

- J. Whereas the European Council has set up principles to create labour market models that have as well as a high level of security as a high level of flexibility, the so called flexicurity model; it is recognised that an important part of a successful flexicurity model includes strong social partners with a significant scope for collective bargaining,
- K. Whereas the Albany judgement (C-67/96) in the field of competition law gave substantial and large space for trade unions to regulate labour market issues; in fact, at that time the ECJ rejected the direct horizontal effect for competition rules on collective bargaining,
- L. Whereas the ECJ in both the Laval and Rüffert cases made a completely different interpretation of European legislation than the advocate general,
- M. Whereas the ECJ in both the Laval and Rüffert cases has made a narrow interpretation of the possibilities for trade unions to demand better conditions for posted workers,
- N. Whereas the ECJ in the Rüffert case has significantly diminished the scope for Member States to regulate their collective bargaining and also narrows down the purpose of the PWD, neglecting the PWD’s two fold aim – protection of workers and free movement,
- O. Whereas the ECJ in the Viking case introduces a horizontal direct effect of Articles 43 and 49 which can be used by employers and service providers to challenge collective agreements and industrial actions with a cross-border effect; the autonomy for collective bargaining from competition rules is thereby not extended to the field of free movement with a risk that industrial relations in the Member States will be put under legal scrutiny; consequently, this new uncertainty in industrial relations could result in a “flood” of cases to the ECJ,

Fundamental Principles

1. Underlines that the freedom to provide services is a cornerstone of the European project; however, this has to be balanced against fundamental rights and the possibility for governments and trade unions to ensure non-discrimination and equal treatment;
2. Is of the opinion that any EU citizen should have the right to work anywhere in the European Union; therefore regrets that this right is not applied uniformly across the EU;
3. Emphasises that the freedom to provide services is not superior to the fundamental right for trade unions to take industrial action; especially, since this is a constitutional right in several Member States;
4. Welcomes the Lisbon treaty and the fact that the Charter of Fundamental Rights of the European Union is made legally binding; this includes the right of trade unions to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests including strike action;

5. Stresses that Article 3(7) of the PWD clearly states that trade unions should be able to demand terms and conditions of employment which are more favourable to workers;
6. Points out that recital 22 in the PWD states that provisions laid down in the PWD should have no effect on the right to take industrial action;
7. Emphasises that equal treatment, equal pay for equal work as well as Articles 39 and 12 of the EC Treaty form the foundation of EC law which needs to be restored;
8. Underlines the importance of not allowing the verdicts to negatively effect labour market models that already today are able to combine a high degree of flexibility on the labour market with a high level of security and, instead, of further promoting this approach;

Impacts of the judgements

9. Underlines that the intention of the legislator in the PWD and Service Directive is not reflected in the ECJ verdicts, which, instead of protecting workers, is inviting unfair competition between companies; companies that sign and follow collective agreements will have a competitive disadvantage to companies that refuse to do so;
10. Regrets that all conditions imposed on foreign employers above minimum levels are seen as obstacles to free movement, if employees do not already receive more favourable conditions in the country of origin;
11. Questions the introduction of a proportionality principle in the Viking case for the right to use collective action against undertakings which, when using the right of establishment or the right to provide services across borders, deliberately undercut terms and conditions of employment; such a proportionality principle is not compatible with the character of this right as a fundamental right; there should be no question about the right of trade unions to use industrial action to uphold equal treatment and secure decent working conditions;
12. Emphasises that the PWD as interpreted by the ECJ would prevent demands for equal pay for work for all workers regardless of their nationality or that of their employer in the place where the service is provided; this runs counter to the principle of non-discrimination which is established in the Treaty especially with regard to the mobility of workers;
13. Regrets the fact that even though the PWD was formulated as a minimum standard directive, the ECJ determines that those minimum standards must be regarded as the maximum in the context of the Laval judgement; this approach causes great concerns as to whether any directives decided on the basis of a minimum approach are regarded as valid; if all directives in the social dimension were to be reformulated as maximum directives, as in the case of the PWD, the consequences would be enormous;
14. Regrets that the social considerations referred to in Articles 26 and 27 in Directive 2004/18, do not include terms and conditions of employment which go beyond the mandatory rules for minimum protection;
15. Is of the opinion that the limited legal basis of free movement of the PWD has led the ECJ

to interpret the PWD in this way, creating an explicit invitation to unfair competition on wages and working conditions driving them downwards, which is in clear contradiction to the stated aim of the PWD (to ensure a climate of fair competition) and the objective of the EU as established in the Treaty (improvement of living and working conditions); therefore, the legal basis of the PWD must be broadened to include a reference to the free movement of workers;

16. Emphasises that the current situation could lead to a situation where workers in host countries will be pressured by low wage competition; this, in turn, could lead to xenophobia and counterproductive anger against the EU;
17. Regrets that the ECJ fails to consider ILO convention 94, and fears that the ECJ judgement in Rüffert may impede the ratification of ILO 94; this would be counter to the further development of social clauses in public procurement regulations, which is an aim of the Public procurement directive 2004;
18. Regrets that the ECJ fails to recognise ILO conventions 87 and 98; restrictions on the right to industrial action and fundamental rights can only be motivated with respect to health, public order and similar concerns;

Demands

19. Calls on all the Member States to implement the PWD properly;
20. Underlines that the ECJ has interpreted EU legislation in a way that was not the intention of the legislators; calls on the Commission, the Council and the EP to take immediate action to ensure the necessary changes in EU legislation to change the new practise of the ECJ;
21. Therefore calls on the Commission to take immediate action to make necessary changes in European legislation in order to counter the possible detrimental social, economical and political effects of the ECJ judgements;
22. Therefore welcomes the Commission's statement from 3 April 2008 which clearly states that they will continue to fight social dumping and that the freedom to provide services is not superior to the fundamental rights of trade unions;
23. Therefore calls on the Commission to review the PWD and consider the following issues:
 - a new legal basis for the PWD to better protect workers; workers posted within the framework of services should be regarded as using the right of freedom of movement of workers and not the free movement of services;
 - a possibility in the Directive for Member States to refer in law or collective agreements to the 'habitual wages' applicable in the place of work in the host country as defined in the ILO 94 and not only 'minimum' rates of pay;
 - a limit to the period of time during which workers can be considered as being 'posted' to a Member State other than the Member State of their ordinary place of work in the framework of services; after that period the rules on free movement of workers should

apply, i.e. host country rules with regard to wages and working conditions have full application;

- an even clearer expression that the Directive and other EU legislation do not prohibit Member States and trade unions from demanding more favourable conditions for the worker; and
- the recognition of a wider range of methods of organizing labour markets than those currently covered by Article 3(8);

24. Considers that Parliament, the Council and the Commission should adopt measures to combat letterbox-companies, undertakings not engaged in any genuine and meaningful business in the country of origin but created, sometimes even directly by the main contractor in the host country, for the sole purpose of offering ‘services’ to the host country, to avoid the full application of host country rules and regulations especially with regard to wages and working conditions;

25. Would welcome a move to summarize the social clauses that exist in the Monti directive and in the Service directive in a social clause, either through a protocol attached to the Treaty or in an inter-institutional agreement;

26. Calls on the Council to adopt immediately the Temporary Agency Directive in which it is clarified that the same rules should immediately apply to temporary agency workers as if they were employed directly by the enterprise;

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27. Instructs its President to forward this resolution to the Council and the Commission.

EXPLANATORY STATEMENT

Introduction

In December 2007 the European Court of Justice (ECJ) delivered its judgments in two cases on how the EU balances the economic and the social objectives of the Treaty. *The Viking case* concerns a collective action relating to the reflagging of a vessel from Finland to Estonia. In *the Laval case* a Swedish trade union, by means of collective action, had tried to force a Latvian provider of services to sign a collective agreement when performing services in Sweden.

In April 2008 the ECJ delivered another verdict in the *Rüffert case*. The case concerns the right of public authorities, when awarding contracts for work, to demand that tendering companies commit themselves to pay wages that are in line with rates already agreed through collective bargaining where the work is carried out, or whether this could be outlawed as a restriction on the freedom to provide services under Article 49 of the Treaty.

The report is focusing on the principle consequences of the verdicts and not so much on national problems in the implementation which should be dealt with promptly at the national level.

Principles

The first part of the report deals with the guiding principles for the internal market and the necessary balance between the free movement of services and the rights of workers.

Anyone should have the right work anywhere in the European Union and it is regretful that this right is not applied uniformly across the EU. However this has to be balanced against fundamental rights and the possibility for governments and trade unions to ensure non-discrimination and equal treatment. We cannot turn a blind eye when migrant workers are paid less than national workers, sending the message she/he is worth less than the national workers performing the same job. It is in everybody's interest that workers enjoy equal conditions, whether national or migrant. **Thus, equal treatment and pay for equal work should always be the main principle.**

Effects of the ECJ ruling

The posting Directive (PWD)

Traditionally, the PWD has been interpreted as a *minimum* directive in the sense that it lays down a “hard core” of minimum working conditions that member states have to ensure and that also applies to temporary, foreign workers. However, the PWD does not exclude systems with higher protection. The reasons for this interpretation are mainly to be found in article 3(7) in the directive “*Paragraphs 1 to 6 shall not prevent application of terms and conditions that are more favourable to workers*”.

This perception is, however, changed with the Laval ruling, in which the court states that article 3(7) in the Posting Directive “*cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection*”. The ruling furthermore states that the PWD lays down the degree of protection that the host member state “*is entitled to require those undertakings to observe*” (our emphasis) (Para. 80),

and continues in the next paragraph “*the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71*”. What the host member state can impose on a visiting company is thus limited to the core of the PWD, and nothing beyond that. In other words, what we thought was a minimum directive has become a *maximum* directive.

In the reasoning of this ruling, the court has, for practical purposes, *abolished* article 3(7) allowing more favourable terms and conditions. Thus, national wage agreements can be undercut for posted workers. This interpretation is further developed and explained in the Ruffert case. The ECJ states in paragraph 32 that the normal wage in Niedersachsen “*cannot be considered to be a term and condition of employment which is more favourable to workers within the meaning of Article 3(7) of Directive 96/71.*” The Court continues to say that “*such an interpretation would amount to depriving the directive of its effectiveness (see Laval un Partneri, paragraph 80).*” In other word the directive could not be interpreted in the way it is written since it would go against the purpose of the directive which according to the court is to bring about the freedom to provide services and not the protection of workers.

The balance between the free movement of services and the fundamental right to strike

The ECJ in the Viking and Laval cases introduces a horizontal direct effect of article 43 and 49 which can be used by employers and service providers to challenge collective agreements and industrial actions with a cross-border effect. The autonomy for collective bargaining from competition rules is thereby not extended to the field of free movement. This brings about risks: Industrial relations in the Member States could be put under legal scrutiny; uncertainty in industrial relations; a “flood” of cases to the ECJ. Any company in a transnational dispute has the opportunity to use this judgement against union actions, alleging that it was “disproportional”.

The verdict says that the right to strike is a fundamental right but not so fundamental as the EU's free movement provisions. This could lead to wage competition and make it difficult for trade unions to ensure equal treatment.

Demands

Since these verdicts have proven that the current legislation is not sufficient enough to provide a balance between the freedom to provide services and the workers rights, we need to take immediate action to ensure that necessary changes in European legislation are made in order to counter the possible detrimental social, economical and political effects of the ECJ judgements.

These changes should be considered;

- Review the PWD.
- Summarize the social clauses of the Monti directive and the Service directive in a social clause in primary law or in an inter-institutional agreement.
- Immediately adopt the Temporary Agency Directive in which it is clarified that the same rules should immediately apply to temporary agency workers as if they were employed directly by the enterprise.
- Adopt measures to combat letterbox-companies, undertakings not engaged in any genuine and meaningful business in the country of origin but created, sometimes even

directly by the main contractor in the host country, for the sole purpose of offering 'services' to the host country in order to avoid the full application of host country rules and regulations especially with regard to wages and working conditions.