European implications of the Laval case judgment – preliminary analysis and proposed strategy for the EFBWW

The judgments of 11 December in the Finnish Viking Line Case (C 438/05) and 18 December in the Swedish Laval Case (C 341/05) in the European Court of Justice (ECJ) has European implications of the highest order for the European trade union movement. It deals with the interpretation of the Posting of Workers Directive, the status of collective agreements versus legislation, the rights and restrictions for trade union collective actions, and the instruments for combating social dumping. In all these matters the judgments of the ECJ might become legal precedents relating to future trade union actions aimed at combating social dumping.

The judgments will have direct implications for the Swedish and Danish social models, these two countries having no legal possibilities of extending collective agreements into general applicability and lacking a system with legal minimum wages. But leaving the consequences for these two countries aside, it is clear that the judgments may create very serious legal precedents at European level as to what Member States and trade unions are entitled to do to combat social dumping. In the light of the Opinions of the Advocate Generals of these cases, as well as the Opinion of the Advocate General of the Rüffert Case (C-346/96) now pending before the ECJ, the Viking and Laval judgments were surprising and could, in a worst-case scenario, undermine the Posting of Workers Directive (96/71/EC) as an instrument for equality of treatment and protection of workers.

It is true that the judgments recognizes the right to strike as a fundamental right in the EU, which as such, in principle, could justify a restriction in the freedom to provide services. (see Para. 90 and 93 in the Laval Case) But the exercise of this fundamental right is by itself subject to restrictions in accordance with the Treaty, and in this judgment the restrictions under Article 49 in the Treaty play a fundamental role. There is justification for saying that the court, in the Laval judgment, interprets the Posting Directive in a way that turns the meaning of the directive upside-down in relation to what has been the traditional interpretation by the European trade union movement.

Traditionally, the Posting Directive has been interpreted as a minimum directive in the sense that it lays down a “hard core” of minimum working conditions that the Member States shall ensure also will apply to temporary foreign workers, but that a system allowing for a higher protection is not precluded. The reasons why this interpretation has been the most common one are mainly to be found in Article 3(7) in the directive and preamble 22. Article 3(7) states that “Paragraphs 1 to 6 shall not prevent application of terms and conditions that are more favourable to workers.” And preamble 22 states that “this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.”

But in the Laval judgment, 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.” And the judgment continues by stating that the Posting Directive lays down the degree of protection that the host Member State “is entitled to require those undertakings to observe.” (our emphasis) (Para. 80)

In the next paragraph, the judgment expressly states that “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 hard core of the Posting Directive, and nothing beyond that. In other words, what we thought was a minimum directive has been transformed into a maximum directive. And by the reasoning in this judgment, the court has, for all practical purposes, abolished Article 3(7) allowing for more favourable terms and conditions.

It is interesting to compare the reasoning in the Laval judgment with e. g. the Opinion of the Advocate General in the German so called Rüffert Case now pending in the ECJ. The Advocate General first states that the “nucleus” of protective rules mentioned in Article 3(1) of the Posting Directive must be seen as constituting a minimum guarantee, which doesn’t hinder the host States from demanding a higher protection. Contrary to the Court’s finding in the Laval Case, the Advocate General in the Rüffert Case states that Article 3(7) in the Posting Directive “authorizes the implementation of enhanced national protection”. (Para. 83)

The Advocate General of the Rüffert Case continues to state that the regional arrangements in Germany for determining rates of pay are based on specific collective agreements, most of which are not declared universally applicable, and thereby not part of the Posting Directive nucleus. In spite of that, and based on Article 3(7), the Advocate General is not of the opinion that the Posting Directive precludes the Member States from demanding a higher protection than the nucleus, even if it is not laid down in laws or generally applicable collective agreements. Thus it seems as if the Advocate General of the Rüffert case makes a fundamentally different interpretation of the Posting Directive than the court does in the judgment of the Laval case. The risk is that the ECJ has effectively resolved the Rüffert Case by its Laval judgment in a manner detrimental to the Trade Union movement.

The second problematic issue in the Laval case judgment is the reasoning about country-of-origin collective agreements. The judgment states that “national rules … which fail to take into account, irrespective of the content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.” (Para. 116) The judgment continues by saying that discriminatory rules may be justified on grounds of public policy, public security or public health, but since none of the considerations
referred to in the case constitute grounds of this kind, the collective actions are not in accordance with the Treaty.

It is unclear whether such a statement would constitute a general legal precedent concerning country-of-origin collective agreements’ applicability in the country-of-destination. However, the mere fact that the judgment precludes the relevant legislation (i.e. that allows to set aside collective agreements concluded in a country-of-origin in which rates of pay are – as is the situation in this case – even lower than the lowest wage levels cited in collective agreements concluded in the host country, being applied provisionally if wage negotiations fail) is worrying." One way to avoid this situation would, of course, be if all trade unions agreed not to sign collective agreements for work outside their home country, but instead regulate the conditions of work in employment agreements that give room for possible improvements of working conditions in case of posting to a country with collective agreements on higher levels.

Another issue inherent in the Court’s reasoning – which may have very serious general implications for trade unions – concerns the restrictions to the right to take collective actions. In paragraph 110 the Court states that “collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment …” If trade union collective actions would have to be balanced – especially as in this case in connection with collective bargaining – against public interests, it would mean a severe limitation of trade union independence. To weigh trade union industrial actions against public interest and/or corporate interest would mean a total disempowerment of trade unions. Instead, the Court should have relied on Article 137.5 in the Treaty, excluding the right to strike from EU competence.

The full scope of the European implications of the Viking and Laval judgments is not easy to foresee, but the judgments gives reason to worry about possible restrictions to the fight against social dumping. The interpretations of the judgment will continue for a time, but already today we can ask the question whether this means that the fundamental principle in the Treaty of equal pay for equal work is in danger, and whether the judgment justifies social dumping, protecting collective agreements from the country-of-origin even if these imply working conditions which fall below those of the country-of-destination. And even if the court recognizes the right to collective action as a fundamental right according to the Treaty, it also – by its way of referring to Article 49 EC – severely restricts this right. To put it bluntly, the judgments give reasons to question whether what we thought were important and lasting trade union victories in the history of EU social legislation – the Posting Directive and the outcome of the Service Directive process – now in one fatal blow are erased.

In any case, the present situation calls for a political assessment within EFBWW of possible actions to secure the fundamental principles supporting the fight against social dumping and the fundamental EC law principle of equal pay for equal work. There are possible short term and long term strategies, and we have to look upon all possibilities. In the short term we might consider – at national and European level – whether, and if
so which, interventions are possible in the Rüffert case now pending before the ECJ in order to reopen the oral proceedings and refer that case to the full Court. Also in the short term we could see whether interventions in the on-going process to adopt a new directive on working conditions for temporary workers could contribute to safe-guard some of the rights that we fear could be lost via the precedent of the Laval case judgment.

In the long term, we have to analyze what this new interpretation of the Posting of Workers Directive means for the future protection of workers’ rights, and whether a new political strategy is called for concerning possible amendments to the Posting Directive. Since the Posting of Workers Directive and the implications of the Viking and Laval judgments stretch beyond EFBWW industrial sectors, we need, of course, to co-ordinate our efforts with ETUC and other European Industrial Federations. As was the case during the process of adopting the Service Directive, we have at the moment a powerful instrument at our disposal in trying to influence the EU institutions: the ratification process of the new Lisbon Treaty.