

Item 4 of the agenda:

**The European Court of Justice cases:
Consequences for the trade unions**

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The ECJ cases and the consequences for European trade unions

The Viking Line case: collective action versus freedom of establishment

Facts:

- A Finnish company seeks to relocate to Estonia in order to pay lower wages to the crew.
- ITF flag of convenience policy: Estonian seamen's union follows the policy and refuses to negotiate new conditions.
- The threat of collective action by Finnish seamen's union puts pressure on Viking Line to enter into collective bargaining on the planned relocation.

What did the Court say?

- Collective action is a fundamental right and part of the general principles of Community law;
- However, the exercise of this can be an obstacle to economic freedoms, so must be justified by an overriding reason of public interest;
- The protection of workers against social dumping can be an overriding reason;
- But the action should be suitable and proportional (i.e. not go beyond what is necessary to achieve the aim);
- It is for the national Court to make this proportionality test;
- The economic freedoms have horizontal direct effect, which means that any company can invoke them in national courts against a trade union taking collective action.

The Laval case: collective action versus the freedom to provide services (posted workers)

Facts:

- Latvian company posts 35 Latvian workers to Swedish construction site.
- Collective action to force employer to sign collective agreement with Swedish Union to ensure equal wages and working conditions.

- A Latvian union signed a collective agreement with the company, which was also applicable on posted workers when working abroad.

What did the Court say?

- The action has a legitimate aim, namely the protection of workers against social dumping;
- However, the action is not justified, because the Swedish way of fixing wages is not in accordance with the Posting of Workers Directive (PWD), and lacks legal certainty and transparency;
- Trade Unions can only use collective action to make a foreign employer conclude a collective agreement on the matters listed in the PWD;
- Trade Unions cannot ask for more favourable terms and conditions than in national rules for minimum protection;
- The Swedish *Lex Britannia* (not recognizing foreign collective agreements on Swedish territory) does not treat national and foreign collective agreements equally and thus violates the EC Treaty.

The Rüffert case: public procurement and posted workers

Facts:

- A public works contract to build a prison in Land Niedersachsen is awarded to a German company.
- It requires compliance of main contractors and subcontractors with the local applicable collective agreement.
- Polish subcontractor pays posted workers 46% of the local minimum wage.
- The contract is withdrawn and damages must be paid by the main contractor.

What did the Court say?

- The local collective agreement is not declared generally binding, and does not cover all companies in both the public and private sector;
- Public procurement law cannot be considered as a method to fix minimum wages within the meaning of the PWD;
- The PWD is a maximum directive; Public authorities cannot go beyond what is explicitly allowed under the Directive.

Commision v. Luxembourg: public policy provisions and posted workers

Facts:

- Art. 3.10 PWD: Member States may impose other conditions than the minimum standards listed in the PWD if they constitute public policy provisions.

- Commission takes action against Luxembourg: the national legislation goes beyond what is allowed by the Posting directive.
- In particular, Luxembourg uses a too extensive interpretation of %public policy+provisions (applying parts of its labour law to posted workers).

What did the Court say?

- The public policy exception is a derogation from economic freedoms and must be interpreted strictly; the content cannot be determined by the Member State alone.
- A provision can only be considered a public policy provision if it is crucial for the protection of the political, social or economic order of the MS, and therefore requires compliance by all operators in the host country (this is not the case with the labour law provisions of Luxembourg).

THE ECJ and the Trade Unions

On collective bargaining and fundamental rights

- The exercise of a recognised fundamental right (the right to collective bargaining and collective action) is balanced against economic freedoms that guarantee free movement of capital, goods and services.
- Therefore the demands and actions based on this fundamental right must be justified and proportionate
- The economic freedoms have horizontal direct effect, i.e. any company can invoke them against a trade union taking action!

OUR POINT: WHAT IS FUNDAMENTAL? ECONOMIC FREEDOMS OR THE RIGHT TO COLLECTIVE BARGAINING AND TO TAKE COLLECTIVE ACTION?

On working conditions for posted workers

- Actions to protect workers against unfair competition on wages and working conditions (%social dumping+) can be justified. But the list of minimum standards of the Posting Directive is also the maximum.
- These standards must be laid down by law or generally binding collective agreements, and must be applicable to all companies (public and private).
- Public procurement law is not recognized as a method to set the minimum standards of the PWD.
- MSs have a very limited scope to extend their %public policy provisions+ to posted workers.

Trade union Strategies in response: at EU level

Demands:

- Give priority to fundamental rights over economic freedoms. A Social Progress Protocol to the Treaties clarifying that economic freedoms are not a licence for unfair competition (must be justified in the light of fundamental rights!).
- Revision of the Posting of Workers Directive; Safeguards for MS to maintain national labour law and industrial relations.
- More and better social regulation at EU level.

Bridge the East-West divide

- Cross border trade union cooperation.
- Provide information and support to posted workers in the host country: organizing!
- Visibly represent interests of CEE workers: win the battle of images