European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Resolution
Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers

Adopted at the Executive Committee on 7-8 December

For firm and fair 'rules of the game' in the single market

The ETUC has long been calling for a single market framework, which ensures a climate of fair competition, guarantees the respect for the rights of workers and prevents fundamental social rights to be undermined. The ECJ judgments in the Viking, Laval, Rüffert and Commission vs Luxembourg cases have made the need for such rules even more urgent.

The ECJ cases exposed the weaknesses of the current EU legal framework:

- The ECJ confirmed a hierarchy of norms, with market freedoms highest in the hierarchy, and the fundamental social rights of collective bargaining and action in second place
- The ECJ interpreted the Posting of Workers Directive in a very restrictive way, limiting the scope for Member States and trade unions to take measures and action against social dumping and to demand better protection and the non-discrimination between local and migrant workers in the host country.

The consequences of these cases for Social Europe are far-reaching. They threaten social partnership models. Far from the promised social progress, workers everywhere in Europe are now paying the price of the single market.

Since 2008, the ETUC has been urging the EU institutions to take action to address these problems. The EU should revise the current legal framework by adopting a Social Progress Clause, which should clarify the relationship between economic freedoms and fundamental social rights, and conducting a thorough revision of the Posting of Workers Directive (PWD)[1].

Nearly four years after, the Commission will finally take legislative action. It will propose a Regulation on the basis of Article 352 TFEU on the relation between fundamental social rights and economic freedoms (the so called 'Monti II Regulation') and a Directive on the implementation of the PWD.

The ETUC is concerned that these proposals will not provide a sufficient response to the current challenges. The ETUC has already welcomed the principle of a Monti II Regulation as a step in the right direction, but also stressed that this should not mean that our demand for a fully fledged Social Progress Clause would fall off the agenda. In addition, the current proposal to improve the implementation of the PWD is needed

[1] ETUC Resolutions of March 2008, April 2009, March 2010

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but does not by itself respond to all the challenges posed by the ECJ cases. A complete review of the PWD is therefore necessary.

Trade unions' demand for a Social Progress Clause is more relevant than ever

Since 2008, the ETUC has been calling for a Social Progress Clause in order to address the general implications of the ECJ cases and of any future case law. The Social Progress Clause should take the form of a Protocol, to be attached to the European Treaties and with the same legal value. The role of this Protocol is to redress the balance between economic freedoms and fundamental social rights. Following the adoption of the Protocol, it should be clear to the European courts, in particular the ECJ, that the provisions of the Treaties and secondary legislation should be interpreted in the light of the following elements:

- the single market is not an end itself, but is established to achieve social progress for the peoples of the Union
- economic freedoms and competition rules cannot have priority over fundamental social rights and social progress, and that in the event of conflict social rights shall take precedence
- economic freedoms cannot be interpreted as granting undertakings the right to exercise them to evade or circumvent national social and employment laws and practices, or for the purposes of unfair competition on wages and working conditions.

In the Single Market Act[2], the Commission announced that it would adopt legislation clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, in particular the right or freedom to strike. This will be translated into a proposal for a Regulation (the so called 'Monti II Regulation'). According to the Commission, this Regulation will recognise that there is no explicit conflict between the exercise of the right to take industrial action and the economic freedoms. It will underline the important role of national courts in applying the proportionality test on a case-by-case basis, while reconciling the exercise of fundamental social rights and economic freedoms.

In the Athens Manifesto, the ETUC committed to demand and campaign for fundamental social rights to take precedence over economic freedoms and for this principle to be enshrined in a Social Progress Protocol in the European Treaties and internal market regulation known as Monti II. In particular, a Regulation cannot replace our demand for a Social Progress Clause.

First, whilst secondary legislation is to be interpreted in the light of the Treaties, a Protocol is at the highest level. In other words, the Social Progress Clause is the only instrument which can fully address the current Treaty imbalance between economic freedoms and fundamental social rights.

Secondly, a Regulation may not be able to redirect the ECJ interpretation of the Treaties. A Regulation merely stating that economic freedoms and fundamental social rights are equally important will present a risk to trade unions as the ECJ case law could as a result be further strengthened in secondary legislation, thereby making it impossible for the ECJ and/or national courts to mitigate the consequences of the Laval and Viking judgments in future

[2] COM (2011) 608 final

cases. Although this principle was already expressed in the four judgments, the ECJ imposed upon national courts a restrictive test to determine on a case-by-case basis whether the exercise of the fundamental right to take collective action can be justified when it conflicts with economic freedoms.

The proportionality test laid down in the Viking judgment constitutes an intolerable interference with the fundamental right to take collective action. Judges are now empowered to decide whether a collective action is a suitable means. The uncertainty resulting from such assessments has already been condemned by the ILO Committee of experts as having "a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to ILO Convention C87"[3]. Furthermore, the supremacy of economic freedoms over fundamental rights expressed in the ECJ proportionality test runs against the interpretation by the European Court of Human Rights (ECHR) of Article 11 of the European Convention of Human Rights.[4] In light of the forthcoming accession of the EU to the European Convention of Human Right, this incompatibility must be urgently addressed.

Finally, although it is important that the national courts are given great margin of manoeuvre in those Member States where judiciary systems are competent to decide on matters linked to industrial relation systems, the ETUC stresses the need to find a European solution to the problems created by the ECJ judgments. It is impossible for a Regulation on its own to prevent national courts from referring preliminary rulings to the ECJ where they deem it useful. Moreover, preliminary rulings are compulsory whenever an unclear question of interpretation of EU law arises. It is therefore essential that a Monti II Regulation does not restrict trade unions' right to take collective action.

In sum, the proposal for a Monti II Regulation must not lead to a further strengthening of the ECJ case law nor to an interference with national practices with regard to the exercise of the right to take collective action. In particular, a solution must be found to the proportionality test, which constitutes a breach of fundamental rights. Furthermore, the Regulation will not replace the ETUC demand for a Social Progress Protocol. On the contrary, the Regulation is a first step towards the adoption of the Protocol. In view of a possible Treaty change, the ETUC will insist on the adoption of the Social Progress Protocol.

Posting of Workers: finding the right response to the challenges caused by the ECJ cases

Apart from clarifying the exercise of fundamental rights in the framework of the economic freedoms of the single market, the Commission proposes to improve the enforcement of existing rules via a separate Directive, which would include provisions on administrative cooperation, controls and sanctions, and a clearer indication of the constituent elements relating to a posted worker and the establishment of the service provider.

Initiatives aiming at guaranteeing more effective enforcement mechanisms of EU law are welcome, but an enforcement Directive will not on its own solve all the problems caused by the ECJ cases. **Although an enforcement Directive is necessary to fight abuses and**

[3] International Labour Conference 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, p.236-7

[4] Demir and Bakyara Application 34503/97 and Enerji Yapi-Yol Application 68959/01

circumvention of the applicable labour laws, the core provisions of the PWD also need to be revised.

It appears that the Commission's proposal will only address issues relating to the scope of the PWD and the monitoring and enforcement mechanisms. An enforcement Directive with such limited ambition would fall short of six of the eight ETUC demands for a revision of the PWD.[5]

- *The social objectives of the PWD must be restated*

The objectives of the PWD, i.e. respecting the rights of workers and ensuring a climate of fair competition must be more clearly laid down in the PWD. In particular, a reference to the social policy objectives of Articles 151 and 153 TFEU would help to ensure a more coherent interpretation of the PWD. It is unclear to which extent an enforcement Directive could broaden the legal basis of the PWD.

- *The fundamental right to collective bargaining and to take collective action must be safeguarded*

Trade unions throughout Europe must be allowed to approach and put pressure equally on local and foreign companies to improve working conditions and demand equal treatment. This right must be clearly asserted in the context of posting, regardless of parallel discussions on the Monti II Regulation.

- *The PWD must only cover situations of temporary postings*

The Commission will probably try to further qualify the scope of the PWD so as to tackle situations where service providers supply their services on a quasi-permanent basis or without actually being genuinely established in another Member State.

Against this background, the ETUC would stress the following points:

- **The new instrument must introduce the legal presumption that the habitual place of work within the meaning of the Rome I Regulation should be deemed to be in the host Member State, unless it is established that the situation is one of genuine posting.** The application of a country of origin principle for cases falling outside the scope of the PWD would be unacceptable.

- **Posting within the meaning of the Directive should be of short duration. Workers who are posted for a longer period must be considered as habitually employed in the host Member State.** A two years time limit has been discussed by the Commission's services. This is unacceptable as the majority of postings do not exceed a few months. Such a long time period would in fact deprive the new provisions from any useful effect. The length of posting also varies between sectors and the social partners may therefore have an interest to negotiate the duration in accordance with specific needs in the host country.

- The Directive must also ensure that a change of status of the posted worker into a worker habitually employed in the host Member State does not lead to a deterioration of the terms and conditions of employment of the worker, including for instance allowances and compensation of accommodation costs by the employer.

[5] http://www.etuc.org/r/909

- **Posting within the meaning of the PWD must be justified in the context of a genuine transnational provision of services.** This means that workers whose employing company in the alleged Member State of establishment is in fact a letter box company must benefit from the Treaty provisions on free movement of workers and have the right to non-discrimination in the host Member State. The existence of a habitual employment relationship of at least three months in the Member State of origin could be an indicator as well as the existence of genuine economic activity.

- Both quantitative and qualitative criteria are necessary to determine the existence of a genuine posting situation. This would help preventing absurd situations such as posted workers sent on the basis of a succession of contracts. The list of criteria must be binding in its entirety in every Member State. Undertakings throughout the EU must abide by the same rules and not be able to pick and choose the most convenient criteria.

  - *The minimum character of the PWD must be restored*

Equal treatment with regard to wages must be guaranteed, as opposed to minimum rates of pay only (Article 3.1 PWD). Furthermore, the new instrument should clarify the applicable situation to temporary agency workers. Given the specificity of the rules concerning temporary agency work, especially having regard to the provisions surrounding the equal treatment principle, the Temporary Agency Work Directive and PWD must not contradict each other.

  - *The different industrial relations models must be respected*

Less rigid criteria should be developed to judge if a collective agreement can be upheld vis-à-vis a foreign service provider, for instance in situations in which the majority of local companies is in practice bound by the collective agreement (Article 3.8 PWD).

  - *Public authorities should be allowed via social clauses in the procurement contract to demand observance of locally applicable collective agreements*

  - *The very restrictive interpretation of public policy provisions must be revised so as to include social objectives and the protection of workers (Article 3.10 PWD)*

Member States should be allowed to extend the protection of statutory employment rights to posted workers.

  - *Effective monitoring and enforcement mechanisms must be put in place*

Experience in the Member States suggests a significant lack of enforcement of the current provisions of the PWD. This has been acknowledged amongst others by the Commission and the European Parliament. The strengthening of the rules and in particular a better defined scope so as to avoid the abusive use of posting, means that the problem will become more acute.

In practice, an adequate enforcement of the rules involves two aspects:

- **The control of the observance of the applicable terms and conditions of employment**

For the ETUC, it is important that Member States and social partners must be given the means to use effective monitoring and enforcement mechanisms in the host Member State, for instance to check that the posted worker is really habitually employed in the country of origin. Effective means of control should include:

- The appointment of a representative to undertake the responsibilities of the service provider as the employer;

- Prior notification by service providers of the intended posting. This is a basic mechanism, already in place in many Member States to ensure effective monitoring and control;

- The requirement to keep and store relevant documents in the territory of the host country; and

- The fight against bogus self-employment is crucial to halt potential abuses. In particular, the competent entity must be given the means to verify that the "self-employed worker" is not repeatedly employed for a substantial part by the same employer and that there is no link of dependency between the self-employed and the employer.

- **Appropriate measures in case of breach of the obligations in the PWD and national law**

Effective and dissuasive sanctions are indispensable in order to protect workers against abuses. In this regard, a joint and several liability mechanism must be introduced. Recent years have seen the increase of subcontracting across the EU. By creating extremely complex networks of subcontractors, general/main contractors can create easy ways to circumvent legal or collectively agreed labour standard and working conditions.

The proposed instrument on posting should stipulate that the general/main contractor(s) is liable for the compliance, by all subcontractors, with the applicable terms and conditions of employment, and social security contributions. The basic principle is that general/main contractors should be encouraged to select bona fide subcontractors and to carry out appropriate supervision.