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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

12 July 2012

Case No. 1

**Swedish Trade Union Confederation (LO) and Swedish Confederation of
Professional Employees (TCO) v. Sweden**
Complaint No. 85/2012

COMPLAINT

Registered at the Secretariat on 27 June 2012

Collective complaint by LO and TCO on the development in Sweden of freedom of association and right to take collective action after the European Court of Justice judgement in the Laval case (case C-341/05)

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A. Swedish Trade Union Confederation and the Swedish Confederation for Professional Employees

1. Swedish Trade Union Confederation (LO) comprises 14 affiliated trade unions. The 1.5 million members of these unions work within both private and public sector, for example in healthcare, industry and tourism. LO is the major trade union confederation in Sweden organizing blue-collar workers.
2. The Swedish Confederation for Professional Employees (TCO) comprises 15 affiliated trade unions. The 1.2 million members of these unions work in all parts of the labour market, for example in the schools, healthcare, trade, the media, the police, industry, IT and telecom. TCO is the major trade union confederation in Sweden organizing white-collar workers.

B. Introduction

3. In the following the Laval dispute will be presented as well as the court proceedings before national and supranational courts and legislative actions adopted by the Swedish parliament in the backwater of the judgement delivered by the Court of Justice of the European Union (ECJ) in the Laval case (case C-341/05). Finally, the negative repercussions for the rights of workers and their trade unions in Sweden will be summarized and it will be indicated in any respect, Sweden has not ensured the satisfactory application of Article 4, 6 and 19.4 of the European Social Charter.
4. The dispute between the Latvian company Laval un Partneri (Laval) and the Swedish Building Workers' Union (Byggnads), their local branch in Stockholm called "Byggettan" and the Swedish Electricians' Union (Elektrikerna) began in the summer of 2004 and ended in December 2009 with a judgement from the Swedish Labour Court (AD) ordering the trade unions to pay punitive damages to Laval for collective action in breach of the law of the European Union (hereafter EU law¹ – despite the fact that the trade unions acted in accordance with Swedish legislation existing at the time.
5. Restrictions on the rights of freedom of association and collective bargaining of trade unions due to the interest in promoting market access by companies is not recognized by the European Social Charter or the ILO. The imposition of fines against the trade unions and the legislative changes introduced in Sweden imply a

¹ In accordance with the adoption of the Treaty of Lisbon, hereafter the term EU law will be used. All reference will be made to new numbering of the articles in the Treaty of the functioning of the European Union.

serious limitation on the trade union rights - and violates what is provided for by the European Social Charter and interferes in their freedom to decide themselves on which matters they want to regulate in collective agreements and on which legitimate methods to be used in their effort to promote and defend the interest of their members. The European Social Charter principles on non-discrimination and equal treatment between national and foreign workers can no longer be upheld by trade unions due to the legislative interference in their sovereign right to decide their own policy.

6. The new legislation (Lex Laval), which restricts trade unions rights, came into force in Sweden on 15 April 2010. In addition, the removal of the legal requirement on foreign companies conducting economic activities in Sweden to have a legal representative in Sweden will undermine the possibility of establishing collective agreements. This new legislation is contrary to the obligations by Sweden to promote collective bargaining and to protect migrant workers and to assure the worker concerned a treatment no less favourable than that accorded to the nationals, according to Article 4, 6 and 19.4 of the European Social Charter as well as the ILO C.98 (Article 4) and C.154.

C. Wage formation and the right to strike

7. There is no state supervision of the labour market in Sweden other than as regards the work environment and working hours. Legislation on pay rates is entirely non-existent. Instead wage levels are established primarily through national sectorial collective agreements followed by local negotiations – which is the case for construction workers in Sweden. Consequently, wages and employment conditions are regulated to a great extent through collective agreements. Over 90 percent of workers are covered by collective agreements. Collective agreements are entirely subject to civil law and an employer is bound by a collective agreement either by joining an employer organisation or by signing a collective agreement directly with the trade union organisation. In practice collective agreements are also normative for pay and employment conditions at workplaces without collective agreements. Influence over, and insight into, the employer's business are also conditional on the trade union organisation having signed a collective agreement with the employer.

8. Without a collective agreement a trade union organisation in Sweden has no tools for safeguarding its members' rights. If the trade union organisations are prevented from signing collective agreements it means that pay is not regulated either by law or by collective agreement and that there is no supervision whatsoever of pay and employment conditions.

9. The collective agreements in general do not specify minimum wages – but contain various wage levels and where the lowest wages in the collective agreement are set for young and unskilled workers. The collective agreements in force do not allow any discriminatory treatment including discrimination based on national origin (which is relevant in the Laval case). The collective agreements also oblige the employer to apply it to non-organized workers.²

10. Swedish legislation has never previously regulated the terms and conditions of pay and employment on which trade union organisations can make collective agreements. The contents of collective agreements have been regarded as a matter the social partners can negotiate for themselves. The collective agreements signed by Swedish trade union organisations directly with employers that are not members of an employers' organisation normally refer to the collective agreement made for the industry between the trade union organisation and the employer organisation for the industry. It should be stressed that the agreement the Swedish Building Workers' Union wanted to sign with Laval was exactly the same collective agreement that the Union normally concluded with Swedish employers.

11. The basic rule in Swedish Labour law has traditionally been expressed in such a way that industrial actions are legal in conflicts of interest. The Swedish regulation of the right to strike is the Swedish Instrument of Government: Chapter 2, section 17 states:

A trade union or an employer or employers' association shall be entitled to take industrial Action unless otherwise provided in an Act of law or under an agreement.

12. The Labour Court has when interpreting this provision held that it applies not only in relation to the State, but also in the relationship between private individuals. This private law effect ("civilrättslig verkan") has by the Labour Court been held to prevent the Labour Court from introducing any limitations on the right to collective action that is not supported by a law or an agreement.³

13. When a collective agreement is concluded, the possibilities to resort to collective action are limited, in accordance with section 41 § of the Co-determination Act. Contravention of the obligation to keep industrial peace is subject to severe sanction in Sweden. The sanction for unlawful collective action

² For a fuller description of the Swedish wage system see for example para 24-26 in the ECJ judgement on Laval.

³ See AD 2003 nr 46.

is economic and punitive damages (see section 54-55 of the Co-determination Act). The punitive damages may be considered as a punishment and does not require a “real” damage suffered. A trade union organisation that takes unlawful industrial action may be liable to pay both non-pecuniary damages, punitive damages, to the employer and to reimburse the employer's entire financial loss. Such far-reaching tort liability assumes that it is easy beforehand for the trade union organisation to determine when industrial action is lawful. And that was also the case in Sweden previously. The principle that applied was that when a collective agreement exists between the parties there is an obligation to keep the industrial peace and when there is no collective agreement then industrial action can be taken. As mentioned, legislation never previously set any restrictions as regards the level of pay or which employment conditions may be regulated. It is also extremely unusual for a trade union in Sweden to take industrial action that is subsequently considered to have been unlawful.

14. Section 42 of the Co-determination Act had the following wording at the time when the Laval-dispute was initiated:

Employers' or workers' associations shall not be entitled to organise or encourage illegal collective Action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way. An association which is itself bound by a collective agreement shall also, in the event of collective Action which its members are preparing to take or are taking, seek to prevent such Action or help to bring it to an end.

If any illegal collective Action is taken, third parties shall be prohibited from participating in it.

The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the present Law.

In a judgement delivered in 1989⁴, the Swedish Labour Court interpreted the first paragraph and held that collective actions aimed at repelling or amending an already existing collective agreement between other parties, national or foreign, are contrary to the first paragraph of section 42 and thus prohibited. The dispute concerned a ship, M/S Britannia, and the rule delivered by the Labour Court is since then known as *the Britannia Principle*.

15. The Labour Court's judgement containing the Britannia principle led to almost immediate action from the Swedish legislator. On 1 July 1991, *Lex*

⁴ AD 1989 nr 120.

Britannia entered into force it consisted of three different additions to the Co-determination Act among one was the third paragraph of section 42. The new legislation resulted in a right of Swedish trade unions to replace foreign collective agreements by Swedish collective agreements. The aim was to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden and to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

16. Lex Britannia's compatibility with EU law was discussed already in the preparatory works to the legislation even though Sweden at that time had not joined the European Community.⁵ The legislative procedure concurred with Sweden's application to join the EU and the compatibility was again discussed when Sweden joined the EEA agreement and then later the European Union. The Lex Britannia was the subject of a separate investigation in which it was concluded that it was not necessary to amend the law before the accession to the European Union.⁶

17. Sweden joined the European Union on 1 January 1995. In 1996 the EU adopted the Directive 96/71 on the Posting of Workers which was implemented in a particular law on the posting of workers. In the preparatory works on this law, Lex Britannia was discussed and it was considered as a tool to prevent social dumping. The trade unions were given a clear assignment by the legislator to ascertain equal treatment of national and foreign companies and thus preventing social dumping. The assignment was to be realised through collective agreement ultimately concluded after collective action.⁷ The posting of workers Directive was implemented in broad tripartite consensus.

18. Trade unions in Sweden are legally entitled (in accordance with ILO standards) to request, in their efforts to establish collective agreements, sympathy actions, if deemed necessary from other trade unions. And trade unions in Sweden are consequently legally entitled to decide to take sympathy action upon a request by another trade union if the original dispute is legal.

⁵ See Prop. 1990/91: 162 Om nya fredsplikts regler.

⁶ See Ds 1994:13 Lex Britannia.

⁷ See Prop. 1998/99:90 Utstationering av arbetstagare.

D. The Laval Case

Basic Facts

19. Laval un Partneri Ltd (Laval), established in Latvia, supplied workers to L&P Baltic Bygg AB (Baltic), a company established in Sweden, which carried out construction work in Sweden. Baltic was the subsidiary of Laval. Baltic had through a public procurement procedure been awarded a contract concerning the reconstruction of a school in the municipality of Vaxholm, a city situated approximately 50 km northeast of Stockholm.

20. Byggnads is the trade union for all blue-collar construction workers in Sweden and is an affiliate of the Swedish Trade Union Confederation (LO). Byggnads is a trade union that was originally founded in 1889 and whose general aim is to promote the interests of its members in the labour market and work for the development of a society built on political, social and economic democracy. It has several local branches of which Byggettan is one.

21. In June 2004 Byggnads⁸, through one of its local branches – branch No. 1 Byggettan - established contact with B & P Baltic and Laval and discussions were conducted as to the conclusion of a collective agreement between Byggnads and Laval concerning the construction work carried out on the school in Vaxholm. Byggnads demanded that Laval⁹ should sign an ordinary collective agreement with the trade union, a demand that was not met. Laval argued that the collective agreement would make the operations in Sweden too expensive. The final negotiation was conducted on 15 September 2004. But Laval had on the previous day 14 September 2004 concluded a collective agreement with the Latvian federation of building workers – an agreement which only covered members of the union. On the 20 October 2004 Laval concluded a new agreement with the Latvian union, an agreement which only covered work outside Latvia. The company's aim was to claim that those collective agreements signed in Latvia also had validity in Sweden - restricting the rights of Swedish trade unions to regulate work performed in Sweden.

22. On 19 October 2004 Byggnads gave a written notice, in accordance with section 45 of the Swedish Co-determination Act, of collective action. In the

⁸ Byggnads concludes approx. 1 500 local collective agreements every year. In 2004, 98 local agreements were concluded with foreign companies. In the same year, Byggnads also took industrial action against 21 companies which refused to conclude a collective agreement. Nine of these were foreign companies.

notice Byggnads stated that the collective actions were motivated by Laval's refusal to conclude a collective agreement¹⁰. The decision was taken by Byggnads upon a request by the local branch Byggettan. Laval replied that the collective action was unlawful since it breached union law. On 23 November 2004, Elektrikerna gave written notice of sympathy action to the company. Byggnads collective action came into effect on 2 November 2004 and Elektrikerna's sympathy action came into effect a month later on 3 December 2004. Two days earlier, on 1 December 2004, the parties in the dispute had met upon the initiative of the National Mediation Office (Medlingsinstitutet) – but no agreement was reached.

The interim decision of the Swedish Labour Court (AD) 2004 No. 111

23. On 7 December 2004, Laval summoned Byggnads and Elektrikerna before the Swedish Labour Court and petitioned that the court should deliver a provisional order (an interim decision) declaring that the industrial actions taken by the trade unions were unlawful. The Labour Court may deliver such an interim decision if the claimant shows probable cause as to the basis of his claim.¹¹ Laval also presented claims for damages which were not specified.

24. On 20 December 2004, special oral proceedings were conducted before the court in order to handle petitions for an interim decision. Laval argued that the collective actions were unlawful on two separate grounds which were both connected to union law. The first was that collective actions were contrary to the Swedish Britannia principle and that Lex Britannia was in itself contrary to the EU law and should therefore not be applied. The second ground was that the demands put forward by Byggnads together with the sympathy action taken by the Elektrikerna consisted in an unlawful non-proportionate restriction on the free movement of services as regulated in article 53 of the Treaty of the functioning of the European Union (TFEU).

⁹ Laval was well aware of the Swedish labour market system as it had earlier signed collective agreements with Byggnads.

¹⁰ According to Byggnads, Byggettan demanded an hourly wage of SEK 145. Laval offered to pay only SEK 109/hour. It was never established in the legal proceedings what the actual pay for the Latvian workers was. Later it was discovered by Byggnads that the Latvian workers in reality only received SEK 35/hour. Laval on the other hand claimed that wages were higher, but never gave proof to their claim. When the reconstruction work at the school in Vaxholm later was finalised by a new company (after Laval left its contract early 2005) the payment for the construction workers was SEK 163/hour.

¹¹ See chapter 15 section 3 of the Swedish Code of Judicial Procedure (rättegångsbalken)

25. The Labour Court delivered a decision on 22 December 2004 in which the Labour Court rejected the claim by Laval for interim decision. The Labour Court firstly stated that Laval had not shown probable cause as to that Lex Britannia was contrary to EU law. This conclusion was drawn primarily from the legal inquiries conducted by the Government before Sweden's accession to the EU. Regarding the second ground, the Labour Court also stated that Laval had not shown probable cause as to the collective Action being contrary to EU law.

26. On 10 February 2005 the contract between the municipality of Vaxholm and Laval was cancelled. The workers at Laval had left the building site already one month earlier.

The Labour Court's reference to the ECJ for a preliminary ruling

27. The main proceedings before the Labour court were conducted on 11 March 2005. The claim that the Labour Court should declare the collective action unlawful remained and the claim for punitive damages were specified. Laval claimed that the Labour Court should oblige the trade unions to pay a total of 600 000 SEK (approx. 60 000 EURO).¹²

28. The first conclusion of the Swedish Labour Court was that the collective actions were not contrary to Swedish law, as regulated in the Co-determination Act. The Labour Court applied the paragraph 3, section 42 of the Co-determination Act and concluded that the actions were lawful according to Swedish law. The Swedish Labour Court thereby gave its approval of the industrial actions initiated by the Swedish trade unions concerned. It is worth noting that the Labour Court is last and final instance and that its decisions cannot be appealed against.

29. The Labour Court considered that the interpretation of EU law was unclear and that it was obliged, in accordance with article 267 TFEU, to ask for a preliminary ruling from the ECJ. The Labour Court referred the following two questions to the ECJ:

(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC ... for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for

the building sector), if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [Co-determination Act] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the “Lex Britannia”, only where a trade union takes collective Action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective Action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?’

30. The questions were received by the ECJ on the 19 of September 2005.

The opinion of Advocate General Mengozzi

31. The Advocate General delivered his opinion on 23 May 2007 after the hearing, which was conducted before the ECJ on the 9th January 2007. Several Member States used the opportunity, provided by the ECJ’s statute, to submit written and/or oral observations, among others the Swedish government.

32. In the opinion of the Advocate General the adjudication called for a detailed examination of the Posting of Workers Directive and article 53 TFEU with consideration to the specific model of collective labour relations existing in Sweden.¹³ The conclusion of the Advocate General was as follows (italics added):

309. Where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71/EC [...] concerning the posting of workers [...] and Article [53 TFEU] must be interpreted as *not preventing trade unions from attempting*, by means of collective Action in the form of a blockade and solidarity Action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective Action is motivated by public interest objectives, such as the

¹² See AD 2005 nr 49.

¹³ C-341/05 Laval un Partneri, AG opinion, para 5.

protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives.

310. When examining the proportionality of the collective Action, the national court should, in particular, verify whether the terms and conditions of employment laid down in the collective agreement at issue in the case before it, and upon which the trade unions made the application of the abovementioned rate of pay conditional, were in conformity with Article 3(10) of Directive 96/71 and whether the other conditions, upon which application of that rate of pay was also conditional, involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.

33. It may be noted that the Advocate General did not enter into any extensive discussion on the compatibility of the Lex Britannia with EU law. The conclusion of the Advocate General left considerable margin of appreciation to the Swedish Labour Court.

The ECJ judgement of 18 December 2007

34. On 18 December 2007, the ECJ delivered its judgement answering the two questions referred to it by the Swedish Labour Court. The ECJ acknowledges that Sweden has entrusted to employers and workers through collective negotiations to set wages and that in the construction sector this is done on a case by case basis (para.69). The Posting of Workers Directive however only requires that minimum rates of pay are ensured the posted workers; thus the Directive cannot be used as a support for the negotiation of wages other than minimum wages. The ECJ then draws the following conclusion.

It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with [the Directive] is not entitled, pursuant to that Directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers. (para. 71).

35. The ECJ further states that the Posting of Workers Directive only requires the Member States to ensure that undertakings posting workers apply a hard nucleus of employment conditions (article 3.1).¹⁴ The ECJ confirms that article 3.7 states

¹⁴ The conditions contained in the hard nucleus are, (a) maximum work periods and minimum rest periods, (b) minimum paid annual holidays, (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;, (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment

that article 3.1 does not prevent the application of more favourable conditions for the workers. The ECJ then holds that article 3.7 cannot be interpreted as allowing the Member States to apply terms and conditions of employment, which go beyond article 3.1 of the hard nucleus (para 80). The ECJ here clearly established that the Posting of Workers Directive is a maximum Directive. The Posting of Workers Directive is thus a ceiling and not a floor - which was the general understanding before the ruling by the ECJ.¹⁵ The Member States are whatever method they chose for establishing conditions of employment, prevented from imposing requirements other than those that comprises the hard nucleus. The effect of the judgement is that such other conditions may not be the subject of negotiations between employers and trade unions if they are to be enforced by collective Action. The ECJ judgement limits the possible subjects of negotiations between parties since a precondition of such negotiations are that trade unions have the right to resort to collective Action.

36. Member States may require undertakings posting workers to comply with other conditions than those in the hard nucleus when they, in accordance with article 3.10, concern public policy provisions. Provisions in collective agreements negotiated by employers and workers cannot without public intervention be considered as concerning public policy provisions since the labour market organisations, according to the ECJ, may not be considered bodies governed by public law and thus lack the ability to refer themselves to article 3.10 of the Posting of Workers Directive (para. 89).

37. The ECJ after the mentioned remarks concerning the Posting of Workers Directive moves on to consider the collective actions taken by the trade unions and also the Swedish regulation of the right to strike. The objections by the trade unions, supported by the Swedish and Danish governments, that the EU does not have competence to regulate the right to strike, were disregarded by the ECJ. The ECJ held that even if article 153.5 TFEU states that the EU does not have competence to regulate the right to strike, this does not mean that collective actions as such are excluded from the negative integration, that is the regulation on the free movement of services (para 88).

undertakings, (e) health, safety and hygiene at work, (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, (g) equality of treatment between men and women and other provisions on non-discrimination.

¹⁵ See annex " Opinion of the European Parliament on trade union rights "

38. The ECJ refers to among other to ILO convention 87 when it recognizes the right to strike as a fundamental right which forms an integral part of the general principles of EU law, a right that nonetheless may be subject to restrictions (para 91). The recognition of the right to strike did not exclude it from the reach of article 53 TFEU prohibition of restriction on the free movement of services. The mentioned prohibition effects the relationship between two private subjects such as the case before the treaty, when they are attempting to regulate collectively the provisions of services (para 98).

39. The ECJ without particular consideration establishes that the right to take collective action in order to force an undertaking to conclude a collective agreement with certain terms and conditions of employment constitutes a restriction on the free movement of services. This right to collective action *makes it less attractive* to provide services. (see para 99). The threshold that has to be crossed by a collective action in order for such action to be classified as a restriction on the free movement of services is that the action makes it less attractive to provide services. With the threshold set so low, the rhetoric question if every collective action may be considered a restriction on the free movement of services is justified. The infliction of a certain amount of pressure is inherent in the nature of a collective action in a labour dispute, pressure that certainly will make it less attractive to provide services and thus, according to the ECJ, constitutes a restriction on the free movement of services.

40. The restrictive effect of the collective action in this case was, according to the ECJ, enhanced by the fact that the collective agreement did not contain any fixed minimum wage and that wages would be set within a framework of negotiations (para 100). The opinion of the ECJ was that the setting of wages through such a system of negotiations would render it next to impossible to determine what obligations would apply during the temporary period of operations in the host state (para 107).

41. Restrictions of the free movement of services may be justified with reference to the certain overriding requirements to the public interest if they are proportionate. The protection of workers and the prevention of social dumping are both subjects of such public interests. The ECJ recognizes that collective actions aimed at ensuring posted workers terms and conditions of employment fall within public interest of the protection of workers.

42. The ECJ stated that the collective actions taken by Byggnads in this case could not be justified. The collective actions were thus non compatible with the fundamental freedom that is free movement of services (para 110). When

adjudicating this question, if the collective Action was justified, the ECJ does not leave any room for interpretation to the national court and thus settle not only the question of law but also the question of facts.

43. When answering the second question the ECJ draws the conclusion that the mentioned third paragraph of section 42 of Co-determination Act (Lex Britannia) was discriminatory and required justification by a ground mentioned in the article 52 TFEU. The grounds specified there are public policy, public security and public health. The Swedish government motivated Lex Britannia in part with the intent of ensuring that all employers operating in Sweden would apply certain conditions of employment and also in part by attempting to create a fair climate of competition. Such reasons are not grounds of public policy, public security or public health and therefore the ECJ did not consider those reasons when determining if Lex Britannia was justified or not.

The Swedish Labour Court's Final Judgement

44. The Swedish Labour Court delivered its final judgement on 2 December 2009.¹⁶ The Court was divided with 4 members of the Court in favour and 3 members against.¹⁷ Laval's claims for punitive damages was after the ECJ's preliminary ruling adjusted and they claimed that the trade unions should be obligated to pay 1 350 000 SEK (approximately 135 000 EURO). Laval also claimed that the trade unions should pay economic damages of a total 1 420 000 SEK (approximately 142 000 EURO) a claim that had not previously been presented. The claims made were contested by the trade unions.

45. The trade unions had conceded that, with regard to the ECJ's judgement, the collective actions were unlawful. The Labour Court's judgement is thus not concentrated on the lawfulness of the collective action but rather on the question whether the trade unions were liable to pay damages to Laval. It should again be noted that the Labour Court in the judgement AD 2005 No. 49 had concluded that the collective actions were lawful according to Swedish law.

46. The Labour Court provides a general presentation of when EU Member States may be liable to pay damages and declares that there is no explicit Swedish regulation that even after interpretation in accordance with the EU treaties would give Laval a right to damages based on a collective action in breach of EU law.

¹⁶ See annex.

47. The Labour Court presents the ECJ case law on *Member States liability for damages*. The Court states that liability for damages has been extended to situations when a private subject against another private subject makes claims.

It may also be considered established that there is a general legal principle within EC law that damages are also to be able to be awarded between private parties[..].

48. Regardless of whether this could be considered as an accurate interpretation of EU law or not, this was the conclusion of the Swedish Labour Court. A prerequisite for such a liability is that the breached provision has “horizontal direct effect”. Regarding the retroactive effect of judgements, the Labour Court held that the ECJ has stated that Member States liability cannot be limited to damages that have occurred after the breach of EU law, as established in a judgement from the ECJ.

49. Laval alleged two grounds for its claims for damages. The first ground was that the collective action taken in order to force Laval to conclude such a collective agreement at hand was in violation of EU law in particular the free movement of services. The second ground was the collective actions were unlawful since Laval was already bound by a collective agreement and EU law prevented the application of the third paragraph of section 42 of the Co-determination Act (Lex Britannia). Both grounds were contested by the trade unions.

50. The Labour Court concluded that article 56 TFEU has horizontal direct effect and therefore it may be invoked by Laval against the trade unions. The next question posed by the Labour Court is if the effect of the violation of the Treaty should be damages. The Labour Court repeats that a Member State can be made liable to pay damages on grounds of union law if three criteria are fulfilled.

1. The State has infringed a rule of law intended to confer rights for individuals;
2. The breach must be sufficiently evident¹⁸; and
3. There must be a direct causal link between the breach and the loss or damage sustained.

The Labour Court held that the first and the third criteria were fulfilled and the question was if the violation was sufficiently clear (serious). The Labour Courts then refers to the judgements C-46/93 and C-48/93 *Brasserie de Pecheur and Factortame* concerning Member State liability and the statements made there on when a Member State’s violation is sufficiently serious.

51. The Labour Court made the following statement.

Without taking a stance as to the question of whether that stated above can be completely applied in the present situation, the Labour Court finds that the actions of the Labour Unions at issue, the industrial actions, in accordance with the European Court of Justice's preliminary ruling, constituted a serious violation of the treaty, as they were in conflict with a fundamental principle in the treaty, the freedom to provide services. Even if the right to take industrial actions has also been recognized by the European Community as a fundamental right, it was found that the actual industrial actions, despite their objective of protecting workers, are not acceptable as they were not proportionate. The Labour Court finds that the stance of the European Court of Justice in these issues entails in this case that there is a violation of EC law that is sufficiently clear. The requisites for damage liability exist therewith.

52. The Swedish Labour Court establishes that the trade unions may be held liable to pay damages since the ECJ had concluded that their industrial action constituted a serious breach of a fundamental freedom (the free movement of services). The Labour Court considered that the effect of EU law would be jeopardized if it was not possible to oblige the trade unions to pay damages.

53. The Swedish Labour Court applies by analogy the provisions on damages in section 54-55 of the Co-determination Act concerning the first legal ground argued by Laval. The Labour Court, with reference to the EU law principle of equivalence, held that punitive damages should be awarded also in this case. Since the Swedish legislator had chosen punitive damages as a sanction in these kinds of disputes it should also be imposed here.

54. Regarding the second ground adduced by Laval, that the industrial actions were in breach of the Britannia principle, the Labour Court held that, with regard to the ECJ judgement, it was prevented from applying the third paragraph of section 42 of the Co-determination Act (Lex Britannia). The trade unions actions were thus in breach of the first paragraph and thus unlawful. The Labour Court stated that the trade unions were liable to pay damages with a direct application of section 54-55 of the Co-determination Act.

55. The Labour Court, after having stated that the trade unions could be held liable for damages, continued by testing the actual claims for economic and punitive damages.

¹⁸ In the judgments of the ECJ the term used in the English language is "sufficiently serious". The Labour Court in its judgment uses the term "tillräckligt klar" which it translates to sufficiently clear or evident.

56. As regards economic damages, the Labour Court states that Laval in accordance with the procedural regulation had not shown that they had suffered the loss for which they claimed damages. Had Laval shown that they suffered the damage claimed (SEK 1 420 000 or EUR 142 000) it seems likely that the Labour Court would have ordered the trade unions to pay the claimed damages.

57. The trade unions contested their liability for damages¹⁹ and adduced that a prerequisite for liability to pay damages is culpa (negligence). The Labour Court held that there was no support for such a statement in the judgements given by the Labour Court concerning the liability provisions in the Co-determination Act. Another question according to the Labour Court is that negligence and/or intent could be regarded when determining the amount of punitive damages ordered. When applying the Co-determination Act provisions on damages it is according to the Labour Court sufficient that the action constitutes a breach of the Co-determination Act. The same, according to the Labour Court, seems to apply concerning breaches of EU law.

58. As to the question of determining the amount of damages the Labour Court noted that there is a statutory possibility to reduce or waive damages when it is reasonable under the circumstances (section 60 of the Co-determination Act). The collective actions were lawful according to Swedish law but constituted a clear violation of union law. It was without any doubt not evident until the ECJ judgement that the collective actions were in breach of community law. The trade unions had, however, reasons to consider if the collective actions were compatible with union law since Laval had made objections concerning the collective actions potential conflict with EU law. The ECJ has not limited the judgments effect in time and the judgement has retroactive effect. Therefore it should be applied also to the actions taken before the judgement was delivered.

59. The fact that Laval's claims were rejected in the interim decision since the Labour Court did not consider that Laval had been able to show probable cause and therefore allowed the collective Action to continue, could not be attributed any significance when determining the level of punitive damages.

¹⁹ On the 6th July 2010 the Swedish Supreme Court (HD) refused to accept an extraordinary appeal made by Byggnads, Byggettan and Elektrikerna against the judgement by the Labour Court. In the appeal it was argued, inter alia, that it should rather be the State on not the trade unions that should be forced to pay damages.

60. The trade unions were on the basis of the presented reasons ordered to pay a total amount of SEK 550 000 (approximately EUR 55 000 in damages as well as trial costs and legal fees to Laval, approx. SEK 2 100 000 or EUR 210 000).

61. The Swedish Labour Court is the court of last resort for the settlement of labour law disputes in Sweden. Consequently, the judgment handed down by the Swedish Labour Court on 2 December 2009 is final and cannot be appealed. The only way to rehear the case is through extraordinary remedies. In May 2010 the three trade union organisations concerned applied for a rehearing and submitted an appeal against miscarriage of justice regarding the Swedish Labour Court judgment to the Swedish Supreme Court. For a rehearing to be granted, the application of the law by the Labour Court must have been manifestly contrary to the law and for a successful appeal against a miscarriage of justice there must have been a grave procedural error in the hearing that can be assumed to have affected the outcome of the case. Hence the judgment must be manifestly erroneous, which the trade unions considered to be the case in several respects. In a decision dated 6 July 2010, however, the Supreme Court rejected the trade unions' action.

62. The Swedish Building Workers' Union, Branch No. 1 of the Swedish Building Workers' Union and the Swedish Electricians' Union subsequently paid the damages and litigation costs along with interest ordered by the Labour Court. This means that the organisations were forced to pay a total of SEK 3 155 000 (about EUR 342 000) to Laval, of which SEK 550 000 (about EUR 60 000) refers to general damages (punitive damages), SEK 2 129 739 (about EUR 230 000) refers to litigation costs and SEK 475 000 (about EUR 52 000) refers to interest. In addition there were major costs for the lawyers the organisations themselves were forced to engage for litigation in the Labour Court and the European Court of Justice. Payment to Laval was made in October 2010 after the company applied to the Swedish Enforcement Authority, requesting compulsory enforcement of the Labour Court judgment against the trade union organisations. It can be mentioned that Laval was declared bankrupt in July 2009 and that the payment was therefore made to the Latvian trustee in bankruptcy.

E. Legislation following the ECJ judgement restricting trade union rights

63. On 10 April 2008 the Swedish government decided to appoint a special committee with the instruction to present necessary changes in the Swedish legislation (The Laval Committee). The head of the Laval Committee Mr. Claes Stråth presented the findings of the Committee on 15 December 2008 (SOU 2008:123). The Laval Committee states that it believes that its proposals will not violate ILO conventions (87, 98, 154) – but that it cannot totally be excluded – but the Committee is nevertheless obliged under its instruction to make proposals in accordance with EU law. The Committee mentioned the European Social Charter but there are no comments if the proposals are in line with the Charter. LO and TCO were critical of the proposals laid forward by the Laval Committee.²⁰

64. On 9 March 2009 the Swedish tripartite ILO Committee dealt with the proposals from the Laval Committee. A majority composed by the employer and government representatives concluded that the proposals by the Laval Committee do not violate any ILO convention – but asks the Government to secure, as far as possible, that its proposals will not violate Sweden's obligations in relation to ILO Conventions No. 87, 98, 151 and 154.

65. The worker representatives in the ILO Committee disagreed and instead argued that the proposals violated those ILO conventions. More specifically a) restrictions on the rights of freedom of association and collective bargaining of trade unions due to the interest in promoting market access by companies is not recognized by the ILO (CFA, Case 1963 Australia 2000, para 241) b) the restrictions on the right to strike went beyond what was allowed according to the ILO jurisprudence (CFA Digest 2006, paras 520 – 676) c) the proposals restricted the rights of trade unions to decide themselves what to regulate in collective agreements and limited their possibility to choose methods of Action (CFA Digest 2006 para 913) d) the Laval Committee should have examined ILO principles on non-discrimination and equal treatment between national and foreign workers. In addition, the ECJ had not fully taken into account the obligations of Sweden arising from ratified ILO Conventions – obligations which the ECJ could not cancel/make invalid – and the worker representatives also

²⁰ See annex : LO-TCO joint opinion on the Laval inquiry

made a specific reference to the unanimous tripartite conclusion from ILOs 8th European Regional Meeting in Lisbon 9 – 13 February 2009 and its para 28 which reads “It is of key importance to ensure that the interpretation and implementation of freedom of association and collective bargaining at regional and sub-regional level is fully consistent with international labour standards and the ILO supervisory system”.

66. Proposals from the Laval Committee were transformed into a Government Bill, which was presented before Parliament on 5 November 2009. The Bill proposes amendments to the Swedish Co-determination Act and the Act on Posting of Workers. The proposal was after a debate adopted by Parliament and entered into force on 15 April 2010. In the debate objections were made that the proposals implied a restriction of the constitutionally protected rights of freedom of association.

67. The main legislative changes concern collective actions directed towards employers posting workers to Sweden and they consist of an actual and genuine restriction on trade unions right to resort to collective action. It should be observed that these amendments of law entail restrictions in the right to take industrial action against all companies that post workers to Sweden, including employers based in countries outside the EU/EEA (EU countries and Norway, Iceland and Lichtenstein).

68. Trade unions right to resort to collective action for the purpose of regulating the conditions for the posted workers in a collective agreement is limited in the new regulation (section 5 a of the Posting of Workers Act). The major interference with the right to take industrial action are as follows.

69. In the first place, the collective agreement requested by the trade union organisation may only regulate matters covered by Article 3 (1) a-g of the EU Posting of Workers Directive, i.e. work periods, annual holidays and minimum rates of pay etc., see the Swedish Posting of Workers Act, Section 5 a, point 2. It means that the legislator has prohibited trade unions from trying to bring about collective agreements using industrial action on matters other than those specifically mentioned. According to the preparatory works to the provision it is not, for example, allowed to impose requirements concerning insurance cover for the foreign workers, such as occupational accident insurance and life insurance (Government Bill 2009/10:48 p. 34). This regulation is essentially alien to Swedish labour law tradition and means that the Government is severely restricting freedom of association and the associated right to negotiate and right to

take industrial action as well as the ability to guarantee migrant workers the same protection as nationals.

70. In the second place, the agreement may only contain rules on minimum rates of pay and minimum conditions. The trade union organisations are thus prohibited from trying, with the help of industrial action, to reach agreements at a higher level than the absolute minimum level that exists in the central collective agreement in the industry. This implies a clear discrimination of employees of foreign posted employers, since the lowest pay in many Swedish collective agreements is considerably lower than the normal rate of pay in the industry calculated on the basis of the labour collective. These lowest rates of pay are only intended to be applied to people without occupational experience, such as young people, and the collective agreements often oblige the employer to pay a higher rate to workers with experience and skill. As stated above, there is no legislation on rates of pay in Sweden; the wage levels are only regulated in collective agreements.

71. In the third place, the new statutory requirements mean that the trade union organisations in some cases are entirely deprived of the right to try to regulate working conditions through collective agreements achieved with the help of industrial action. Under Section 5 a, paragraph 2 of the Posting of Workers Act, industrial action may not be taken at all if the employer shows that the workers' conditions are in all essentials at least as favourable as the minimum conditions of a normal Swedish collective agreement within the framework of the Posting of Workers Directive, Article 3 (1) a-g. There is no requirement for these conditions to be present in a foreign collective agreement, or even in a binding agreement at all. It is sufficient for the employer to show that he applies such conditions. If the employer can present some type of document in which it is stated that he applies such conditions it would probably be sufficient to prohibit the industrial action. This means that in these cases collective agreement free zones are created in the Swedish labour market, where it is only possible to conclude a collective agreement if the employer accepts it voluntarily. It can be mentioned that during the legislative work the trade union organisations proposed that it should at least be allowed to require that the foreign employer confirms in a written agreement with the trade union organisation that it applies the rates of pay and working conditions that it itself has stated. In that case there would be an agreement that under Swedish law is regarded as a collective agreement, thus constituting legal grounds for the trade union organisations to require the employer to pay at least what it claims. The legislator did not consider that even this compromise proposal from the trade union organisations was allowed under EU law, Bill 2009/10:48 p. 35-36.

72. The described provision is connected to a new provision (section 41 c of the Co-determination Act) stating that collective actions in breach of section 5 a of the Posting of Workers Act are unlawful. A consequence of the insertion of this provision in the Co-determination Act is that the sanctions for unlawful collective actions, economic and punitive damages according to section 54-55 are applicable. In practice, this would probably make Swedish trade unions very cautious and less inclined to approach foreign companies posting workers in Sweden with a view to conclude collective agreements. The judgement of the Swedish Labour Court also revealed that economic sanctions could be imposed retroactively on trade unions 5 years later – even if the trade unions only took actions that were legal at the time.

73. The Swedish government went beyond the ECJ judgement in its legislative change since the restrictions on the rights of trade unions also apply to companies from Third countries posting workers in Sweden. This will create a situation where the Swedish trade unions only could request ordinary collective agreements from Swedish companies. The end result is that the trade unions in Sweden are forced to accept signing collective agreements that will impose inferior wages and benefits for foreign workers posted in Sweden compared to national workers – which is against the principles of equal treatment and non-discrimination of workers due to national origin.

74. There are no specific details or criteria provided on how an employer may be able to show that he applies, in all essential, the same or better conditions than those stipulated in the demanded collective agreement. It is sufficient that the employer shows individual contracts of employment to establish an obligation to maintain the industrial peace. In practice, it will be very difficult for trade unions to verify the truth. There have been numerous examples in Sweden where foreign posted workers have received much less in reality than what is officially stated and where the workers concerned have been threatened if they make contacts with Swedish trade unions.²¹

75. If an employer objects that pay and other employment conditions in all essentials are as favourable as in the agreement demanded by the trade union organisation, this means that the trade union organisation must apply to a court to have the legality of the industrial action reviewed. The Swedish Act on Co-Determination at Work, Section 41, first paragraph, point 1, stipulates that it is not allowed to take industrial action if there is a legal dispute concerning the legality of the action. Only if the Swedish Labour Court has issued an interim

²¹ See for example LO-rapporten ”När arbetskraftskostnaderna pressar priset”.

order can the industrial action be taken without being unlawful already on those grounds. If the employer at that hearing presents some type of documentation that states that pay and employment conditions in all essentials already correspond to the trade union organisation's demands it is very difficult for the trade union organisation to refute this. Experience shows that in practice the foreign posted workers do not dare to testify in court against their employer due to fear of being sent home and losing their job. Double agreements at foreign companies are a growing problem in the Swedish labour market and the trade union organisations can do nothing about it because of the new legislation.

76. If it subsequently proves that the conditions in reality were considerably worse than the employer "demonstrated" to a court there are no legal grounds for demanding higher pay for the workers than that stated in their individual employment contracts. Consequently, without collective agreements the trade union organisation has no possibility of safeguarding employees' interests.

77. The mentioned new regulation does not differentiate between the situations when one or several workers posted are organised in the acting trade union. The Swedish government in the travaux préparatoires held that the conclusions reached by the ECJ in Laval are independent of whether the workers are organised by the trade union or not and therefore held that it was not possible to make such a differentiation.²² The individual worker's aspiration to secure his conditions of employment in a collective agreement is thereby prevented by the legislation and the trade union is unable to act on behalf of its members.

F. Other legislative changes

78. When Sweden implemented the EU Services Directive on 27 December 2009 a change in the legislation was made (The Foreign Offices Act (1992:160) and the Foreign Branches Office Ordinance (1992:308)), with the effect that a requirement that foreign companies should have a legal representative in Sweden when it conducts economic activities in Sweden was withdrawn with respect to companies within the EEA – but still applies to companies outside the EEA. The result will be that Swedish trade unions could be forced to try to get in touch with the employer abroad (in the EEA) when it wants to engage in collective bargaining. This will undermine the possibility for establishing collective agreements and is contrary to the obligations by Sweden to promote collective bargaining according to Article 4, 6 and 19.4 of the European Social Charter as well as ILO C. 98 (Art.4) and C. 154. When the Swedish tripartite ILO Committee 21 January 2009 dealt with the proposal, a majority composed of the

²² Prop. 2009/10:48 Åtgärder med anledning av Lavaldomen, page 40 f.

worker and government representatives (employers against) demanded that the Government should secure that the change in the legislation would not violate Sweden's obligations in relation to ILO C. 98 and 154. The Government did not however take this view into account when making the legislation.

79. This means that there is now no legal obligation in Sweden to have a representative here in the country with whom the trade union organisations can negotiate and enter into collective agreements for business activities in Sweden. This implies a very great practical obstacle to exercising the right to negotiate in practice and to trade union activities in other respects.

G. Consequences of the Laval judgment and the new legislation

80. Foreign companies have operated in the Swedish labour market for many years. These companies have normally signed the same collective agreements with the Swedish trade union organisations as Swedish companies. The agreements have almost always been signed without any need to take industrial action. But of course the knowledge that industrial action can be taken has had significance for the willingness to sign collective agreements. Since there is no legislation whatsoever or other rules concerning duty of notification or registration of foreign companies that operate temporarily in Sweden there are no statistics on the extent of these activities. However, there are good grounds for stating that the extent has increased considerably, particularly after the enlargement of the EU on 1 May 2004.

81. As shown in the Swedish Labour Court judgement in the Laval case, the trade union organisation's tort liability is strict. Not even the circumstance that the industrial action in the Laval case was clearly lawful under Swedish legislation then in force had any significance for the tort liability. The trade union organisations were ordered to pay damages despite the fact that they took industrial action that the Swedish legislator had expressly stated was lawful. The interpretation by the ECJ of EU law was applied retroactively. The fact that the incorrect assessment by the trade unions concerned was excusable obviously seems not to have any importance. Determining which parts of the pay that are included in the term "minimum wage" and otherwise deciding in advance what is lawful to demand under the new legislation is difficult. An error of judgement may cause a trade union organisation financial ruin as the employer can demand full financial compensation for its loss. Nor does it seem to have any significance for the tort liability that the Swedish Labour Court in an interim order declared that the industrial action was lawful. That was the case in the Laval case, but the Swedish Labour Court did not consider that this had any bearing on the tort

liability. Therefore it is never possible for a trade union organisation to obtain a binding answer in advance as to whether particular industrial action is lawful and that there is therefore no risk of tort liability. The only reason that the trade union organisations were not also obliged to pay financial compensation to Laval was that the company had not managed to verify the size of the loss the company suffered due to the industrial action.

82. The difficulty to determine in advance what is lawful and the risk of large claims for damages have made the trade union organisations in Sweden more cautious about demanding collective agreements. A large proportion of the posted foreign workers work in the construction industry. At the beginning of the 2000s the Swedish Building Workers' Union signed about 100 collective agreements per year with foreign companies. Statistics presented in the annual reports of the National Mediation Office from the years 2007-2010 show that the number of collective agreements signed has fallen drastically after the European Court of Justice judgment in the Laval case in December 2007. Thus 107 collective agreements were signed directly with foreign companies in 2007. In 2008 only 40 agreements were signed, in 2009 there were 29 agreements signed and in 2010 there were 27. In addition, there are about 15 companies per year that are bound by collective agreements through membership of a Swedish employer organisation. Thus the decrease in the number of agreements signed from 2007 to 2010 is dramatic. There is no corresponding decrease for Swedish companies.

83. The implication is also that Swedish companies can no longer compete on equal terms with foreign companies. This led the Managing Director of Peab (a large Swedish construction company) and the President of the Swedish Building Workers' Union in a joint article in one of Sweden's largest newspapers to call for terms corresponding to those in collective agreements to be required for public procurements, as public funds should not be used to contribute to wage dumping and unfair competition. (The article was published in Svenska Dagbladet on 7 September 2010). The article also expresses great concern about the consequences of not having any requirement for a representative to be present in the country for foreign employers, see point 78 - 79 above.

84. The problems that the new legislation has created are real and are therefore often discussed in the trade union organisations. At a meeting on 25 May this year, for example, the head negotiators of all the Swedish Trade Union Confederation (LO) affiliates instructed LO to again approach the ILO and describe the situation that has arisen.

85. It can also be noted that the legal situation means that clients and purchasers are also uncertain as to the requirements that can be imposed in procurements as regards pay and employment conditions. In the Laval case, for example, in the construction contract with the municipality of Vaxholm the company had undertaken to sign a customary Swedish collective agreement with the Swedish Building Workers' Union for the work. The municipality later waived this requirement due to the legal uncertainty thought to apply to such conditions in connection with public procurement. It can be added that Sweden has still not ratified ILO Convention No 94 and that the main reason for this is the assertions that the Convention contravenes EU law.

86. No trade union industrial action with a view to bringing about a collective agreement with a foreign company has taken place at all in recent years in the Swedish labour market. This was relatively rare even before the Laval case, but notice of industrial action against foreign companies for the purpose of achieving a collective agreement was regularly issued every year.

87. The preparatory works to the Swedish legislation clearly show that the right to take industrial action and the restrictions in this right implied by the Laval legislation are not affected by whether the trade union organisation has any members at the workplace or not (Government Bill 2009/10:48 p. 41). For several years intensive work has been in progress in the industries in which posting of workers is more frequent to try and organise the foreign workers who are posted to Sweden, above all those who stay for longer periods. However, with the new legislation it doesn't matter if the union has any members among the employees. Hence the trade unions cannot represent these members in the same way as other members, since collective agreements can only be made with their foreign employers, either voluntarily, at a lower level and only on certain matters or not at all. We also want to underline that Laval had no collective agreement at all when it came to Sweden in May-June 2004. The collective agreement with the Latvian union was concluded the 14 of September 2004, about 3 month after the work began in Sweden.

88. To conclude, Sweden has violated its obligations under Article 4 and 6 in respect of the restrictions on the right to strike and in respect of the breach of the State's duty to promote collective bargaining. So far as the latter is concerned, the legislation now in place permits some employers to undermine established agreements, the terms of which cannot be enforced against them, with consequences set out in point 82. Sweden has also violated its obligations under Article 19.4, by the imposition of restrictions on the right to take industrial action against foreign companies.

89. The combination of the new rules on industrial peace and full financial tort liability without a negligence requirement has led to great wariness on the part of the trade union organisations as regards signing collective agreements with foreign employers. The fear felt by the trade union organisations of doing the wrong thing by mistake and putting the organisation at risk of being forced to pay high levels of damages has meant that there has been a severe fall in the number of collective agreements signed as regards foreign companies carrying on business in Sweden. This means that foreign workers are entirely without protection as regards reasonable terms and conditions of pay and employment when they are working in the Swedish labour market and that Swedish workers are exposed to competition from workers with very low pay and wretched employment conditions. In the long term there is a risk that this will have negative repercussions for the entire Swedish labour market model.