EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case document No. 4

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

OBSERVATIONS BY THE EUROPEAN TRADE UNION CONFEDERATION (ETUC)

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Collective Complaint

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

Observations by the European Trade Union Confederation (ETUC)

(03/05/2013)

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1. In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (Article 7§2) the European Trade Union Confederation (ETUC) would like to present the following observations on the case dealing with the CJEU judgment in the Laval case (C-341/05) and the subsequent Swedish legislation which has been put into practice and which restricts the right to collective bargaining and the right to strike, in violation of Articles 6 (the right to bargain collectively) and 19§4 (the right to information and consultation) of the European Social Charter (Revised) - hereinafter the Charter[1].

2. Sweden has ratified both the Charter and the Collective Complaints procedure Protocol. It has also accepted the relevant provisions of the Charter.

I. The landmark case in respect of the right to collective bargaining and the right to strike and the consequences for EU law

3. The 'Laval' case and its consequences are of outstanding importance for the Swedish and Nordic trade unions but also for the European trade union movement as a whole. It deals with one of the most sensitive issues of the industrial relation system(s) not only within the countries themselves but also in its transnational dimension. It not only covers general issues concerning the right to collective bargaining and the right to strike, but also issues regarding international private law (lex Britannia) and the posting of workers in the context of EU law.

4. The ETUC therefore attaches greatest importance to these problems and permits itself to look at the relevant legal arguments in greater depth including the interpretation framework in harmony with the European Court of Human Rights' (ECtHR) approach (particularly as regards social human rights).

II. International law

5. The complaint describes in detail the Swedish domestic legislative framework and its consequent restriction of the right to collective bargaining and the right to strike. The ETUC would like to add the pertinent references to international law[2].

A. European Convention on Human Rights

6. The ECtHR has not yet expressed itself explicitly on the 'Laval' situation and consequences. In several judgments however, it has recognised that Art. 11 ECHR covers the right to collective bargaining and the right to strike.

7. The most important judgment was delivered unanimously by the Grand Chamber in the *Demir and Baykara*[3] case which reversed the Court's previous jurisprudence by recognising for the first time the right to collective bargaining as being enshrined in the protection of

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[1] For clarification purposes it should be noted that statements on the (1996) Charter apply in principle *mutatis mutandi* also to the original (1961) Charter. If, however, the original Charter is meant this is expressed by a reference to either the 'ESC' or the '1961 Charter'.

[2] As to the legal impact see below under 26.

[3] ECtHR (Grand Chamber [GC]), 12.11.2008, no. 34503/97 *Demir and Baykara v. Turkey* [2008] ECHR 1345.

freedom of association guaranteed by Article 11 ECHR. Based on this judgment the Third Section has also recognised in *Enerji Yapi-Yol Sen*[4] the right to strike as an aspect of the same human right. This was followed by a series of further judgments[5].

8. Even if the ECtHR has not yet pronounced itself on the *Laval* issue scientific research has shown that the CJEU's judgments, in particular *Viking* and *Laval* are not consistent with this jurisprudence[6]. Moreover, the ILO (freedom of association) standards and respective case-law to which the ECtHR attaches specific importance[7] show the problems of conformity in respect of the 'Laval' situation (see just below).

B. International Labour Organisation (ILO)

1. General framework

a) *Conventions No. 87 and 98 on freedom of association*

9. In respect of the ILO it should be noted that Sweden has ratified both the core ILO Conventions No. 87[8] and 98[9].

10. More generally, freedom of association belongs to the 'hard core' of the human rights Conventions within the framework of the ILO. This has been recognised by and was even

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[4] ECtHR 21.4.2009, no. 68959/01 *Enerji Yapi-Yol Sen v. Turkey.*

[5] ECtHR 15.9.2009, no. 30946/04 *Kaya and Seyhan v Turkey,* 15.9.2009, no. 22943/04 *Saime Özcan v. Turkey,* 13.7.2010, no. 33322/07 *Çerikci v. Turkey* (see also 27.3.2007, no. 6615/03 *Karaçay v. Turkey*).

[6] *Keith D Ewing and John Hendy*, The Dramatic Implications of *Demir and Baykara*, Ind Law J (2010) 39 (1): 2-51, 40: "But the ECtHR has since clarified the position and has certainly not recognised any limitation on the right to strike that would reflect that imposed by the ECJ in *Viking* and *Laval.*"; *Filip Dorssemont*, The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking : foes are forever! in European Union internal market and labour law, DE VOS, M. (2009), Intersentia, p. 45 – 104; *idem*, The right to take collective action under Article 11 European Convention on Human Rights, Dorssemont/Lörcher/Schömann, The European Convention on Human Rights and the Employment Relationship (to be published in 2013)): "Inevitably, the question arises as to what extent the restrictions to the right to take collective action based on the so-called balancing operation (i.e. the proportionality test) the CJEU undertook in Viking and Laval could pass the test of Article 11 § 2 ECHR. ... A proper understanding of this balancing operation leads to the conclusion that the CJEU does not just balance interests.". *Sandra Tenggren*, The Development of the Right to Strike in International Instruments - The Viking and Laval Cases Revisited (Thesis 30 points in Private Law - Stockholm Autumn 2011) "the statement is now clear that the ECJ judgment does not go in line with those guidelines from the ILO as well as the judgments from the ECtHR; rather the ECJ positioned itself in a backward corner." p. 68; *Albertine Veldman*, The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR: "Since the *Demir* and *Enerji* cases, by which the socio-economic rights of collective bargaining and strike were incorporated into the 'classical' human rights catalogue of the ECHR, it seems that the ECtHR and the ECJ are likely to head for a clash in respect of the protection of the fundamental right to strike, once [116] the EU accedes to the ECHR."

[7] ECtHR *Demir and Baykara*, see note 3, concerning Convention No. 87: "principal instrument" § 100, "fundamental text" § 123; Convention No. 98: "one of the fundamental instruments concerning international labour standards" § 147, "the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements" § 166.

[8] C 87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950).

[9] C 98 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Entry into force: 18 Jul 1951)

one of the founding principles for the ILO Constitution[10] itself expressed in its preamble referring to the "recognition of the principle of freedom of association" being reconfirmed in the Declaration of Philadelphia of 1944 ("effective recognition of the right of collective bargaining").

11. Moreover, the International Labour Conference 1998 has adopted - as a sort of important 'evidence' - the "ILO Declaration on fundamental principles and rights at work"[11]. Among the four main subjects of human rights in the labour field the first is defined as "freedom of association and the effective recognition of the right to collective bargaining". This was reaffirmed by the "ILO Declaration on Social Justice for a Fair Globalization" (2008)[12] constituting "a compass for the promotion of a fair globalization based on Decent Work". This Declaration is particularly important in the framework of this complaint dealing with one important aspect of (the consequences of) globalisation.

12. As the/a core activity of the ILO freedom of association is the only subject dealt with by it which is supervised by a special (tripartite) body, the Committee on Freedom of Association (CFA). This underlines the utmost importance the ILO attaches to this subject.

2. Convention No. 87

a) *General principles*

13. Concerning the right to strike the CEACR has in the past recognised this right as deriving from Convention No. 87 and reaffirmed in its most recent General Survey:

> 117. ***Strikes are an essential means available to workers and their organizations to protect their interests*** ...
> 119. The Committee reaffirms that the right to strike derives from the Convention. The Committee highlights that the right to strike is broadly referred to in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments, which justifies the Committee's interventions on the issue. Indeed, the principles developed by the supervisory bodies have the sole objective of ensuring that this right does not remain a theoretical instrument, but is duly recognized and respected in practice....[13]

b) *New legislation ('Lex Laval')*

14. In its 2013 Report the CEACR denies the need for a 'principle of proportionality' as a permissible restriction of the right to strike:

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[10] Article 1(1) "A permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purposes of the International Labour Organization adopted at Philadelphia on 10 May 1944, the text of which is annexed to this Constitution."

[11] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up - Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) - http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

[12] "drawing on and reaffirming the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) in which Members recognized, in the discharge of the Organization's mandate, the particular significance of the fundamental rights, namely: freedom of association and the effective recognition of the right to collective bargaining, ..."

[13] *ILO*, International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III (Part 1 B), General Survey - Giving globalisation a human face, Geneva 2012, § 198.

In general, the Committee recalls that when drafting its position in relation to the permissible restrictions that may be placed upon the right to strike, this never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has however suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 2012 General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, paragraphs 136–139). The Committee considers, however, that the principles of the Convention do not impose the recognition of a Lex Britannia rule, which is specific to Sweden. This would be a matter to be determined at the national level. [14]

15. Moreover, in its 2013 Report the CEACR expresses 'concern' in respect of the restriction by having recourse to industrial action to conditions corresponding to the Posting of Workers Directive's (PWD) minimum conditions in Swedish legislation. The result of these restrictions is that a foreign employer who posts workers to Sweden can benefit from a legally protected immunity against certain types of industrial action requiring a collective agreement to be concluded, while a Swedish employer in the same sector has no such "immunity":

> The Committee does observe with ***concern***, however, that the amendments to the Foreign Posting of Employees Act restrict recourse to industrial action to conditions corresponding to the PWD's minimum conditions and further bar unions from taking industrial action even if they have members working in the enterprise concerned and regardless of whether a collective agreement covers the workers concerned, provided that the employer can show that the employees' terms and conditions are as favourable as the minimum conditions in the central collective agreement. The Committee considers that foreign workers should have the right to be represented by the organization of their own choosing with a view to defending their occupational interests and that the organization of their choice should be able to defend its members' interests, including by means of industrial action. ***The Committee therefore requests the Government to review, with the social partners, the 2010 amendments made to the Foreign Posting of Employees Act so as to ensure that workers' organizations representing foreign posted workers are not restricted in their rights simply because of the nationality of the enterprise.*** [15]

c) Sanctions concerning industrial action

16. Concerning sanctions the CEACR states in its General Survey 2012 that

> [t]he principles developed by the supervisory bodies in relation to the right to strike are only valid for lawful strikes, conducted in accordance with the provisions of national law, on condition that the latter are themselves in conformity with the principles of freedom of association. [16]

17. In the part of its Report 2013 concerning *Laval* consequences the CEACR states:

> The Committee, observing that the Government has still not provided any reply to this point, first wishes to recall its considerations when examining the impact of the *International Transport Workers' Federation and the Finnish Seaman's Union* v. *Viking Line ABP (Viking)* and *Laval* judgments in another European country. As in that case, the Committee wishes to

[14] *ILO*, International Labour Conference, 102nd Session, 2013, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III (Part 1 A), p. 177 f.
[15] *ILO*, CEACR Report 2013, see note 14, Sweden - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) p. 178 f.
[16] *ILO*, CEACR General Survey 2012, see note 13, § 157.

reiterate that its task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* as they set out an interpretation of the European Union Law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level is such as to deny workers' freedom of association rights under Convention No. 87. The Committee raised the concern at the time that the omnipresent threat of an action for damages that could bankrupt the union, possible in the light of the *Viking* and *Laval* judgments, created a situation jeopardizing the exercise of the rights under the Convention. In this specific case, the Committee is ***deeply concerned*** that the union in question has been held liable for an action that was lawful under national law and for which it could not have been reasonably presumed that the action would be found to be in violation of European Law. The Committee recalls that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association. The Committee considers that this principle is all the more relevant in the circumstances where the action was lawful at the time it was exercised. ***While aware that the payment has already been made to the trustee in bankruptcy, the Committee requests the Government to review this matter with the social partners concerned so as to study possible solutions for compensation of the two unions, particularly in light of the 2004 court judgment leading the unions to believe their action was lawful.***[17]

18. Concerning *Laval* consequences in relation the BALPA case in the UK the CEACR states in its Report 2010 :

> The Committee observes with ***serious concern*** the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, it is the opinion of the Committee that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government's statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.
>
> ***In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations in order to***

[17] *ILO*, CEACR Report 2013, see note 14, p. 177.

enable them to engage in industrial action and to indicate the steps taken in this regard.[18]

3. Convention No. 98 (Article 4 - Promotion of collective bargaining)

19. In its most recent General Survey the CEACR (2012) has once again clarified certain principles pertaining to Article 4 of Convention No. 98.

a) *General principle*

20. Generally speaking, the CEACR General Survey (2012) states:

> 198. Under the terms of the ILO Declaration on Fundamental Principles and Rights at Work, 1998, collective bargaining is a fundamental right accepted by Member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith. ... The **agreements** so concluded must be respected and **must be able** to establish **conditions of work more favourable** than those envisaged in law: indeed, if this were not so, there would be no reason for engaging in collective bargaining.[19] (Emphasis added)

b) *Free and voluntary negotiation and autonomy of the parties*

21. The CEACR General Survey (2012) continues:

> 200. ***Under the terms of Article 4 of the Convention, collective bargaining must be free and voluntary and respect the principle of the autonomy of the parties***. However, the public authorities are under the obligation to ensure its promotion. ... The detailed regulation of negotiations by law would also infringe the autonomy of the parties.[20]

c) *Workers covered by collective bargaining*

22. The CEACR General Survey (2012) continues:

> 209. With the exception of organizations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State, recognition of the right to collective bargaining is general in scope and all other organizations of workers in the public and private sectors must benefit from it. However, the recognition of this right in law and practice continues to be restricted or non-existent in certain countries. This situation has reminded the Committee that the right to collective bargaining should also cover organizations representing the following categories of workers: ... temporary workers, outsourced or contract workers ...[21]

d) *Content of collective bargaining*

23. The CEACR General Survey (2012) continues:

> 215. Conventions No 98, 151 and 154 and Recommendation No. 91 focus the content of collective bargaining on the terms and conditions of work and employment, and on the regulation of relations between employers and workers and their respective organizations. ***The***

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[18] *ILO*, International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III (Part 1 A); United Kingdom - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
[19] *ILO*, CEACR General Survey 2012, see note 13, § 198.
[20] *ILO*, CEACR General Survey 2012, see note 13, § 200.
[21] *ILO*, CEACR General Survey 2012, see note 13, § 209.

concept of "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.). [22]

24. In its 2013 Report, in respect of Convention No. 98 and Sweden, the CEACR states:

> The Committee further expresses its ***concern*** that foreign companies may be exempt from collective bargaining demands provided they only "show" that minimum pay and conditions pertain. ***The Committee requests the Government to reply to these comments and to continue to provide information on any measures taken or envisaged to combat this practice.***[23]

e) *Representative of a foreign employer*

25. In its 2013 Report, in respect of Convention No. 98 and Sweden, the CEACR states:

> ***The Committee welcomes the plans to submit a Bill, at the latest on 30 November 2012, whereby a foreign employer must report that it posts workers to Sweden and appoint a contact person in Sweden, who shall be authorized to receive notice on behalf of the employer and hopes that this will facilitate engagement in collective bargaining with foreign employers. The Committee requests the Government to indicate the developments in this regard in its next report.***[24]

III. The law

A. Interpretation framework

26. In several cases the Committee has clearly expressed its acceptance of the basic interpretation rules defined by the Vienna Convention on the Law of Treaties (VCLT):

> The present complaint raises issues of primary importance in the interpretation of the Charter. In this respect, the Committee makes it clear that, when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties. Article 31§1 of the said Convention states:
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> > "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[25]

27. This general statement has far-reaching consequences for the whole interpretation process. The Charter has to be interpreted in harmony with its context, object and purpose (1.), with other rules of international law (2.) as well as with the specific Charter-related principles (3.).

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[22] *ILO*, CEACR Report 2013, see note 14, p. 180.
[23] *ILO*, CEACR Report 2013, see note 14, p. 180.
[24] *ILO*, CEACR Report 2013, see note 14, p. 180.
[25] Decision on the merits 8 September 2004, *International Federation of Human Rights Leagues (FIDH) v. France,* Collective Complaint No. 14/2003, § 26.

1. Interpretation in harmony with its context, object and purpose: the Charter as a human rights instrument

28. First and foremost, the Committee has stated that "the Charter must be interpreted so as to give life and meaning to fundamental social rights":

> 27. The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.
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> 28. Indeed, according to the Vienna Declaration of 1993, all human rights are "universal, indivisible and interdependent and interrelated" (para. 5). The Committee is therefore mindful of the complex interaction between both sets of rights.
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> 29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter. [26]

29. More specifically, the Committee has stressed the 'human rights' character of the social rights enshrined in the Charter:

> 34. The Committee recalls that the Charter was envisaged as a **human rights** instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality, solidarity (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 27) and other generally recognised values. It must be interpreted so as to give life and meaning to fundamental social rights (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 29). ...[27](Emphasis added)

30. On the basis of Article 31§1 VCLT ("in the light of its object and purpose"), it has furthermore recognised the 'teleological approach' as an important interpretation tool:

> 36. The Committee considers that a **teleological approach** should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is the most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties (OMCT v. Ireland, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 60). It follows *inter alia* that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29). [28](Emphasis added)

31. It is therefore against this background and in this spirit that all rights at work guaranteed by the Charter, in particular the 'hard core' trade union rights enshrined in Article(s 5 and) 6 of the Charter, have to be interpreted.

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[26] Decision *FIDH v. France*, see note 25.

[27] Decision on the merits 20 October 2009: *Defence for Children International (DCI) v. The Netherlands*, Collective Complaint No.47/2008, §§ 34.

[28] ECSR *DCI v. The Netherlands*, see note 27, § 36.

2. Interpretation in harmony with other rules of international law

a) General principles

32. Second, Article 31§3(c) VCLT also requires interpretation in harmony with other rules of international law. The Committee has explicitly recognised that

> [t]he Committee interprets the Charter in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, among which its Article 31§3(c), which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part....[29]

33. It thus follows the line of interpretation developed by the ECtHR and reconfirmed more recently by the Grand Chamber:

> In interpreting and applying this provision, **account must also be taken of any relevant rules and principles of international law** applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-...; *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 273-274, ECHR 2010 (extracts).[30] (Emphasis added)

34. However, the systematic implementation of this approach has unfortunately not been sufficiently developed in the Committee's case-law.

b) Specific relationship to the European Convention on Human Rights and the case-law of the European Court of Human Rights

35. At European level, the two human rights instruments (ECHR and Charter) exist in a close relationship. Indeed, the complementary and mutually reinforcing relationship between the ECHR and the Charter[31] has been expressed by the Committee on several occasions[32]. Obviously, this specific relationship can even lead the Committee to often refer to ECtHR judgments even without any further explanation[33].

36. For the case at hand, it means that the internationally oriented interpretation is reinforced and is therefore particularly necessary.

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[29] ECSR *DCI v. The Netherlands*, see note 27, § 35.

[30] ECtHR (GC) 19 October 2012 - nos. 43370/04, 8252/05 and 18454/06 - *Catan and others v. Moldova and Russia*, § 136.

[31] See for the references of the ECtHR to the Charters, for example, *ECtHR (Research Division)*, The use of Council of Europe treaties in the case-law of the European Court of Human Rights ("The European Social Charter of 1961, revised in 1996, is the treaty that has been the most referred to.", p. 1; see the specific references in nos. 035 (ESC), pp. 14 ff., and 163 (RESC) pp. 35 ff.).

[32] See in particular paras. 28 and 29.

[33] See, for example, Decision on the merits 20 October 2009: *Defence for Children International (DCI) v. The Netherlands*, Collective Complaint No.47/2008, §73 ("As the Court has repeatedly stressed when interpreting Article 14 of the Convention, the Committee has held that the principle of equality, which is reflected in the prohibition of discrimination, means treating equals equally and unequals unequally (Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 52). Thus, as acknowledged above, States Parties may treat persons lawfully or unlawfully present on their territories differently. However, in so doing, human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected.").

c) Specific relationship to ILO standards and case-law

37. In addition to the general relationship between the Charter(s) and other international instruments, there is also a specific and close link to the ILO and its standards. It is expressed in different ways. By incorporating the ILO in the supervisory procedure of the Charter (Article C of the Charter referring Article 26 ESC (Participation of the International Labour Organisation)) the Charter recognises this specific relationship. Moreover, it should be remembered that many (if not most) of the provisions of the Charter are based on ILO instruments[34] Finally, the Committee has adopted the same approach as ILO supervisory bodies such as the Committee on Freedom of Association (CFA):

> The Committee, **like the ILO Freedom of Association Committee, considers** that the extension of collective agreements should take place subject to tripartite analysis of the consequences it would have on the sector to which it is applied" (Digest of the Freedom of Association Committee of the Governing Body of the ILO, 5th (revised edition), 2006, para. 1051).[35] (Emphasis added)

38. Whereas the relationship to the ECHR is mainly linked to the nature of human rights enshrined therein, the relationship to the ILO standards also strengthens the social aspect.

d) Interim conclusion

39. In conclusion the Charter is to be interpreted in line with international standards and the respective case-law of the competent bodies providing a minimum level of protection. However, nothing should and, indeed, does not prevent the Committee from going beyond this minimum level taking into account the specific Charters' standards[36] bearing in mind that European standards should in principle contain a higher level of protection than international standards[37].

3. Interpretation in harmony with principles specifically related to the Charter

40. According to Article 5 VCLT[38] the Council of Europe, as an international organisation, can develop and apply its own rules. Based on the Charter, the ETUC is of the opinion that the following two principles at least should additionally be applied:

- the principle of 'social progress and
- the principle of non-regression.

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[34] See the ILO Conference leading to the adoption of the text of the 1961 (but there is no Explanatory Report to which one could easily refer): Conversely, for the (1996) Charter clear references are included in the Explanatory Report).

[35] Interpretative statement on Article 6§2 (Conclusions XIX-3 and 2010).

[36] See in general Article H of the Charter (Relations between the Charter and domestic law or international agreements).

[37] And this is expressly recognised for example in Article 12§2 ESC ("at least equal to that required for the ratification of International Labour Convention (Nr. 102)") and in particular in combination with §3 ("raise progressively"). This principle is even confirmed by the new Article 12§3 RESC referring to the higher standard of the European Code of Social Security.

[38] *Article 5 - Treaties constituting international organizations and treaties adopted within an international organization*
The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

The ETUC would like to repeat its arguments concerning these two principles which it developed in its Joint Observation in cases 76 - 80/2012[39]:

> The preamble refers to the aim of the Council of Europe as facilitating 'economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms' (1st recital). Moreover, the Governments declare themselves 'resolved to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and action' (4th recital).
>
> The general line may be summarised as 'social progress'. This should be borne in mind when interpreting specific ESC's provisions ...

41. Moreover, particular attention is required in respect of the 'effective exercise' of the Charter's rights at stake[40]. Therefore the full implementation 'in law and practice' has to be ensured.

B. Preliminary question: relationship between the Charter and EU law

42. Probably more than any other case which the Committee had to deal with, this case requires an in-depth examination of the relationship between the Charter and EU law. The origin of all the problems related to restrictions of the right to collective bargaining and collective action derive in the end from the judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) in the '*Laval*' case being described more in depth in the application. Therefore, it is not surprising the main argument of the respondent Government relies on the (necessity of) conformity with EU law.

1. Charter in relation to EU law

43. It is not the first time that the Committee has had to deal with the relationship between the two systems. Indeed in its 'Introductory Observation on the Relationship between European Union Law and the European Social Charter'[41] the Committee stressed the **autonomy of the Charter** in relation to EU obligations in different respects and rejected the idea of an– even rebuttable – presumption of conformity with the Charter[42].

44. The very limited exemption to this general statement could only ever be envisaged in the case of a full recognition of the Charter's rights in EU law[43]. However, this has obviously not materialised. This is already clear in respect of the Laval judgment itself: Although the CJEU had mentioned (Article 6 of) the 1961 Charter in justifying the recognition of the right to strike as such it had not taken it into account concerning the criteria of permissible restrictions nor referred to any case-law of the Committee. This situation has not changed even after the

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[39] Case Document no. 5, Observations by the European Trade Union Confederation (ETUC), III.B. p. 13-14.

[40] See the introductory words in nearly every Article of the Charter, in particular the two main Articles (6 and 19) at stake in this complaint ("With the view to ensuring the effective exercise of the right ..."). In this respect, reference should also be made to Article A§4 of the Charter requiring a 'system of labour inspection' thus aimed at strengthening the practical application.

[41] Decision on the merits 23 June 2010 - *Confédération générale du travail (CGT) v. France* – Collective Complaint No. 55/2009.

[42] ECSR, *CGT v. France*, see note 42, §§ 34 and 35.

[43] ECSR, *CGT v. France*, see note 42, § 37 ("It will review its assessment on a possible presumption of conformity as soon as it considers that factors which the Court has identified when pronouncing on such a presumption in respect of the Convention and which are currently missing insofar as the European Social Charter is concerned have materialised.")

entry into force of the Lisbon Treaty (01/12/2009) which included various references to the Charters (see below 2.). Although recognising the right to collective bargaining in once example by referring i.a. to the 1961 Charter[44] it would appear that the CJEU has made very rare references[45] to the Charters[46].

45. In sum, if the Charter was ever referred to it was in a very sporadic, incomplete and incoherent way and even less taken into account. There is nearly no implementation of the Charter's rights in EU law.

46. It might be further argued that this approach would not be applicable because the Swedish *Laval* legislation did not transpose a directive, a fact which had led the Committee to the previously mentioned observations. However, an analogy appears coherent because the situation in the case at hand clearly deals with a situation in which Sweden was considered as not having adequately implemented the Directive and afterwards realised this and implemented the CJEU judgment. Therefore, the main approach adopted by the Committee, i.e. scrutinizing the content of the national legislation (and practice) in line with the Charter's requirements[47] will remain valid in the circumstances of the case at hand.

47. Based on its case-law the Committee, "whenever it has to assess situations where states take into account or are bound by legal texts of the European Union, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law"[48]. The case at hand will therefore require a full assessment as to its conformity with the Charter.

2. EU law in relation to the Charter

48. The EU (primary) legislative framework is to a large extent based on the Charter. This relationship is two-fold. On the one hand the references to the ESC are explicitly enshrined in primary law (5th recital of the TEU, Article 151(1) TFEU). On the other hand, there is a strong fundamental rights foundation. Indeed, via the legally binding EU Charter of Fundamental Rights (CFREU, Article 6(1)(1) TEU) the interpretation of this Charter has to be based on the respective Charters' provisions. This is already made clear in the preamble referring to the "Charters of the Council of Europe" which means both the European Social Charter (1961)

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[44] CJEU 15 July 2010 - C-271/08, *Commission v. Germany,* § 37: "In that regard, it should be noted, first, that the right to bargain collectively ... is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996 ...".

[45] It would appear that there is only one further (see for the other note 44) reference to the Charter "Moreover, the first paragraph of Article 136 EC, which defines the objectives with a view to which the Council may, in respect of the matters covered by Article 137 EC, implement, in accordance with Article 139(2) EC, agreements concluded between social partners at European Union level, refers to the European Social Charter signed in Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter (*Impact*, paragraph 113)." CJEU, 10 June 2010 - C-395/08 and C-396/08, *Pettini e.a.*, § 31.

[46] Advocates General have referred to some more extent to the Charter, see as last example: Opinion of Advocate General Trstenjak 8 September 2011 - C-282/10 –*Dominguez*, § 104 (the reference in § 102 is a quotation of an extract of the 5th recital of the Preamble of the Charter of Fundamental Rights of the European Union) but the CJEU (24 January 2012) did not refer to those references.

[47] ECSR, *CGT v. France*, see note 42, § 33 (at the end) "It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter."

[48] ECSR, *CGT v. France*, see note 42, § 38.

as well as the Revised European Social Charter (1996). Moreover, the Explanations to the respective CFREU articles "shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations" (Article 6(1)(3) TEU).

49. This statement has two consequences. Firstly, as regards the concrete provision of Article 28 CFREU the explanations explicitly refer to Article 6 ESC[49]. Secondly, concerning the general interpretative approach Article 53 CFREU contains a definition of the 'level of protection':

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements **to which the Union or all the Member States are party**, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. (Emphasis added)

Since all EU Member States have ratified either the former or the latter and since the latter has the same content as the ESC in respect of the rights at issue (here Articles 6§2 and 4 as well as Article 19§4 of both Charters) Article 53 CFREU protects the content of these rights as minimum standards.

50. Summing up, all these provisions require an interpretation of EU law in full conformity with the Charter and would therefore, in principle, not allow the (continuation of the CJEU's) '*Laval*' approach.

51. However, if for whatever reason formal conflicts were to remain, the question on the consequences would arise. EU primary law foresees a conflict resolution in a time dimension – indeed, Article 351(1) TFEU defines this conflict: treaties which have been concluded or adhered to before the entry into the EU remain valid.

52. It is against this backdrop that the Swedish situation would need to be looked at more closely. The ratification of the RESC (1998[50]) took place after Sweden's entry into the EU (1995). One might therefore think that EU law overrides the Charter's provisions. However, this would not be correct taking into account Article B of the RESC which stipulates that any given provision of the 1961 ESC remains the same after ratification of the RESC. In fact, by ratifying the RESC a Contracting Party has no possibility of escaping its existing obligations (Article B(1) RESC). Since Sweden had already accepted Articles 6 and 19(4) ESC when ratifying the ESC (1962) it remains bound to these provisions irrespective of the later RESC's ratification. Therefore Article 351(1) TFEU applies and these obligations have remained valid ever since.

a) Conclusion

53. There is no argument for the Swedish Government to refer to (primary or secondary) EU law in order to justify any restrictions concerning the Charter's rights.

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[49] "This Article is based on Article 6 of the European Social Charter and ..." (OJ C 303/26, 14.12.2007).

[50] The dates of ratification are understood as meaning the entry into force.

C. Article 6 of the Charter

54. This brings the Committee to examine the substance of the case. The ETUC refers to the complaint in particular in respect of the practical consequences of the new legislation.

1. Preliminary observations

55. In respect of Article 6 of the Charter the following elements should also be taken into account.

a) Wording of Article 6 of the Charter

56. Article 6 of the Charter[51] reads as follows[52]:

> **Article 6 – The right to bargain collectively**
>
> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ...
>
> 2 to promotemachinery for voluntary negotiations between employers or employers' organisations and workers' organisations, where necessary and appropriate, with a view to the regulation of terms and conditions of employment by means of collective agreements; ...
>
> and recognise:
>
> 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

57. The appendix defines the relationship between Article 6§4 and Article G RESC:

> **Appendix to the Revised European Social Charter**
>
> **Article 6, paragraph 4**
>
> It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.

58. Art. G RESC specifies (i.a.) the limits for restrictions of rights:

> **Article G - Restrictions**
>
> (1) The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

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[51] There is no Explanatory Report for the ESC; this provision has been transferred to the RESC without any change, the Explanatory Report for the RESC does not contain any explanation on the substance either: "39. No amendment"

[52] (the further authentic French version reads as follows:)

b) Main content of the complaint: Article 6§2 and §4 of the Charter

59. The complaint refers in general to Article 6 of the Charter. However, it is clear from the whole motivation of the complaint that it refers to the two main aspects of this article. Indeed, the complaint concentrates on restrictions of the right to collective bargaining (Article 6§2 of the Charter) and of the right to collective action (Article 6§4 of the Charter).[53] The ETUC observations, therefore, concentrate on those two provisions.

c) Article 6 of the Charter as human right

60. On the basis of the Charter's general human rights nature (see above para. 29) the ETUC would like to specifically point out the character of Article 6 §§ 2 and 4 of the Charter: these provisions are some of the most important human rights guaranteed in the Charter. This is underlined by the fact that Articles 5 and 6 are contained in the so-called 'hard core' articles (Article A(1)(b)) of the Charter) and that Article 6§4 of the Charter is even more emphasised by the fact that the right to collective action is explicitly 'recognised' whereas practically all other rights[54] are 'undertakings' of the Contracting Parties.

61. Moreover, it will be recalled that the ECtHR has interpreted the human right of freedom of association (Article 11 ECHR) in a consistent manner by also referring to those Articles[55].

62. Finally, within the European Union the Community Charter of the Fundamental Rights of Workers' the specific chapter 'Freedom of association and collective bargaining' and more particularly Article 28 of EU Charter of Fundamental Rights are based i.a. on Article 6 of the Charter[56]. The human rights character is further underlined further by the international instruments, in particular of the ILO (see above II.B.).

2. Legal analysis on the merits concerning Article 6§2 of the Charter

63. The complainants allege that several situations violate the respective provisions in Article 6 of the Charter. As regards (the promotion of) collective bargaining several aspects are criticised:

a) Related to the decrease in the number of collective agreements

64. The complainants refer to the restrictions related to the decrease in the number of collective agreements:

> 82. ... 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 since 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

[53] The other two provisions relating to "consultation between workers and employers" (Article 6§1 of the Charter) and "voluntary arbitration" (Article 6§3 of the Charter) are not tackled.
[54] The same formulation is only to be found in Article 18§4 of the Charter (right to leave the country).
[55] In *Demir and Baykara*, see note 3, for example: §§ 45 (Article 5 of the Charter), 49 (Article 6 of the Charter), 77 (reference to ECSR case-law), 103 (Article 5 of the Charter in the reasoning), 149 (reference to Article 6§2 of the Charter in the reasoning); in *Enerji Yapi-Yol Sen*, see note 4, § 24 (reference to the right to strike guaranteed in the Charter).
[56] See note 49.

the number of agreements signed from 2007 to 2010 is **dramatic**. There is no corresponding decrease for Swedish companies. (Emphasis added)

65. The Committee has asked Contracting Parties on several occasions about the number of collective agreements concluded during the reference period[57]. In (rare) cases of a coverage of only 20% of the workforce by collective agreements[58] it has concluded that Article 6§2 of the Charter was violated.

66. Based on the clear factual description in the complaint on the one hand and on the interpretation framework described above on the other hand, the Committee is called upon to clarify the content of Article 6§2 of the Charter in this (quantitative) respect. Comparing this 'post-Laval' to the previous situation it is clear that in this category of collective agreements their conclusion has not been promoted but, on the contrary, very much impeded.

67. Therefore with particular reference to the human rights character of Article 6§2 of the Charter (see above paras. 29 and 60), the teleological approach (see above para. 30) and the specific Charter-related principles (see above paras. 40 and 41) this situation does not conform to this provision of the Charter.

b) Related to the right to conclude a collective agreement

68. The Lex Laval restricts the power of trade unions to apply pressure by means of industrial action in order to reach a collective agreement where the foreign employer is following certain minimum standards in individual employment relationships. In the words of the complaint:

> 71. ... This means that in these cases collective agreement free zones are created in the Swedish labour market, it is only possible to conclude a collective agreement if the employer accepts it voluntarily.

Such a restriction – which even applies in situations where the trade union is only requesting a collective agreement confirming these minimum standards – is a clear violation of Convention No. 98. In the Swedish system effective enforcement and even safety in the work environment or the monitoring of working time is only possible if there is a collective agreement in place. There is therefore a strong need for the trade unions to conclude an agreement with even such a limited content. Article 6§2 is clearly violated in this respect.

c) Related to the level of protection provided for by collective agreements

69. The complainants refer to the restrictions related to the level of protection provided for by collective agreements:

> 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

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[57] See for example: Conclusions XIX-3 – Croatia, Conclusions XIX-3 – Poland, Conclusions XIX-3 – Latvia, Conclusions 2010 – Armenia, Conclusions 2010 – Bulgaria, Conclusions 2010 – Georgia, Conclusions 2010 – Moldova, Conclusions 2010 – Ukraine, Conclusions XVI-1 – Germany, Conclusions XV-1 - Denmark

[58] Meanwhile, it however notes from statistics from the European industrial relations observatory (ERIO) and the European trade union institute (ETUI)[1] that it is estimated that approximately 20% of the workforce is covered by collective agreements. The Committee considers this coverage to be too weak and thus not in conformity with Article 6§2 of the Revised Charter. (Conclusions XIX-3 - Latvia - Article 6-2)

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.

70. This means that national legislation prohibits the improvement of the situation by concluding collective agreements; in other words, the latter must not improve the minimum level of protection. This clearly contradicts the essence of the right to collective bargaining recognised by the general principles drawn up by the ILO (see above para. 20). By taking into account all elements of the interpretation framework (see above III.A.) and in particular the legal value of international (in particular ILO) statements (see above paras. 32 ff. and particularly para. 37) as well as the human rights nature of Article 6§2 of the Charter (see above paras. 29 and 60), the teleological approach (see above para. 30) and the specific Charter-related principles (see above paras. 40 and 41) the Committee should – in the ETUC's view – come to the conclusion that Article 6§2 is also being violated in this respect. It must also be noted that in this respect the legislation does not treat respective groups of employers equally. Employers outside Sweden enjoy protection against industrial action which is designed to improve the described minimum level by means of collective bargaining, while employers based in Sweden enjoy no such legal protection.

d) Related to the subject matter of collective agreements (ratione materiae)

71. The complainants refer to the restrictions related to the subject matter of collective agreements:

> 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. ...

72. One essential element of collective bargaining is that the two sides can agree in principle on what they think appropriate to regulate. Any limitation would therefore have to be constrained as narrowly as possible. In any event, the restrictions would appear to be in clear contradiction with ILO case-law (see above paras. 23 and 24). By taking into account all elements of the interpretation framework (see above III.A.) and in particular the legal value of international (in particular ILO) statements (see above paras. 32 ff. and particularly para. 37) as well as the human rights character of Article 6§2 of the Charter (see above paras. 29 and 60), the teleological approach (see above para. 30) and the specific Charter-related principles (see above paras. 40 and 41) the Committee should – in the ETUC's view – come to the conclusion that Article 6§2 is also being violated in this respect.

e) Related to the coverage of collective agreements (ratione personae)

73. The complainants refer to the restrictions related to the coverage of collective agreements:

> 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.

74. These restrictions are even less justified. There is no EU law obligation to change national law or practice as to third country employers. If there is no justification at all the violation of Article 6§2 of the Charter appears even more obvious (without the need to refer specifically to the interpretation framework set out above).

f) Related to the absence of the obligation for a legal representative of the foreign employer

75. The complainants refer to the restrictions related to the absence of the obligation for a legal representative of the foreign employer:

> 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.

76. This is also an important aspect in the collective bargaining process. If there is no representative who is empowered to negotiate how can a collective agreement ever be concluded?

77. From the Government's observations it would appear that they recognise that this is a problem by indicating an amendment in legislation. However, this amendment not yet being in force does not have the force of binding legislation. Therefore, – in the ETUC's view – the Committee will be obliged to conclude negatively in this respect as well.

g) Interim Conclusions

78. The ETUC recommends that the Committee conclude negatively on all six points mentioned above under Article 6§2 of the Charter (III.C.2.a) to III.C.2.f)).

3. Legal analysis on the merits concerning Article 6§4 of the Charter

79. For the trade union movement throughout the world the right to strike is at the very core of its activities to protect and further workers' rights and interests.

80. As has already been pointed out more generally (see above paras. 29 and 60), this right has become one of the most important elements in the collective rights protection from the human rights perspective. In this context, it should be noted that Article 6§4 ESC was the first to explicitly recognise the right to strike in an international convention[59], followed by several other instruments at the international level (e.g. Article 8(d) International Covenant on Economic, Social and Cultural Rights), the latest of which being Article 28 of the EU Charter of Fundamental Rights[60]. These developments clearly demonstrate the importance of this fundamental social right.

a) Related to the new legislation (restrictions in respect of collective agreements)

81. The complainants refer to the restrictions related to the restrictions in respect of 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.

82. Indeed, the three restrictions on the right to collective bargaining (mentioned under Article 6§2 of the Charter, see above III.C.2.b), to III.C.2.e)) have the direct consequence that a

[59] See Conclusions I, p. 34; but there was already an established case-law in the ILO concerning the right to strike and ILO Convention No. 87 as well as the Declaration of Philadelphia.
[60] See note 49.

collective action started by a trade union to make one or more improvements which are not permitted will be considered as illegal. If these restrictions are not already compatible with Article 6§2 of the Charter they cannot be permitted under Article 6§4 of the Charter.

83. This amounts individually and even more when combined to a serious violation of Article 6§4 of the Charter. A justification relying on EU law is not sufficient (see above paras. 43 ff.).

b) Related to sanctions

84. The complainants refer to the restrictions related to sanctions:

> 81. As shown in the Swedish Labour Court judgement in the Laval case, the trade union organisation's tort liability is strict.

85. The sanction described by the complainants is to be understood as an example of the consequences of the new legislation which is also highlighted by the aspect of the related uncertainty about whether to go on strike or not.

86. It should be recalled that the CEACR greatly limits the possibility of recourse to sanctions. This is all the more true in respect of strikes which have to be considered as 'legal' according to international law (see above para. 16). In the most recent observations addressed to Sweden it has criticised in particular the financial consequences for the trade union concerned (see above paras. 17; and concerning the BALPA case para. 18). By taking into account all the elements of the interpretation framework (see above III.A.) and in particular the legal value of international (in particular ILO) statements (see above paras. 32 ff. and particularly para. 37) as well as the human rights character of Article 6§4 of the Charter (see above paras. 29 and 60), the teleological approach (see above para. 30) and the specific Charter-related principles (see above paras. 40 and 41) the Committee should – in the ETUC's view – come to the conclusion that Article 6§4 is also violated in this respect.

87. As a consequence of the (enormous threat of) sanctions, there is a fundamental uncertainty for trade unions. Before calling a strike they always have to try to assess the legality of industrial actions combined with the (threat for) strict tort liability. This makes unions in Sweden more cautious about demanding collective agreements and even more cautious when calling for a strike with the aim of concluding a collective agreement thus limiting the right to strike in practice as this is not a problem of the (new) legal provisions as such but a very serious practical consequence.

c) Interim Conclusion

88. The ETUC recommends that the Committee conclude negatively on the two points mentioned above under Article 6§4 of the Charter (III.C.3.a) and III.C.3.b).

D. Article 19§4 of the Charter

89. Under Article 19§4 of the Charter, the Parties undertake

> "to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of e.g. the following matters: a) remuneration and other employment and working conditions; and b) membership of trade unions and enjoyment of the benefits of collective bargaining."

90. Posted workers clearly fall into the scope of article 19§4, despite their temporary stay. Article 19§4 only speaks of "workers lawfully within their territories" while other provisions of Article 19 expressively have a narrower scope requiring the worker to be "lawfully residing" (Article 19§8) or permitted to "establish himself within their territory" (19§6).

91. Support for the argument that the duration or temporary nature of the migrant worker's stay in the host country should not affect his or her right to equal treatment can also be found in the treatment of this subject by the ILO. In its 1999 General Survey to the International Labour Conference, the CEACR wrote the following, regarding the personal scope of ILO conventions in the field of migrant workers[61]:

> The four instruments dealt with in this survey in general make no distinction between workers who have migrated for permanent settlement, and those who have migrated for short-term or even seasonal work. States are not permitted to exempt any category of regular entry migrant workers not specified in the instruments. In other words, no distinction can be made, within the provisions of the instruments, between migrants for permanent settlement and migrants who do not intend to stay for any significant length of time in the host country, such as seasonal workers.

92. In defining the possibilities for exceptions from the scope of Convention No. 143[62] the General Survey continues to state that

> Article II(2)(e) of Convention No. 143 adds to the list of exceptions "employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties of assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments". The preparatory work to Convention No. 143 stressed that this provision applies essentially to those workers who have special skills, going to a country to undertake specific short-term technical assignments.[63]

However, as this text shows the general idea behind this exception was not determined by the contractual arrangement between the migrant worker and the employer in the home country but the "special skills" of the workers concerned for a "specific short-term" period. It would not therefore appear justified to assume that posted workers as such can be considered as excluded from ILO standards protection. Moreover, this exception should in any case be defined narrowly.

93. Even if the Committee does not follow this line of argumentation it would have to consider the aim and purpose of the term 'migrant worker' in the context of the Charter. Taking therefore particular account of the teleological approach (see above para. 30) and the specific Charter-related principles (see above paras. 40 and 41) posted workers cannot be considered outside the scope of Article 19§4 of the Charter.

94. The content of the collective agreements that Swedish trade unions, backed up by the possibility of collective action, can ask the employers of posted workers to sign, is restricted to minimum standards and to certain subject matters by current Swedish legislation. Sweden

[61] ILO (1999) Migrant Workers – Report III (Part 1B) to the 87th session of the International Labour Conference, para. 107.

[62] C 143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) - Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Entry into force: 09 Dec 1978).

[63] See footnote 61, para. 115.

thus effectively denies posted workers equal treatment in respect of remuneration and other employment conditions as well as the enjoyment of the benefits of collective bargain on the same terms as Swedish nationals. Sweden is therefore in violation of Article 19§4 (a) and (b) of the Charter.

E. Conclusions

95. As demonstrated above, the ETUC considers that the measures criticised by the complainant organisations are not in conformity with:

- Article 6§2 (see III.C.2.a) to III.C.2.f)),
- Article 6§4 (see III.C.3.a) and III.C.3.b)) and
- Article 19§4 (see III.D).

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