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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 May 2013

Case document No. 5

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

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE) and BUSINESSEUROPE

Registered at the Secretariat on 7 May 2013

SUBMISSION ON THE MERITS OF THE COLLECTIVE COMPLAINT No. 85/2012

From:

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From:

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Considering the collective complaint lodged by the Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden of the 12 July 2012, No. 85/2012;

Considering the letter of Mr. Regis Brillat, Executive Secretary of the European Social Charter, Directorate General of Human Rights, Council of Europe, dated 20 February 2013, inviting the IOE to formulate its submissions on the merit of the Complaint No. 85/2012, in application of Article 7.2 of the Additional Protocol to the European Social Charter;

BUSINESSEUROPE and the IOE, to which the Swedish Confederation of Enterprise is affiliated, refer below their submission on the merits of complaint No. 85/2012.

Outline

1. GENERAL OBSERVATIONS ON THE MERITS OF THE COMPLAINT

1. The European Union, the Council of Europe and the International Labour Organisation were established by Member States with different objectives, geographical scopes and competences.

2. Complaint No. 85/2012 relates to the compatibility of Swedish legislation, including the new rules which have been adopted by the Swedish Parliament in 'Lex Laval', primarily to conform to the interpretation of the European Court of Justice in its Laval ruling C-341/05 of 18 December 2007.

3. Swedish legislation should reflect the obligations accepted by Sweden in the context of the ILO, the Council of Europe and as a Member State of the European Union.

4. The IOE and BUSINESSEUROPE strongly believe that the claim of Swedish trade unions LO and TCO that Sweden is in breach of its obligations under Articles 4 (the right to fair remuneration); Article 6.4 (the right to bargain collectively); and Article 19.4 (the right of migrant workers to equal treatment in respect of employment, trade unions and accommodation) are not substantiated by facts and are therefore unfounded.

5. As regards the origin of this complaint in European Union case law, it is worth remembering that:

   - According to Article 26 of the Treaty on the Functioning of the European Union (TFEU), "the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market".

   - The Single Market has € 12.6 trillion GDP, making it the world's largest economy. It accounts for 20% of Europe's global exports and imports. In 2011, € 2,800 billion have been traded in goods within the Single Market. The European single market is the cornerstone of European integration, it adds € 600 billion a year to our economy, and since 1992 it has helped create almost 3 million new jobs in Europe. Moreover, thanks to the Single Market, 6 million Europeans have been able to find a job and work in another Member State.

   - In their report on the joint work of the European social partners on the European Court of Justice (ECJ) rulings in the Viking, Laval, Rüffert and Luxembourg cases of March 2010, the European social partners stated that "the 'four freedoms' regarding the free movement of people, goods, services and capital need to be safeguarded and properly developed with a view to enabling higher levels of prosperity and social development in Europe".

   - According to Article 56 of TFEU, "the restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended". At the same time, Article 57 of the TFEU stipulates that the "person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

- As was shown in the Laval ruling, Sweden's legislation has for a long time not been in conformity with TFEU provisions on free provision of services and with the Posting of Workers Directive. National transposition rules were silent on some provisions of the Posting of Workers Directive.
- In the Viking and Laval rulings, the ECJ recognised the trade unions' right to take collective action as a fundamental right, taking into account the inclusion of the EU fundamental rights charter in the Lisbon Treaty. It is also worth noting that the ECJ in this ruling took into consideration other international and European treaties, including the European Social Charter (ESC) of the Council of Europe.
- However, there can be limits on the exercise of social fundamental rights such as the right to take collective action. This is also the case with other fundamental rights such as, for example, the freedom of expression. According to the ECJ settled case law, unlike other fundamental rights such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly appears to be absolute.
- In line with the ECJ's interpretation in the Viking and Laval rulings, BUSINESSEUROPE and the IOE believe that it is logical that trade unions' industrial action be submitted to an objective test. Collective action should have a legitimate objective and be necessary for "overriding reasons of public interest". Its use should also be proportionate, considering its interaction with interests/rights/freedoms of other parties.
- In line with EU treaty provisions on service provision, the Posting of Workers Directive 1996/71/EC builds on the assumption that the "promotion of transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers" – recital 5.
- This directive enacted an obligation to respect a nucleus of mandatory rules as set out in Article 3.1 of the Posting of Workers Directive, without requiring the harmonisation of national laws or collective agreements. Taking into account the temporary nature of service provision, this directive is not based on ensuring equal treatment of posted workers with workers of the host country. It sets out conditions under which social partners may agree on terms and conditions going beyond the minimum provisions that must be respected in any event (Articles 3.7 and 3.8). It is also clear that trade unions may only impose on foreign service providers the working conditions foreseen in Article 3.1. For any working conditions going beyond those, they should negotiate proportionately and responsibly with foreign service providers in accordance with the directive and national industrial relations practices.

6. Consequently, with Lex Laval, Sweden ended a situation of non-conformity with EU law without compromising its obligations under other international instruments, such as the Council of Europe's ESC.

7. The IOE is also aware of the Swedish trade unions' complaint in the context of the International Labour Organisation, and will provide its views on this other complaint in due course to the competent authority.

2. SPECIFIC COMMENTS ON COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER

2.1. THE EUROPEAN SOCIAL CHARTER

8. In both the Laval and Viking cases, the ECJ recalled that the right to take collective actions, including the right to strike, was recognized by various international instruments which the Member States have signed or cooperated in, such as the ESC (revised). The ECJ declared that the right to take collective action must be recognized as a fundamental right which forms an integral part of the general principles of EU law, the observance of which is ensured by the ECJ. Nevertheless, the ECJ concluded that the exercise of this right may be subject to certain restrictions, since the rights to take collective actions can constitute breaches of the freedom to provide services and the freedom of establishment provided for in Articles 56 and 49 of the TFEU.

9. On 1 December 2009, the Lisbon Treaty entered into force. The Lisbon Treaty explicitly states that EU shall work for a social market economy (Article 3(3) TEU). Furthermore, the European Charter of Fundamental Rights has been legally binding at Treaty level. The European Charter of Fundamental Rights recognizes the right to take collective actions, including strikes (Article 28). Furthermore, the ESC is part of EU law, since references are made to the ESC in the European Charter of Fundamental Rights.

10. All this has been taken into account in the *travaux preparatoires* regarding the Swedish legislative changes due to the ECJ's ruling in the Laval case, where it was concluded that the proposed legislative changes were compatible with Sweden's obligations under international conventions.

11. However, the complainant organisations argue that Sweden violates its obligations under Article 4 (the right to a fair remuneration), Article 6.4 (the right to bargain collectively) and Article 19.4 (the right of migrant workers to equal treatment in respect of employment, trade unions and accommodation) of the ESC (revised).

12. The IOE and BUSINESSEUROPE firmly reject the conclusions of the complainants that the Swedish legislative changes following the Laval case are in breach of the ESC.

13. The first consideration to be given to this specific case, is that it appears from the Appendix to the ESC that the persons covered by Articles 1 to 17 "include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned". This implies that Articles 4 and 6 only are applicable to nationals of any of the contracting states of the ESC. Furthermore, there is a requirement that the individuals concerned are either "lawfully resident" or "working regularly" within the territory of the concerned state, in this case Sweden.

14. As regards posting of workers from foreign employers to Sweden, these workers are staying only temporarily in Sweden. Usually the posted workers come to Sweden for a very limited period in connection with a single job. After the work is completed they return to their home countries where they normally and regularly perform work and where they are resident and have families. Due to the temporary character of the work

performed by the posted workers in Sweden, they cannot be considered to be "lawfully resident" or "working regularly" in Sweden. As a result, these workers are not covered by Sweden's obligations under Articles 4 and 6 of the ESC.

15. If, on the contrary, the workers, were working on a regular or permanent basis in Sweden, their employments would be closely connected to Sweden, and Swedish law would apply to their employments according to the choice of law provisions. They would in such case not be covered by the special provisions applicable to posted workers in the Posting of Workers Act and in the Co-determination Act. Rather they would be covered by the same rules on rights to take industrial action and observe labour stability in the Co-determination Act as apply in strictly Swedish situations.

16. Should Articles 4, 6 or 19 apply according to the Appendix, the IOE and BUSINESSEUROPE wish to underline that, given the scope of application and content of the ESC, and according to case law and the most recent conclusions of the European Committee of Social Rights on the case of Sweden, the Swedish legislation is in compliance with Article 4, 6 and 19.4 of the ESC (revised version). With reference to what is described regarding the rights of posted workers in Sweden (see the next Chapter on detailed comments on the Swedish legislation), the following reasons are to be highlighted:

    a. The posted workers are granted fair and acceptable employment conditions (Section 3.5.3);

    b. Posted workers remain free to start a process of negotiation aimed at concluding collective agreements. Posted workers are also free to join any trade union of their choice. (Section 3.5.6).

    c. Collective agreements can be concluded on a voluntary basis and are indeed concluded with foreign employers which post workers in Sweden. (Section 3.5.7). The conditions in collective agreements signed voluntarily can be more favorable than the so-called “hard core” of rules in the Posting of Workers Directive (Article 3 (1) (a-g)). (Paragraph 114).

    d. According to Section 5 of the Swedish Posting of Workers Act an employer posting workers to Sweden has to apply the conditions within the hard core of rules in Swedish Law. (Section 3.1.4).

    e. In addition, according to Section 5 (a) of the Swedish Posting of Workers Act, the unions can resort to industrial action in order to force the foreign employer to sign a collective agreement containing conditions that correspond to the minimum working conditions of the national Swedish collective agreement for the sector concerned. In accordance with the Laval ruling industrial action may only be taken to regulate the minimum terms and conditions of employment in accordance with Article 3 (1) (a-g) of the Posting of Workers Directive. Also in accordance with the Laval ruling industrial action may not be taken if the foreign employer already applies conditions that are at least as favourable as the minimum working conditions of the national Swedish collective agreement for the

sector concerned. If requested, the foreign employers have to be able to provide sufficient proof of the working conditions to the trade unions or to a Swedish court. (Section 3.4.2 and 3.5.4).

2.1.1. The Swedish legislative changes are not in violation of the ESC provisions

17. As regards Article 4 of the ESC establishing: "1. [...] The parties undertake to recognize the right of workers to a remuneration such as will give them and their families a decent standard of living" [...] "The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions" it is to be noted that the Digest of the Case Law of the European Committee of Social Rights (last version, 2008), by providing details on the interpretation to be given to the text of Article 4.1, clarifies that:

18. "Assessment of the implementation of Article 4.1 has proved difficult throughout the history of the supervision of the Charter. Several factors have contributed to the difficulties, notably the widely differing wage formation mechanisms in the countries concerned due to differences in labour market, socio-economic and institutional conditions and the paucity of data which could be used to determine the relevant wage levels".

19. In order to determine the level of "decent remuneration", the Committee of Social Right has adopted a method based on statistical studies carried out by the OECD and the Council of Europe by which a so-called decency threshold corresponds to 60% of the national average wage in a given country.

20. "The reference wage considered by the Committee is the national net average wage for a full-time wage earner, if possible calculated across all sectors for the whole economy, but otherwise for a representative sector such as manufacturing industry or for several sectors".

21. "As the lowest wage the Committee will consider the net statutory minimum wage for those countries where such a wage has been established. For countries with no statutory minimum wage it will consider information on the net value of minima agreed upon in collective agreements and/or actually paid in the labour market".

22. "If the lowest wage in a given Contracting Party does not satisfy the 60% threshold, [...] the Committee will ask the Government in question to furnish it with detailed evidence that the lowest wage is sufficient to give the worker a decent living standard even if it is below 60% of the national net average wage".

23. In the specific case the complainants organisations claim that Sweden is not complying with the provision contained in Article 4 of the ESC, for example, by restricting the possibility to resort to collective action to force the foreign employer to adopt a Swedish collective agreement, the posted workers are granted a salary which is less consistent compared to the Swedish standards.

24. However, the Swedish legislation allows the Swedish unions to resort to collective action to force the foreign employer to apply a collective agreement that entitles posted workers the agreed minimum wage in the sector concerned. The minimum wages in the collective agreements agreed by the social partners are of course sufficient to give the worker a decent living standard and they do not deviate from the OECD/Council of Europe decency threshold.

25. In addition, on the basis of the last conclusions elaborated by the Committee of Social Rights under the reporting procedure (2010), the Committee determined that the situation in Sweden is in conformity with Article 4.1.

26. Article 5 of the ESC, which guarantees workers' and employers' freedom to organise, and Article 6.2 of the ESC, on the regulation of employment relations through free and voluntary collective agreements, can also be used to further support the compliance of the new Swedish legislation with the ESC. Should the Committee of Social Rights consider that the *Lex Britannia* principle shall be reinstated in Swedish law, it would consequently mean that it would be possible for the Swedish trade unions to push aside a foreign collective agreement by which the posted workers and the posting employers are bound. This would be in breach of the right to organize and bargain contained in Articles 5 and 6.2 of the ESC. It should also be noted that in the Laval ruling the ECJ found the *Lex Britannia* principle to be discriminatory, since it did not apply to Swedish employers.

27. In addition to Articles 5 and 6.2, Article 6.4 of the ESC states: the Parties [...] "recognize the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into". Further to the obligations that might arise out of collective agreements previously entered into, the Charter admits another type of restriction: "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" (Appendix). Article G of the revised ESC (former article 31 of the ESC) allows States to introduce restrictions or limitations by law, when those are necessary in a democratic society for the protection of the rights and freedom of others or for "the protection of public interests, national security, public health or morals.

28. Here, the first admissible restriction to the right to strike in Article 6.4 of the ESC must be taken into consideration. Indeed according to the Charter, indeed, the obligations that might arise out of collective agreements previously entered into may limit workers' collective action in cases of conflict of interest.

29. First of all, the right to undertake collective action is allowed only for cases of conflicts of interest, which explicitly exclude from its scope the conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement and to the violation of a collective agreement. Conflict of interest may arise in all cases where a bargaining process is occurring between workers and the employer aimed at solving a problem of common interest, whatever its nature may be (for instance, where there is no collective

agreement in force, the application of safety rules, or consultation prior to redundancy procedure) .

30. The understanding of the nature of the conflict is strictly associated with the "collective agreements previously entered into" of Article 6.4 of the ESC. The basic element here is then the function of the collective agreement, which is considered as a contract binding on parties and therefore something with which domestic law shall not interfere by allowing the exercise of collective action during the existence, validity and interpretation of a collective agreement, or in cases of violation of it.

31. In Sweden the law (Section 41 of the Co-determination Act) prescribes that an employer and an employee who are bound by a collective agreement may not initiate or participate in a strike (labour stability obligation) (Section 3.1.3.). Furthermore, trade unions are prevented from taking industrial action against an employer in order to set aside or bring about an alternation in the collective agreement which the employer has entered with another trade union (paragraph 59). Such industrial action is unlawful and subject to punishment. In the interpretations of the Committee of Social Rights, such statutory provisions have been considered to be in conformity with Article 6.4 of the ESC.

32. In the Laval case Laval had signed a collective agreement with the Latvian building sector trade union. The industrial actions taken by the Swedish trade unions were therefore initiated while a collective agreement with another trade union was in force and during the blockade the workers in Laval were already covered by the Latvian collective agreement. The industrial actions were taken in order to set the existing Latvian collective agreement aside and make Laval apply a Swedish collective agreement.

33. Furthermore the reintroduction of the Lex Britannia principle, as requested by the complainant organisations would be a violation of the collective agreement by which the posted workers and the posting employers are bound and would be in breach of Article 6.4.

34. The Swedish legislation is indeed in compliance with Article 6.4 of the ESC.

35. According to Section 5 of the Swedish Posting of Workers Act an employer posting workers to Sweden has to apply the conditions within the hard core of conditions in Swedish Law. (Section 3.1.4).

36. Section 5 (a) of the Posting of Workers Act which refers to the "collective agreements which are generally applicable to all similar undertaking in the geographical area and in the profession or industry concerned" (Article 3.8 of the Posting of Workers Directive) also put pressure on the foreign employer to adhere to the national collective agreement for the sector involved, or to apply conditions, in for example a foreign collective agreement, that is at least as favorable as the minimum conditions of the central Swedish Collective agreement.

37. As described in Section 4 below, according to Section 5 (a) of the Swedish Posting of Workers Act, the unions are free to resort to industrial action in order to force the

foreign employer to sign a collective agreement containing conditions that correspond to the minimum working conditions of the national Swedish collective agreement for the applicable sector. In accordance with the Laval ruling, industrial action may only be taken to regulate the minimum terms and conditions of employment in accordance with Article 3 (1) (a-g) of the Posting of Workers Directive. Also in accordance with the Laval ruling, industrial action may not be taken if the foreign employer already applies conditions that are at least as favourable as the minimum working conditions of the national Swedish collective agreement for the sector concerned. If requested, the foreign employers have to be able to provide sufficient proof of the working conditions to the trade unions or to a Swedish court.

38. As explained above it would also be a violation of Article 6.4 if a collective agreement by which the posted workers and the posting employer are bound could be pushed aside by industrial action.

39. It should also be noted that in many cases employers posting workers to Sweden voluntarily sign Swedish collective agreements and there have been no disputes regarding the new legislation (Section 3.5.7).

40. The conclusion that the Swedish Posting of Workers Act is not in breach of Article 6.4 of the ESC is also supported by the 2010 conclusions of the Committee of Social Rights, according to which Sweden is in compliance with Article 6.4 of the Revised Charter.

41. As for the obligation imposed on the unions to pay damages in the event of the exercise of illegal industrial action, this is in conformity with Article 6.4 (Section 3.5.8), and the 2010 conclusions of the Committee of Social Rights, which specifically stated: "The Committee recalls that it was previously concerned that the level of the fines that may be imposed was too high and therefore might be considered as a restriction on the right to strike. However the Committee has reexamined the situation and it considers that given the relative wealth and resources of the organisations concerned the level of fines cannot be considered as too high".

42. Article 19.4 of the ESC, which the complainant organisations consider to be violated by the new Swedish legislation, does not apply to this specific case. Article 19 of the ESC aims to provide migrant workers and their families with the right to protection and assistance.

43. Within this context, it is fundamental to underline that the category of posted workers does not fall within the personal scope of Article 19. According to the European Commission, a posted worker is a person who is employed in one EU Member State but, for a limited period of time, is sent by his employer to another Member State in order to carry out his or her work. "For example, a service provider may win a contract in another country and send his employees there to carry out the contract. This trans-national provision of services, where employees are sent to work in a Member State other than the one they usually work in, gives rise to a distinctive category, namely that of "posted workers". This category does not include migrant workers to go to another Member State to seek work and are employed there".

44. Confirmation of the exclusion of posted workers from the category of migrant workers is also to be found in Article 11 of ILO Convention No. 143 (Migrant Workers Convention, 1975).

45. Part II of the ESC does not protect nationals of non-contracting parties at all. Consequently, individuals who are not nationals of any of the contracting states of the ESC are not covered by Articles 4, 6 and 19.4.

46. In conclusion, the Swedish legislation is in conformity with Articles 4, 6 and 19 of the ESC.

47. If the Swedish legislative changes due to the Laval case are considered to be in breach of Articles 4, 6 and 19.4, the IOE and BUSINESSEUROPE are of the opinion that any limitations or restrictions of the aforesaid Articles are permitted under Article 31 of the ESC (Article G of the revised ESC), that established that any restriction determined by law on the right to resort to industrial action is necessary for the protection of the rights and freedom of others.

3. DETAILED COMMENTS ON THE NEW SWEDISH LAW IN EU AND INTERNATIONAL CONTEXTS

3.1. BACKGROUND

3.1.1. The Posting of Workers Directive

48. The free movement of services has been regulated by different Directives, of which the Posting of Workers Directive is of particular relevance. This Directive was adopted on 16 December 1996.

49. The aim of the Posting of Workers Directive is to enable the free movement of services when employers in one Member State post workers to temporarily perform work in another Member State, while at the same time, ensuring the posted workers an adequate level of protection.

50. In order to protect workers from one Member State who are temporarily sent by their employer to carry out work in another Member State the Posting of Workers Directive provides that a "hard core" of rules of the host country (country of destination) needs to be observed. Article 3 (1) (a-g) of the Posting of Workers Directive states which terms and conditions of employment of the host country are to apply. These are conditions determined "by law, regulation or administrative provision and/or collective agreements or arbitration awards which have been declared universally applicable", insofar as they concern certain activities (including building operations for instance), in the following areas:

    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 undertakings;

    e) health, safety and hygiene at work;

    f) proactive 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".

51. If a Member State does not have a system for declaring collective agreements or arbitration awards to be universally applicable, that State may instead, subject to certain preconditions, according to Article 3 (8), second paragraph of the Posting of Workers Directive, base itself on:

    (a) collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

(b) collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

52. Pursuant to Article 3 (10) of the Posting of Workers Directive the application of terms and conditions of employment on matters other than those referred to in the hard core in the case of public policy provisions is not precluded.

3.1.2. Sweden and the Free Movement of Services

53. Sweden is a small country with a population of about 9.5 million. Sweden's economy is heavily oriented towards foreign trade, which means that Sweden is dependent on trade with the rest of the world for its prosperity. Consequently, the rules on the free movement of goods and services within the EU are of crucial significance.

54. Sweden's exports represent about 50 per cent of the country's GDP, and the majority of these exports goes to countries within the European Union. At present, the export of services makes up approximately one-third of total exports. The export of services is gradually increasing.

55. The service sector is expanding in both Sweden and Europe, and the free movement of services will become increasingly important in the future.

3.1.3. The labour stability obligation and the *Lex Britannia* Principle

56. In Sweden, the right to resort to industrial action is a constitutional right which may be exercised with the limitations set out under Swedish law or agreements.

57. Section 41 of the Co-determination Act prescribes that an employer and employee who are bound by a collective agreement may not initiate or participate in a stoppage of work (lockout or strike), blockade, boycott or other industrial action comparable therewith if the action is in breach of a provision on mandatory social truce (labour stability obligation) in the collective agreement or where the action has as its aim certain objectives specified in the Section. Such industrial action is unlawful according to Section 41, second paragraph.

58. Further, it follows from Section 42, first paragraph of the Co-determination Act, that an employers' association or an employee organisation may not organise or in any other manner induce unlawful industrial action. Nor may such an organisation, through support or otherwise, participate in unlawful industrial action.

59. The aforesaid regulations mean that if a collective agreement is concluded with an employer, the trade unions have very limited possibilities to resort to industrial actions against the employer for the duration of the collective agreement. Furthermore, trade unions are prevented from taking industrial actions against an employer in order to set aside or bring about an alternation in the collective agreement which the employer has entered into with another trade union. Sympathy actions by other trade unions in these situations are also prohibited.

60. The scope of the labour stability obligation was limited by the so called "*Lex Britannia*" principle. This principle was, *inter alia*, manifested in Section 42, third paragraph of the

Co-determination Act where it was stated that the provisions of the first paragraph of the same Section apply only where the trade union resorts to industrial actions with reference to working conditions to which the Co-determination Act is directly applicable, so not for foreign employers. Accordingly, the content of the *Lex Britannia* principle was that Swedish trade unions were given a right to take industrial actions against foreign employers conducting temporary activities in Sweden with the aim of replacing the foreign collective agreements with Swedish collective agreements. The labour stability obligation that applies between Swedish trade unions and Swedish employers, consequently did not apply between the trade unions and the foreign employers.

61. Since the *Lex Britannia* principle clearly distinguishes between Swedish and foreign companies, the compatibility of the *Lex Britannia* principle with EU law was already questionable at its introduction.

3.1.4. The Posting of Workers Act

62. In Sweden, the Posting of Workers Directive was implemented in 1999 through the Posting of Workers Act. Pursuant to Section 5 of the Posting of Workers Act, employers from other countries have to apply the legislation applicable in Sweden in the areas specified in the hard core of the Directive in relation to posted workers. The Posting of Workers Act left aside the "minimum rates of pay", as Sweden does not have any statutory provision on minimum rates of pay and Sweden did not make use of the possibility contained in Article 3 (8) of the Posting of Workers Directive (Section 3.1.1).

63. The legislative bodies of the Posting of Workers Act assumed that the Posting of Workers Directive was a minimum Directive and, while leaving the Swedish system as it was, it assumed that EU law also allowed the trade unions to continue to have the right to take industrial action in order to establish customary collective agreements with posting employers from other Member States (*Lex Britannia* principle). However, no provisions were introduced in the Posting of Workers Act regarding minimum rates of pay.

3.2. THE LAVAL CASE

3.2.1. Background

64. The dispute in the Laval case originated in industrial action in the form of a blockade which had been mounted at a building site in Vaxholm in Sweden in November 2004. The reason for this industrial action was that the Swedish Construction Workers Union ("Byggnads") had demanded a collective agreement with the Latvian company Laval un Partneri Ltd ("Laval"), which had posted building workers to Sweden. Negotiation began between the company and the Swedish building and public works trade union. However, these negotiations broke down and Laval subsequently signed collective agreements with the Latvian building sector trade union. The Swedish trade union then took collective action by means of a blockade of all Laval sites in Sweden, with the support of the Swedish Electricians Union ("Elektrikerna"). Following these prolonged actions Laval found itself impeded to continue to provide services in Sweden.

65. Laval brought proceedings in the Swedish courts for a declaration that the action of Byggnads and Elektrikerna was unlawful in that it conflicted with the right established under Article 49 EC (now Article 56 of the TFEU) A few days later Laval instituted proceedings in the Swedish Labour Court.

66. On 22 December 2004, the Swedish Labour Court rejected an interim application by Laval for the industrial action to be declared unlawful and on 29 April 2005, the Swedish Labour Court decided to refer the issue to the ECJ for a preliminary ruling.

67. The ECJ rendered its ruling on 18 December 2007 which was followed by the Swedish Labour Court's final judgement on 2 December 2009.

3.2.2. The ruling of the European Court of Justice

68. In the Laval judgement, the ECJ laid down that it is not in compliance with EU law for a Member State to permit industrial action under those circumstances that arose in the Swedish Labour Court's case. It laid down also that a Member State cannot apply provisions having the same effect as the *Lex Britannia* Principle.

69. The ECJ declared that the Posting of Workers Directive was adopted with a view to laying down the terms and conditions of employment governing the employment relationship upon postings. As regards rates of pay, the ECJ stated that Sweden had not made use of the possibility provided for in Articles 3 (1) and 3 (8) of the Posting of Workers Directive to implement the Directive in that respect (Section 1.1). According to the EJC, the Posting of Workers Directive does not preclude another method than the one provided by the Directive being used to determine terms and conditions of employment. However, if the remuneration that a posting employer shall pay is to be determined by a collective agreement, there are requirements for the predictability and transparency of the agreement that the trade unions wish the employer to conclude (that is why the possibility under Article 3 (8) of the Directive could be used by Member States).

70. The ECJ declared that a Member State cannot – on the basis of the Posting of Workers Directive – demand that a foreign services' provider applies conditions that go further than the level prescribed by the Member State's mandatory rules within the hard core referred to in the Posting of Workers Directive (Article 3(1) (a-g)). Nor can a Member State on the basis of the Posting of Workers Directive demand that terms and conditions of employment, beyond those stated in the hard core set out in Article 3 (1), or in the case of public policy pursuant to Article 3 (10), shall be applicable to posted workers. The social parties are not bodies governed by public law. Thus, they cannot invoke Article 3 (10) by citing grounds of public policy in order to maintain that industrial actions, intended to force an application of a collective agreement on to foreign employers posting workers to Sweden, are compatible with EU law.

71. The ECJ stated that collective action must be recognised as a fundamental right forming an integral part of the general principles of Community law. Additionally, the right to take such action against possible social dumping may constitute an overriding reason of public interest. However, this does not mean that Community law does not

apply in relation to such action. The ECJ noted that industrial action aimed at obtaining terms and conditions that went beyond the minimum established by law made it less attractive for undertakings such as Laval to carry out its business in the Member State and therefore constituted a restriction on the freedom to provide services, guaranteed under the Treaty. The ECJ declared that Article 49 (now Article 56 of the TEUF) could be invoked by a company against a trade union in the current situation.

72. In principle, industrial action aimed at guaranteeing posted workers a certain level of terms and conditions of employment is deemed to have the purpose of protecting workers. However, industrial actions with the aim of establishing a collective agreement where the conditions lie outside the hard core of the minimum protection contained in the Posting of Workers Directive, or where the conditions for minimum rates of pay are not sufficiently precise and accessible, cannot be deemed to be justified with reference to the protection of workers, as the employer's obligations in these respects are coordinated within the provisions of the Posting of Workers Directive.

73. According to the ECJ, the industrial actions undertaken against Laval, represented a restriction on the freedom to provide services pursuant to Article 49 EC (now Article 56 of the TEUF). However, such a restriction could be allowed if the industrial action aimed to provide the workers in the host Member State such protection against social dumping was of overriding public interest.

74. As regards the *Lex Britannia* principle, the ECJ found that the rules according to which consideration is not given to whether a company from another Member State is already bound by a collective agreement in its country of origin, regardless of the content of such agreement, are discriminatory according to EU law. Such discrimination may be justified only on grounds of public policy, public security or public health; grounds which did not exist in this specific case.

3.2.3. Conclusions from the European Court of Justice's judgement in the Laval case

75. The ECJ declared that Swedish legislation was in breach of both the right to provide services and the Posting of Workers Directive.

76. After the ruling of the ECJ, it is evident that the Posting of Workers Directive not only constitutes a "floor" for the level of worker protection for posted workers, but also a "ceiling" for what may be demanded of the posting employer. It is clear, after the judgement of the ECJ, that the possibilities for the trade unions to take industrial actions are more limited than was presumed to be the case prior to the judgement.

77. It follows from the ruling of the ECJ that the trade unions are not allowed to take industrial actions in order to conclude a collective agreement in its entirety and/or to demand conditions that go beyond the minimum conditions constituting the hard core that may be forced through industrial action in relation to an employer from another Member State. According to the ruling of the ECJ, industrial actions aimed at forcing an employer to sign a collective agreement containing higher level of protection than the minimum level violates the free movement of services.

78. It follows from the ECJ's ruling that the collective agreement provisions to be negotiated with posting employers should refer to the minimum level according to the Posting of Workers Directive, and should include working conditions which are plain and clear. The posting employer must also be able to determine, in a reasonable and simple way, the obligations deriving from a collective agreement within the hard core of rights of the Posting of Workers Directive. Industrial actions demanding collective agreements should consequently only be allowed if the conditions of the collective agreement are plainly and clearly stated and thereby predictable for an employer who posts workers to Sweden.

79. Another consequence of the ECJ's judgment in the Laval case was that the *Lex Britannia* principle could no longer be applied as regards posting of workers to Sweden from another Member State. In practice, this means that it is no longer possible to ignore a collective agreement that a posting employer from another Member State applies to the posted workers.

3.2.4. The judgement of the Swedish Labour Court

80. According to EU law, Member States are obliged to ensure that EU law has effective impact and enforcement. This means that breaches of EU law shall lead to effective sanctions. The ECJ has held, in several judgements, that breaches of EU law shall constitute obligations for the breaching party to pay damages. The ECJ has extended the liability to pay damages to apply in situations where individuals claim their rights under EU law against other individuals. A condition for such a liability to exist is that the breached provision has direct horizontal effect. The Swedish Labour Court concluded that Article 49 EC (now Article 56 TFEU) has direct horizontal effect.

81. The ECJ has, in several cases, declared that the obligation to pay damages cannot be limited to apply only to damages occurred after the pronouncement of a judgement, since this would be in conflict with the right to damages for breaches against EU law and undermine an effective implementation of EU law.

82. According to the ruling of the ECJ, Byggnads and Elektrikerna had seriously breached EU law, by breaching one of the fundamental principles; the free movement of services. The Swedish Labour Court announced that the industrial actions trade unions clearly violated EU law. It was ruled that the effectiveness of EU law would be jeopardized if it was not possible to oblige the trade unions to pay damages.

83. When determining if Byggnads and Elektrikerna were obliged to pay punitive damages for the illegal industrial actions, the Swedish Labour Court considered the requirement that the Member States are obliged to ensure that EU law has effective impact and enforcement, the fact that the illegal industrial actions had taken place for a relatively long time (they did not stop before the posted workers had left Sweden) and the circumstance that the ECJ had not limited its judgement in time, which meant, taking into account the previous case law of the ECJ, that the judgement was applicable with retroactive effect.

84. Furthermore, the Swedish Labour Court announced that Byggnads and Elektrikerna had reasons to consider whether the industrial actions were compatible with EU law at the time of the strike, since during the process Laval had provided clear and well founded grounds as to why the industrial actions violated EU law. Additionally, the Swedish Labour Court declared that according to Swedish case law, high obligations are put on a party to carefully investigate if a planned industrial action might be illegal under Swedish Law. According to the Swedish Labour Court, the same obligations.

85. The Swedish Labour Court had found, in its interim decision of 22 December 2004, that there existed no probable cause as to the industrial actions being unlawful. The Swedish Labour Court did, however, state in the interim decision that it was not possible to draw any sufficiently reliable conclusions as to the relationship of the industrial actions with EU law. The Swedish Labour Court had not ruled with a clear degree of certainty on the admissibility of the industrial actions in the interim decision. The uncertainty regarding whether Swedish law was in compliance with EU law led to the reference to the ECJ for a ruling in this regard. Consequently, the fact that Laval's claims were rejected in the interim decision did not have any significance when determining the level of punitive damages. Finally, the Swedish Labour Court considered that Laval had not been contributoriliy negligent to any punitive damages.

86. Against this background, the Swedish Labour Court ruled that Byggnads and Elekrikerna were obliged to pay punitive damages of a total amount of SEK 550,000 (approximately EUR 55,000).

3.3. OTHER JUDGEMENTS OF THE ECJ

87. The ECJ has ruled in favor of the free movement of services and the freedom of establishment in other cases similar to the Laval case.

88. In the case of Viking, the ECJ acknowledged that the right to take collective action, including the right to take industrial actions, constitutes a fundamental right which forms an integral part of the general principles of EU law. The ECJ added that the right must, however, be reconciled with the fundamental freedoms within the internal market, such that the exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality. The ECJ ruled that a proportionality assessment has to be made between the freedom of establishment and the rights to take industrial actions.

89. The case of Rüffert, concerned the rights of public authorities to set requirements in public procurement. The ECJ ruled that Member States may not adopt legislative measures which limit contractors for public works contracts to those companies which, agree to pay their employees at least the rate set by a collective agreement. The ECJ ruled that such action would be in breach of the Posting of Workers Directive interpreted in the light of the freedom to provide services in Article 49 EC (now Article 56 TFEU).

90. In the case of Luxembourg, the ECJ declared that Luxembourg had not fulfilled its obligations under the Posting of Workers Directive, nor under Article 49 ECT (now Article 56 of the TFEU). According to Article 3 (10) of the Posting of Workers Directive,

Member States may extend conditions of matters other than the hard core of mandatory rules if they concern public policy provisions. The ECJ declared that the concept of public policy provisions shall be interpreted strictly since it involves a deviation from the principle of free movement of services. The exemption regarding public policy provisions could not be invoked by Luxembourg.

91. The ECJ has recognized the right to take collective actions, including the right to take industrial actions, as a fundamental right which forms part of the general principles of EU law. The ECJ has, however, stressed that there are restrictions to the exercise of that right under EU law.

92. In these cases, the ECJ has clarified the relationship between collective actions and the free movement of services and the right to establishment. According to the ECJ, collective actions initiated by trade unions against companies in order to induce the company to enter into collective agreements are not in principle excluded from Article 49 and 56 of the TFEU. However, collective actions may be considered as restrictions on the freedom of services and the right to establishment. The restrictions may be justified according to the proportionality principle.

3.4. CHANGES IN SWEDISH LEGISLATION AFTER THE LAVAL JUDGEMENT

3.4.1. The Laval Committee and the Government Bill

93. It was evident, after the ruling of the ECJ, that Swedish legislation was in breach of EU law and needed to be changed. A special committee, the Laval Committee, was appointed, which presented its results on 12 December 2008. The legislative proposals of the Laval Committee were investigated further and a government bill was passed on 10 November 2009. The purpose of the legislative investigations was to propose changes to Swedish legislation in order for Sweden to comply with EU law. It was, however, emphasized that the rights to take industrial actions under Swedish law should, as far as possible, remain the same.

94. On 15 April 2010 legislative changes entered into force in Swedish legislation as a result of the Laval case. It should be noted that the following described legislative changes do not affect the right to take industrial action in exclusively Swedish situations or in situations where Swedish law is applicable according to the choice of law provisions. In such situations, the ordinary rules in the Co-determination Act on mandatory labour-stability obligation shall apply. Nor do the legislative changes influence the right for the posted workers to take industrial action according to the rules of their home countries. The legislative changes are only applicable in situations where foreign companies post workers to Sweden to work temporarily in Sweden.

95. Sweden has based the legislative changes on Article 3 (8), second paragraph of the Posting of Workers Directive. By using the option included in Article 3.8 of the Posting of Workers Directive Sweden now considers as a source of the labour relationship similar to the law, by the terms of Article 3.1 of the Directive, the collective agreements "which are generally applicable to all similar undertaking in the geographical area and in the profession or industry concerned".

3.4.2. Changes in the Posting of Workers Act

96. A new provision, Section 5 (a), was added to the Posting of Workers Act. This Section has the following wording;

"*Industrial action against an employer for the purpose of regulating conditions for posted workers through a collective agreement may only be taken if the conditions demanded:*

a. *correspond to the conditions contained in a collective agreement concluded at central level that are generally applied throughout Sweden to corresponding workers within the sector in question;*

b. *relate only to a minimum rate of pay or other minimum conditions within the areas referred to in Section 5; and*

c. *are more favorable for the workers than those prescribed by Section 5.*

Such industrial action may not be taken if the employer shows that the workers, as regards pay or within the areas referred to in Section 5, have conditions that in all essential respects are at least as favorable as the minimum conditions in such a central collective agreement as referred to in the first paragraph."

97. Section 5 of the Posting of Workers Act reflects the content of Article 3 (1) of the Posting of Workers Directive and contains the hard core terms and conditions of employment, which foreign companies are obliged to apply in relation to the posted workers in Sweden. In short, Section 5 regulates employment conditions such as vacation benefits, parental leave benefits, protection against discrimination and work hours. However, pay is not covered by Section 5 of the Posting of Workers Act (see Section 2.6).

98. According to the *travaux préparatoires* the term "pay" shall cover all types of pay, e.g. overtime pay and different salary increments.

99. To summarize, an industrial action against a foreign company which posts workers to Sweden is permitted provided that the following circumstances prevail;

(ii) the demanded conditions are limited to involve pay and/or other conditions covered by Section 5 of the Posting of Workers Act, the so-called hard core of conditions;

(iii) the demanded conditions relate to minimum rate of pay or other minimum conditions;

(iv) the demanded conditions must be more favorable than those regulated in Section 5 of the Posting of Workers Act;

(v) the demanded employment conditions must correspond to conditions in a central collective agreement applied in Sweden for the relevant sector.

100. An industrial action, which is permitted according to the aforesaid, is, however, unlawful if the employer can show that the workers in question have conditions that in all

essential respects are at least as favorable as the minimum conditions in a central collective agreement, for the relevant sector.

3.4.3. Changes in the Co-determination Act

101. A new provision, Section 41 c, was added to the Co-determination Act, which stipulates the following;

"Industrial action that has been taken in violation of Section 5 (a) of the Posting of Workers Act is unlawful".

102. The ECJ declared in its ruling that the *Lex Britannia* principle was in breach of EU law. As a result, the *Lex Britannia* principle has been modified in the Co-determination Act. Section 42 of the Co-determination Act now has the following wording;

"An employers' organization or an employees' organization may not organize or in any other manner induce unlawful industrial action. Nor may such an organization, through support or in any other manner, participate in unlawful industrial action.

An organization that is bound by a collective agreement shall be obliged, if unlawful industrial action is imminent or is being taken by a member, to attempt to prevent such action or to endeavor to achieve a cessation of such action.

Where any person has taken unlawful industrial action, no other person may participate in such action."

103. In addition, a new provision, Section 42 (a), has been added in the Co-determination Act, which has the following wording;

"The provisions contained in Section 42, first paragraph shall not be applied where an organization resorts to industrial action as a consequence of a working condition to which this Act is not directly applicable.

Notwithstanding the first paragraph, Section 42, first paragraph, shall be applied where action is taken against an employer who posts employees in Sweden as referred to in the Posting of Workers Act".

104. The Lex Britannia principle still exist in the Co-determination Act, which follows from the first paragraph in Section 42 (a), but is no longer applicable as regards the posting of workers from a foreign company to Sweden. In practice, the *Lex Britannia* principle now has a very limited scope of application.

3.4.4. Information to foreign employers who posts workers to Sweden

105. The Swedish Work Environment Authority is the liaison office and can provide information regarding the terms and conditions which might become applicable to the posted workers in Sweden. Section 9 of the Posting of Workers Act has the following wording;

"The Swedish Work Environment Authority shall be the liaison office and provide information about the work and employment conditions that may become applicable upon a foreign posting in Sweden.

The Swedish Work Environment Agency shall also assist in providing information about conditions according to such collective agreements that may be demanded with the support of industrial action according to Section 5 (a) or that may otherwise become applicable.

The Swedish Work Environment Authority shall also collaborate with the corresponding liaison offices in other States within the EEA and in Switzerland."

106. In order to make it clearer for posting employers and posted workers to determine which conditions can be demanded by the Swedish trade unions, a new provision, Section 9 (a), has been added to the Posting of Workers Act, with the following wording;

"An employee organization shall submit to the Swedish Work Environment Authority conditions according to such collective agreements that the organization may demand with the support of industrial action according to Section 5 (a)."

3.5. CONSEQUENCES OF THE SWEDISH LEGISLATIVE CHANGES AFTER THE LAVAL CASE

3.5.1. The Swedish legislative changes do not go beyond what is required by EU law

107. In the *travaux préparatoires* to the new legislation, it was repeatedly pointed out that Sweden wanted to maintain its system of freedom to engage in collective agreements for determining minimum wages and other conditions of work, while, however, fully taking into account the new state of affairs after the ECJ ruling in the Laval case, and, therefore, in compliance with the scope and content of EU Law.

3.5.2. Increased predictability for posting employers, posted workers in Sweden and trade unions

108. The Swedish legislative changes have made it significantly easier for companies in other Member States to operate temporarily in the Swedish market. The changes in Swedish legislation due to the Laval case have facilitated the cooperation between Swedish and foreign companies, which is to the benefit of both posted workers and Swedish workers. Increased trade and employment creates growth and welfare.

109. It is, as a consequence of the Swedish legislative changes, more predictable and clear for posting employers to determine which employment terms and benefits could possibly apply when operating temporarily in the Swedish market. It is also much more evident what employment terms and benefits can be demanded by means of industrial action and when industrial actions are allowed. The Swedish Work Environment Authority is now informed of the conditions stemming from the collective agreements that the trade unions are willing to demand through industrial action. It is also to the benefit of posting employers that the discriminatory *Lex Britannia* principle has been removed. As a result, it is easier for foreign companies to calculate the costs involved in posting workers to Sweden.

110. From the perspective of the posted workers it is also much easier to verify whether the employer fulfills its obligations in terms of the content and the level of the employment conditions provided to the worker. For instance, the workers can turn to the Swedish

Work Environment Authority to ascertain if the employer applies the minimum conditions of the hard core conditions according to the collective agreement applicable to the relevant sector in Sweden.

111. The trade unions have been provided with better tools to safeguard and control the posted workers conditions. Firstly, it is now clear when the trade unions can resort to industrial actions. Before the Laval case it was questionable under which circumstances industrial actions against posting employers were lawful. For instance, the *Lex Britannia* principle was broadly questioned as incompatible with EU law. Secondly, the trade unions have been given wide-ranging possibilities to influence the conditions of the posted workers, since it is possible for the trade unions to resort to industrial action in order to demand better minimum conditions than those stated in the Posted Workers Act, provided that these minimum conditions are included in the central collective agreement negotiated for the relevant sector. Thirdly, the obligation for the posting employers to show that the posted workers have conditions essentially at least as favorable as the minimum conditions in the applicable collective agreement, gives the trade unions a good insight into the posted workers conditions and an opportunity for the unions to request improved conditions, ultimately through industrial actions.

3.5.3. Possibilities exist to maintain fair and acceptable employment conditions for posted employees

112. The complainant organisations maintain that the Swedish legislative changes restrict the ability to guarantee migrant workers the same protection as nationals and claim that it constitutes clear discrimination since only minimum conditions may be requested by industrial action.

113. However, pursuant to Section 5 of the Posting Workers Act, posted workers enjoy several important working conditions such as paid vacation, parental leave, employment protection and protection against discrimination. Better minimum conditions than those prescribed under Section 5 of the Posting Workers Act and minimum conditions regarding pay may be demanded within the mechanism of adoption of national collective agreements applicable to the sector involved. In many cases, these conditions are much more beneficial for the posted workers compared to the employment conditions they are assured in their home countries.

114. It shall also be emphasized that the foreign employers are free to voluntarily apply employment benefits which are more beneficial to the employees than stated in Section 5 of the Posting of Workers Act.

115. It is evident from the ruling of the ECJ that only minimum conditions that lie within the hard core of the Posted Workers Directive may be forced through industrial action in relation to an employer from another Member State. The demanded conditions must also be plain and clear.

116. It should be noted that Swedish collective agreements do not imply that a Swedish employer who has signed a (Swedish) collective agreement is obliged to pay higher wages or provide more beneficial conditions than the minimum levels specified in the

collective agreement. By following the complainant organisations arguments there is a risk that foreign companies are subject to discriminatory treatment, because higher wages will be demanded of foreign companies who sign collective agreements compared to Swedish companies in a similar situation. Swedish central collective agreements for the specific sector do not contain any provisions related to discriminatory treatment, so the assertion by the complainant organisations that "the collective agreements in force do not allow any discrimination including discrimination based on national origin" appears to be misleading and not founded.

117. If too high demands are placed on the posting employers as regards the levels of employment conditions for posted workers, the costs of posting workers to Sweden would be too high and obstruct the posting of workers to Sweden. In reality, foreign workers would be prevented from working abroad which would be discriminatory and not at all protective of the foreign workers rights to employment.

118. The complainant organisations' idea that lower wages and working conditions for posted workers will affect the purely internal Swedish conditions is not supported by any evidence and could therefore not be used as a demonstration of a situation which has worsened with the entry into force of the new legislation.

119. Furthermore, it shall be pointed out that Swedish trade unions may, in some situations, be permitted to resort to industrial action against foreign companies bound by collective agreements. This right applies if the foreign employer fails to show that it applies essentially the same minimum employment conditions as provided for under the relevant central collective agreement. There exists no corresponding right for the trade unions under Swedish law when it comes to the possibilities to take industrial actions against Swedish employers. If the Swedish employer is bound by collective agreements that are applicable to the employees concerned, the trade unions are bound to respect the "labour stability obligation", regardless if the employer applies less beneficial conditions for the employees compared to the demanded collective agreement. The trade unions are in such situations obliged to refrain from taking industrial actions with the aim of putting aside or bringing about an alternation in the collective agreement which the employer has signed with another trade union. Thus, from this perspective, the industrial action provisions in relation to posting employers are more beneficial to the trade unions compared to the industrial action provisions applicable in situations involving only Swedish companies.

3.5.4. The obligation for foreign employers to provide information regarding the posted workers' conditions

120. Pursuant to Section 5 (a) of the Posting of Workers Act, industrial action may not be undertaken if the employer shows that the workers' conditions are in all essential at least as favorable as the minimum conditions of the collective agreement applicable to the sector.

121. The complainant organisations claim that there are no specific details or criteria on the requirement of the employer "to show" the application of similar working conditions as contained in the relevant collective agreement. The complainant organisations

argument is that there is a risk of having an increased number of double employment agreements (a false agreement respecting the law and the real agreement contrary to the Swedish law) which may be detrimental to the Swedish labour market.

122. However, it is specifically the employer that has a real burden of proof on "employment conditions essentially at least as favourable". For instance, in order to obtain a court ruling which declare an industrial action as unlawful the foreign employer has to present a foreign collective agreement, individual employment agreements or payroll records. In the *travaux préparatoires* to the new legislation it is stated that high standards of reliability must be placed on the statements presented by the employer. The foreign employer has to present this information during the whole period of the assignment of workers to Sweden. Nothing prevents the trade unions from going back to the employer and repeatedly requiring that the employer presents evidence that the required employment conditions be applied. As a result, it is not likely that a foreign employer would be able to protect itself against industrial action solely by citing, for example, contracts of employment, without being able to demonstrate that the salaries and conditions actually provided are at least as favourable as the minimum conditions of the collective agreement applicable to the sector involved.

123. It is, of course, not consistent with Swedish law to pay lower wages than the employer has promised the employees or to have a procedure involving double contracts of employment. Given that no record of disputes related to the new rules in the Posting of Workers Act and the Co-determination Act (Section 3.5.7) has been registered, there is no clear evidence that this would take place.

124. It can hardly be acceptable to have a system that provides for an unexceptional right to take industrial action with the purpose of concluding collective agreements regardless of the real employment conditions applied to posted employees. If the workers already have working conditions which are in line with the demanded collective agreement, there is no proportionality between the industrial action and the purpose of the industrial action.

3.5.5. The rights of the posted workers and trade unions to apply to Swedish courts

125. Posted workers may apply to the Swedish courts for claims against their employers. Furthermore, Swedish trade unions may represent posted workers before the Swedish courts. Consequently, posted workers have the right to apply to Swedish courts if they have, for instance, not been granted the minimum conditions under Section 5 (a) of the Posting of Workers Act or, if the employer is bound by foreign collective agreements, or if the benefit from condition not comparable to the minimum conditions established by the relevant collective agreement applicable in Sweden.

126. It should be noted that if double employment agreements have been issued for the posted workers they are able to cite both employment agreements as grounds for claims in Swedish courts against their employers. Furthermore, the posted workers are able to refer to foreign collective agreements as grounds for claims before the Swedish courts. Claims of this kind may be brought by Swedish or foreign trade unions or by the workers themselves.

3.5.6. The obligations for foreign companies to negotiate and the rights to organise

127. The complainant organisations claim that the Swedish legislative changes severely restrict freedom of association and the trade union right to negotiate and resort to collective action. This is not representing the actual situation of the Swedish labour market.

128. Foreign employers who post workers to Sweden are bound to follow the same rules regarding negotiations set by the Co-determination Act as Swedish employers. Therefore, when the foreign company has been duly notified of a request for negotiation the company is obliged to attend negotiations under penalty of damages.

129. The Swedish legislative changes do not in any way affect the workers' right to form trade unions or to join trade unions. The posted workers are free to organise in both Swedish and foreign trade unions. Similarly, there are no barriers for foreign companies to become members of employers' associations.

130. The negotiation rights and the rights to organise are granted under Section 7 of the Posting of Workers Act.

3.5.7. Collective agreements between Swedish trade unions and foreign employers posting workers to Sweden

131. The changes in the Posting of Workers Act and in the Co-determination Act only relate to the trade unions' ability to take industrial action against foreign companies who post workers to Sweden. The Swedish legislative changes after the Laval case do not affect the ability of foreign employers to voluntarily sign collective agreements with Swedish trade unions, provided that the conditions in the agreements are at least as beneficial as those following from Section 5 (a) of the Posting of Workers Act. The unions and the foreign employers are free to agree on the entering into of collective agreements if they so wish.

132. The Swedish trade unions may request that a negotiation process aimed at concluding a collective agreement is started with the foreign employers. The latter are then obliged to attend the negotiations. Furthermore, the unions and the foreign employers are free to agree on more beneficial employment terms in the collective agreements, compared to what follows from Section 5 of Posting of Workers Act. During the negotiations regarding the entering of collective agreements, the trade unions are free to request the conditions which they find appropriate. The negotiations are not limited to the hard core rights such as salaries, hours of work and vacation benefits, etc. Neither are the conditions restricted to only minimum conditions. If a collective agreement is concluded, the collective agreement is effective under Swedish law.

133. There is no evidence, as claimed by the complainants', that the Swedish legislative changes have made Swedish trade unions more reluctant to start negotiation and request foreign companies to sign collective agreements. On the contrary, it is quite common for Swedish trade unions to request foreign companies to sign collective agreements and the foreign companies usually voluntarily sign the collective agreements.

134. Likewise, there is no evidence of disputes occurring in relation to the signing of collective agreements with foreign companies in the last couple of years, and it does not appear that a foreign employer has attempted to protect itself against industrial action by referring to the new regulations.

135. This picture is confirmed by the Swedish National Mediation Office's statistics on the number of disputes relating to the signing of collective agreements between trade unions and employers. The table below is an extract from the Mediation Office's annual report "Wage negotiation and salary formation 2012".

Collective agreements disputes 2002-2012

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Disputes	80	53	69	55	102	44	13	18	17	12	16
of which ship related	12	6	4	12	7	5	1	4	2	1	3
of which foreign companies	5	5	12	11	4	1	1	0	0	0	0

136. The figures show the number of disputes between Swedish trade unions and employers related to the signing of collective agreements. From the statistics it is clear that collective agreement disputes involving foreign employers are extremely uncommon in Sweden. Over the past four years, such disputes have not occurred. The reduction in the number of collective agreement disputes began in 2005, and reflects the decrease in the total number of collective agreement disputes. In 2012, the total number of collective agreement disputes had fallen by approximately 85 per cent from the record year of 2006. The Mediation Office estimates that approximately 90 per cent of all employees in Sweden are covered by collective agreements. Around 11,000 new employers became bound by collective agreements during 2012. Taking these figures into account, disputes relating to the signing of collective agreements are very rare, in respect of both foreign and Swedish companies.

137. With respect to the complainants' reference to statistics on the number of collective agreements concluded between Byggnads and foreign companies between 2007 and 2010 (after the ECJ judgment in the Laval case), which theoretically should demonstrate that the conclusion of collective agreements has fallen drastically because of the legislative changes in the Swedish legislation, it has to be stressed that the reduction in the number of collective agreements concluded cannot be attributed to the

changes in Swedish law, which entered into force on 15 April 2010. Additionally, no information on the number of collective agreements signed with foreign companies before 2007 has been provided by the complainant organisations.

138. Furthermore, the figures only refer to the construction sector, while do not furnish any information on the situation of other sectors.

139. In addition to circumstances such as the resources and priorities of the unions involved, factors such as the financial crisis, which started in 2007 and the subsequent slowdown in the European and Swedish economies may have further led to a reduction in the number of foreign companies operating in the Swedish construction sector during the period considered and in the number of collective agreements signed. Furthermore, there exist other data, which show that employers who have become parties to a collective agreement through their membership of an employers' organisation are not recorded. During 2011 and 2012, after the new Swedish regulation had entered into force, a small increase took place in the number of collective agreements which Byggnads concluded with foreign companies. This despite the continuing recession in Europe and in Sweden. Byggnads concluded 38 collective agreements in 2011 and 44 collective agreements in 2012.

3.5.8. The obligations to pay damages for illegal industrial action

140. With reference to the claimed high tort liability for calling and undertaking an unlawful strike, it has to be stressed that an obligation to pay damages for illegal industrial actions is normal under most legal systems.

141. In Sweden, the obligations to pay damages for illegal industrial actions are set forth in Sections 54-55 of the Co-determination Act. These rules have been in force for decades. The sanction for unlawful industrial action might include economic and punitive damages. The Swedish Labour Court applied these rules and ordered Byggnads and Elektrikerna to pay damages for taking industrial actions in violation of EU Law.

142. It is important to point out that the aforesaid regulations regarding the obligations to pay damages shall be applied regardless of whether the industrial action is taken against a Swedish company or a foreign company. In other words, the same rules regarding liability to pay damages for illegal industrial action apply when the industrial actions are taken against a Swedish company as when the industrial actions are taken against a foreign company. This is compatible with EU law and the principle of equality and non-discrimination of other Member States.

143. It is of great importance that there exist effective remedies in cases of industrial actions. Section 60 of the Co-determination Act stipulates that, if it is reasonable, the damages might be reduced, or not awarded, by the Court.

144. This said, it is not unreasonably difficult for the trade unions to assess the precise conditions they are permitted to demand by means of collective action under Section 5 (a) of the Posting of Workers Act. The Swedish trade unions have very good knowledge of the terms and conditions under their collective agreements and both Swedish

employers and trade unions must on an everyday basis determine which minimum conditions of employment apply according to the collective agreements.

3.5.9. Posting of workers from third countries

145. Regarding the complainants' observations that the Swedish government went beyond the ECJ's ruling in the Laval case since the restrictions on the rights of trade unions also apply to companies from third countries, it should be pointed out that Article 1 (4) of the Posting of Workers Directive indicates that companies that are established in countries outside the EU may not be treated more favourably than companies that are established in a Member State. The Posting of Workers Act is therefore also applicable to postings from countries outside the EU. If companies from countries outside the EU were not requested to apply at least the same requirements as national companies in cases of posting of workers from a third country, they would enjoy more favorable treatment than companies from Member States.

146. As regards the *Lex Britannia* principle it is stressed in the *travaux préparatoires* that there were no reasons to depart from a uniform regulation. Workers and employers from third countries should have the same possibilities to work in Sweden as European workers and employers.

3.5.10. Differences are not made between unorganised and organised posted workers

147. The complainant organisations claim that the trade unions are not able to act on behalf of theirmembers since the new regulation in Swedish law does not differentiate between situations when one or several workers posted are organised in the acting trade union.

148. First of all it is to be mentioned that the judgement of the ECJ was not dependent on the fact that the posted workers were not members of Byggnads. Nothing points in the direction that the ECJ would have ruled differently if the posted workers had been members of Byggnads. On the contrary, Sweden would be in breach of EU law if other rules were to apply if trade unions have members at the work place.

149. It would also be discriminatory against Swedish employers if the trade unions were free to take industrial actions against foreign companies which post workers to Sweden on the basis that the trade unions have members at the work place. If a Swedish company is bound by collective agreements, the trade unions are bound by labour stability obligation. They may not resort to industrial action with the aim of setting aside or altering the collective agreement by which the employer is bound. This applies regardless of whether the trade unions concerned have members at the work place or not. It is difficult to understand why the complainant organisations wish to treat foreign companies differently and not respect the collective agreements by which the employer is bound.

150. Furthermore, foreign employers are obliged to show that the posted workers have essentially the same conditions as the minimum conditions in the relevant central collective agreement. The trade unions' members at the work place will in such case not find themselves in a better position by the fact that a collective agreement is concluded.

3.5.11. Employment conditions in connection with public procurement

151. It is worth noting that the Swedish legislative changes have not led to uncertainty on the standards which may be set in public procurement. There are regulations in EU law in this area, developed, inter alia, in the Rüffert case (Paragraph 89), which Sweden is obliged to adhere to.

3.6. NEW LEGISLATION CONCERNING INDUSTRIAL ACTION AGAINST FOREIGN TEMPORARY WORK AGENCIES

152. On 1 January 2013, the Hiring of Workers Act entered into force. At the same time changes were introduced in the Posting of Workers Act, which extended the Swedish trade unions rights to take industrial actions against foreign temporary work agencies posting workers to perform temporary work in Sweden. The legislative changes implement the Agency Workers Directive.

153. According to the legislative changes, the trade unions are permitted to take industrial actions against foreign temporary work agencies with the purpose of regulating conditions for posted workers through a collective agreement within the areas of the hard core in Section 5 of the Posting of Workers Act. The demanded conditions are, however, not limited to the minimum conditions in the relevant collective agreement. This is possible pursuant to Article 3 (9) of the Posting of Workers Directive, which gives the option, but not the obligation, to treat temporary work agencies in a different manner from other posting companies. The foreign temporary work agency can protect itself from becoming bound by collective agreements by showing that the company already applies in all essential at least as favourable conditions for the posted workers as the conditions in either the demanded collective agreement or in the collective agreement applicable in the user company.

154. It appears that the legislative changes are highly likely to lead to an increase in the number of collective agreement disputes with foreign companies on the Swedish labour market as in many cases, the line between temporary work agencies and other businesses will be very difficult to draw. A judgement will be required as to whether a company is to be treated as a temporary work agency or not. The legislative changes constitute a reversal of the situation before the ruling of the ECJ in the Laval case. Due to the legislative changes it will be unreasonably difficult for foreign temporary work agencies to predict the precise conditions which they may need to apply during the period in which they are active in Sweden. The legislative changes are likely to negatively impact the possibilities of Swedish companies to import and export services.

3.7. LEGAL REPRESENTATIVES FOR FOREIGN BRANCH OFFICES

155. In 2009, changes in the Foreign Branch Offices Act entered into force. The requirement to have a manager resident in Sweden now only applies to Swedish or foreign citizens who are resident outside the EEA. Further, the Foreign Branch Offices Act was amended to state that commercial enterprises which are covered by the provisions on the free movement of goods and services in the TFEU, are not subject to the requirement to

establish branch offices. The legislative change was necessary for Sweden to be in compliance with the EU Service Directive and the free movement of services.

156. The legislative change cannot be seen as a barrier to the possibilities of establishing collective agreements and is not in breach of Sweden's obligations to promote collective bargaining and/or the negotiating right. A requirement to have a legal representative resident in Sweden would, on the contrary, be in breach of EU law.

157. A foreign employer who posts workers to Sweden is obliged to comply with the same rules on negotiating obligations under the Co-determination Act as Swedish employers. The rules mean that when the foreign company has been notified of a request for negotiation, provided that a negotiating obligation exists under the provisions of the Co-determination Act, the company is obliged to attend negotiations under penalty of damages. The trade unions can request negotiations with foreign companies as with Swedish companies, for example by visiting the workplace, by telephone, letter, through a website or by e-mail.

3.8. GOVERNMENT BILL REGARDING NEW LEGISLATION ON OBLIGATIONS FOR EMPLOYERS WHO POST WORKERS TO SWEDEN TO HAVE A CONTACT PERSON IN SWEDEN AND TO REPORT THE POSTING OF WORKERS

158. A government bill was passed on 19 February 2013 regarding changes to the Posting of Workers Act. According to the bill, employers who post workers to Sweden shall be obliged to have a contact person in Sweden and to report the posting of workers. It is suggested in the bill that the legislative changes enter into force on 1 July 2013.

159. The bill established that foreign employers shall be obliged to appoint a contact person in Sweden who shall be authorized to receive notices on behalf of the employer. Furthermore, the contact person shall also be able to provide documentation evidencing that the requirements under the Posting of Workers Act, as regards employment conditions for posted workers, are fulfilled. The foreign employer shall be obliged to notify the Swedish Work Environment Authority about the appointed contact person. In addition, the foreign employer will be obliged to notify the Swedish Work Environment Authority that the employer posts workers to Sweden.

160. According to the bill, the Swedish Work Environment Authority shall supervise the compliance of the new rules and foreign employers who are in breach of the regulation may be sentenced to a penalty.

161. The purpose of the bill is to allow Sweden to fulfill its obligations under the Posting of Workers Directive and to ensure that the Posting of Workers Act works in practice.

162. The proposed legislation will improve the position of the trade unions, which will obtain even greater possibilities to control and monitor the employment conditions of the posted workers. Firstly, the proposed legislation will facilitate the trade unions' capacity to get in contact with the posting employers. If the unions are unable to get in contact with the posting employer by any other means, they can easily contact the Swedish

Work Environment Authority to obtain the name of a contact person. Secondly, the capacity of the contact person to provide the unions with documentation, as regards employment conditions for posted workers, will make it easier for the trade unions to control whether the employer fulfills the requirements under the Posting of Workers Act. If, for instance, the posted workers' conditions were not to reach the minimum conditions of a Swedish central collective agreement for the sector concerned, and the posting employer does not change the workers' conditions in order to achieve such standard, the trade unions can serve the contact person a request for negotiations. If the trade unions provide the contact person with a request for negotiations, it is in the interest of the posting employer to make sure that an authorised representative attends the collective agreement negotiations in order to prevent the unions from taking industrial actions.

163. The existence of a requirement for posting employers to have an authorised representative in Sweden would, on the other hand, most likely be in breach of Article 56 of the TEUF.

4. THE RIGHT TO STRIKE IN INTERNATIONAL LAW: ILO CONVENTION NO. 87 AND 98

164. Given the importance attributed by the Committee of Social Rights to the "right to strike" as intended and recognised in other international treaties, the IOE, speaking as the Secretariat of the Employers' Group of the ILO (one of the three ILO Constituents), takes this opportunity to raise its concern over the reference to the observation of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).

165. As the Committee of Social Rights is certainly aware, there was an intense debate within the International Labour Conference of the ILO (ILC) last June (2012), whereby a strong position was adopted by the Employers' Group, on the basis of the following elements:

a. The right to strike is not provided for in either ILO Convention No. 87 or 98 and was not intended to be. Convention No. 87, in particular, does not recognise, either expressly or implicitly, a right to strike; the legislative history of Convention No. 87 is undisputedly clear on the fact that "the proposed convention relates only to freedom of association and not to the right to strike".

b. The CEACR is a body charged with the preliminary assessment of the government reports, and is called upon to bring to the attention of the ILO Conference Committee on the Application of Standards (CAS) any national standards and practices that are not in conformity with the text of ILO Conventions. The CEACR can provide guidance to national authorities, but cannot constitute authoritative interpretations of ILO Conventions, authority that pertains exclusively to the International Court of Justice (ICJ), as established by Article 37 of the ILO Constitution.

166. From time to time, the CEACR has based its views on statements from the ILO Committee on Freedom of Association (CFA). It has to be stressed here that the CFA was set up by the ILO Governing Body to assess whether a specific complaint put forward by an employers' or workers' organisation demonstrates that a State is not respecting the principle of freedom of association contained in the ILO Constitution and the annexed Declaration of Philadelphia. Therefore, the CFA is not entitled to establish what is to be considered as part of the text of Conventions 87 and 98. Using as a reference only the ILO Constitution and the Declaration of Philadelphia, the CFA is entitled to issue recommendations to Government on a specific case, even when the State has not ratified Conventions 87 and 98.

167. Given the importance of this debate at international level, with possible relevant repercussions at national level, the IOE trusts that the Committee of Social Rights will take into account the current discussion taking place among the ILO tripartite constituents when deciding on the merits of the present complaint.

5. CONCLUSIONS

168. In conclusion, the IOE and BUSINESSEUROPE consider that the new Swedish legislation, as adapted after the ECJ Laval Judgement and according to the EU Law, is in full conformity with the terms of the ESC.

169. In particular, the IOE and BUSINESSEUROPE wish to underline that, given the scope of application and content of the ESC, and according to case law and the most recent conclusions of the European Committee of Social Rights on the case of Sweden, the Swedish legislation is in compliance with Article 4, 6 and 19.4 of the ESC (revised version). With reference to what is described regarding the rights of posted workers in Sweden, the following reasons are to be highlighted:

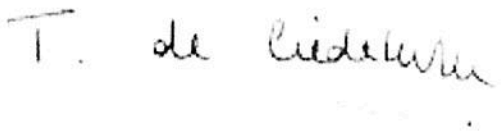
a. The posted workers are granted fair and acceptable employment conditions (Section 3.5.3);
b. Posted workers remain free to start a process of negotiation aimed at concluding collective agreements. Posted workers are also free to join any trade union of their choice. (Section 3.5.6).
c. Collective agreements can be concluded on a voluntary basis and are indeed concluded with foreign employers which post workers in Sweden. (Section 3.5.7). The conditions in collective agreements signed voluntarily can be more favorable than the so-called "hard core" of rules in the Posting of Workers Directive (Article 3 (1) (a-g)). (Paragraph 114).
d. According to Section 5 of the Swedish Posting of Workers Act an employer posting workers to Sweden has to apply the conditions within the hard core of rules in Swedish Law. (Section 3.1.4).
e. In addition, according to Section 5 (a) of the Swedish Posting of Workers Act, the unions can resort to industrial action in order to force the foreign employer to sign a collective agreement containing conditions that correspond to the minimum working conditions of the national Swedish collective agreement for the sector concerned. In accordance with the Laval ruling industrial action may only be taken to regulate the minimum terms and conditions of employment in accordance with Article 3 (1) (a-g) of the Posting of Workers Directive. Also in accordance with the Laval ruling industrial action may not be taken if the foreign employer already applies conditions that are at least as favourable as the minimum working conditions of the national Swedish collective agreement for the sector concerned. If requested, the foreign employers have to be able to provide sufficient proof of the working conditions to the trade unions or to a Swedish court. (Section 3.4.2 and 3.5.4).

7 May 2013

For BUSINESSEUROPE

MANAGING DIRECTOR

Thérèse de Liedekerke



For the IOE

SECRETARY GENERAL

Brent Wilton