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

Confidential¹

**Swedish Trade Union Confederation (LO) and Swedish Confederation of
Professional Employees (TCO) v. Sweden**

Complaint No. 85/2012

REPORT TO THE COMMITTEE OF MINISTERS

Strasbourg, 3 July 2013

¹ It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 20 November 2013.

Introduction

1. Pursuant to Article 8§2 of the Protocol providing for a system of collective complaints (“the Protocol”), the European Committee of Social Rights, a committee of independent experts of the European Social Charter (“the Committee”) transmits to the Committee of Ministers its report² on Complaint No. 85/2012. The report contains the Committee’s decision on admissibility and on the merits of the complaint (adopted on 3 July 2013).
2. The Protocol came into force on 1 July 1998. It has been ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal and Sweden. Furthermore, Bulgaria and Slovenia are also bound by this procedure pursuant to Article D of the Revised Social Charter of 1996.
3. The Committee’s procedure was based on the provisions of the Rules of 29 March 2004 which it adopted at its 201st session and revised on 12 May 2005 at its 207th session, on 20 February 2009 at its 234th session and on 10 May 2011 at its 250th session.
4. The report has been transmitted to the Committee of Minister on 19 July 2013. It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 20 November 2013.

² This report may be subject to editorial revision.



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

**DECISION ON ADMISSIBILITY AND
THE MERITS**

3 July 2013

**Swedish Trade Union Confederation (LO) and Swedish Confederation of
Professional Employees (TCO) v. Sweden**

Complaint No. 85/2012

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 265th Session attended by:

Luis JIMENA QUESADA, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK
Birgitta NYSTRÖM
Rüçhan IŞIK
Alexandru ATHANASIU
Jarna PETMAN
Elena MACHULSKAYA
Giuseppe PALMISANO
Karin LUKAS
Eliane CHEMLA
Jozsef HAJDU
Marcin WUJCZYK

Assisted by Régis BRILLAT, Executive Secretary

Having deliberated on 3 July 2013,

On the basis of the report presented by Giuseppe PALMISANO,

Delivers, in English only, the following decision adopted on this date:

PROCEDURE

1. The complaint presented by the Swedish Trade Union Confederation ("LO") and Swedish Confederation of Professional Employees ("TCO") was registered on 27 June 2012.

2. The complainant trade unions allege that the legislative amendments made in 2010 to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678) violate:

- Articles 4 and 6 of the Revised European Social Charter ("the Charter"), with respect to the State's duty to promote collective agreements and recognise the right to collective action;
- Article 19§4, with respect to the State's obligation to secure for foreign workers treatment not less favourable than that of nationals with respect to remuneration, employment conditions and the enjoyment of the benefits of collective bargaining.

As regards the State's duty to promote collective bargaining, LO and TCO allege that the changes made in 2009 to the Foreign Branch Offices Act (1992:160) and the Foreign Branch Offices Ordinance (1992:308) violate Articles 4, 6 and 19§4 of the Charter as well.

3. In accordance with Rule 29§2 of the Committee's Rules, the Committee asked the Swedish Government ("the Government") to make written submissions on the merits in the event that the complaint was found to be admissible, by 20 September 2012, at the same time as its observations on the admissibility of the complaint. At the request of the Government, the President of the Committee agreed to extend the deadline for the above-mentioned submissions until 31 October 2012. The Government's submissions were registered on 26 October 2012.

4. The complainant trade unions were asked to submit a response to the Government's submissions by 31 January 2013. The response was registered on 29 January 2013.

5. In a letter of 20 February 2013, the Committee invited the Parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Charter to send it any comments they wished to make by 9 May 2013 in the event that the complaint was found to be admissible.

6. In a letter of 20 February 2013, pursuant to Article 7§2 of the Protocol, the Committee invited the international employers' and workers' organisations mentioned in Article 27§2 of the Charter of 1961 to submit observations before 9 May 2013.

7. The observations from the International Organisation of Employers and BUSINESSEUROPE were registered on 7 May 2013. The observations from the European Trade Union Confederation were registered on 8 May 2013.

SUBMISSIONS OF THE PARTIES

A – The complainant trade unions

8. The complaint alleges that the legislative amendments made in April 2010 (so called “*Lex Laval*”), following the Government’s proposal No. 2009/10:48, to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678), in the aftermath of the judgment of the Court of Justice of the European Union (“CJEU”) of 18 December 2007, Case C-341/05 - *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* (“the Laval case”), violate Articles 4, 6 and 19§4 of the Charter.

9. LO and TCO point out that the above-mentioned legislative amendments:

- do not promote the use of collective agreements, rather the opposite, thus constitute an infringement of Article 6§2 of the Charter;
- represent a severe restriction on the right to industrial action, which cannot be said to be in line with Article G, and therefore constitute an infringement of Article 6§4 of the Charter;
- restrict the content of the collective agreements that Swedish trade unions, with the backing of a possibility to take collective action, can ask the employers of posted workers to sign, to minimum standards and to certain subject matters. In this respect, the complainant trade unions claim that the Swedish State effectively denies posted workers equal treatment with respect of remuneration, other employment conditions and the enjoyment of the benefits of collective bargain on the same terms as nationals and conclude that the Swedish State is thus in violation of Article 19§4 *a* and *b* of the Charter.

10. The complaint also alleges that the changes made in December 2009 to the Foreign Branch Offices Act (1992:160) and the Foreign Branch Offices Ordinance (1992:308), which removed for companies within the European Economic Area (“EEA”) the obligation to have a legal representative in Sweden when they conduct economic activities in Sweden, violate Articles 4, 6 and 19§4 of the Charter on the

ground that the above-mentioned changes are contrary to the State's duty to promote collective agreements and secure for migrant posted workers treatment not less favourable than that of nationals with respect to the enjoyment of the benefits of collective bargaining. More specifically, the complainant trade unions argue that the above-mentioned changes, adopted in order to implement Directive 2006/123/EC on services in the internal market, undermine the possibility for establishing collective agreements because, as regards EEA, they force Swedish trade unions to establish contacts with employers abroad.

B – The respondent Government

11. The Government considers that the changes made, on the one hand, to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678), and, on the other hand, to the Foreign Branch Offices Act (1992:160), do not violate Articles 4, 6 and 19§4 of the Charter.

12. Moreover, the Government draws the attention of the Committee on a number of new legislative initiatives regarding posted workers temporarily in Sweden.

OBSERVATIONS OF THE INTERNATIONAL ORGANISATIONS OF EMPLOYERS AND TRADE UNIONS

A - International Organisation of Employers and BUSINESSEUROPE (employers' organisations)

13. The International Organisation of Employers ("OIE") and BUSINESSEUROPE ("BE") consider that given the scope of application and content of the Charter and according to the case-law and most recent conclusions of the Committee concerning Sweden, the changes in the Swedish legislation mentioned in the complaint are in compliance with Articles 4, 6 and 19§4 of the Charter.

14. In this respect, as a preliminary point, OIE and BE observe that based on the Appendix of the Charter, paragraph 1., "[d]ue 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 (...)".

15. Should Articles 4, 6 of the Charter apply according to the Appendix, as regards Article 4 the employers' organisations consider that:

"[T]he 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".

16. OIE and BE take the view that:

“Posted workers are granted fair and acceptable employment conditions”. Moreover, they observe that “(...) 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”.

17. As regards the alleged violation of Article 6§§2 and 4, the employers’ organisations put forward the following considerations:

“[P]osted workers remain free to start a process of negotiation aimed at concluding collective agreements; collective agreements can be concluded on a voluntary basis and are indeed concluded with foreign employers which post workers in Sweden; 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)); an employer posting workers to Sweden has to apply the conditions within the hard core of rules in Swedish Law; trade 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; industrial action may not be taken only 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”.

18. Furthermore, OIE and BE consider that:

“Article G of the Charter 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” and that “here, the first admissible restriction to the right to strike in Article 6.4 of the ESC must be taken into consideration”.

19. More specifically, the employers’ organisations observe that:

“[I]f the Swedish legislative changes due to the Laval case are considered to be in breach of Articles 4, 6 and 19.4, (...) any limitations or restrictions of the aforesaid Articles are permitted under (...) Article G (...) 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”.

20. OIE and BE consider that the legislative changes in the Foreign Branch Offices Act were necessary for Sweden to be in compliance with the EU Service Directive and the free movement of services. More particularly, they consider that:

“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”.

21. The employers’ organisations report that a recent government bill oblige employers who post workers to Sweden to have a contact person in Sweden, authorised to receive notices on behalf of the employer and to report the posting of workers. OIE and BE are of the opinion that “[t]he 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”.

22. The employers' organisations consider that Article 19§4 does not apply to the complaint because "the category of posted workers does not fall within the personal scope of [this provision]". In this respect, they consider that:

"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".

23. OIE and BE are of the opinion that "[c]onfirmation 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)". They also point out that "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".

B – The European Trade Union Confederation

24. The European Trade Union Confederation ("the ETUC") considers that the Swedish legislation adopted in the aftermath of the Laval case "restricts the right to collective bargaining and the right to strike, in violation of Articles 6 (...) and 19§4 (...) of the (...) Charter".

25. With respect to relevant international law, the ETUC refers to Article 11 of the European Convention on Human Rights and, in this framework, to *Demir and Baykara v. Turkey* - Application No. 34503/97, judgment of the European Court of Human Rights of 12 November 2008. According to the ETUC, this judgment "reversed the Court's previous jurisprudence by recognising for the first time the right to collective bargaining as being enshrined in the protection of freedom of association guaranteed by Article 11 ECHR (...)". The ETUC also refers to the relevant treaties of the International Labour Organisation (ILO), namely the Convention concerning Freedom of Association and Protection of the Right to Organise No. 87, and the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No. 98. In this respect, the ETUC quotes the relevant statements by the ILO Committee of Experts on the Application of Conventions and Recommendations namely the General Survey – Giving a globalization a human face - adopted at 101st Session (2012), the Report adopted in 2013, at 102nd Session, specifically referring to Sweden and the Laval case, as well as the Report adopted in 2010, at the 99th Session, with respect to the United Kingdom and the BALPA case.

26. As regards the interpretation framework, the ETUC recalls that in *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the merits of 8 September 2004, §26, “the Committee stated that when it has to interpret the Charter, it does so on the basis of [Article 31§1] of the 1969 Vienna Convention on the Law of Treaties”. The ETUC considers that the consequence of this statement is that the Charter has to be interpreted in harmony with its context, object and purpose; other rules of international law; the specific Charter-related principles.

27. Therefore, the ETUC considers that the Charter must be interpreted a) so as to give life and meaning to fundamental social rights, which are human rights, and, according to the teleological approach, to realise the aim and achieve the object of the treaty, not that would restrict to the greatest possible degree the obligations undertaken by the Parties; b) in line with international standards and the respective case-law of the competent bodies providing a minimum level of protection. However, the ETUC also considers that nothing should and, indeed, does not prevent the Committee from going beyond this minimum level taking into account the specific Charters’ standards, bearing in mind that European standards should in principle contain a higher level of protection than international standards. Moreover, the ETUC is of the view that the principles of social progress and non-regression should be applied.

28. As regards the Charter in relation to European Union (“EU”) law, the ETUC recalls that in the framework of *Confédération générale du travail (CGT) v. France*, Complaint No. 55/2009, Decision on the merits of 23 June 2010, “the Committee stressed the autonomy of the Charter in relation to EU obligations in different aspects and rejected the idea of an – even rebuttable – presumption of conformity with the Charter” and stated that “whenever it has to assess situations where States take into account or are bound by legal texts of the European Union, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law”.

29. Concerning EU law in relation to the Charter, the ETUC refers to a number of EU normative provisions (i.e. 5th recital, Article 6(1)(1) and (3) of the Treaty on European Union; Article 151(1) of the Treaty on the functioning of the European Union; Preamble, Articles 28 and 53 of the Charter of Fundamental Rights) which, according to the ETUC, “require an interpretation (...) in full conformity with the Charter and would therefore, in principle, not allow the (continuation of the ...) ‘Laval’ approach”. Having regard to Article 351(1) of the Treaty on the functioning of the European Union, the ETUC observes that “if for whatever reason formal conflicts were to remain (...) treaties which have been concluded or adhered to before the entry into the EU remain valid”. The ETUC concludes that “there is no argument for the Swedish Government to refer to (primary or secondary) EU law in order to justify any restrictions concerning the Charter’s rights”.

30. More specifically, as far as the alleged violation of Article 6§2 is concerned, having regard to the relevant paragraphs of the complaint (i.e., respectively: 82, 71, 70, 69, 73, and 79), the ETUC recommends the Committee to conclude negatively on the following grounds: decrease in the number of collective agreements in the period 2007-2010; restrictions on the power of trade unions to conclude a collective agreement through collective action; limitation of the level of protection that collective agreements can achieve; limitations introduced with respect to the subject matter of collective agreements (*ratione materiae*); extension of the restrictions to collective agreements regarding third countries' posted workers (*ratione personae*); absence of the obligation for a foreign employer from EEA to have a legal representative in Sweden.

31. As far as the alleged violation of Article 6§4 is concerned, the ETUC recommends that the Committee conclude negatively on the ground that a number of the restrictions on the right to collective bargaining described in the above paragraph, "have the direct consequence that a collective complaint action started by a trade union to make one or more improvements which are not permitted will be considered as illegal. If these restrictions are not already compatible with Article 6§2 of the Charter they cannot be permitted under Article 6§4 of the Charter".

32. Moreover, the ETUC considers that there is a violation of Article 6§4 also on the following ground:

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

33. As far as the alleged violation of Article 19§4 is concerned, after stressing that posted workers "clearly fall into the scope [of this provision]", the ETUC considers that:

"The content of the collective agreements that Swedish trade unions, backed up by the possibility of collective action, can ask the employers of posted workers to sign, is restricted to minimum standards and to certain subject matters by current Swedish legislation. Sweden thus effectively denies posted workers equal treatment in respect of remuneration and other employment conditions as well as the enjoyment of the benefits of collective bargain on the same terms as Swedish nationals. Sweden is therefore in violation of Article 19§4 (a) and (b) of the Charter".

RELEVANT LAW

NATIONAL LAW

General rules

34. Chapter 2 of the Swedish fundamental law “Instrument of Government” sets out the freedoms and fundamental rights enjoyed by citizens. Under Article 14 thereof, workers’ associations, employers and employers’ associations have the right to take collective action, unless otherwise provided by law or agreement.

Specific rules

35. The legislation that applies to the complaint is as follows:

- **Foreign Posting of Employees Act (1999:678)** / Amendments: up to and including SFS 2012:857, SFS 2013:351

Section 5

“An employer shall, irrespective of which act would otherwise apply to the employment relationship, apply the following provisions for foreign posted employees:

- Sections 2, 2 a, 5, 7, 16-16 b, 17-17 b, 24, 28-29 a, 31 and 32 of the Annual Leave Act (1977:480),
- Sections 2, 4 first paragraph, and 16-22 of the Parental Leave Act (1995:584);
- Sections 2-7 of the Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act (2002:293);
- Chapter 1 - Sections 4 and 5, Chapter 2 – Sections 1-4 and 18, and Chapter 5 - Sections 1 and 3 of the Discrimination Act (2008:567).

In connection with foreign posting also the following apply:

- the Work Environment Act (1977:1160),
- the Working Hours Act (1982:673), though not Section 12,
- the Working Hours for Certain Road Transport Work Act (2005:395), though not Section 16,
- the Working Hours etc. of Mobile Workers in Civil Aviation Act (2005:426), though with the limitation as regards Section 1, paragraph 2 that Section 12 of the Working Hours Act does not apply; and
- the driving and Rest Periods for International Railway Transport Act (2008:475), though with the limitation as regards Section 1, paragraph 3, that Section 12 of the Working Hours Act does not apply.

For foreign posting of temporary employees also Sections 2, 9, 10, 13 and 15 of the Act on Temporary Agency Work (2012:854) shall apply (...).

The first – third paragraphs do not prevent the employer from applying terms and conditions that are more favourable for the employees” (SFS 2012:857).

Section 5 a

“Industrial action against an employer for the purpose of regulating conditions for posted workers through a collective bargaining agreement may, with the exception of the situation described in Section 5 b, only be taken if the conditions demanded:

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

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

3. are more favourable 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 favourable as the minimum conditions in such a central collective bargaining agreement as referred to in the first paragraph" (SFS 2012:857).

Section 5 b

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

1. correspond to the conditions contained in a collective agreement concluded at central level generally applied throughout Sweden to the corresponding workers within the temporary agency work sector and which respects the overall protection of temporary workers provided for in the Directive 2008/104/EC on temporary agency work,

2. relate only to pay or other conditions within the area referred to in Section 5, and

3. are more favourable for the workers than those prescribed by Section 5.

Such industrial action may only be taken if the employer shows that the workers, as regards pay or the areas referred to in Section 5, have conditions that in all essential respects are at least as favourable as the conditions

1. in such a collective agreement as referred to in the first paragraph, or

2. the collective agreement that applies in the user undertaking" (SFS: 2012:857).

(...)

Duty to report and contact person (SFS 2013:351)

Section 10

"An employer shall report the Swedish Work Environment Authority about foreign posting of employees at the latest when a foreign posted employee begins his or her work in Sweden (...)" (SFS 2013:351).

Section 11

"The employer shall appoint a contact person in Sweden and report to the Swedish Work Environment Authority about him or her. The report shall be done at the latest when a posted employee begins his or her work in Sweden.

The contact person shall be authorised to receive notifications on behalf of the employer (...).

The contact person shall also be able to make available documentation providing evidence that the requirements of the Foreign Posting of Employees Act are met.

That first paragraph does not apply if the activity in Sweden is intended to last at the most for 5 days. If such an activity continues for more than 5 days, the employer shall fulfil the requirement of the first paragraph on the 6th day of the posting" (SFS 2013:351).

- The Employment (Co-Determination in the Workplace) Act (1976:580) / Amendments: up to and including SFS 2012:855

Section 41

“An employer and an employee who are bound by a collective bargaining agreement may not initiate or participate in a stoppage of work (lockout or strike), blockade, boycott, or other industrial action comparable therewith, where an organisation is party to that agreement and that organisation has not duly sanctioned the action, and where the action is in breach of a provision regarding a labour-stability obligation in a collective bargaining agreement or where the action has as its aim:

1. to exert pressure in a dispute over the validity of a collective bargaining agreement, its existence, or its correct interpretation, or in a dispute as to whether a particular action is contrary to the agreement or to this Act;
2. to bring about an amendment to the agreement;
3. to effect a provision that is intended to enter into force upon termination of the agreement; or
4. to aid someone else who is not permitted to implement an industrial action. Industrial actions that have been taken contrary to the first paragraph are unlawful.

The first paragraph shall not prevent employees from taking part in a blockade duly ordered by an employees' association for the purpose of exacting payment of pay or any other remuneration for work that has been performed that is clearly due (collection blockade). Industrial action of this nature is not unlawful”. (SFS 1993:1498)

Section 41 a

“An employer may not, as an industrial action or as a part of an industrial action, withhold pay or other remuneration for work that has been performed and which is due and payable. Nor may an employer withhold pay or other remuneration for work that has been performed and which is due and payable as a consequence of employee participation in a strike or other industrial action. Industrial actions referred to in the first paragraph are unlawful”. (SFS 1993:1498)

Section 41 b

“An employee may not implement or participate in an industrial action that has the aim of reaching a collective bargaining agreement with a business that does not have any employees or where only the business operator or members of the business operator's family are employees and sole owners. This also applies when industrial action has the purpose of supporting someone who wishes to reach a collective bargaining agreement with such a business. What is stated here does not prevent an employee from participating in an employment blockade that is directed at such a business and which has been duly ordered by an employees' organisation.

Industrial action that has been taken in violation of the first paragraph are deemed unlawful. Alterations to the employment or ownership position that have occurred after industrial action has been notified or implemented shall not be taken into account when assessing whether an industrial action is to be deemed unlawful under the first paragraph” (SFS 2000:166)

Section 41 c

Industrial action that has been taken in violation of Section 5 a or Section 5 b of the Foreign Posting of Employees Act is unlawful (SFS 2012:855).

Industrial action that has been taken in violation of 5 a § of the Posting of Workers Act is unlawful.

Section 42

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

An organisation that is bound by a collective bargaining 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 endeavour to achieve a cessation of such action.

Where any person has taken unlawful industrial action, no other person may participate in such action" (SFS 2010:229).

Section 42 a

"The provisions contained in Section 42, first paragraph shall not be applied where an organisation 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 Foreign Posting of Employees Act (1999:678)" (SFS 2010:229).

Section 54

"Unless otherwise provided below, an employer, an employee, or an organisation in breach of this Act or a collective bargaining agreement shall pay compensation for any loss that is incurred".

Section 55

"In assessing whether, and to what extent, a person has suffered loss, consideration shall also be given to such person's interest in compliance with statutory provisions or provisions in the collective bargaining agreement and to factors other than those of purely economic significance".

- **Foreign Branch Offices Act (1992:160)**

Section 2

"A foreign company shall conduct its economic activities in Sweden through:

1. a branch office with independent management (branch);
2. a Swedish subsidiary, or
3. an agency with operations in Sweden.

The first paragraph does not apply if the economic activity is made subject to the provisions on free movement of goods and services in the Treaty on the Functioning of the European Union or the corresponding provisions of the Agreement on the European Economic Area (EEA).

For economic activities undertaken in Sweden by Swedish or foreign nationals residing outside the EEA, a representative must exist who is resident in Sweden and in charge of the activity. Act (2011:722)".

Modified 2009-11-24 by SFS 2009:1083, entry into force 2009-12-27.

Section 2 a

"The Government may, for a certain types of businesses, provide for exemptions from the requirements of Section 2, first paragraph 1 and the third paragraph on the branch or representative, if a branch office or a representative is not deemed necessary for the purpose of fulfilling the aim of this Act.

If there are special reasons, the Government or an authority appointed by the Government may, in an individual case decide for an exception from the requirement for a branch office or a representative. Act (2011:722)".

Text in Swedish language available at:

<http://www.notisum.se/rnp/sls/lag/19920160.htm>

(Swedish Rikdag)

- **Foreign Branch Offices Ordinance (1992:308)**

Until June 2011, the second paragraph of Section 3 of this Ordinance was as follows:

"A foreign company established within the meaning of the European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market in a state other than Sweden within the European Economic Area (EEA) and which is a service provider within the meaning of the same Directive is not covered by the requirement for a branch office if the company only temporarily exercises economical activities in Sweden".

This paragraph was introduced by means of Ordinance 2009:1097 in December 2009. The paragraph was nevertheless abolished by means of Ordinance 2011:724.

The latest modifying Ordinance may be found here: <http://www.notisum.se/rnp/sls/sfs/20110724.pdf>

Section 3 of the Foreign Branch Offices Ordinance therefore nowadays reads as follows:

"A building activity driven no longer than for the period one year by a foreign company established outside the European Economic Area (EEA) or by a Swedish or foreign national residing outside the EEA are not subject to the requirement on the branch office or representative¹".

Footnote 1 of the Ordinance reads as follows: "latest wording 2009:1097. The modification means inter alia that the second paragraph is abolished".

Text in Swedish language also available at:

<http://www.notisum.se/rnp/sls/lag/19920308.HTM>

(Swedish Rikdag)

- **Temporary agency work Act (2012:854)**

Section 1

"This Act concerns employees that are employed by a temporary-work agency with a view to being assigned to a user undertaking to work under its supervision and direction".

Section 2

"An agreement shall be invalid to the extent that it would result in the removal or limitations of the employee's rights according to this act, unless something else follows from Section 3".

Section 3

"By a collective bargaining agreement concluded by or approved by a national trade union derogations from 6 § are allowed, under the condition that the agreement respects the overall protection of temporary workers provided for in the Directive 2008/104/EC of 19 November 2008 on temporary agency work".

(...)

Section 6

"A temporary-work agency shall, for the duration of the employee's assignment at a user undertaking, ensure the employee at least those basic working and employment conditions that would apply if he or she has been recruited directly by the undertaking to occupy the same job".

(...)

Section 9

"A temporary-work agency shall not by agreement or in any other way prevent an employee to conclude a contract of employment by a user undertaking with which he or she carries or have carried out an assignment".

Section 10

"A temporary work agency shall not ask for, agree upon or charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment with a user undertaking with which he or she carries or have carried out an assignment".

(...)

Section 13

"A temporary-work agency which does not comply with 6, 9, or 10 § shall pay damages to the temporary worker for any loss that is incurred, including factors other than those of purely economic significance".

(...)

Section 15

"If it is reasonable under the circumstances damages may be reduced or waived entirely".

EUROPEAN UNION LAW

36. The European Union's law to be taken into consideration is as follows:

- **The treaty on European Union**

TITLE I – Common provisions

Article 6 (ex Article 6 TEU)

(...)

“3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”.

- **Treaty on the functioning of the European Union**

Part two – Non-discrimination and citizenship of the Union

Article 18 (ex Article 12 TEC)

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination”.

Part three – Union policies and internal actions

(...)

TITLE IV - Free movement of persons, services and capital

Chapter 1 – Workers

Article 45 (ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

(...)

Chapter 2 – Right of establishment

(...)

Article 52 (ex Article 46 TEC)

“1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions”.

(...)

Chapter 3 – Services

(...)

Article 56 (ex Article 49 TEC)

"Within the framework of the provisions set out below, 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.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union".

Article 57 (ex Article 50 TEC)

"Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".

'Services' shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

(...)

Article 62 (ex Article 55 TEC)

"The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter".

(...).

TITLE X – Social policy

Article 151 (ex Article 136 TEC)

"The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action".

Article 152

"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy."

(...)

Article 153 (ex Article 137 TEC)

"1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

(...)

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

- **Charter of Fundamental Rights of the European Union**

Article 28 - Right of collective bargaining and action

"Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

Explanation on Article 28 — Right of collective bargaining and action

"This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States".

(cf. Explanations relating to the Charter of Fundamental Rights).

Article 51 - Scope

"1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

Article 52 - Scope of guaranteed rights

"1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

Article 53 - Level of protection

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

- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Preamble - recitals 6, 13, 17 and 22

" [T]he transnationalisation of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; ... it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; ... such coordination can be achieved only by means of Community law;

the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”.

Article 1

"1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) ...

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting”.

...”

“Article 3 - Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(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) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

8. Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

9. Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.”.

- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work

Preamble – recital 19

“This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law”.

Article 5 - The principle of equal treatment

“1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job”.

(...)

“3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment”.

Article 9 - Minimum requirements

“1. This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers”.

- **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market**

Preamble – recital 65

“Freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. However, these criteria should not include requirements according to which a provider or one of his employees or a representative must be present during the exercise of the activity when this is justified by an overriding reason relating to the public interest. Furthermore, a Member State should not restrict the legal capacity or the right of companies, incorporated in accordance with the law of another Member State on whose territory they have their primary establishment, to bring legal proceedings. Moreover, a Member State should not be able to confer any advantages on providers having a particular national or local socio-economic link; nor should it be able to restrict, on grounds of place of establishment, the provider's freedom to acquire, exploit or dispose of rights and goods or to access different forms of credit or accommodation in so far as those choices are useful for access to his activity or for the effective exercise thereof”.

Article 1

“Subject matter

1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

(...)

7. This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law”.

INTERNATIONAL CONVENTIONS

37. The provision of the **International Covenant on Economic, Social and Cultural Rights** to be taken in to consideration reads as follows:

Article 8

"1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention".

38. The conventions of the International Labour Organization ("ILO") to be taken into consideration are as follows:

- **Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87)** – ratified by Sweden on 25.11.1949

Article 11

"Each Member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise".

- **Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98)** - ratified by Sweden on 18.07.1950

Article 4

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

- **Convention concerning the Promotion of Collective Bargaining (No. 154)** - ratified by Sweden on 11.08.1982

PART I. SCOPE AND DEFINITIONS

Article 2

“For the purpose of this Convention the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for--

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations”.

PART III. PROMOTION OF COLLECTIVE BARGAINING

Article 5

“1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following: (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention; (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention; (c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged; (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules; (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining”.

Article 6

“The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate”.

Article 7

“Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations”.

Article 8

“The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining”.

39. The provision of the **Convention for the Protection of Human Rights and Fundamental Freedoms** to be taken in to consideration reads as follows:

Article 11 - Freedom of assembly and association

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”.

RELEVANT CASE-LAW

NATIONAL CASE-LAW

40. Three decisions adopted by the Swedish Labour Court are relevant (see also paragraphs 84, 86, 88 below):

- **Decision No. 111 of 22 December 2004** on the complaint submitted by *Laval un Partneri* (Case No. A 268/04), related to the lawfulness of industrial actions according to the Co-determination Act.

- **Decision No. 49 of 29 April 2005** on the complaint submitted by *Laval un Partneri* (Case No. A 268/04), concerning the compliance of the Co-determination Act with EU law.

- **Decision. 89 of 2 December 2009** on the complaint submitted by *Laval un Partneri* (Case No. A 268/04), related to the implementation of the Co-determination Act, adopted in the aftermath of the Judgment of CJEU of 18 December 2007, Case C-341/05.

EUROPEAN UNION CASE-LAW

41. The following judgment of the CJEU is relevant:

- **Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet - Case C-341/05, judgment of 18 December 2007**

42. In this judgment, the CJEU considered that:

“1. A Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 concerning the posting of workers in the framework of the provision of services is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers. (see para. 71)

2. Article 3(7) of Directive 96/71 concerning the posting of workers in the framework of the provision of services cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.

As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe in its territory.

Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those

workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision. (see paras 80-81)

3. Although the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

Whilst the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, the exercise of such rights does not fall outside the scope of the provisions of the Treaty and must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.

It follows that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services. (see paras 91, 93-95)

4. Article 49 EC and Article 3 of Directive 96/71 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The right of trade unions of a Member State to take such collective action is liable to make it less attractive, or more difficult, for undertakings to provide services in the territory of the host Member State, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. Such an obstacle cannot be justified with regard to the objective of protecting workers, into which, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls, since the employer of such workers is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State. Nor can such an objective justify the negotiations on pay which the trade unions seek to impose on undertakings established in another Member State which post workers temporarily to the territory of the host Member State, where such negotiation forms part of a national context characterised by a lack of provisions which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay. (see paras 99, 107-111, operative part 1)

5. Articles 49 EC and 50 EC preclude a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly. Such a prohibition discriminates against undertakings which post workers to the host Member State in that it does not take account, whatever their content, of collective agreements by which those undertakings are already bound in the Member State in which they are established, and treats them in the same way as national undertakings which have not concluded a collective agreement. Such discrimination cannot be justified either by the aim of allowing trade unions to take action to ensure that all employers active on the national labour market pay wages and apply other terms and conditions of employment in line with those usual in that Member State, or by the aim of creating a climate of fair competition, on an equal basis, between national employers and entrepreneurs from other Member States. Those considerations do not constitute grounds of public policy, public security or public health within the

meaning of Article 46 EC, applied in conjunction with Article 55 EC. (see paras 116, 118-120, operative part)”

(cf. Summary of the Judgment).

43. On this basis, the CJEU held that:

“Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade (‘blockad’) of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly”.

(cf. ruling of the CJEU).

44. Other judgments of the CJEU to be taken into consideration are: *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* - Case C-438/05, judgment of 11 December 2007; *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* - Case C-346/06, judgment of 3 April 2008; *European Commission v Luxembourg* - Case C-319/06, judgement of 19 June 2008; *European Commission v Federal Republic of Germany* - Case C-271/08, judgment of 15 July 2010; *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* - Case C-36/02, judgment of 14 October 2004; *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* - Case C-112/00, judgment of 12 June 2003.

CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

45. The judgments of the European Court of Human Rights (“ECtHR”) to be taken into consideration are as follows:

- **Demir and Baykara v. Turkey - Application No. 34503/97, judgment of 12 November 2008**

46. As regards the right to bargain collectively, the ECtHR held that “(...) having regard to developments in labour law, both international and national, and to the practice of Contracting States in this area, (...) the right to bargain collectively with an employer had, in principle, become one of the essential elements of the ‘right to form

and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions (...)"

- Wilson, and the National Union of Journalists, Palmer, Wyeth and the National Union of Rail Maritime and Transport Workers and Doolan and Others v. the United Kingdom - Applications Nos. 30668/96, 30671/96 and 30678/96, judgment of 02 July 2002

47. In the judgment, the ECtHR held that: "[C]ollective bargaining was not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The union and its members had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the legal systems of the countries which had ratified the Convention, there was a wide margin of appreciation as to how trade union freedom might be secured. There were other measures available to the applicant unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action 'in contemplation or furtherance of a trade dispute'". (cf. summary of the judgment).

48. As regards the right to strike, the ECtHR held that: "[T]he essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests" (cf. § 46).

- Gustafsson v. Sweden - Application No. 15573/89, judgment of 25 April 1996

49. In this judgment, the ECtHR held that: "Article 11 (...) of the Convention does not as such guarantee a right not to enter into a collective agreement (...). The positive obligation incumbent on the State under Article 11 (...), including the aspect of protection of personal opinion, may well extend to treatment connected with the operation of a collective-bargaining system, but only where such treatment impinges on freedom of association. Compulsion which (...) does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11 (...)"

- Swedish Engine Drivers' Union v. Sweden - Application No. 5614/72, judgment of 6 February 1976

50. The ECtHR held that "Article 11 (...) does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them. Not only is this latter right not mentioned in Article 11 para. 1 (...), but neither can it be said that all the Contracting States incorporate it in their national law or practice, or that it is

indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention”.

51. More specifically, as regards the European Social Charter, the ECtHR held that “(...) trade union matters are dealt with in detail in another Convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 October 1961. Under Article 6 para. 2 of the Charter, the Contracting States ‘undertake ... to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements’. [T]he Charter thus affirms the voluntary nature of collective bargaining and collective agreements. The prudence of the wording of Article 6 para. 2 demonstrates that the Charter does not provide for a real right to have any such agreement concluded, even assuming that the negotiations disclose no disagreement on the issue to be settled. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 para. 2. Thus, it cannot be supposed that such a right derives by implication from Article 11 para. 1 (...) of the 1950 Convention, which incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain”.

- **Schmidt and Dahlström v. Sweden, Application No. 5589/72, judgment of 6 February 1976**

52. In the judgment, the ECtHR held that “Article 11 ... leaves each State a free choice of the means to be used [to make collective action possible]. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others”.

- **National Union of Belgian Police v. Belgium - Application No. 4464/70, judgment of 27 October 1975**

53. With respect to the alleged violation of Article 11, the ECtHR held that “(...) the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible” (cf. §39).

OTHER RELEVANT INTERNATIONAL DOCUMENTS

54. The following reports of the ILO Committee of Experts on the Application of Conventions and Recommendations (“ILO Committee”) apply to the complaint:

- **International Labour Conference, 102nd Session, 2013 - Report of the Committee of Experts on the Application of Conventions and Recommendations (cf. Part II. Freedom of association, collective bargaining, and industrial relations / Observations concerning particular countries – Sweden, pp. 176-180)**

55. In the above-mentioned report, the ILO *Committee* reviewed and commented the final judgement of the Swedish Labour Court in the Laval case (see paragraph 40 above and 88 below) and the consequent legislative amendments adopted in April 2010 by the Swedish Parliament (see paragraph 8 above) in relation to the Freedom of Association and Protection of the Right to Organise Convention No. 87

and the Right to Organise and Collective Bargaining Convention No. 98 (see paragraph 38 above).

With respect to ILO Convention No. 87

56. The ILO Committee recalled first of all that “its task is not to judge the correctness of the [CJEU’s] holdings in (...) Laval as they set out an interpretation of the European Union Law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level is such as to deny workers’ freedom of association rights under Convention No. 87”. In this respect, the ILO Committee expressed its deep concern in relation to the fact that “the union in question has been held liable for an action that was lawful under national law and for which it could not have been reasonably presumed that the action would be found to be in violation of European Law”. It “recalled that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association”. It also considered that “this principle is all the more relevant in the circumstances where the action was lawful at the time it was exercised”. While aware that the payment has already been made to the trustee in bankruptcy, the ILO Committee requested the Government “to review this matter with the social partners concerned so as to study possible solutions for compensation of the two unions, particularly in light of the 2004 court judgment leading the unions to believe their action was lawful”.

57. As a general matter, the ILO Committee also recalled that “when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services”. However, the ILO Committee suggested that “in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (...)”.

58. The ILO Committee considered that “the principles of the Convention do not impose the recognition of a *Lex Britannia* rule, which is very particular to Sweden. This would be a matter to be determined at the national level” (about *Lex Britannia* see paragraph 84 below). However, it observed with concern that “the amendments to the Foreign Posting of Employees Act restrict recourse to industrial action to conditions corresponding to the [Directive 96/71/EC] minimum conditions and further bar unions from taking industrial action even if they have members working in the enterprise concerned and regardless of whether a collective agreement covers the workers concerned, provided that the employer can show that the employees’ terms and conditions are as favourable as the minimum conditions in the central collective agreement”. In this respect, the ILO Committee considered that “foreign workers should have the right to be represented by the organization of their own choosing with a view to defending their occupational interests and that the organization of their choice should be able to defend its members’ interests, including by means of industrial action”. It therefore requested “the Government to review with the social partners the 2010 amendments made to the Foreign Posting of Employees Act so as to ensure that workers’ organizations representing foreign posted workers are not restricted in their rights simply because of the nationality of the enterprise”.

With respect to ILO Convention No. 98

59. As regards the general appreciation of the impact of the legislative amendments introduced in Sweden in 2010 in response to the CJEU's judgment in the *Laval*, the ILO Committee referred to its comments under Convention No. 87. More specifically, it welcomed "the plans to submit a Bill, at the latest on 30 November 2012, whereby a foreign employer must report that it posts workers to Sweden and appoint a contact person in Sweden, who shall be authorized to receive notice on behalf of the employer and hopes that this will facilitate engagement in collective bargaining with foreign employers". The ILO Committee also requested "the Government to indicate the developments in this regard in its next report". It further expressed "its concern that foreign companies may be exempt from collective bargaining demands provided they only 'show' that minimum pay and conditions pertain" and therefore requested that "the Government to reply to these comments and to continue to provide information on any measures taken or envisaged to combat this practice".

- **International Labour Conference, 99th Session, 2010 - Report of the Committee of Experts on the Application of Conventions and Recommendations (cf. Part II - Freedom of association, collective bargaining, and industrial relations / Observations concerning particular countries – United Kingdom, pp. 208-209)**

60. With respect to ILO Convention No. 87, in the above-mentioned report the ILO Committee first of all observed that "[I]ts task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87" and that "(...) when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on freedom of association and collective bargaining, paragraph 160). The Committee is of the opinion that there is no basis for revising its position in this regard".

61. On the basis of these preliminary remarks, the ILO Committee observed “[W]ith *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised (...)”.

62. More generally, the ILO Committee observed that “[i]n the current context of globalisation, such cases are likely to be ever more common, particularly with respect to certain sectors of employment (...), and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating”. The ILO Committee thus considered that “[T]he doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention”.

63. In the light of its past observations on the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, the ILO Committee requested the Government concerned to “(...) consider appropriate measures for the protection of workers and their organisations to engage in industrial action and to indicate the steps taken in this regard”.

64. The following communication of the European Commission is relevant:

- Commission Communication COM(2003) 458 on the implementation of Directive 96/71/EC

4.1.2.1. - Collective agreements

“(...) [C]ollective agreements as referred to in Article 3(1) of the Directive must, for the purposes of implementation of the Directive, be *declared universally applicable* within the meaning of Article 3(8). The first subparagraph of Article 3(8) of the Directive refers to *erga omnes* collective agreements, which must be observed by all undertakings in the geographical area and in the profession or industry concerned in order to guarantee equality of treatment between domestic undertakings and undertakings established in another Member State providing services in the territory of a Member State.

In the absence of a system for declaring collective agreements to be of universal application, the second subparagraph of Article 3(8) offers Member States options designed to guarantee equality of treatment. The group of experts which prepared the transposal of the Directive was of the opinion that if Member States, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, decide to base themselves on the two other categories of collective agreements referred to in Article 3(8), i.e. generally applicable collective agreements or collective agreements concluded by the most representative employers' and labour organisations, they must make explicit mention thereof in their legislation implementing the posted workers Directive. If their implementing legislation makes no reference to this effect, Member States may not oblige undertakings established in another Member State which post workers to their territory to observe the collective agreements referred to in the second subparagraph of Article 3(8).

Since no Member State's transposing legislation makes any mention of the options offered by the second subparagraph of Article 3(8), the Commission concludes that those Member States which do not have collective agreements declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of the Directive do not apply the terms and conditions of employment laid down in collective agreements to workers posted on their territory. In these countries, therefore, only the terms and conditions of employment laid down in legislative provisions apply to workers posted on their territory".

(...)

4.3. - The acceding countries

"As regards the situation in the acceding countries, it should be remembered that these countries are obliged to transpose the provisions of the Directive prior to joining the European Union. Most of them have already adopted new provisions and/or adapted existing legislation with a view to transposing the Directive on the posting of workers. Transposal is seemingly well under way in some countries, while in others a great deal of work remains to be done. This applies in particular to Article 3(1), whereby, as host States, they must lay down the rules to be followed by foreign undertakings providing services on their territory".

65. The following resolution of the European Parliament is relevant:

- Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI))

" (...) - having regard to the European Social Charter, in particular Articles 5, 6 and 19 thereof, (...) "

"A. whereas the EC Treaty acknowledges the fundamental rights laid down in the Charter of Fundamental Rights of the European Union, in the constitutions of the Member States and in different international treaties and conventions, as basic references in Community law and practice",

B. whereas the EC Treaty lays down a number of relevant principles; whereas one of the main purposes of the Community is an internal market with a social dimension, characterised by the abolition, between Member States, of obstacles to the free movement of goods, persons, services and capital,

C. whereas one of these principles is the recognition of citizens' basic constitutional rights, including the right to form trade unions, the right to strike and the right to negotiate collective agreements,

(...)

G. whereas the ECJ recognizes the right to take collective action as a fundamental right that is an integral part of the general principles of Community law; whereas this right will also be enshrined in the Treaties if the Lisbon Treaty is ratified,

H. whereas the Commission has on several occasions stressed the importance of the existing national framework of employment legislation and collective bargaining for the protection of workers' rights,

(...)

K. whereas, according to the preamble of the PWD, the promotion of the transnational provision of services requires conditions of free and fair competition and measures guaranteeing respect for the rights of workers and in accordance with the legal framework relating to national employment law and industrial relations in the Member States,

L. whereas the PWD clearly states in recital 12 that "Community law does not preclude Member States from applying their national legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State" and that "Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means",

M. whereas the objective of the PWD – to provide a climate of fair competition and measures guaranteeing respect for the rights of workers – is important, in an era in which the transnational provision of services is expanding, for the protection of the workers concerned, while respecting the framework of employment law and industrial relations in the Member States, provided that Community legislation is not thereby infringed,

N. whereas, according to the PWD, the laws of the Member States must lay down a nucleus of mandatory rules for minimum protection of posted workers to be observed in the host country without preventing the application of terms and conditions of employment more favourable to workers,

(...)

R. whereas Article 28 of the Charter of Fundamental Rights of the European Union codifies the right of collective bargaining and collective action,

(...)

V. whereas in relation to the free movement of goods the following clause (known as the "Monti clause") was included in Regulation (EC) No 2679/98: Article 2: "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States",

W. whereas Article 1(7) of the Services Directive provides that: "This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law",

(...)

AA. whereas the right to take collective action and to conclude collective agreements is a fundamental right which forms an integral part of the general principles of Community law; (...).

(...)

AC. whereas it has been noted that differing views and interpretations existed within the ECJ and between the Court and its Advocates-General in the various cases relating to the PWD, in particular in the abovementioned Laval and Rüffert cases; whereas when such views and interpretations differ, there may be a case for clarification of the balance between fundamental rights and freedoms,

1. Emphasises that freedom to provide services is one of the cornerstones of the European project; considers however, this should be balanced, on the one hand, against fundamental rights and the social objectives set out in the Treaties and on the other hand, against the right of the public and social partners to ensure non-discrimination, equal treatment, and the improvement of living and working conditions; recalls that collective bargaining and collective action are fundamental rights that are recognised by the Charter of Fundamental Rights of the European Union and that equal treatment is a fundamental principle of the European Union;

2. Is of the opinion that any EU citizen should have the right to work anywhere in the European Union and thus should have a right to equal treatment; therefore regrets that this right is not applied uniformly across the EU; is of the view that transitional arrangements remaining in place should be subject to rigorous review by the Commission, to assess whether they are truly necessary to prevent distortions in national labour markets and, that where that is not found to be the case, they should be removed as quickly as possible;

3. Emphasises that freedom to provide services does not contradict and is not superior to the fundamental right of social partners to promote social dialogue and to take industrial action, in particular since this is a constitutional right in several Member States; stresses that the intention of the Monti clause was to protect fundamental constitutional rights in the context of the internal market; recalls at the same time that free movement of workers is one of the four freedoms of the internal market;

4. Welcomes the Lisbon Treaty and the fact that the Charter of Fundamental Rights of the European Union is to be made legally binding; notes that this would include the right of trade unions to negotiate and conclude collective agreements at the appropriate levels and, in the case of conflicts of interest, to take collective action (such as strike action) to defend their interests;

5. Emphasises that freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member States; emphasises therefore that the abovementioned ECJ rulings in Rüffert, Laval and Viking demonstrate that it is necessary to clarify that economic freedoms, as established in the Treaties, should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights as recognised in the Member States and by Community law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers;

6. Stresses that the PWD allows public authorities and social partners to lay down terms and conditions of employment which are more favourable to workers according to the different traditions in the Member States;

7. Stresses that recital 22 of the PWD states that the Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions which is confirmed by Article 137(5) of the EC Treaty;

8. Emphasises therefore the need to safeguard and to strengthen equal treatment and equal pay for equal work in the same workplace as laid down in Articles 39 and 12 of the EC Treaty; considers that in the framework of freedom to provide services or freedom of establishment, the nationality of the employer, or of employees or posted workers cannot justify inequalities concerning working conditions, pay or the exercise of fundamental rights such as the right to strike;

(...)

General impact

(...)

13. Considers that correct application and enforcement of the provisions of the PWD are essential to secure the attainment of its objectives, namely to facilitate the provision of services while guaranteeing the appropriate protection of workers, and to fully respect collective bargaining arrangements existing in the Member States to which workers are posted within the framework of that Directive;

(...)

16. Questions the introduction of a proportionality principle for actions against undertakings which, by relying on the right of establishment or the right to provide services across borders, deliberately

undercut terms and conditions of employment; considers that there should be no question as to the use of industrial action to uphold equal treatment and to secure decent working conditions;

17. Emphasises that the EU's economic freedoms cannot be interpreted as granting undertakings the right to evade or circumvent national social and employment laws and practices, or to impose unfair competition on wages and working conditions; considers therefore that cross border actions of undertakings which may undercut terms and conditions of employment in the host country must be proportionate and cannot automatically be justified by the EC Treaty provisions on, for example, free movement of services or freedom of establishment;

18. Emphasises that Community law has to respect the principle of non discrimination; emphasises further that the Community legislator has to ensure that no obstacles are created either to collective agreements, for example, those implementing the principle of equal pay for equal work for all workers in the workplace, regardless of their nationality or that of their employer, in the place where the service is provided, or to industrial action in support of such an agreement which is in accordance with national laws or practice;

19. Acknowledges that the ECJ rulings in the abovementioned Laval , Rüffert and Luxembourg cases have caused significant concern regarding the way in which minimum harmonisation directives must be interpreted;

(...)

21. Is of the opinion that the limited legal basis of free movement of the PWD may lead to the PWD being interpreted as an express invitation to unfair competition concerning wages and working conditions; therefore considers that the legal basis of the PWD could be broadened to include a reference to the free movement of workers;

22. Emphasises that the current situation might as a result lead to workers in host countries feeling pressured by low wage competition; considers therefore that consistent implementation of the PWD must be ensured in all Member States;

(...)

Demands

(...)

27. Therefore welcomes the statement of 3 April 2008 in which the Commission committed itself not only to continue to tackle competition that is based on low social standards but also emphasised that freedom to provide services does not contradict and is not in any way superior to the fundamental right to strike, and to join a trade union; (...).

(...)

31. Believes that the exercise of fundamental rights as recognised in the Member States, in ILO Conventions and in the Charter of Fundamental Rights of the European Union, including the right to negotiate, conclude and enforce collective agreements and the right to take industrial action should not be put at risk;

32. Emphasises that it must be made absolutely clear that the PWD and other directives do not prohibit Member States and social partners from demanding more favourable conditions, aimed at equal treatment of workers, and that there are assurances that Community legislation can be implemented on the basis of all the existing labour market models;"

(...)

THE LAW

ON THE ADMISSIBILITY

66. The Committee notes that, in accordance with Article 4 of the Protocol, which was ratified by Sweden on 29 May 1998 and took effect in respect of that state on 1st July 1998, the complaint was lodged in writing and concerns Articles 4, 6 and 19 of the Charter, which were accepted by Sweden when it ratified this treaty on 29 May 1998 and by which it has been bound since the entry into force of the treaty in respect of it on 1st July 1999.

67. Moreover, the grounds for the complaint are stated.

68. The Committee also observes that pursuant to Articles 1 c) of the Protocol, the Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) are representative national trade unions for the purposes of the collective complaints procedure. It also notes that this is not contested by the Government.

69. The Committee notes that the complaint is lodged in the name of LO and signed by its President, Mr Karl Petter Thorwaldsson; the complaint is also lodged in the name of TCO and signed by its President, Mrs Eva Nordmark, both entitled to represent their organisation. The Committee, therefore, considers that the condition provided for in Rule 23 of the Rules is fulfilled.

70. The Committee notes that no observations on the admissibility of the complaint are formulated in its submissions by the Government.

71. The Committee declares the complaint admissible.

ON THE MERITS

Preliminary observations

As to the relationship between the Charter and EU law

72. With respect to the relevance, from the point of view of the Charter, of any legally binding measures adopted by the institutions of the EU within the framework of EU law, the Committee recalls that:

“(...) [T]he fact that [national] provisions (...) are based on a European Union directive does not remove them from the ambit of the Charter (...). In this regard, the Committee has already stated that it is neither competent to assess the conformity of national situations with a directive of the European Union nor to assess compliance of a directive with the European Social Charter. However, when Member States of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the Committee to assess compliance of a national situation

with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter” (see *Confédération Générale du Travail (CGT) v. France* – Complaint No. 55/2009, decision on the merits of 23 June 2010, §§32 and 33).

73. The Committee considers that the same principle is applicable – *mutatis mutandis* – to national provisions based on preliminary rulings given by the CJEU on the basis of Article 267 of the Treaty on the functioning of the European Union, as that given with respect to the Laval case (see paragraph 8 above). This means that it is ultimately for the Committee to assess compliance of a national situation with the Charter, including when legislative changes, which have been introduced into domestic law to comply with preliminary rulings given by the CJEU, may affect the implementation of the Charter.

74. As regards a possible presumption of conformity of EU law with the Charter, the Committee first of all points out that the law of the Charter and EU law are two different legal systems, and the principles, rules and obligations constituting EU law do not necessarily coincide with the system of values, principles and rights embodied in the Charter. Second, the Committee, recalling that “the European Court of Human Rights has already found that in certain circumstances there may be a presumption of conformity of European Union law with the European Convention on Human Rights (‘the Convention’),” considers that EU rules, normative acts and judicial decisions may often conform also with the requirements of the Charter, especially now that the provisions of the EU Charter of Fundamental Rights have legal force. However, the Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter. Furthermore the Committee notes that the EU has not taken steps to accede to the European Social Charter at the same time as the European Convention on Human Rights. Therefore, the Committee confirms that it will carefully follow developments resulting from the gradual implementation of the reform of the functioning of the EU following the entry into force of the Treaty of Lisbon, including the Charter of Fundamental Rights. It will review its assessment on a possible presumption of conformity when it considers that the existence of the factors which the European Court of Human Rights identified as warranting the existence of such a presumption in respect of the Convention, which are currently missing insofar as the European Social Charter is concerned, have materialised. In the meantime, whenever it has to assess situations where States take into account or are bound by legal rules or acts of the EU, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law (see *Confédération Générale du Travail (CGT) v. France* – Complaint No. 55/2009; more generally, Interpretative statement on Article 19§6 - Conclusions 2011, as well as *CFE-CGC v. France*, Complaint No. 16/2003, decision on the merits of 12 October 2004, §30).

As to the provisions of the Charter at stake

75. In the text of the complaint, LO and TCO allege that “Sweden has not ensured the satisfactory application of Article 4, 6 and 19§4 of the European Social Charter” and that it “(...) has violated its obligations under Articles 4 and 6 in respect of the restrictions on the right to strike and in respect of the breach of the State’s duty to promote collective bargaining.” (cf. paragraphs 3 and 88 of the complaint).

76. However, in its response to the Government’s submissions, the complainant trade unions merely specifies that:

“(...) Sweden has, by the legislation passed in the aftermath of the ECJ’s Judgment in the Laval case, violated its obligations under Article 6.2 and 6.4 in the European Social Charter, in respect of the restrictions on the right to strike and in respect of the breach of the State’s duty to promote collective bargaining. Sweden has furthermore violated Article 19.4 by imposing restrictions on the right to take industrial action against foreign companies”.

77. The Committee notes that no reference to a possible violation of Article 4 of the Charter on the right to a fair remuneration is made in the response of LO and TCO to the Government’s submissions. It notes that in the above-mentioned response, the complainant trade unions made several considerations concerning Articles 6§§2 and 4, as well as 19§4, but not with respect to Article 4 of the Charter.

78. The Committee considers that the substance of the arguments contained in the complaint and the response to the Government’s submissions do not concern Article 4 of the Charter. Therefore, the Committee will limit its assessment to the alleged violation of Article 6§§2 and 4, and Article 19§4 *a* and *b*.

I. THE ALLEGED VIOLATION OF ARTICLE 6§§2 and 4 OF THE CHARTER

79. Article 6§§2 and 4 of the Charter reads:

Article 6 – The right to bargain collectively

Part I: "All workers and employers have the right to bargain collectively.";

Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

... ;

2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

... and recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

80. The Appendix to the Charter, Part II, Article 6§4, reads as follows:

Appendix to the Charter, Part II, Article 6§4

"It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G."

81. Article G of the Charter reads:

Article G – Restrictions

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

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A - Arguments of the parties

a) The complainant trade unions

82. In view of a better understanding of their arguments, LO and TCO provide background information on the role of collective agreements and actions in Sweden and the evolution of the Swedish labour legislation in relation to Directive 96/71/EC on the Posting of Workers (see paragraph 36 above). Wage levels in Sweden are established primarily through national sectorial collective agreements, followed by local negotiations. Such collective agreements do not in general specify minimum wages, but instead establish various wage levels for different categories of employee, with lower wage levels being set for inexperienced and/or unskilled workers. These collective agreements, when in force, cannot permit any discriminatory treatment, including discrimination based on national origin. Employers are also obliged to apply collective agreements – which cover over 90% of workers - to non-organised workers, and are also legally bound by the provisions of these agreements either directly as a result of their decision to enter into such an agreement with the trade unions concerned or indirectly through their membership of local or national employer organisations.

83. However, the complainant trade unions also state that in Sweden there is no state supervision of the labour market, other than that concerning the working environment and working hours. Legislation on wages is entirely non-existent. As a result, LO and TCO consider that, without a collective agreement, a trade union in Sweden has no tools for safeguarding its members' rights and that if the trade unions are prevented from signing collective agreements, pay is not regulated either by law or by collective agreement and therefore there is no supervision whatsoever of pay and employment conditions.

84. As regards the right to strike, after recalling the basic applicable provisions (see paragraph 35 above), LO and TCO stress that when a collective agreement is concluded, the possibilities to resort to collective action are limited and that contravention of the obligation to keep 'industrial peace' is subject to legal sanction and the possibility of economic and even punitive damages. The complainant trade unions indicate that, following the judgment delivered in 1989 (AD 1989 No. 120) by the Swedish Labour Court, a legislative amendment was made in 1991 to the Co-determination Act (so called *Lex Britannia* – Act No. 1994:13) in order to allow trade unions to carry out collective action against a foreign employer who would not comply with a Swedish collective agreement on the ground that he is already bound by a less protective collective agreement in his country. LO and TCO consider that the new legislation established the right of Swedish trade unions to replace foreign collective agreements by Swedish collective agreements. According to the complainant trade unions, the aim of the reform was to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with usual practice in Sweden and create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other member States. LO and TCO also point out that in the preparatory works on the posting of workers (see paragraph 35 above), - adopted as an implementation of Directive 96/71/EC (see paragraph 36 above) - *Lex Britannia* was referred to as a tool to prevent social dumping.

85. The complainant trade unions report that against this statutory background, at the end of 2004, 2 trade unions - i.e. LO-*Byggnads* (through one of its local branches in Stockholm, called *Byggettan*) and *Elektrikerna* - implemented a collective action against the Latvian construction company *Laval* because it temporarily posted Latvian workers to Sweden without signing any local collective agreements relating to, among other conditions of employment, the wage level. Given this situation, in December 2004, *Laval* commenced proceedings before the Swedish Labour Court against *Byggnads*, *Byggettan* and *Elektrikerna*, seeking a declaration that the collective action affecting its worksites was illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the Swedish Labour Court dismissed *Laval*'s application for an interim order that the collective action should be brought to an end.

86. However, since it wished to ascertain whether Articles 12 and 49 of the Treaty establishing the European Community (TEC), as well as Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Swedish Labour Court decided on 29 April 2005 to make a reference to the CJEU for a preliminary ruling. In its order for reference, of 15 September 2005, the Swedish Labour Court referred the following questions to the CJEU for a preliminary ruling:

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

Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

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

87. In response, the CJEU ruled that the collective actions carried out by the trade unions concerned constituted a disproportionate infringement of Community provisions on the freedom to provide services abroad, and also concluded that states cannot impose an obligation on foreign service providers to respect any working standards which would go beyond the minimum standards set out under the provisions of Directive 96/71/EC. The collective action was thus deemed illegal by the CJEU (see paragraphs 42 and 43 above).

88. In accordance with the preliminary ruling of the CJEU, in December 2009 the Swedish Labour Court (see paragraph 40 above) held that the above-mentioned collective actions “constituted a serious violation of the [TEC] as they were in conflict with a fundamental principle in the treaty, the freedom to provide services. Even if the right to take industrial actions has also been recognised by the European Community as a fundamental right, it was found that the actual industrial actions, despite their objective of protecting workers, are not acceptable as they were not proportionate (...)”. On this basis, the trade unions concerned were ordered by the court to pay damages, and this despite the fact – as pointed out by LO and TCO - “that they took industrial action that the Swedish legislator had expressly stated was lawful”.

89. The complainant trade unions report that following the above-mentioned judicial decisions and according to a governmental proposal (No. 2009:10), legislative amendments were introduced by the Parliament to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678). The amended legislation came into force on 15 April 2010. The complainant trade unions claim that the relevant amendments restrict the right of trade unions to resort to collective action against all companies that post workers to Sweden, including employers based in countries outside the EEA. LO and TCO consider that Swedish authorities went beyond the CJEU judgment in the legislative change since the restrictions on the rights of trade unions also apply to companies from non-EEA countries posting workers in Sweden.

90. The complainant trade unions point out that the right to resort to collective action for the purpose of regulating the conditions for posted workers in a collective agreement is limited in the new regulation by Section 5a of the amended version of the Posting of Workers Act. Furthermore, LO and TCO note that Article 41 c of the Co-determination Act establishes that collective actions in breach of Section 5a of the Posting of Workers Act are unlawful, and thus make legal sanctions for unlawful collective actions, economic and punitive damages according to Section 54-55 applicable in such cases.

91. The complainant trade unions are of the view that the “main interference” with the rights guaranteed in the Charter is as follows:

“In the first place, the collective agreement requested by the trade union organisation may only regulate matters covered by Article 3(1) a-g of the EU Posting of Workers Directive, i.e. work periods, annual holidays and minimum rates of pay etc., see the Swedish Posting of Workers Act, Section 5a, point 2. It means that the legislator has prohibited trade unions from trying to bring about collective agreements using industrial action on matters other than those specifically mentioned.

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

In the third place, the new statutory requirements mean that the trade union organisations in some cases are entirely deprived of the right to try to regulate working conditions through collective agreements achieved with the help of industrial action. Under Section 5 a, paragraph 2 of the Posting of Workers Act, industrial action may not be taken at all if the employer shows that the workers' conditions are in all essentials at least as favourable as the minimum conditions of a normal Swedish collective agreement within the framework of the Posting of Workers Directive, Article 3 (1) a-g. There is no requirement for these conditions to be present in a foreign collective agreement, or even in a binding agreement at all. It is sufficient for the employer to show that he applies such conditions. If the employer can present some type of document in which it is stated that he applies such conditions it would probably be sufficient to prohibit the industrial action. This means that in these cases ‘collective agreement free zones’ are created in the Swedish labour market, where it is only possible to conclude a collective agreement if the employer accepts it voluntarily”.

92. LO and TCO point out that the new legislation applies even to situations where the union has members among the employees. This means that the legislation prevents the unions from representing these members in the same way as other members, since the legislation only allows collective agreements to be concluded with their foreign employers on a voluntary basis and concerning a limited range of minimum terms and conditions. The complainant trade unions also stress that trade unions in Sweden are now legally required to accept collective agreements that will impose inferior wages and benefits for foreign workers posted in Sweden compared to national workers, which is contrary to the principle of equal treatment and non-discrimination of workers due to national origin.

93. As regards the consequences of the new legislation on the functioning of the Swedish labour market, in their response to the Government submissions, LO and TCO state inter alia that:

- The new rules will probably make Swedish trade unions very cautious and less inclined to approach foreign companies posting workers in Sweden with a view to conclude collective agreements. The judgement of the Swedish Labour Court also revealed that economic sanctions could be imposed retroactively on trade unions, even if the trade unions had taken action which were clearly understood to be lawful under Swedish legislation at the time.
- The decrease in the number of agreements signed from 2007 to 2010 (from 107 to 27) provides evidence of this above-mentioned concern. No trade union has commenced industrial action with a view to bringing about a collective agreement with a foreign company in recent years in the Swedish labour market. This was relatively rare even before the Laval case, but notice of industrial action against foreign companies for the purpose of achieving a collective agreement was regularly given every year.
- Swedish companies can no longer compete on equal terms with foreign companies. In the short run, the new legislation will only affect the right to take industrial actions in support of posted workers. However, in the long run it is obvious that lower wages and working conditions for these workers will affect even the purely internal Swedish labour market.
- If it is impossible to force employers to conclude collective agreements on some parts of the labour market, this will in the long run have an impact on the entire Swedish labour market model. The purpose of industrial actions is to put economic pressure on the counterpart. If industrial actions by trade unions can be illegal because of the economic interest of the employer, this will disturb a fair balance on the labour market.

94. The complainant trade unions thus conclude that the legislative amendments made in 2010 to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678) violate Articles 4 and 6§§ 2 and 4 of the Charter, with respect to the State's duty to promote collective agreements and recognise the right to collective action.

95. LO and TCO also indicate that further to the above-mentioned legislative amendments, in December 2009, when the Directive 2006/123/EC on services in the internal market (see paragraph 35 above) was implemented, a change was made also to the Foreign Offices Act (1992:160) and the Foreign Branches Office Ordinance (1992:308). On this basis, the requirement for EEA foreign companies to have a legal representative in Sweden when they conduct economic activities in Sweden was withdrawn.

96. The complainant trade unions argue that, as regards EEA countries, the result will be that when Swedish trade unions want to engage in collective bargaining, they could be forced to try to get in touch with the employer abroad. This will undermine the possibility for establishing collective agreements and therefore is contrary to the obligations by Sweden to promote collective bargaining according to Article 6§2 of the Charter.

97. The complainant trade unions conclude that Sweden has, by the legislation passed in the aftermath of the CJEU's Judgment in the Laval case and by the legislative amendments adopted in order to implement Directive 2006/123/EC (see paragraph 35 above) violated its obligations under Article 4 and Article 6§§2 and 4 of the Charter, in respect of the breach of the State's duty to promote collective bargaining and recognise the right to strike.

b) The respondent Government

As to the provisions of the Charter at stake

98. The Government is of the view that the legislative amendments made in 2010 to the Foreign Posting of Employees Act (1999:678) do not affect either the right to take industrial action in a purely national situation or the ability of foreign employers to sign a collective agreement with a Swedish trade union. It points out that the amendments refer to the possibility that Swedish trade unions can take industrial action against a foreign employer who posts workers to Sweden in order to regulate employment conditions that go beyond the minimum requirements of the "hard core" or the above-mentioned act. As regards the changes made in December 2009 to the Foreign Branch Offices Act (1992:160), the Government indicates that were deemed necessary in order for legislation to comply with Directive 2006/123/EC on services in the internal market (see paragraph 35 above).

99. The Government states that the legislative changes introduced in 2010 as a consequence of the Laval case by the [CJEU], and those made to the Foreign Branch Office Act adopted in 2009 "do not violate the provisions of the European Social Charter, including the ECSR practice to date". In this respect, it refers to Articles 4, 6 and 19§4 whose violation is directly alleged in the text of the complaint. Moreover, the Government points out that "neither the Swedish Laval inquiry, nor the majority of the Swedish tripartite ILO Committee (Sw. *Svenska ILO-kommittén*), at the time of enactment considered the legislative proposal following the Laval case contrary to relevant international regulations". The Government also stresses that the changes were considered necessary in order for the Swedish legislation to comply with EU law on freedom to provide services and non-discrimination, as interpreted by the [CJEU] in the "Laval case".

Additional information on new legislative initiatives regarding posted workers temporarily in Sweden

100. The Government firstly refers to the assignment of a parliamentary committee with the purpose of evaluating the changes to the Foreign Posting of Employees Act after the Laval case. This committee, which, according to the information provided by the Government, shall present the results of its work by the end of 2014, is inter alia entrusted to “consider necessary changes to safeguard Swedish labour market model in an international context”. The Government indicates that the proposals of the above-mentioned committee “shall include an analysis of the consequences, if any, in relation to relevant international regulations”. In this respect, the Government points out that it “would be happy to submit in due time further information to the European Committee of Social Rights regarding the conclusions of this newly assigned parliamentary committee”.

101. Secondly, the Government indicates that according to a planned bill - to be submitted to the Swedish Council on Legislation and to the Parliament by 30 November 2012 - a foreign employer will be inter alia obliged to appoint a contact person in Sweden, who should be authorised to receive notice on behalf of the employer. On this basis, Swedish trade unions will have the opportunity to establish easier contacts with foreign employers, and this also in view of the establishment of collective agreements. The Government points out that it would be happy to provide the Committee with further information “once the planned bill has been submitted to the Swedish Council on Legislation and the Parliament”.

102. Thirdly, the Government indicates that “[o]n 18 December 2012, a bill regarding agency posted workers was submitted to the Parliament, which includes a proposal that will increase the trade unions’ possibilities to take industrial action in order to regulate the terms and conditions of employment of posted agency workers”. According to the Government, the bill provides that “trade unions may take industrial action as regards posted agency workers in order to regulate employment terms that go beyond the minimum levels of the ‘hard core’ of the EU posting of Workers Directive. This will provide trade unions with powerful tools to ensure fair terms and conditions of posted agency workers in accordance with relevant EU law. The legislative changes are proposed to enter into force on 1st January 2013”.

c) Response by the complainant trade unions on the additional information provided by the Government

As to the assignment of a Parliamentary Committee regarding posting of workers

103. LO and TCO consider that the parliamentary committee has not been given the task of evaluating whether Sweden fulfils its obligations under the European Social Charter or other international conventions. The terms of reference of the parliamentary committee only includes a standard phrase urging the committee to consider the relation of their proposals to relevant international regulations. The fact that the standard phrase does not provide any guarantee for a sufficient analysis of

relevant conventions and recommendations is evident from the records of the tripartite Swedish ILO Committee which on numerous occasions in recent years has been forced to conclude that committees preparing new legislation have failed in this respect. LO and TCO conclude that the assignment of the above-mentioned parliamentary committee “should therefore not be interpreted as a measure aimed at remedying Sweden’s ongoing violation of the European Social Charter”.

As to the Government proposal regarding contact person and obligation to report posting of workers

104. LO and TCO consider that the possible adoption of a legislation requiring foreign employers to appoint a contact person in Sweden would be “an improvement compared to the current situation”. However, the complainant trade unions consider that “there would still not be any guarantee that foreign companies will provide Swedish trade unions with a counterpart, as there is no requirement that the representative of the employer will be mandated to negotiate and conclude collective agreements with the unions during the work in Sweden”.

As to the new legislation regarding posted agency workers

105. LO and TCO consider that the new national legislation on posted agency workers is “a step forward”. However, they consider that “Swedish unions will still not be allowed to take industrial actions in order to bring about equal treatment with Swedish workers on issues outside the framework of the EU Posting of Workers Directive, Article 3 (1) a-g” and that “the problem with ‘collective agreements free zones’ will remain”. Moreover, the complainant trade unions are of the view that “if the employer shows that the workers’ conditions, within the framework of the Posting of Workers Directive, are in all essentials at least as favourable as those of a regular Swedish collective agreement, or those at the user company, still no industrial actions at all will be allowed (...)”.

As to the improvement of the application of the EU Posting of Workers Directive

106. LO and TCO consider that the ongoing discussions within the EU regarding the above-mentioned improvement is, in the present context, “irrelevant” and that “a proposal being discussed within the EU does not address the issue of the right to take collective action [in Sweden]”.

B - Assessment of the Committee

107. Having regard to the preliminary observations on the merits of the complaint (paragraphs 72 to 74 above), the Committee considers that its task is not to judge the conformity to the Charter of the CJEU's preliminary ruling in the Laval case, but rather to assess whether the legislative amendments adopted by the Swedish Parliament, in April 2010 (in the aftermath and as a consequence of the above-mentioned ruling) and in December 2009 (in order to implement the provisions of Directive 2006/123/EC) constitute a violation of the Charter.

108. In its assessment regarding the alleged violation of Article 6§§2 and 4, the Committee will refer in particular to: a) Sections 5a - 5b (SFS: 2012:857) and Sections 10 - 11 (SFS 2013:351) of the Foreign Posting of Employees Act (1999:678), Section 41c of the Co-determination Act (1976:580) and the Temporary Agency Work Act (2012:854); b) the changes made in Section 2 of the Foreign Branch Offices Act (2009:1083), Section 3 of the Foreign Branch Offices Ordinance (1992:308).

109. From a general point of view, the Committee considers that the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22), protection in cases of termination of employment (Article 24), protection of the workers' claims in the event of the insolvency of their employer (Article 25), dignity at work (Article 26) workers' representatives protection in the undertaking and facilities to be accorded to them (Article 28), information and consultation in collective redundancy procedures (Article 29).

110. In addition, the Committee notes that the right to collective bargaining and action receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and EU level. In this respect, reference is made *inter alia* to Article 8 of the International Covenant on Economic, Social and Cultural Rights (see paragraph 37 above), the relevant provisions of the ILO conventions Nos. 87, 98 and 154 (see paragraph 38 above) as well as the EU Charter of Fundamental Rights, Directive 2006/123/EC on services in the internal market (cf. Article 1§7) and the Directive 2008/104/EC on temporary agency work - recital 19 (see paragraphs 36 above).

111. The Committee recalls that on the basis of Article 6§2 of the Charter "Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other (...)" (Conclusions I - 1969, Statement of Interpretation on Article 6§2). The Committee also considers that the States should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which

legitimate methods should be used in their effort to promote and defend the interest of the workers concerned.

112. The Committee is aware that collective bargaining is a mutual process where not all conditions required by one party is likely to be accepted by the other, and that ensuring the effective exercise of the right to collective bargaining does not mean that employers can be obliged by the State or forced by trade unions to participate to a collective agreement or to accept all the conditions required by trade unions. However, as regards the alleged violation of Article 6§2 by the Swedish legislation, the Committee notes that, with respect of foreign posted workers, on the basis of Section 5a and Section 5b of the Foreign Posting of Employees Act, collective agreements requested by trade unions may only regulate, with the backing and by means of a collective action, the minimum rate of pay or other minimum conditions - or, as regards the particular case of posted agency workers, the pay or other conditions - within the matters referred to in Section 5 of the above-mentioned Act. In this respect, the Committee notes that this statutory framework imposes substantial limitations on the ability of Swedish trade unions to make use of collective action in establishing binding collective agreements on other matters and/or to reach agreements at a higher level.

113. Moreover, the Committee notes that following the changes in Section 2 of the Foreign Branch Offices Act (2009:1083), foreign companies which conduct their economic activities in Sweden are not obliged to create a branch office with independent management in Sweden if the economic activity is made subject to the provisions on free movement of goods and services in the Treaty on the Functioning of the European Union or the corresponding provisions of the Agreement on the European Economic Area (EEA).

114. Given this statutory framework, Swedish trade unions willing to conclude agreements with the above-mentioned foreign companies are forced to negotiate and conclude such agreements with the responsible employers abroad. In this respect, the Committee notes that the Foreign Posting of Employees Act has been amended as from 1st July 2013. The amendments provide that the foreign employer is obliged to appoint a contact person in Sweden and notify the Swedish Work Environment Authority about him or her. The contact person shall be authorised to receive notifications on behalf of the employer and be able to provide evidence that the requirements of the Foreign Posting of Employees Act are met (see paragraph 35 above). However, the Committee notes that the applicable legislation does not require that the contact person be entitled to negotiate and conclude collective agreements.

115. As regards the changes in the Foreign Branch Offices Ordinance (1992:308), the Committee notes that, until June 2011, the second paragraph of Section 3 of this Ordinance read as follows: "A foreign company established within the meaning of the European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market in a state other than Sweden within the European Economic Area (EEA) and which is a service provider within the meaning of the same Directive is not covered by the requirement for a branch office if the company only temporarily exercises economical activities in Sweden". However, the Committee notes that this paragraph - introduced by Ordinance 2009:1097 in December 2009 - was abolished by Ordinance 2011:724.

116. The Committee considers that, as regards posted workers, the legislative restrictions and limitations, described in the paragraphs above, do not promote the development of suitable machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee therefore holds that, on the one hand, Sections 5a and 5b of the Foreign Posting of Employees Act (1999:678) and, on the other hand, the changes made in the Foreign Branch Offices Act (SFS 2009:1083), are not in conformity with article 6§2 of the Charter.

117. As for Article 6§4, the Committee recalls first of all that this Article "(...) recognises the right to collective action (...) in cases of conflicts of interest. It follows that it cannot be invoked in cases of conflicts of right, i.e. in particular in cases of disputes concerning the existence, validity or interpretation of a collective agreement, or its violation, e.g. through action taken during its currency with a view to the revision of its contents. This interpretation should be adopted even where a collective agreement contains provisions purporting to permit such industrial action." (Conclusions I, Statement of Interpretation on Article 6§4). Further to the right to strike, Article 6§4 encompasses other types of action taken by employees or trade unions, including *blockades* or *picketing*.

118. The Committee considers that in accordance to the Appendix to the Charter relating to Article 6§4 "[E]ach 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". This means that even though the right of trade unions to collective action is not an absolute one. Nevertheless, a restriction to this right can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: a) is prescribed by law; b) pursues a legitimate purpose - i.e. the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, c) is necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued.

119. The Committee considers that excessive or abusive forms of collective action, such as extended blockades, which would put at risk the maintenance of public order or unduly limit the rights and freedoms of others (such as the right of co-workers to work, or the right of employers to engage in a gainful occupation) may be limited or prohibited by law. In this context, the Committee considers that the prohibition of certain types of collective action, or even the introduction of a general legislative limitation of the right to collective action in order to prevent initiatives aimed at achieving illegitimate or abusive goals (e.g. goals which do not relate to the enjoyment of labour rights, or relate to discriminatory objectives) would not be necessarily contrary to Article 6§4 of the Charter.

120. However, the Committee considers that national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers. In this context, within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.

121. The Committee further considers that legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.

122. Consequently, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality.

123. Applying this reasoning to the alleged violation of Article 6§4 by the Swedish legislation, the Committee notes that: a) Section 5a of the Foreign Posting of Employees Act, taken together with the provisions of Section 41c of the Co-determination Act, provides that no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (including wage levels and other essential aspects of work) that are at least as favourable as the minimum conditions established in agreements at central level; b) Section 5b of the Foreign Posting of Employees Act, taken together with the provisions of Section 41c of the Co-determination Act, provides that no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (including wage levels and other essential aspects of work) that are at least as favourable as the conditions established in agreements at central level or in the user undertaking. Furthermore, the Committee notes that, under Section 41c of

the Co-determination Act, collective action taken in violation of Section 5a and 5b is unlawful, and trade unions acting in breach of the Foreign Posting of Employees Act shall pay compensation for any loss incurred (cf. Section 55 of the Co-determination Act). This constitutes a disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action, insofar as it prevents trade unions taking action to improve the employment conditions of posted workers over and beyond the requirements of the above-mentioned conditions.

124. In this respect, the Committee notes that the Temporary Agency Work Act, entered into force on 1st January 2013, increased trade unions' possibilities to take collective action in order to regulate the terms and conditions of employment of agency posted workers. This Act also provides that trade unions may take collective action as regards posted agency workers in order to regulate employment terms that go beyond the minimum levels established by the EU posting of Workers Directive. The Committee considers that the guarantees introduced by the Swedish legislation with respect to agency posted workers represent a step forward in protecting the right of posted workers to collective action. However, there are still restrictions on the right of posted agency workers to take collective action as a result of Section 5b of the Foreign Posting of Employees Act.

125. The Committee therefore holds that Sections 5a and 5b of the Foreign Posting of Employees Act, as well as Section 41c of the Co-determination Act (see paragraph 35 above) do not adequately recognise the fundamental right to collective action and therefore are not in conformity with article 6§4 of the Charter.

II. THE ALLEGED VIOLATION OF ARTICLE 19§4 *a* AND *b* OF THE CHARTER

126. Article 19§4 *a* and *b* of the Charter reads:

Article 19 – The right of migrant workers and their families to protection and assistance

Part I: "Migrant workers who are nationals of a Party and their families have the right to protection and assistance in the territory of any other Party.";

Part II: "to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

- a) remuneration and other employment and working conditions;
- b) membership of trade unions and enjoyment of the benefits of collective bargaining.

(...)"

A - Arguments of the parties

a) The complainant trade unions

127. In general, the arguments developed by LO and TCO with respect to the alleged violation of Article 6 of the Charter, are applicable, *mutatis mutandis*, to the alleged violation of Article 19§4. However, with specific regard to the alleged violation of Article 19§4, the complainant trade unions make the following precision:

“[W]orkers from EU/EEA countries that are posted to Sweden are migrant workers lawfully within Swedish territory, with the effect that Sweden has the obligation to ensure them treatment not less favourable than that of their own nationals in respect of, inter alia, remuneration and other employment and working conditions and the enjoyment of the benefits of collective bargaining”.

128. In this respect, LO and TCO also point out that:

“[A]s the current Swedish legislation restricts the content of the collective agreements that Swedish trade unions, with the backing of a possibility to take collective action, can ask the employers of posted workers to sign, to minimum standards and to certain subject matters, Sweden effectively denies posted workers equal treatment in respect of remuneration and other employment conditions. For the same reason, current Swedish legislation denies posted workers the enjoyment of the benefits of collective bargain on the same terms as Swedish nationals. Sweden is thus in violation of Article 19§4 letter a) and b) of the Charter”.

129. More particularly, as regards the status of migrant workers, it is argued that:

“[T]he fact that the posted workers’ stay in Sweden is of a temporary nature should not affect their status as ‘migrant workers’. Article 19.4 only speaks of “workers lawfully within their territories” while other provisions of Article 19 expressively have a more narrow scope requiring the worker to be ‘lawfully residing’ (Art 19§8) or permitted to ‘establish himself within their territory’ (19§6)”.

130. The complainant trade unions conclude that, on the one hand, the legislative amendments made to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678) constitute a violation of Article 19§4 *a* and *b*; on the other hand, the changes made to the Foreign Branch Offices Act (1992:160) and the Foreign Branch Offices Ordinance (1992:308) constitute a violation of Article 19§4 *b*.

b) The respondent Government

131. The arguments developed by the Government with respect to the alleged violation of Article 6 of the Charter, are applicable, *mutatis mutandis*, to the alleged violation of Article 19§4.

B - Assessment of the Committee

132. Having regard to its preliminary observations on the merits of the complaint (paragraphs 72 to 74 above), as well as its findings with respect to the alleged violation of Article 6§§2 and 4, in its assessment the Committee will refer to: a) Sections 5a - 5b (SFS: 2012:857) and Sections 10 - 11 (SFS 2013:351) of the Foreign Posting of Employees Act (1999:678), Section 41c of the Co-determination Act (1976:580) and the Temporary Agency Work Act (2012:854); b) the changes made in Section 2 of the Foreign Branch Offices Act (2009:1083), Section 3 of the Foreign Branch Offices Ordinance (1992:308).

133. The Committee considers that according to Article 19§4, with a view to assisting and improving the legal, social and material position of migrant workers and their families, States parties are required to guarantee certain minimum standards with respect to, *inter alia*, a) remuneration and other employment and working conditions b) trade union membership and the enjoyment of benefits of collective bargaining. In this respect, States parties are required to prove the absence of discrimination, direct or indirect, in terms of law and practice. Moreover, States should pursue a positive and continuous course of action providing for more favourable treatment of migrant workers.

134. With regard to the alleged violation of Article 19§4, the Committee first of all notes that the complaint concerns the treatment in Sweden of foreign posted workers. In this respect, the Committee recalls that posted workers are workers who, for a limited period, carry out their work in the territory of a State other than the State in which they usually work, which is often their national State. The Committee is aware that, in terms of length and stability of presence in the territory of the so called "host State", as well as of their relationship with such State, the situation of posted workers is different from that of other category of migrants workers, and in particular from the situation of those foreign workers who go to another State to seek work and to be permanently embedded there. Nonetheless, the Committee considers that, for the period of stay and work in the territory of the host State, posted workers are workers coming from another State and lawfully within the territory of the host State. In this sense, they fall within the scope of application of Article 19 of the Charter and they have the right, for the period of their stay and work in the host State to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining (Article 19§4, *a* and *b*).

135. In addition, the Committee notes that according to Section 5a of the Foreign Posting of Employees Act, as regards wages and other working conditions, it is admissible to grant foreign posted workers, irrespective of their age or level of occupational experience and skills, minimum standards equivalent to those enjoyed by national workers under the correspondent central collective agreements (unless employers voluntarily grant more favourable conditions). The Committee notes however that in Sweden collective agreements do not very often provide for rules

concerning minimum wages, and that the minimum wage can be considerably lower than the normal rate of pay generally applied throughout the country to Swedish workers (working in the same professional sector). In addition, minimum wages rules, when they are provided for by collective agreements, are normally applied only to people without occupational experience, such as young people; the collective agreements often oblige the employer to pay a higher rate to workers with professional experience and skills. Furthermore, the Committee notes that, under Section 5a of the Foreign Posting of Employees Act, collective action is prohibited if the employer shows that, as regards pay and other working terms, posted workers have conditions that are at least as favourable as the minimum conditions in a collective agreement concluded at central level. Regarding Section 5b of the same Act, posted agency workers can benefit from normal standards but there is still a limited scope of working conditions that applies to them and which could be regulated in a collective agreement. In this respect, collective action is prohibited if the employer shows that as regards to pay and other working terms, posted agency workers have conditions which are at least favourable as in central collective agreements or in collective agreements that apply in the undertaking. Considering such a prohibition of collective action, it is unlikely that employers agree to grant posted workers more favourable conditions, since there would be no effective negotiating methods to be used by posted workers to persuade their employer to agree on better conditions during their posting.

136. In the light of the above, the Committee finds that the Swedish legislation, in respect of remuneration and other working conditions, does not secure for posted workers the same treatment guaranteed to other workers with permanent employment contracts; and for this reason it is not in conformity with the Charter. In particular, the Committee holds that insofar it does not secure for foreign posted workers lawfully within the territory of Sweden treatment not less favourable than that of Swedish workers with comparable occupational experience and skills, with respect to remuneration and other working conditions, Section 5a and Section 5b of the Foreign Posting of Employees Act (1999:678) are contrary to Article 19§4 a of the Charter.

137. As regards the issue of enjoyment for posted workers of the benefits of collective bargaining, the Committee recalls that under Section 5a of the Foreign Posting of Employees Act collective actions are prohibited if the employer shows that, as regards pay and other working terms, posted workers have conditions that are at least as favourable as the minimum standards. Regarding Section 5b of the same Act, collective actions are prohibited if the employer shows that as regards pay and other working terms, posted agency workers have conditions which are at least favourable as in central collective agreements or in collective agreements that apply in the user undertaking. Section 41c of the Co-determination act set forth that a collective action taken in violation of Section 5a or Section 5b is unlawful. The restrictions established by Section 5a and Section 5b of the Foreign Posting of

Employees Act also apply to those situations where trade unions have members among the employees of the undertaking concerned.

138. The Committee has already found that the legislation in question constitutes a disproportionate restriction of the enjoyment of the right of trade unions to engage in collective action (see paragraph 123 above). On the other side of the coin, which is from the standpoint of the rights of posted workers, the Committee finds now that this legislation is also not in conformity with the provisions of the Charter concerning the right of migrant workers to protection and assistance. In particular, the Committee holds that, insofar it does not guarantee for foreign posted workers lawfully within the territory of Sweden treatment not less favourable than that of Swedish workers respect to the enjoyment of the benefits of collective bargaining, Section 5a and Section 5b of the Foreign Posting of Employees Act (1999:678) and Section 41c of the Co-determination Act (1976:580)] are contrary to Article 19§4 *b* of the Charter.

139. The Committee also considers that notwithstanding the contents of the amendments to the Foreign Posting of Employees Act which entered into force on 1st July 2013 (see paragraphs 35 and 114 above), the changes made in Section 2 of the Foreign Branch Offices Act and the consequent withdrawal of the requirement for foreign undertakings belonging to EEA countries, carrying out economic activities in Sweden, to appoint a contact person authorized to negotiate and conclude collective agreements, undermine the possibility for Swedish trade unions to promote collective agreements with foreign employers.

140. The Committee notes that the different – and less favourable – treatment concerning posted workers has been provided for, by the Swedish normative acts in question, in order to facilitate free cross border movement of services and guarantee freedom to provide services abroad, in conformity with EU law. In this respect, the Committee recalls that, from the point of view of the system of values, principles and rights embodied in the Charter, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated as having a greater *a priori* value than labour rights (see paragraph 122 above), including the right for posted workers to receive from the host State treatment not less favourable than that of other workers, in respect of the enjoyment of the benefits of collective bargaining, as well as in respect of remuneration and other employment conditions. In this regard, the Committee recalls that applying the principle of non-discrimination, as set out in Art. 19§4 *b* of the Charter to the context of collective bargaining, requires that State parties have to take action to ensure that migrant workers enjoy equal treatment when it comes to benefiting from collective agreements aimed at implementing the principle of equal pay for equal work for all workers in the workplace, or from legitimate collective action in support of such an agreement, in accordance with national laws or practice.

141. In the light of the above, the Committee holds that, in conformity with Article 19§4 and the object and purpose of the Charter, posted workers, for the period of their stay and work in the territory of the host State, should be treated by the host State as all the other workers who work in that State; and foreign undertakings should be treated equally, by the host State, when they provide services by using posted workers. On the contrary, the Committee points out that excluding or limiting the right to collective bargaining or action with respect to foreign undertakings, for the sake of enhancing free cross border movement of services and advantages in terms of competition within a common market zone, constitutes, according to the Charter, discriminatory treatment on the ground of nationality of the workers, on the basis that it determines, in the host State, lower protection and more limited economic and social rights for posted foreign workers, in comparison with the protection and rights guaranteed to all other workers.

142. The Committee holds that the lack of statutory provisions providing the requirement for foreign employers to appoint in Sweden a contact person entitled to negotiate and conclude agreements with Swedish trade unions does not secure for foreign workers lawfully within the territory of Sweden treatment not less favourable than that of Swedish nationals in respect of the enjoyment to the benefits of collective bargaining and it is therefore contrary to Article 19§4 *b* of the Charter.

CONCLUSION

For these reasons the Committee:

Unanimously declares the complaint admissible

By 13 votes to 1 concludes that there is a violation of Article 6§2 of the Charter

By 13 votes to 1 concludes that there is a violation of Article 6§4 of the Charter

Unanimously concludes that there is a violation of Article 19§4 *a* of the Charter

Unanimously concludes that there is a violation of Article 19§4 *b* of the Charter

Giuseppe PALMISANO
Rapporteur

Luis JIMENA QUESADA
President

Régis BRILLAT
Executive Secretary