Assignment 1

Final Report

The Impact on the Rights of Collective Actions by the ECJ decision to uphold the Rights of Freedom of Cross Border Establishments in a Single Internal Market

Based on C341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* 2007 [1]

Introduction

Courts and institutions internal and external of EU have different opinions upon the ECJ Judgment on Lava case. Six years after the ECJ's verdict of the Laval case, the amount of unrests and disputes within the EU member states regarding the social rights, namely, the rights of labour and trade union to engage in collective action and strike being overshadowed and restricted by the Treaty (Article 49- 55 and 56-62 TFEU) that grants protection to the economic rights, namely, the freedoms of cross border establishments, have gained magnitude and have given rise to an intense social and judicial debate.

Decision of the ECJ followed by the Swedish Labour Court to fine the two trade unions for calling the strike created reverberations among legal, labour and human rights institutions not only within the European Union but also in an international level; involving such institutions as the EFTA Court (Court of Justice of the European Free Trade Association), the ILO (International Labour Union), ETUC (European Trade Union Confederation, the ECSR (European Committee for Social Rights), and the European Court of Human Rights (ECtHR).

Research Purpose

The purpose of this paper is to give a short overview of the arguments provided by different jurisdictions, and try to suggest ways to resolve the differences.

1 The EJC decision

The EJC held that the right to take collective action is a fundamental right that falls within the principle of the Community law and constitutes a major public interest. The ECJ also noted that while Article 3 (1)(a) to (g) of the Posted Workers' Directive (PWD) [2] gave a right to minimum terms and conditions to posted workers, these rights have been underpinned either by law or universally applicable collective agreements. However, the EJC noted that Sweden has neither a statutory minimum wage nor a universally applicable collective agreement. Consequently industrial action to impose terms, in the absence of legally enforceable national provisions, could not be justified under EU law. The EJC therefore ruled that the Sweden's collective bargaining systems and labour laws were felt to be not precise enough [3]for the company to know its obligations in advance, a rate of pay insisted by the Union which depart from the measures transposing the Directive is liable to make it less attractive, or more difficult, for such undertakings established in other EU Member States to carry out construction work in the host state (Sweden), and therefore constitutes a restriction on the freedom to provide services [4a][4b].

2 The Swedish Labour Court

In principle, the Treaty's provisions have direct effect on Member States (MS) and MS must modify national laws that restrict such freedoms. In its ruling made on December 2 2009, the Sweden Labour Court took one step further to rule that Article 56 TFEU have *direct horizontal effect* and therefore it may be invoked by Laval against the trade unions; while the trade unions, being "semi-public" actors, have the obligation to comply since their act to strike ran counter to the freedom to provide services (Article 49 TFEU) and is considered to be 'private barrier'. As such, the Swedish Labour Court fined the unions for general damages plus interest and legal costs. The judgment is in several aspects innovative and controversial, one of the questions is whether horizontal direct effect applies – can an individual rely on Article 43 TFEU and Article 49 TFEU to act on another individual? [5]

3 The EFTA Court

The EFTA Court closely followed the decisions of the Court of Justice (ECJ), as required by the principle of homogeneity. For them social justice for posted workers was to be delivered through allowing them to take advantage of their cheaper labour and to be able to work (in Sweden in *Laval*/Norway in *STX* [6]), not through high social standards once they started working on the Swedish/Norwegian markets (which might preclude them from access to the market in the first place) [7]. However, it is at the expense of the local Swedish workers in submitting their jobs to lower pay posted workers that come across the border.

4 ECtHR European Court of Human Rights

Article 11(1) of the European Convention on Human Rights (ECHR) establishes the rights of association and Article 11(2) specifies when a restriction may be acceptable showing that the right to collective action is non-absolute, i.e. collective bargaining and strike action were not rights which were guaranteed as such by the European Convention. The ECJ does not access restrictions placed upon the right to collective action. On the contrary, it considered the right to collective action a restriction place upon two of the EU fundamental freedoms. ECtHR does hold Article 11 ECHR (i.e. the right to form and join trade unions) to safeguard the freedom to protect the occupational interests of workers by trade union action; however, the choice of means to be used by the State in order that the trade union 'should be heard' fell within the Member State's margin of appreciation. Whilst concluding collective agreements (or initiating strike action) are one of these means, there are others [8]. Moreover, the burden is on the trade union to prove that their strike action had a legitimate aim and was not disproportionate [9].

5 ECSR European Committee of Social Rights

In 2012, the Swedish Trade Union Confederation (LO) and the Swedish Confederation for Professional Employees (TCO) filed a collective complaint (Complaint No. 85/2012) with the ECSR on the development in Sweden of freedom of association and right to take collective action after the ECJ's judgment in the Laval case. [10]

Assessment of the ECSR revealed that 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. It is ruled that Sweden has violated its obligations under Article 4 and 6 in respect of the restrictions on the right to strike and in respect of the breach of the State's duty to promote collective bargaining. Sweden has also violated its obligations under Article 19.4, by the imposition of restrictions on the right to take industrial action against foreign companies. [11]

Assessment by the Commission focused on amendments made to the Sweden national laws and judgments delivered by the Swedish Labour Court. It has not *directly* challenged the authority of the ECJ and interpretation of the Posted Workers Directive.

6 ILO - Committee of Experts on the Application of Conventions and Recommendations

In 2010, the Laval and Viking cases were reviewed by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) [12]. CEACR proclaimed that the legislations adopted by Sweden as a result of the ECJ's ruling in the Laval case is in violation of the fundamental trade union rights – specifically Convention Nr. 87 on the Freedom of Association and Protection of the Right to Organize. In another report published in 2013 [13], the CEACR again criticized the changes made in Sweden as severe breach of the freedom of association and protection of the right to organize, and this time, CEACR also indirectly questioned the whole minimum character of the Posted Workers Directive by stating that trade unions should always be able defending their members' interests, including by industrial actions, no-matter the nationality of the enterprise. Further, the Committee "recalled that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association." [14]

Discussion

7 Single market competence Vs social fundamental rights

The stance that the ECJ took in the Laval case to protect the freedoms of movement of cross border establishments and to uphold homogeneity of the single market was followed by the Swedish Labour Court to set up restrictions for trade unions and limit their freedom to protect the interests and rights of posted workers - in cross border situations. The combination of making the lawfulness of collective actions dependent on a vague proportionality test together with a threat of action for damages does have manifest preventive effect on the possibility of exercising the fundamental rights of association and collective actions [5]. The single market is fundamental principle of the EU competence, but industrial relation and social stability are national ones. The ruling of the EJC and actions of the Swedish Labour Court are deemed problematic as they clash with the position taken by the ECSR, the ECtHR and the ILO CEACR regarding social fundamental rights.

8 The Charter of Fundamental Rights

The Charter of Fundamental Rights was solemnly declared by the Commission, Council and Parliament in 2000 but was not given legal status, not until the Lisbon Treaty referred to the amended version of the Charter and gave it legal force [Charter of Fundamental Rights of the European [2007] OJ C 301/1]. Article 28 of the Charter provides *workers and employers*, or their respective organizations, in accordance with the Union and national Laws and practices, the rights to negotiate and conclude agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strikes actions. The provision offers protection in accordance with 'national laws and practices', meaning that the rights at stake are only recognized at the EU level to the extent that it is recognized by national law [9]. In the Laval case, since the ECJ ruled that the Swedish national laws were felt not to be precise enough to protect Laval's rights, thus causing a restriction to freedom to provide services, Article 28 is used to provide protection to the MS establishments (employer) against unions' collective action.

9 European Trade Union Confederation (EUTC)

The Laval case together with C-346/06 *Rüffert* [2008] ECR I-1989, C-319/06 *Commission vs Luxembourg* [2008] ECR I-4323, and C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP* [2008] ECR I- 10779 have caused widespread agony and mounting concerns among the European Human Rights institutions and the trade union world. The ECJ decision has been perceived as threat by trade unions in a large number of European countries and is negatively affecting the relationship and support for the EU.

For the European Trade Union Confederation (EUTC) [15] and its members the outcome of the Laval case posts a major hurdle in defending and legitimizing labour standards in the age of economic globalization. To the ETUC and its members, the ECJ has overlooked the very basic function of the trade unions: to defend their members and workers in general against unfair treatments and competitions on employment terms, including wages and working conditions; to fight for equal treatment between migrant and local workers, and to take action to improve living and working conditions of workers across Europe. In addition, the EJC, based on the effectivity of TFEU as primary law, is limiting the possibilities for Member States to safeguard the role of collective bargaining and their own labour legislation in dealing with the effects of increasing cross border mobility of establishments and workers [16].

Purposed Remedies

10 There is no true European system of industrial relations leaving MS freedom to preserve national sovereignty over their social system. It could have been the intention of the Treaty to have left the embrace an EU system of industrial relations and the subjects of wages and strikes from the EU's competences in the Treaty [17]. In order that national governments may avoid running into labour disputes that lead to economic, social and judicial distress, it is proper for national governments to review and revise laws, making provision for minimum wage, and universal collective agreement which provide for the implementation of the Posted Workers Directives. [18] On the other hand, it is also proper to clarify the implementation of the PWD and strengthen dissemination of information on the

rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of free movement of persons and cross border provision of services. [19]

11 A system for informal dispute solution as proposed in the Monti Report [19] to handle these kinds of cases. Another method of dealing with this problem would be to establish a specialized court to hear and determine at the first instance certain classes of actions or proceeding according to Article 257 TFEU [20]. [5]

12 Trade unions have proposed amending the Treaty by introducing a clause that will exclude the right of strike from its scope of application – the so called "social progress clause". However, seeking Treaty changes has to be a long term objective [19]. The mounting tension between ECJ and ECtHR could best be stood down through dialogues, both formally and informally, among the regimes. Such procedure could be formalized in the EU/EEA, by holding fora and debates with parties like the BUSINESSEUROPE and ETUC and between the regimes [5].

Conclusion

The divergent character of the European legal order becomes obvious in the Laval case (and the Viking case). The legal order of the EU and the Council of Europe differ in nature and so is the protection of fundamental rights within their orders. The ECJ when applying social fundamental rights, has to give due regard to the economic freedoms of establishments and to provide services and goods, being fundamental principles of the Union's legal order. The implications of the case law of the ECtHR could also carry some weight, especially when such decision embed the international labour law standards of the ILO referring to the ECSR, the EU Charter and state practices, [Demir & Baykara v Turkey case ECHR 1345]. [17]

With ECSR clashing with the EFTA Court on the Laval case, and the apparent conflict between the line of reasoning of the ECtHR and the ECJ in respect to trade union rights, it is almost certain that the tension would intensify due to possible legal incompatibilities in the treatise of collective actions by trade unions.

Remedial measures as suggested by different parties are included and summarized in the section above.

Within the EU, there always hide an inherent struggle over the lines that run between the EU single market and the social divergence at the national level among the Member States, a regulatory solution is unlikely to be within reach [17].

- End -

References

[1] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-341/05

[2]Posted Workers Directive (PWD)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML

[3] TECJ also found that a piece of Swedish legislation – lex Britannia – was not in line with article 56- 57 TFEU (ex. Articles 49 EC and 50 EC)

[4a] Observatory, EurWORK, European Observatory of Working Life, Laval Case, Published on Nov 30 2010 http://eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/laval-case

[4b] Judgment of the Court
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005CJ0341

[5] European Parliament, Directorate-General for Internal Policies, Employment and Social Affairs 2010, The impact of the ECJ judgement on the Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action
www.europarl.europa.eu/document/.../20110718ATT24274EN.pdf

[6] STX Norway Offshore AS m.fl. v Staten v/Tariffnemnda, EFTA Court case E-2/11
http://www.eftacourt.int/cases/detail/?tx_nvcases_pi1%5Bcase_id%5D=138&cHash=251afc251cab209b816a30e803e2075e

[7] Catherine Barnard, Posting matters, Arbeidsrett, Vol ii Nr i 2014 www.law.cam.ac.uk/faculty-resources/10013613.pdf

[8]Albertine Veldman, The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR, Utrecht Law Review, Volume 9 Issue 1 2013 page 104

[9] Alicia Hinarejos, Laval and Viking: The Right to Collective Actions versus EU Fundamental Freedoms, Human Rights Law Review, 8:4 (2008) Oxford University Press page 727 - 728

[10]https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC85CaseDoc1_en.pdf

[11] https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC85AdmissMerits_en.pdf

[12] International Labour Conference, 99th Session, 2010
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123424.pdf

[13] Claes-Mikael Jonsson, Legal advisor LO, ILO: Swedish Laval Legislation Violates Freedom of Association, 2013
http://www.tco.se/Documents/2013/Lavallag%20bryter%20mot%20ILO%20konvention.pdf

[14] http://www.ituccsi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf

[15] http://en.wikipedia.org/wiki/European_Trade_Union_Confederation

[16] Brian Bercusson and European Labour Law discussion section, London, May 29 2009

[17] The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR

[18] Renaud Dehousse, Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights – where does the balance lie? Debate: Laval & Co: Law and Politics in EU Social Policy July 2008 ETUI-REHS European Trade Union Institute

[19] http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf

[20] http://euwiki.org/TFEU] to address social or labour disputes for cross border establishments

(2720 words)