
A CLASH OF KINGS

THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS ON THE 'LEX LAVAL' ... AND ON THE EU FRAMEWORK FOR POSTING OF WORKERS

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Abstract

On the 20 November 2013 the European Committee of Social Rights delivered its decision on the Swedish law aimed at bringing the Swedish system in line with the case law of the Court of Justice of the European Union regarding posting of workers and industrial relations. The evaluation of the so-called 'Lex Laval' however provides for an occasion to implicitly scrutinise the whole framework of EU law regulating the posting phenomenon. The present contribution hence analyses the relationship of the decision delivered by the ECSR with two aspects of EU law. On the one hand, the contribution deals with the case law of the CJEU about the (complicated) relationship between fundamental social rights and fundamental economic freedoms of the internal market. On the other hand, it will examine the more specific issue of posting of workers. Both topics reveal the existence of a sharp contrast between EU-law and the system of values, principles and rights embodied in the European Social Charter.

I. INTRODUCTION

On the 20 November 2013 the European Committee of Social Rights (ECSR) delivered its decision¹ on the so-called 'Lex Laval'. The law,² adopted in March 2010, owes its nickname to the fact that it was enacted in order to bring the Swedish system in line with the Laval³ decision of the Court of Justice of the European Union (CJEU). The amendments, which essentially deal with the setting (through the means of collective action) of wages and working conditions for workers posted to Sweden, were the object of the complaint presented by the Swedish Trade Union Confederation (LO) and Swedish

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1 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.
3 Case 341/05, Laval [2007] ECR I-11767.
Confederation of Professional Employees (TCO) to the ECSR. The Swedish trade unions lamented the violation of several obligations stemming from the Swedish ratification of the (Revised) European Social Charter (ESC). In particular, the trade unions alleged the violation of the duty to recognise and promote the rights to fair remuneration, to collective bargaining and collective action, and to equal treatment for migrant workers.

In the remaining paragraphs of this Introduction the 'Swedish' context will be briefly outlined. However, the following sections will be devoted to the European context and to the ramifications of the decision at stake. Thus, Section II looks at two interesting 'precedents' coming from the ILO forum. In particular, the Conclusions of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) dealing with the so-called BALPA case and with the very same Lex Laval will be presented. Section III deals with the first substantive topic touched by the ECSR decision, the role of fundamental (collective) social rights in the context of posting of workers, as well as in the broader context of their relationship with the fundamental freedoms of the EU internal market. The second substantive topic, and in a way the most ground-breaking, tackles the very understanding of the posting phenomenon, by bringing it back to the context of migrant workers. This topic is examined in Section IV. After this substantive part the strident contrast of the decision with the EU legal order will hopefully be apparent. Hence, Section V is devoted at considering the relationship between this legal order and the ESC. Finally, Section VI draws some conclusions about the possible scenarios for reconciliation.

A. The aftermath

Delivering his Opinion in the Laval case, AG Mengozzi had suggested caution to the CJEU when dealing with the industrial relations system of a Member State. Indeed, he considered that Community law, in casu embodied by its sharpest edge, the fundamental freedoms, should refrain from encroaching upon a specific national approach at regulating industrial relations. As it is well known, the Court of Justice did not heed the call. Along its decision it considered a number of intrinsic characteristic of the Swedish system of 'autonomous collective bargaining' to be in violation of the Posting of

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4 The same amendments were also object of scrutiny by the ILO Committee of Experts for the Application of Conventions and Recommendations (CEACR); see infra, Section II.
6 Article 4 (Rev)ESC. However, the reference to this right was dropped during the procedure.
7 Article 6 (Rev)ESC.
8 Article 19§4 (Rev)ESC.
11 AG Mengozzi in Laval at 260.
Workers Directive\textsuperscript{13} (PWD) as interpreted in light of the freedom to provide services. Or, more precisely, the Court considered that the Swedish system had no means to extend its (minimum) wages to posted workers in a way compatible with the PWD.

From this perspective, three elements can be highlighted. Those were pointed out by the CJEU as hindering the said extension, and were afterwards tackled by the \textit{Lex Laval}. The first of these elements is the intrinsic uncertainty (coupled with the lack of transparency) entailed by a system based on a case-by-case negotiation.\textsuperscript{14} The Court of Justice considered that the possibility for posting undertakings to be forced by means of collective action into negotiations 'of unspecified duration' was bound to constitute a restriction to the freedom to provide services.\textsuperscript{15} This was reinforced, in the reasoning of the Court, by the lack of provisions sufficiently \textit{precise} and accessible as to make possible for a posting undertaking to determine (supposedly, \textit{before} the negotiations) the obligations with which it had to comply.\textsuperscript{16} The second point, strictly intertwined with the first, is represented by the interpretation of the PWD as providing the maximum level of wages and working conditions applicable to posted workers. This interpretation effectively turned, as it was summarised,\textsuperscript{17} the 'floor' of rights of the Directive into a 'ceiling'. The stance, adamantly confirmed in \textit{Rüffert},\textsuperscript{18} made it very difficult (if not impossible) to justify the demands put forward in a company-level negotiation with the posting undertaking. Indeed, the demanded wage could hardly be identified as a 'minimum' under the PWD.\textsuperscript{19} Third, the Court struck down the so-called \textit{Lex Britannia} as discriminatory.\textsuperscript{20} The law essentially allowed Swedish trade unions to undertake collective action against foreign undertakings operating in Sweden, notwithstanding the fact that those might be covered by a 'foreign' collective agreement. The law hence allowed the system of autonomous collective bargaining to operate in respect of those foreign employers and to set wages and working conditions in line with those applied in the rest of the country. AG Mengozzi in his Opinion considered that such a system could

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\textsuperscript{13} 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.
\textsuperscript{15} \textit{Laval}, paragraphs 99-100.
\textsuperscript{16} \textit{Ibid}, paragraph 110.
\textsuperscript{18} Case C-346/06, Rüffert [2008] ECR I-1989.
\textsuperscript{19} Which allows the application of minimum wages (and other working conditions listed in Article 3.1) to posted workers only if established by law or by collective agreements falling into one of the categories of Article 3(8). That is to say, a) universally applicable \textit{(erga omnes)} collective agreements; b) agreements which are \textit{generally} applicable in the sector and/or geographical area; c) agreements concluded at national level by the most representative employers' and labour organizations and applied nationwide.
\textsuperscript{20} \textit{Laval}, paragraph 120.
be considered as a functional equivalent to the framework provided by the PWD. Once again, the CJEU did not follow his advice.

B. The Lex Laval

As it was highlighted before, the amendments constituting the Lex Laval were to provide an answer to the questions raised by the Laval decision. The impervious task was multifaceted. On the one hand, the objective was to preserve the Swedish system of industrial relations, so that a path-breaking intervention was out of question. On the other, the Laval decision represented a recent 'shock'. Hence, the objective of providing a CJEU-proof solution was at least as important as the first one. On top of this, as recalled by Malmberg, the climate was made somewhat more tense by the fact that the Swedish private employers’ organisation had partly financed the employer’s side in the Laval case.

The resulting amendments try to ‘integrate’ the points raised by the CJEU decision into the Swedish system, while leaving it as untouched as possible. As a result, posting undertakings are legally placed in a sort of ‘bubble’, where the possibilities for collective action are subject to (more) stringent conditions. Those conditions are closely connected with the three points highlighted in the previous paragraphs.

The first requirement to take (lawful) collective action against a posting undertaking with the aim of setting wages and working conditions of posted workers is linked with the issue of transparency/uncertainty. Thus, the demands backed by the collective action must correspond to wages and working conditions already provided by a ‘central branch agreement’, i.e. a nationwide sector agreement. The second condition deals with the minimum/maximum character of the PWD, by limiting the said legitimate demands to minimum wages and other working conditions set by the central branch agreement. The third condition is aimed at taking into account foreign collective agreement, though it ultimately goes further than that. It forbids the collective action in the situation where the posting employer can ‘show’ that posted workers already enjoy wages and working conditions which are as good as the central branch agreement. Such an evidence hence bears no obligation for the posting employer to sign a collective agreement whatsoever, even in the home country.

C. The complaint

21 AG Mengozzi in Laval at 185.
23 Decision on Admissibility and the Merits, supra note 1, paragraph 35.
Against those legislative changes, the Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) introduced a complaint to the ECSR in June 2012. The Swedish trade unions lamented that the *Lex Laval* was 'essentially alien to Swedish labour law tradition', and that, by restricting the right to bargain collectively and the right to take collective action, it was hamstringing trade unions in their attempts to guarantee the equal treatment of migrant workers. The workers' organisations thus concluded that the new legislation would either create 'collective agreement free zones' or force trade unions to accept signing collective agreement setting wages and working conditions for posted workers at a lower level than national workers. Importantly, they also stressed the fact that the amendments composing the *Lex Laval* did not 'differentiate between the situations when one or several workers posted are organised in the acting trade union'.

The Swedish government in its submission put forward two main objections. One can be defined as 'hiding behind the EU', meaning that the government did justify the legislative amendments in light of the necessity to comply with EU law. The second, substantive, argument denies the violation of the obligations stemming from the ESC. This on the basis of three elements: a) the new legislation only applies in genuinely transnational situations; b) the new legislation still allows for the application of a 'certain level of protection' to posted workers; c) the new legislation 'does not affect the ability of the foreign employers to sign a collective bargaining agreement'.

The European relevance of the dispute is further highlighted by the fact that both the ETUC and BUSINESSEUROPE (together with the International Organisation of Employers, IOE) submitted their observations on the case to the ECSR. The ETUC backed the complaints of the Swedish trade unions. In particular, the European Confederation focused on bringing to the attention of the ECSR the international law context of the issue, by referring both to the European Convention on Human Rights (ECHR) and to ILO Conventions. The Observations submitted by

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26 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, Case document No. 1, Complaint.
27 Ibid, paragraph 69.
28 Ibid, paragraph 71.
29 Ibid, paragraph 73.
30 Ibid, paragraph 77.
31 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, Case document No. 2, Submissions of the Government on Admissibility and Merits.
32 Ibid, 3.
33 Ibid, 2.
34 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, Case document No. 4, Observations by the European Trade Union Confederation (ETUC), 3.
35 Ibid, 4-9. Here the ETUC also stresses the importance of the interpretation provided by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). I will come back to this in Section II.
BUSINESSEUROPE and the IOE\textsuperscript{36} on the contrary reaffirmed the compatibility of the \textit{Lex Laval} with the ESC. Those observations are largely concurrent with the ones put forward by the Swedish government.\textsuperscript{37} BUSINESSEUROPE and the IOE thus consider that the possibility to take collective action (only) in order to apply minimum conditions and the fact that the posting employer remains in principle free to voluntary sign a collective agreement granting better wages and working conditions are sufficient to ensure the compatibility.\textsuperscript{38} The employers' associations also show a high degree of appreciation for the \textit{Laval} decision of the CJEU, in particular as regards the limitations placed on the right to take collective action.\textsuperscript{39}

\section*{II. THE PRECEDENT(S) OF THE CEACR}

As pointed out by the ETUC in its Observations, the very same \textit{Lex Laval} had already been scrutinised by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).\textsuperscript{40} Taking into account the different framework of reference, the Conclusions of the CEACR on the legislative changes introduced in Sweden are focused on the freedom of association\textsuperscript{41} and on the rights to take collective action and of collective bargaining.\textsuperscript{42} Hence, questions related to the 'migrant nature' of posted works are not analysed. Still, also in this case, the \textit{Lex Laval} was found wanting.

The CEACR did in fact express its concerns about the \textit{Lex Laval} on two issues which are relevant in the analysis of the decision of the ECSR. The first reason for concern stems generally from the restrictions placed on the right to take collective action. The CEACR however focuses on the eventuality of a trade union in the \textit{host} state having members among the \textit{posted} workers. In such a case, concludes the Committee, this organisation would be restricted in its right to represent its members.\textsuperscript{43} Going back to the procedure in front of the ECSR, the Swedish trade unions have also stressed this issue in their complaint.\textsuperscript{44}

The second element on which the ILO Committee of Experts expressed its concerns is the possibility for the posting employer to merely 'show' the application of conditions

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\textsuperscript{36} Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, Case document No. 5, Observations by the International Organisation of Employers (IOE) and BUSINESSEUROPE.
\textsuperscript{37} See for example, \textit{Ibid}, paragraph 16 on the possibility to conclude collective agreements 'on a voluntary basis' (\textit{i.e.} without resorting to collective action) and paragraph 111.
\textsuperscript{38} \textit{Ibid}, paragraph 169.
\textsuperscript{39} \textit{Ibid}, paragraph 5 at page 5: 'In line with the ECJ's interpretation in the Viking and Laval rulings, BUSINESSEUROPE and the IOE believe that it is logical that trade unions' industrial action be submitted to an objective test. Collective action should have a legitimate objective and be necessary for 'overriding reasons of public interest'. Its use should also be proportionate, considering its interaction with interests/rights/freedoms of other parties'.
\textsuperscript{40} International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden).
\textsuperscript{41} Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
\textsuperscript{42} Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
\textsuperscript{44} Complaint, \textit{supra} note 26, paragraph 87.
\end{footnotesize}
equivalent to the minima set by the central branch agreement in order to hinder the collective action. In particular, the CEACR acknowledged the worries of the Swedish trade unions about the practice of 'double agreements', in which a 'fake agreement' is set up only to be showed to trade unions, while wages and working conditions are actually set at a lower level.

The CEACR delivered a stronger statement about the European context. That is, about the situation created by the Viking and Laval decision. The statement is in fact a repetition of the conclusion already reached in the so-called BALPA case. The ILO Committee thus for the second time explicitly condemned the proportionality test regarding the freedom of establishment or the freedom to provide services as a permissible restriction to the right to take collective action.

III. COLLECTIVE SOCIAL RIGHTS

Coming to the actual decision delivered by the ECSR, I will present the arguments following the order in which those have been examined in the decision. Hence I will first analyse the question of collective social rights (right to take collective action, right to bargain collectively). Then I will turn to the question of the protection of posted workers as migrant workers.

Having reasserted the importance of the rights at stake not just as ends in themselves, but also in their role of stepping stones for the enjoyment of other fundamental rights protected by the Charter, the Committee stresses the fact that the contracting parties cannot satisfy themselves of recognising those rights. The concept of promoting collective bargaining is thus highlighted by the ECSR. At the same time the Committee remarks the importance of preserving the autonomy of social actors, in particular as regards the legitimate methods used to defend the interest of workers. On this background, the ECSR goes on to analyse the limitations provided by the Lex Laval. It then notes that the limitation to minimum working condition as regards the legitimate demands of a collective action (and the legitimate contents of an eventual collective agreement backed by such an action) imposes a 'substantial limitation' to the rights at stake. This, coupled with the practical difficulty to bargain with an employer established abroad, brings the Committee to the conclusion that the amendments constituting the Lex

49 Decision on Admissibility and the Merits, supra note 1, paragraphs 107-125.
50 Ibid, paragraphs 132-142.
51 Ibid, paragraph 109.
52 Ibid, paragraph 111.
53 Ibid, paragraph 112.
Laval are not in conformity with the obligation to promote collective bargaining between social actors\(^{54}\) (Article 6§2 ESC).

The reasoning, as well as the conclusion, is similar for the right to take collective action (Article 6§4 ESC). The ESCR places the emphasis on the possibility for trade unions to 'strive for the improvement of existing living and working conditions of workers'.\(^{55}\) The restriction of legitimate demands to minimum wages and working conditions is thus defined as a violation of the very substance of the right protected by the ESC. The same reasoning is extended to the restrictive effect of the eventual 'evidence' showed by the employer of the application of wages and working conditions at least as good as the minimum ones.\(^{56}\) By referring to Article G\(^{57}\) the Committee considers that restrictions to the right to take collective action in the name of the exercise of economic freedoms should be proportionate,\(^{58}\) provided that those freedoms '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'.\(^{59}\)

It is interesting to note that the ECSR has also provided the glimpse of an answer to the concerns of the employers' side regarding the possible discrimination of foreign service providers.\(^{60}\) That is, the situation in which higher wages and working conditions than those generally applied by national undertakings would be demanded in order to pursue protectionist objectives. Indeed, the Committee commented that even a 'general legislative limitation of the right to collective action' aimed at preventing actions having a discriminatory objective would not be per se in contrast with Article 6§4 of the ESC.\(^{61}\)

IV. POSTED WORKERS, THROUGH THE LOOKING-GLASS

\(^{54}\) Ibid, paragraph 116.  
\(^{55}\) Ibid, paragraph 120, emphasis added.  
\(^{56}\) Ibid, paragraph 123.  
\(^{57}\) Which deals with restrictions to the rights protected by the Charter: '[t]he 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'.  
\(^{58}\) Decision on Admissibility and the Merits, supra note 1, paragraph 121. Here the Committee highlights once again the importance of the possibility to strive for the improvement of living and working conditions, including 'equal treatment of workers regardless of nationality or any other ground' (emphasis added).  
\(^{59}\) Ibid, paragraph 122.  
\(^{60}\) Observations by the International Organisation of Employers (IOE) and BUSINESSEUROPE, supra note 36, paragraph 116. A similar objection was also raised by the Confederation of Swedish Enterprises in the context of the procedure in front of the CEACR: 'The Confederation has difficulty understanding the argument advanced by the LO and the TCO that the fact that, in situations involving posting of workers, they are only able to take industrial action to demand the minimum levels set out by collective agreements opens the door to social dumping. To the contrary, it appears that the unions want to demand higher wages for foreign companies than Swedish companies in similar situations' (emphasis added).  
\(^{61}\) Decision on Admissibility and the Merits, supra note 1, paragraph 119.
As it is evident from the previous Section, the reasoning of the ECSR about the right to bargain collectively and to take collective action already potentially enters into conflict with the decision delivered by the CJEU in Laval. However, the Committee then turns to analyse the issue under the point of view of the protection of migrant workers, and the conflict becomes surprisingly even more apparent. One should also keep in mind that the conclusion about the violation of Articles 6§2 and 6§4 (collective bargaining and action) was reached by 13 votes to 1, whereas the violation of Article 19§4 (protection of migrant workers) was affirmed unanimously by the Committee.

What makes this clash between the system of the ESC and EU law even more spectacular is the substantial simplicity of the reasoning delivered by the ECSR on the issue here at stake. The Committee was asked to consider the question under Article 19§4 by the Swedish trade unions in their submission. This Article requires the signatory parties to assure equal treatment in a number of fields to 'workers lawfully within their territories'. The matters covered by this obligation include 'remuneration and other employment and working conditions' as well as 'membership of trade unions and enjoyment of the benefits of collective bargaining'. As recalled by Świątkowski, the provision is inspired by Article 6§1 of ILO Convention No. 97 (Migration for Employment Convention) of 1949. Similarly to Article 19§4 of the ESC, this provision makes reference to immigrants 'lawfully within' the territory of the signatory party. It is interesting to note that BUSINESSEUROPE and the IOE affirmed the non-applicability of Article 19§4 to posted workers on the basis of another ILO Convention (No. 143), which is supplementing the aforementioned Convention No. 97. Convention No. 143 in fact excludes 'employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments' from the definition of 'migrant workers'.

However, the ECSR in its reasoning emphasises the literal version included in the ESC. Thus, on the basis of the understanding of 'migrant worker' as a worker 'coming from another State and lawfully within the territory of the host State', the Committee goes on to analyse the situation of posted workers. On this background, the inevitable conclusion is that, notwithstanding the differences between posted workers and other migrant workers, posted workers are indeed migrant workers, falling in the scope of application of Article 19§4. The world of posting of workers in the EU just turned upside down. Or right side up, depending from the perspective. Indeed, from the very first cases on posting of workers, Webb, Seco and the well-known Rush Portuguesa, the

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63 Observations by the International Organisation of Employers (IOE) and BUSINESSEUROPE, supra note 36, paragraph 44.
64 Decision on Admissibility and the Merits, supra note 1, paragraph 134.
Court of Justice has always analysed posting of workers through the lenses of the freedom to provide services (of the posting undertaking). Posted workers have thus been explicitly considered by the CJEU as not being migrant workers, on the assumption of their ‘lack of access’ to the labour market of the host state.\textsuperscript{68}

Having instead included posted workers in the category of ‘migrant workers’ the ECSR presents the logical conclusion of such a finding. Posted workers have the right ‘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’.\textsuperscript{69} Furthermore, the limitations to the right to take collective action introduced by the Lex Laval are bound to hinder the reaching of equal treatment.\textsuperscript{70} Also, the comparator for the equal treatment should be the actual Swedish worker with ‘comparable occupational experience and skills’,\textsuperscript{71} while minimum wages and working conditions as those identified by the Lex Laval normally do not take into account those characteristics. Hence, according only minimum protection to posted workers, as well as economic and social rights which are more limited than the ones guaranteed to national workers, constitutes a discriminatory treatment.\textsuperscript{72} Concluding the decision, the ECSR shows its perfect awareness about the legal context in which the posting phenomenon takes place. In this sense, the Lex Laval is framed in the context of the internal market, as the aims of the less favourable treatment of posted workers are correctly identified with the facilitation of cross border movement of services and the guarantee of the freedom to provide services abroad.\textsuperscript{73} Those objectives however ‘cannot be treated as having a greater a priori value than labour rights’,\textsuperscript{74} meaning that they cannot justify, under the ESC, the discriminatory treatment of (migrant) posted workers. Turning again to Luxembourg, the Court of Justice had instead decided in favour of the application of minimum wages well before the enactment of the Posting of Workers Directive.\textsuperscript{75} Though an obiter dictum in the Rush Portuguesa decision had given the impression of a revirement\textsuperscript{76} the CJEU was quick to correct the ‘mistake’ in the following Vander Elst decision.\textsuperscript{77} The PWD thus included the reference to ‘rules of minimum protection’ as well as to ‘minimum wages’.\textsuperscript{78} In the more recent decisions regarding the PWD the Court effectively construed the different treatment of posted workers (\textit{i.e.} the


\textsuperscript{69} Decision on Admissibility and the Merits, supra note 1, paragraph 134.

\textsuperscript{70} I\textit{bid}, paragraph 135.

\textsuperscript{71} I\textit{bid}, paragraph 136.

\textsuperscript{72} I\textit{bid}, paragraph 141.

\textsuperscript{73} I\textit{bid}, paragraph 140.

\textsuperscript{74} I\textit{bid}.

\textsuperscript{75} Seco, paragraph 14.

\textsuperscript{76} Rush Portuguesa, paragraph 18.


\textsuperscript{78} PWD, Recital 13 and Article 3§1.
strict application of *minimum* wages and working conditions) in respect of migrant workers as the *effet utile* of the PWD. I will come back to this in Section VI.

V. **THE ESC AND THE EU**

The evident contrast between the decision of the ECSR and the (here just sketched) EU legal framework for posting of workers, running as deep as the very understanding of the nature of the phenomenon, urges to consider the relationship between the two legal orders. The clash is particularly apparent between the decision here at stake and the interpretation of the Posting of Workers Directive (and of the EU Treaties) delivered by the CJEU in *Laval*. Hence the 'Clash of Kings', provided that both bodies are the highest instance in their respective legal systems.

The ECSR spends a few paragraphs in analysing the question in the present decision. In particular, the Committee does not consider itself competent to assess the compliance of EU law with the ESC. Instead the Committee places its intervention downstream, meaning that national measures adopted by those states which have ratified the ESC (fully or in part) in order to implement EU law, can be scrutinised by the ECSR. The same reasoning is extended to those measures adopted in order to bring in line a given national system with a decision of the CJEU. A very similar approach was followed by the ILO Committee of Experts on the Application of Conventions and Recommendations while examining both the BALPA case and the *Lex Laval*.

The ECSR also rules out the possibility of a 'presumption of conformity' of EU law with the provisions of the European Social Charter. This also on the basis of the different treatment reserved to the ESC in respect of the ECHR. Indeed, while the Lisbon

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* Laval, paragraph 80; Rüffert, paragraph 33
* Decision on Admissibility and the Merits, supra note 1, paragraph 72. The approach was developed in a previous decision of the ECSR. See Confédération Générale du Travail (CGT) v. France, Complaint No. 55/2009, paragraph 38: ‘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’.
* Ibid, paragraph 73.
* International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations (The United Kingdom), 208-209, 209: ‘the Committee wishes to make clear that its task is not to judge the correctness of the ECI’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’. Similarly in International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), 178-179, 178.
* Decision on Admissibility and the Merits, supra note 1, paragraph 74: ‘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’. 

Treaty introduced the obligation for the EU to accede to the latter,\textsuperscript{84} a similar process was not envisaged for the former, nor different steps have been taken in such a direction.

A. EU law and the ESC

Looking at the issue from the EU side does not provide a final clarification either, though it adds some important elements to the puzzle. Two points are thus worth stressing, and it is interesting to note here that both are intertwined with the specific question of the ‘continuity’ (or lack thereof) of the ESC of 1961 and its revised version of 1996. As it is well known, the European Charter of Fundamental Rights (EUCFR) includes a provision protecting the rights of collective bargaining and action.\textsuperscript{85} Article 28 EUCFR did in fact provide the CJEU (together with other provisions, including Article 6 ESC) with the legal basis to affirm the fundamental nature of both aforementioned rights.\textsuperscript{86} However, the same Article also provided to the Court of Justice a seemingly blanket permission as regards the restrictions to those rights. Recalling the formulation of Article 28, the CJEU found that those fundamental rights had to be protected only 'in accordance with Community law'\textsuperscript{87} (and national law and practices). Interestingly, when dealing with the restrictions to the (fundamental) rights of collective bargain and action, the Court of Justice did not look to the ESC to draw inspiration. Now, the EUCFR makes explicit reference to the European Convention of Human Rights in Article 52§3, establishing that the rights which are also protected by the ECHR should be interpreted in accordance with the Convention. This reference also includes the case law of the European Court of Human Rights\textsuperscript{88}. No similar reference can be found to the European Social Charter,\textsuperscript{89} though the Explanations drawn by the Presidium refer to Article 6 ESC as the basis for Article 28 EUCFR. However, Article 53,\textsuperscript{90} dealing with the level of protection to be accorded to the rights protected by the EUCFR, makes reference to 'international agreements to which the Union or all the Member States are party'. The Explanations are much more succinct on this Article, so that there is no mention of the necessity to take into account the interpretation of those 'international agreements' provided by the competent supervisory bodies. Leaving aside this issue, the question

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\item \textsuperscript{84}Article 6 TEU: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (emphasis added).
\item \textsuperscript{85}Article 28 EUCFR: ‘Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices’.
\item \textsuperscript{86}Viking, paragraph 43; Laval, paragraph 90; Case C-271/08, Commission v. Germany [2010] ECR I-7091, paragraph 37.
\item \textsuperscript{87}Viking, paragraph 44; Laval, paragraph 91; Commission v. Germany, paragraph 43.
\item \textsuperscript{88}Explanations relating to the Charter of Fundamental Rights of the European Union, 18.
\item \textsuperscript{90}‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions’.
\end{itemize}
remains about the possibility to consider all Member States as parties to the European Social Charter. Indeed, all Member States have ratified either the European Social Charter of 1961 or the Revised ESC of 1996. Still, neither version has been ratified by all the present Member States. Five countries have only ratified the Revised ESC, while 13 Member States have not (though they have ratified the original ESC). It should be noted that the provisions here at stake (Article 6 and Article 19) are identical in the two versions. This brought the ETUC, in its submission to the CEACR, to argue in favour of including the ESC in the category of 'international agreements to which the Union or all the Member States are party'. If this is accepted (theoretically, by the CJEU), then Article 28 EUCFR should be interpreted as providing at least the same level of protection of Article 6 ESC. In this eventuality, a second question would remain on the table, namely the necessity (or lack thereof) to take into account the interpretation of Article 6 ESC provided by the ECSR.

The second important point to be mentioned here deals with Article 351 TFEU. This Article states that rights and obligations arising from international agreements concluded before the accession to the EU of a given Member State 'shall not be affected by the provisions of the Treaties'. The timing question is particularly tricky for the European Social Charter, in view of the 'duality' of the instrument (the ESC and the RevESC). On top of this, the Court of Justice seems to consider that an international agreement concluded to replace an older one 'resets the clock' even if it includes the same clauses of the earlier one. For those Member States which have ratified the Revised ESC, it is the date of this second ratification that should be taken into account under Article 351 TFEU. In particular, Austria, Croatia, Czech Republic, Denmark, Greece, Hungary, Latvia, Poland, Slovakia, Spain and the United Kingdom have not yet ratified the RevESC, while their ratification of the ESC predates the accession to the EU. On the other hand, Bulgaria, Cyprus, Estonia, Lithuania, Romania and Slovenia have ratified the RevESC before their accession to the EU. Those Member States could thus oppose the obligations stemming from the ESC or the RevESC to EU institutions. Such a scenario is succinctly regulated by the second paragraph of Article 351, where it is said that 'the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established', including as extrema ratio, the unilateral denunciation of the international agreements.

91 The picture gets even more complicated if one adds the fact that countries can decide not to ratify specific articles of the ESC or (Rev)ESC. In casu, Greece alone has not ratified the whole Article 6, while Austria, Luxembourg and Poland have not ratified Article 6§4 (collective action). As for Article 19§4, it has not been ratified by Austria, Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Lithuania, Malta, Romania, while Slovakia has only ratified paragraphs 1 and 2.
92 Bulgaria, Estonia, Romania, Slovenia. Last update 4 April 2012.
93 Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain, United Kingdom. Last update 4 April 2012.
94 Observations by the European Trade Union Confederation (ETUC), supra note 34, paragraph 49.
agreement conflicting with EU law.\textsuperscript{96} Provided the very different situation among Member States highlighted before, this procedure is not particularly helpful in clarifying the relationship between EU law and the obligations arising from the ESC in general. Also, in the specific case of Sweden, the precedent set by the CJEU seems to suggest that Article 351 TFEU would not be applicable, since Sweden ratified the Revised European Social Charter after its accession to the EU.

VI. PERSPECTIVES

Article 3§7 of the Posting of Workers Directive allows the application of 'of terms and conditions of employment which are more favourable to workers' above and beyond the list of minimum conditions of Article 3§1. In \textit{Laval} and \textit{Rüffert} the CJEU decided that, contrary to the Opinion of the AG in both cases,\textsuperscript{97} Article 3§7 only covered more favourable conditions set by laws or collective agreement of the \textit{home} state of the posting undertaking. In particular, in both cases the Court stated that 'Article 3(7) of Directive 96/71 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 [...] such an interpretation would amount to depriving the directive of its effectiveness'.\textsuperscript{98} Dealing with the \textit{Lex Laval}, which essentially limits wages and working conditions applicable to posted workers to those 'rules for minimum protection', the ECSR stated that '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'.\textsuperscript{99} Or, if one prefers to look at the question from the point of view of collective social rights: '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 [...] 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'.\textsuperscript{100} The mere juxtaposition of these statements brings the observer to a pressing, though somewhat rhetorical, question: is the entire PWD-system, shaped by the case law of the CJEU, in violation of the obligations stemming from the European Social Charter? Or, more specifically, is the quantum of

\textsuperscript{97} AG Mengozzi in \textit{Laval} at 197-198; AG Bot in \textit{Rüffert} at 79-81, 'a textbook illustration of the pre-\textit{Laval} approach to posting of workers', see C. Kilpatrick, 'Internal market architecture and the accommodation of labour rights. As good as it gets?', (2012) 1 \textit{European Journal of Social Law} 4, 19.
\textsuperscript{98} \textit{Laval}, paragraph 80; \textit{Rüffert}, paragraph 33 (emphasis added).
\textsuperscript{99} Decision on Admissibility and the Merits, \textit{supra} note 1, paragraph 136 (emphasis added).
\textsuperscript{100} \textit{Ibid}, paragraph 121 (emphasis added).
competitive advantage\textsuperscript{101} awarded to posted workers by EU law in contrast with the obligation of protecting and promoting the rights to collective bargain and action and the equal treatment for migrant workers?\textsuperscript{102} At the end of the present analysis one can hardly avoid answering for the affirmative. If this is the case, the decision of the ECSR here at stake opens the door to a conflict between the EU and the ESC legal order of unprecedented latitude. As highlighted in the previous Section, such a situation does not lend itself to a simple legal solution.

In the remaining part of this contribution I will focus on the question of the fundamental rights of collective bargaining and action, leaving aside the question regarding the 'migrant nature' of posted workers. This in light of the fact that the corpus of decision stemming from the different instances on the first issue appears more developed than the second one. Also, the rights protected by Article 6 ESC in their 'instrumental' role,\textsuperscript{103} could well represent the tools to bring about the equal treatment requested by Article 19§4.

A. A Game of Courts?

To further highlight the epic proportion of the conflict, another king is to be summoned to the battlefield: the European Court of Human Rights (ECtHR). Apparently, this third king can instil some form of respect in the EU one, at least on paper. As it was highlighted before, the EUCFR explicitly refers to the European Convention on Human Rights in Article 52§3,\textsuperscript{104} while the Explanations clarify that this reference includes the case law of the ECtHR. However, in a relatively recent decision,\textsuperscript{105} the ECtHR opened an important channel to the corpus of decisions of the ECSR\textsuperscript{106} and of other supervisory bodies, as the CEACR.\textsuperscript{107} Essentially the European Court of Human Rights referred to the interpretation provided by those bodies of their respective international agreements (ILO Conventions and the European Social Charter), in order to assess the emerging consensus (and the 'continuous evolution') around the rights protected by the ECHR.\textsuperscript{108} In casu such

\textsuperscript{102} Keeping in mind that all Member States have ratified either the ESC or the RevESC (or both), which contain the very same provisions as to these obligations.
\textsuperscript{103} Decision on Admissibility and the Merits, \textit{supra} note 1, paragraph 109 (emphasis added).
\textsuperscript{104} Even though the reference goes to 'rights which \textit{correspond} to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms'. The Explanations provide a list of those rights which (unsurprisingly) does not include Article 28 EUCFR. It remains to be seen if the reference of Article 52§3 EUCFR will be interpreted as to cover the rights to collective bargaining and action recognised by Article 28 EUCFR and now protected (to some extent) by the ECtHR under Article 11 ECHR (Freedom of Association). See further K. Ewing & J. Hendy QC, 'The Dramatic Implications of Demir and Baykara', (2010) \textit{39 Industrial Law Journal} 1; Dorsemont F., 'How the European Court of Human Rights gave us Enerji to cope with Viking and Laval', in M.-A. Moreau (ed.), \textit{Before and After the Economic Crisis. What Implications for the European Social Model?} (Edward Elgar, Cheltenham, 2011), 217-235.
\textsuperscript{105} Demir and Baykara v. Turkey [2008], EcHr1345, (2009) 48 EHrr54.
\textsuperscript{106} \textit{Ibid}, paragraphs 50 and 149.
\textsuperscript{107} \textit{Ibid}, paragraphs 38, 43, 101, 122, 147 and 166.
\textsuperscript{108} \textit{Ibid}, paragraphs 85-86. On the point, see further K. Lörcher, The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara
emerging consensus brought the ECtHR to consider the right to bargain collectively as an 'essential element' of the right to form and join trade unions, protected by Article 11 ECHR. Putting together the firm stance of the CEACR and the present decision of the ECSR, one could effectively argue that there is an emerging consensus against the limitations to the right to take collective action (and to bargain collectively) imposed by the Court of Justice through the means of the proportionality test. It is also worth mentioning that in Demir the European Court of Human Rights, deciding a case against Turkey, took into account Articles 5 and 6 ESC though Turkey had not ratified those Articles. In the (unlikely) event of a given Member State unilaterally denouncing the Articles of the ESC to solve a contrast with the EU Treaties (under the procedure of Article 351 TFEU), this choice would not per se impede the ECtHR to take into account those Articles. Still, it should be clear enough that the eventuality of witnessing an open conflict between the two apical Courts of the European area is remote.

B. Reconciliation

In view of the previous analysis, it would appear preferable that the EU institutions themselves take into account the 'emerging consensus'.


109 Demir and Baykara, paragraph 154.

110 International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations (The United Kingdom), 208-209 and International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), 178: 'the Committee recalls 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'.

111 Decision on Admissibility and the Merits, supra note 1, paragraph 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'.

112 The possibility was explored even before the present decision of the ECSR in A. Bücker, F. Dorssemont & W. Warnek, The search for a balance: analysis and perspectives', in A. Bücker & W. Warnek, Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert (Nomos, Baden Baden, 2011), 315-360, 350.

113 Demir and Baykara, paragraphs 45, 49 and 78.

114 In fact, the European Social Charter allows for a State to accept only a limited number of Articles. See O. De Schutter, The Two Lives of the European Social Charter', in O. De Schutter (ed.), The European Social Charter: a Social Constitution for Europe (Bruylant, Bruxelles, 2010), 11-37, 16.
The first logical answer would be to hope for a legislative solution. Unfortunately, such a possibility already vanished into thin air with the failure of the so-called 'Monti II' proposal. As it is well known, the initiative of the Commission was stopped by the ‘yellow cards’ raised by a number of national parliaments under the subsidiarity protocol and by the (partly consequent) difficulty ‘to gather the necessary political support within the European Parliament and the Council’. To further discourage the hopes surrounding an eventual legislative solution to the conflict outlined before, one should keep in mind that the ‘Monti II’ proposal did in fact refer to the proportionality test as the instrument to solve eventual conflicts between fundamental freedoms of the internal market and the (fundamental) right to take collective action.

The second option is a continuation of the Game of Courts, rectius of the Game of Court. The Court of Justice could go beyond the simple superficial reference to international texts to engage in a true analysis of the interpretation of those texts provided by their supervisory bodies, in order to avoid conflict. It goes without saying that such a change of attitude has far reaching implications which go beyond the limited scope of this contribution. For a few closing comments I will just add some observations about the possibilities offered by the EUCFR. The possible role of Articles 52§3 and 53 EUCFR has already been presented in Section V. Instead, here I will look into the


117 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

118 As mentioned in the letter accompanying the withdrawal of the proposal, Brussels 12 September 2012, Ares(2012)1058907.

119 Monti II proposal, Recital 13.

120 Though, as stated by De Burça, so far ‘there has been a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights law and jurisprudence’. See G. De Burça, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’, (2013) 20 Maastricht Journal of European and Comparative Law 168, 173; specifically about the (lack of) reference to the ESC see J-F.Flauss, ‘Les interactions normatives entre les instruments européens relatifs à la protection des droits sociaux’, in J-F. Flauss (ed.), Droits sociaux et droit européen. Bilan et prospective de la protection normative (Nemesis, Bruxelles, 2002), 89-114, 109: ‘en effet, si la Cour de Luxembourg, s'est à l'occasion référée à la Charte sociale européenne, elle l'a fait avec mesure et discrétion, et en toute hypothèse à dose homéopathique’.

interplay of Article 28 and Article 52§1 EUCFR. The former recognises the rights to collective bargaining and action, while the latter regulates the possibility to restrict the exercise of the rights recognised in the Charter. In doing so Article 52§1 recalls the necessity for those restrictions to a) respect the ‘essence' of the right, b) undergo a proportionality test. Now, keeping in mind the newly found legal value of the EUCFR, one could draw inspiration from the ‘emerging consensus' to interpret the ‘essence' of the rights to collective bargaining and action. The ECSR made it easy to find this inspiration. Dealing with the right to take collective action in its decision about the Lex Laval, the Committee stated that ‘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'.122 Furthermore, the Committee found the limitation to minimum conditions as a disproportionate restriction to the rights protected, among others, by Article 28 EUCFR. Once that striving for equal treatment is included in the essence/substance of the rights to collective bargaining and action,123 it remains to be seen what lies outside this scope. In this too the decision of the ECSR could provide an interesting inspiration for the CJEU. In particular, the Committee found that the prohibition of collective actions backing discriminatory objectives would be prima facie legitimate under the system of values established by the EESC.124 The Court of Justice would thus be perfectly equipped to tackle those actions aimed at setting wages and working conditions of posted workers at an artificially higher level in respect to those generally applied in the host state. To this extent, statistical data, which have proved useful in tackling discriminations, could provide an instrument to identify eventual protectionist behaviours.

122 Decision on Admissibility and the Merits, supra note 1, paragraph 120 (emphasis added).
123 Though the issue of the equal treatment of posted workers on the basis of their nature of migrant workers has been left aside, it could be argued that a change of stance regarding the rights of collective bargaining and action could provide a solution also to that problem.
124 Decision on Admissibility and the Merits, supra note 1, paragraph 119.