

**Forum of Workers' Rights and Economic Freedoms
Brussels, 8-9 October 2008**

*Workshop on the interpretation of Directive 96/71/EC
and the case law of the ECJ*

Note by the International Labour Office

- The ILO welcomes this initiative by the European Commission, which offers the opportunity to exchange views on very topical issues.
- The ILO also welcomes the support to the Decent Work Agenda and to the ILO Declaration on social justice for a fair globalization of 2008 expressed in the Renewed Social Agenda of the EU¹.
- Coming to the specific topic of this workshop, a number of recent judgments of the Court of Justice of the European Communities² are of particular significance for ILO standards.
- The Court rulings in the *Laval*, *Rüffert* and *Commission v. Luxembourg* cases are liable to have an impact on the application of **ILO Convention No. 94** on labour clauses in public contracts, the aim of which is to avoid social dumping in the context of public procurement.
- Convention No. 94 requires bidders to be informed in advance, by means of standard labour clauses included in tender documents, that, if their bid is successful, they will have to observe, in the performance of the contract, wages and other labour conditions that are not less favourable than the highest minimum standards established locally by collective bargaining³, arbitration or law.

Its objectives are twofold:

- First, to remove wages, working time and working conditions from being used as elements of competition among bidders for public contracts, by requiring all bidders to respect, as a minimum, certain locally established standards. In this sense, it proposes a common level playing field – in terms of labour standards – for all economic actors, and thus promotes fair competition and socially responsible procurement.
- Second, to ensure that public contracts do not exert downward pressure on wages and working conditions, through the inclusion of a standard clause in public contracts to the effect that workers employed to carry out the contract shall receive wages and enjoy working conditions that are no less favourable than those established, by collective agreement, arbitration award or national laws and regulations, for the same work in the area where the work is being carried out.

¹ *Renewed social agenda: Opportunities, access and solidarity in 21st century Europe*, COM(2008)412 final of 2 July 2008.

² ECJ, Grand Chamber, 11 December 2007, C-438/05, *VikingLine* ; Grand Chamber, 18 December 2007, C-341/05, *Laval un Partneri*; 3 April 2008, C-346/06, *Rüffert*; 19 June 2008, C-319/06, *Commission v. Luxembourg*.

³ In this context, the Convention refers to collective agreements covering “substantial proportions” of employers and workers concerned (and not only to those declared generally applicable).

It should be noted in this regard that 10 EU Member States are currently bound by Convention No. 94⁴.

- In addition, the ECJ judgments in the *Viking*, *Laval* and *Commission v. Luxembourg* cases may have an impact on the application of two fundamental ILO Conventions: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).⁵
 - **Convention No. 87** establishes notably the right of workers' and employers' organizations to organize their administration and activities and to formulate their programmes, with the aim of furthering and defending the interests of workers and of employers, respectively. The ILO Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) have frequently recalled that the right to strike is a fundamental right of workers and of their organizations. The right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).
 - **Convention No. 98** requires States parties, among other elements, to take appropriate measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The 27 EU Member States have all ratified the eight ILO fundamental Conventions, including Conventions Nos. 87 and 98. Furthermore, freedom of association and the right to collective bargaining and action are solemnly proclaimed in articles 12 and 28 of the Charter of Fundamental Rights of the European Union of 2000. Furthermore, the benefit of the Special incentive arrangement for sustainable development and good governance (GSP+) is subject to the ratification and implementation of, among other instruments, the eight ILO fundamental Conventions.⁶

- The ILO was honoured to welcome in June 2008 Mr. Jan Andersson, Chairperson of the Committee on Employment and Social Affairs of the European Parliament, who participated in a panel discussion on social dimensions of public procurement, following the discussion of the CEACR general survey on Convention No. 94 by the ILO Conference. This debate offered the opportunity for a first exchange of views following the recent case-law of the ECJ and opened the door for further discussions.
- The ILO also notes with the greatest interest that, as recalled last Tuesday by Commissioner Vladimír Špidla on the occasion of the World Day for Decent Work, the

⁴ Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Italy, Netherlands and Spain.

⁵ The principles of freedom of association and the effective recognition of the right to collective bargaining are enshrined in the ILO Constitution. As recalled in the ILO Declaration on Fundamental Principles and Rights at Work of 1998, in freely joining the ILO, all Members have endorsed the principles and rights set out in the Constitution and in its Annex, the Declaration of Philadelphia of 1944.

⁶ Article 9 of the Council Regulation (EC) No 732/2008 of 22 July 2008.

European Commission recently⁷ called upon all EU Member States to ratify and implement the up-to-date ILO Conventions.⁸ The Commission also stressed that the effective application of these instruments should take into account the comments made by the ILO supervisory system. It is important to note in this respect that the Council of the European Union had expressed the same views in its Conclusions on Decent Work for all of 1st December 2006.

- In this regard, the ILO notes with special interest the adoption on 22 September 2008 of a report on “Challenges to collective agreements in the EU” by the Committee on Employment and Social Affairs of the European Parliament.⁹ This report makes explicit reference to ILO Conventions Nos. 94, 87 and 98. It recalls that several EU Member States have ratified Convention No. 94, regrets that judicial rulings fail to take it sufficiently into consideration and calls on the Commission to clarify this situation as a matter of urgency and to continue to promote the ratification of this Convention in order to further enhance the development of social clauses in public procurement regulations which is one of the aims of the Public Procurement Directives 2004. The report also considers that the exercise of fundamental rights, as recognized in Member States, ILO Conventions and the EU Charter of Fundamental Rights, including the right to negotiate, conclude and enforce collective agreements and the right to take industrial action, should not be put at risk.
- It is also to be noted that the CEACR has published earlier this year a General Survey on labour clauses in public contracts, in which it concluded that the objectives of Convention No. 94 are even more valid today than they were at the time of its adoption, 60 years ago, and they strengthen the ILO’s call for fair globalization.¹⁰
- The ILO is looking forward to furthering the dialogue with the institutions of the European Union on these issues, with a view to promoting the effective implementation of international labour standards. In the interest of legal and policy coherence, it hopes that the ILO’s up-to-date Conventions, including Conventions Nos. 87, 98 and 94, will be fully taken into account by the European Union institutions and Members States.

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⁷ Report of July 2008 on the EU contribution to the promotion of decent work in the world, SEC(2008) 2184, section 6.3.

⁸ Currently, 76 ILO Conventions are considered to be up-to-date. They include the eight fundamental Conventions, four priority Conventions on tripartite consultation, labour inspection and employment policy, as well as Convention No. 94.

⁹ The adoption of this report in the plenary of the European Parliament is scheduled for 21 October 2008.

¹⁰ *Labour clauses in public contracts*, International Labour Conference, 97th session, 2008, Report III (Part 1B), para. 308. Based on the Committee’s findings, the International Labour Office has just published a practical guide aimed at helping constituents to better understand the requirements of the Convention, and ultimately to improve their application in law and practice.