A SWEDISH PERSPECTIVE ON *LAVAL*

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I will first recount the facts of the dispute before the Swedish Labour Court,[1] I will then present the questions referred by the Labour Court to the European Court of Justice for a preliminary ruling, and finally I will discuss the judgment delivered by the Court. I will conclude with a few remarks.

I. FACTS

Laval un Partneri (henceforth Laval) is a Riga based Latvian company. In May 2004 Laval posted workers from Latvia to work in Sweden in connection with contracts by tender to be performed in Sweden by Laval's subsidiary, L&P Baltic Bygg (henceforth Baltic). One of the contracts concerned the construction of a school building in the Town of Vaxholm.

Laval was not bound by a collective agreement with the Swedish Building Workers' Union (henceforth Byggnads), its Union Local 1 (henceforth the Union) or the Swedish Electricians' Union (henceforth Electricians' Union). In June 2004 contacts were established between representatives of Laval and Baltic, on the one hand, and the shop steward of the Union, on the other. Discussions were conducted with respect to the conclusion of a collective agreement in connection with the construction work in Vaxholm. In Sweden, whenever a building contractor who is not yet a member of an employer organization is approached by trade unions to sign a collective agreement, the unions require that his wages reflect the average wage paid in the geographical area in which the undertaking is located. In this case the Union requested that 145 SEK be paid per hour. Laval rejected the claim. The Swedish national collective agreement for the building sector does not contain provisions on

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1. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 ECR I-00000. I am not addressing the Opinion of Advocate General Mengozzi. He came to very different conclusions than the European Court of Justice.

minimum pay. The collective agreement contains, however, a "fall-back clause," which stipulated 109 SEK/hr at the time of the dispute. The clause applies if the parties should fail to agree on a higher wage level upon the conclusion of a collective agreement. Such negotiations are carried out on a case-by-case basis. No collective agreement was reached, however, as a result of the discussions between the parties. On September 14 and October 20, 2004, Laval signed two collective agreements with the Latvian Building Workers' Union.

After giving notice of a blockade concerning building and construction work at all the building sites of Laval, the blockade in Vaxholm took effect on November 2, 2004. The Electricians' Union thereafter gave notice of secondary action, which took effect on December 3, 2004, and that was directed against electrical installation work at all the construction sites of Laval, including the one in Vaxholm. After a while Laval and Baltic interrupted their building activities in Vaxholm, and Baltic was declared bankrupt.

II. THE DISPUTE

On December 7, 2004, Laval brought an action before the Swedish Labour Court against Byggnads, the Union, and the Electricians' Union, requesting, *inter alia*, that an interlocutory decision be issued, declaring the industrial action to be unlawful, and ordering it to be called off. Laval also demanded that the aforementioned unions should pay damages to Laval. Furthermore, Laval requested that the Labour Court should submit a request to the European Court of Justice for a preliminary ruling on the matter. The unions contested all the claims. The Labour Court decided to reject Laval's request for an interlocutory decision to discontinue the industrial action.[2]

The Labour Court proceedings took place in March 2005, whereupon a decision was handed down in which the Court concluded that issues relating to European Community law had been raised even though the trade union action was lawful according to Swedish law.[3] The Labour Court declared further that the content of Articles 12 and 49 of the EC Treaty and the Directive 96/71 concerning the posting of

2. Labour Court decision 2004 No. 111 (dated Dec. 22, 2004).
3. Labour Court decision 2005 No. 49 (dated Apr. 29, 2005).

workers[4] was not clear enough for the Labour Court to decide the case.

III. APPLICABLE NATIONAL PROVISIONS

The right to take industrial action is guaranteed by the Swedish Instrument of Government (Constitution), Chapter 2, Section 17. Under its provisions, trade unions, employers, or employer organizations are entitled to take industrial action, unless otherwise provided by law or agreement.

The Joint Regulation Act[5] (henceforth JRA) contains provisions restricting the right to industrial action. Section 41 stipulates circumstances in which the peace obligation shall apply to both employees and employers who are bound by a collective agreement in relation to each other. Among other things, it is forbidden to take industrial action in order to bring about an alteration in the collective agreement in force. If industrial action is unlawful, secondary action is also unlawful.

It also follows from Section 42 of the JRA, first paragraph, that it is likewise unlawful to take industrial action in order to set aside or bring about an alteration in the collective agreement already in force between other parties. In the Labour Court Judgment 1989 No. 120[6] it was concluded that the ban also applied when industrial action was taken in Sweden in order to set aside or bring about an alteration in a collective agreement between foreign parties, if the said action, pursuant to applicable foreign law, was unlawful in relation to the parties.

By means of the so-called Lex Britannia,[7] which came into force on July 1, 1991, the Swedish legislature decided to limit the effects of the principle established in the Britannia judgment. The Lex Britannia is made up of three provisions that can be found in the JRA, of which Section 42, third paragraph, is the most important. The paragraph provides that the provisions of the first paragraph of the same section apply only where a trade union resorts to industrial

4. Directive 96/71 EC of the European Parliament and of the Council (Dec. 16, 1996) concerning the posting of workers in the framework of the provision of services.

5. *Lag (1976:580) om medbestämmande i arbetslivet*, translated here and referred to as the Joint Regulation Act.

6. The so-called Britannia judgment, named so after M/S Britannia against which industrial action was taken by the Swedish trade unions in a Swedish port. M/S Britannia flied a flag-of-convenience. The employer was bound by a Filipino collective agreement and employed a Filipino crew.

7. Official Gazette 1991:681, Government Bill 1990/91:162, om vissa fredspliktstegler [government bill] (Swed.).

action with reference to working conditions to which the JRA is *directly applicable*. Accordingly, industrial action is not unlawful under section 42, first paragraph, when a foreign employer conducts temporary activities in Sweden and the connection to Sweden is deemed to be so weak that the JRA is not directly applicable to the working relationship.

According to the preparatory works,[8] the purpose of the Lex Britannia is to combat social dumping and to give the trade unions the possibility to act in order to make all employers conducting activities on the Swedish labor market apply such wages and other working conditions that correspond to those generally applied in the sector, and to create favorable conditions for fair competition on equal terms between Swedish companies and providers of services from other countries.

Directive 96/71 concerning the posting of workers was implemented into Swedish law in 1999 by means of the Act on the Posting of Workers.[9] Section 5 of the Swedish Act provides terms and conditions of employment that should apply to such workers. Section 5 reflects the content of Article 3(1) of the Directive.[10] However, the Act lacks provisions relating to minimum rates of pay[11] or to Article 3(8), subsection 2 of the Directive.[12] The Swedish legislature had deliberately refrained from introducing any such provisions into the

8. *Id.* at 5-6.

9. Official Gazette 1999:678, Government Bill 1998/99:90, Utstationering au arbetstagare.

10. Article 3(1) of the Directive lays down a nucleus of mandatory rules for minimum protection of workers (maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, and of children and young people, and equality of treatment between men and women and other provisions on non-discrimination) to be applied by a foreign service provider.

11. Swedish labor law lacks statutory provisions concerning minimum wages. This does not imply that there are no minimum wages laid down by collective agreements. A recent study indicates that the minimum wage is equivalent to 60–70% of the median wage in industry. The minimum wage in Sweden is the highest in the European Union; the lowest minimum wage level is found in Latvia (data 2004), see P. Skedinger, *Hur höga är minimilönerna? (How high are the minimum wages?)* (Report 2005:18, at 26–27, Institute for Labour Market Policy Evaluation).

12. It must be stated here that the provisions of the Directive may be implemented by law, regulation or administrative provisions, or by collective agreements or arbitration awards that have been declared universally applicable. In the absence of such collective agreements or arbitration awards (which applies to Denmark, Sweden and Italy) Article 3(8), subsection 2 provides that "Member States *may, if they so decide*, base themselves on: - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or – collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application . . . insures equality of treatment on matters listed in [Article 3(1)] between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position." (Italics added).

Act because this could lead to discrimination of foreign providers of services, in comparison with Swedish entrepreneurs not bound by the collective agreement.[13] It was thought sufficient for the trade unions to have at their disposal legal means by which to approach a foreign provider of services in order to secure the conclusion of a collective agreement.

IV. THE PARTIES' ARGUMENTS WITH RESPECT TO THE LAWFULNESS OF THE INDUSTRIAL ACTION IN LIGHT OF EC LAW

According to Laval, the Union's demands, in combination with the industrial action, entail an unlawful and unreasonable violation of Laval's freedom to provide services in Sweden pursuant to Article 49 of the EC Treaty. The Union's demands and the industrial action violate also the prohibition on discrimination on grounds of nationality, pursuant to Article 12 of the EC Treaty[14] and Directive 96/71 concerning the posting of workers. In Laval's view the Swedish peace obligation shall apply in accordance with EC law, since national rules on industrial action must be set aside if they are contrary to mandatory EC rules. Laval further claims that the EC Directive on the posting of workers provides an exhaustive set of provisions restricting the free movement of services that may be applied by a Member State.

The employee parties have argued that the right to industrial action is not regulated by EC law, but rather at the national level, pursuant to the provisions of Article 137(5) of the Treaty.[15] The demands made by the unions only imply that Laval shall apply the same rules as those used by Swedish companies bound by a tie-in agreement.[16] The employee parties point out that on the basis of the principle of equal treatment between domestic and foreign provider of services the unions' demands cannot be considered to violate the principle of freedom to provide services. Support for this view can

13. Government Bill, *supra* note 9, at 27.

14. The European Court of Justice did not find it necessary to rule on Article 12 since Article 49 applied to the case, see Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 55.

15. Article 137(5) provides—as an exception to the competences given to the Community as regards the social dimension—that the provisions of the same Article "shall not apply to pay, the right of association, the right to strike or the right to impose lockouts." The European Court of Justice disapproved of the view submitted by the trade unions, a viewpoint also argued by the Danish and Swedish Governments, see the *Laval*, ¶¶ 86–88.

16. A tie-in agreement is a standard collective agreement concluded between a trade union and employers who are not already bound by a collective agreement, and who are not members of any employer organization. A tie-in agreement shall have the same content as the national collective agreement.

also be found in Directive 96/71 for taking industrial action in order to bring into being the most representative collective agreement, such as the collective agreement for the building sector.[17] It also follows from the Directive that Sweden may apply its collective agreements to any person who is employed, even temporarily, within its territory (posted workers).[18] The employee parties argue that this may take place by means of application of the provisions as found in the Lex Britannia.

The employee parties argue further that even if it were established that the provisions of Article 49 of the EC Treaty had been infringed, freedom to provide services may be restricted if the objective is justified by overriding reasons of public interest. According to the case law of the European Court of Justice, protection of workers constitutes such an overriding reason of public interest. This applies especially if the employees' terms and conditions of employment are so bad as to amount to social dumping. In the view of the employee parties the working conditions of the Latvian workers at the school construction site in Vaxholm were so bad that they amounted to social dumping.

V. THE LABOUR COURT'S MOTION FOR A PRELIMINARY RULING

In view of the foregoing, the Labour Court submitted the following request to the Court of Justice pursuant to Article 234:[19]

> (1) Is it compatible with rules of the EC 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

17. Recital 22 of the Directive provides that the Directive "is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions."

18. Recital 12 of the Directive provides: "Whereas, Community law does not preclude Member States from applying their 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; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means." This text reflects the tenet of a previous case from the European Court of Justice, Case C-113/89 Rush Portuguesa Ld[a] v. Office national d'immigration, 1990 E.C.R. I-1417, ¶ 18, i.e., that "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means."

19. Submission from the Labour Court to the European Court of Justice (dated Sept. 15, 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 the Swedish trade unions against a foreign temporary provider of services in Sweden?

VI. THE PRELIMINARY RULING OF THE EUROPEAN COURT OF JUSTICE

Sitting in Grand Chamber (thirteen members of the Court), the Court handed down a rather lengthy opinion in the first case ever on industrial action.

The Court began by reviewing the various provisions of Directive 96/71 and ended by reformulating the first question of the Swedish Labour Court. In order to answer that question the Court stated that the Labour Court's first question "*must be understood* as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71" preclude a trade union from taking collective action in order to force a foreign service provider "*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."[20]

20. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 53 (italics added).

Looking in particular at Directive 96/71, the Court first referred to Recital 13 of the Directive, which provides, inter alia, that "the law 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 another Member State. However, this does not imply any harmonization of the material content of those mandatory rules for minimum protection. From this the Court concluded that the first question of the Swedish Court "must be examined with regard to the provisions of that directive interpreted in the light of Article 49 . . . and, where appropriate, with regard to the latter provision itself."[21]

After these preliminary considerations the Court proceeded to examine the *possibilities that were available to Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay*. The European Court found it suitable "in order to provide the national court with an answer which will be of use to it" to examine all these issues, even though the Swedish Labour Court had not requested that the European Court should consider them.[22]

The Court referred first to Article 3(8) of the Directive. The Court stated that "[i]t is clear from the wording of that provision that recourse to the latter possibility requires, first, that the Member State *must* so decide . . ."[23] The European Court has also clarified in this context that only minimum rates of pay are provided for in the Directive, which is why that provision "cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages . . ."[24]

The European Court concluded therefore that a Member State in which the minimum rates of pay have not been determined in the way provided for in Article 3(1) and (8), subsection 2 of the Directive is not entitled "to impose on undertakings established in other Member

21. *Id.* ¶ 61.

22. *Id.* ¶ 62.

23. *Id.* ¶ 66 (italics added). It is not at all so clear that the clause in Article 3(8), subsection 2, i.e., "Member States *may*, if they so decide, base themselves on" commands the Member States to implement such provisions in the national legislation. The general opinion is rather inclined to have been the opposite, i.e., that the Member States could avail themselves of this possibility, if they so decided, with no strings attached in case of the absence of such implementation.

24. *Laval*, ¶ 70.

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."[25]

The next issue examined by the ECJ related to *matters concerning terms and conditions of work applicable to posted workers*. In addressing the minimum protection of the aforesaid, laid down in Article 3(1), as regards a limited list of issues, the Court found that certain terms of the collective agreement for the building sector, and in particular those concerning working time and annual leave, *depart from* the applicable Swedish law, and establish *more favorable terms*. It would have been no problem to apply those terms to posted workers, since it follows from Article 3(7) of the Directive that what is stated in respect of the core provisions of Article 3(1) "shall not prevent application of terms and conditions of employment which are more favourable to workers."[26] The Court has nevertheless come to the conclusion that Article 3(7) "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*," owing to the fact that Article 3(1) "expressly lays down the degree of protection" for posted workers, and, moreover, because "such an interpretation would amount to depriving the directive of its effectiveness."[27]

The implication of this is very revealing: if more favorable provisions are found in a collective agreement as compared with those that follow from a statute in the host State, such (more favorable) provisions must not be applied to posted workers! This is a big blow to those legal systems (such as those prevailing in Denmark and Sweden) in which legislation has been so designed as to make it possible for the social partners to implement other provisions in order to offer more favorable conditions than those provided by the state.[28]

25. *Id.* ¶ 71.

26. The same is also stated in Recital 12 of the Directive, see *supra* note 18.

27. *Laval* ¶ 80 (italics added). This statement is different from the approach chosen by the same Court in Case C-49/98 Finalarte and Others 2001 E.C.R. I-1731 when the Court upheld the six week long paid leave provisions in the German collective agreement applying to the building sector compared to the minimum requirement of four week paid leave in Directive 93/41 concerning certain aspects of the organization of working time.

28. See further on mandatory and quasi-mandatory labor and employment law provisions in Sweden, R. EKLUND, T. SIGEMAN & L. CARLSON, SWEDISH LABOUR AND EMPLOYMENT LAW: CASES AND MATERIALS 25–26 (2008).

The Court invites transnational providers of services to offer terms and conditions of work inferior to those that are generally applied in the industry.

The Court also found that *certain terms* of the collective agreement for the building industry related to matters which were *not specifically referred to* in Article 3(1) of the Directive. The aforementioned terms related mainly to various pecuniary obligations (such as a sum of 1.5 % of total gross wages withheld for the purpose of the pay review that the trade union carries out and a number of other insurance premiums). The Court found that Article 3(10) of the Directive, entitling the Member State to introduce terms and conditions of employment regarding matters other than those referred to in Article 3(1) in the case of "public policy provisions," could not be applied since these obligations were imposed "without the national authorities' having had recourse to Article 3(10) of Directive 96/71."[29] To disregard part of the collective agreement in the way stated by the Court does not sustain the equal treatment principle that is a cornerstone of the Directive.[30]

The *collective action* (the blockade that forced Baltic into bankruptcy) was assessed in light of the provisions of Article 49 only. The Court recalled here that the right to take collective action "is recognised both by various international instruments which the Member States have signed or cooperated in . . . and by instruments developed by those Member States at Community level . . ."[31] References were made here to the European Social Charter of 1961, which is also referred to in Article 136 of the Treaty, and Convention No. 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 1948. References were further made to the Community Charter of the Fundamental Social Rights of Workers of 1989, which is also referred to in Article 136 of the Treaty, and to the Charter of Fundamental Rights of the European Union of 2000. The Court thus concluded that, "Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the *general principles of Community law* the observance of which the

29. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 84. The reference to Article 3(10) in this context is somewhat ambiguous, since it is rather obvious that only a Member State can issue such provisions. The "public policy" exception has a rather narrow application.

30. See on Article 3(8) last proviso in *supra* note 12.

31. *Laval*, ¶ 90.

Court ensures, the exercise of that right may none the less be subject to *certain restrictions*."[32]

The Swedish government had also invoked the constitutional protection of the right to take collective action as provided by the Swedish Instrument of Government, but the Court dismissed the motion by saying that Swedish law provided likewise that that right "may be exercised unless otherwise provided by law or agreement."[33] The fact that the right to take collective action is an integral part of the constitution, as it is in many other Member States, seemed to be of no consequence at all! And yet, in the same breath, the Court admitted that "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, such as the free movement of goods[34] . . . or freedom to provide services."[35] In those two cases, the Court held that "freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality."[36] Consequently, the fundamental nature of the right to take collective action does not render Community law inapplicable. The Court sets the standard: "It must therefore be examined whether the fact that a Member State's trade unions may take collective action . . . constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified."[37]

In its analysis the Court goes back to the observation already made, i.e., that the collective agreement for the building industry included, on the one hand, more favorable conditions than those resulting from the relevant legislative provisions, and on the other that it contained other terms relating to matters not referred to in Article 3(1) of the Directive. The Court said that an undertaking established in another Member States "*may be forced to sign the collective*

32. *Id.* ¶ 91 (italics added). The same Court had submitted the same statement one week before in Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, 2007 ECR I-0000, ¶ 44.

33. *Laval*, ¶ 92.

34. Reference is made to Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich 2003 E.C.R. I-5659.

35. Reference is made to Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeistenn der Bundesstadt Bonn 2004 E.C.R. I-9609.

36. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 94.

37. *Id.* ¶ 96.

agreement for the building sector . . . is *liable to make it less attractive, or more difficult,* for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC."[38] As if this were not enough, the Court continues, "The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings *may be forced,* by way of collective action*, into negotiations* with the trade unions of *unspecified duration* at the place at which the services in question are to be provided."[39]

It is common ground in Community law that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must also be suitable for securing the attainment of the objective it pursues and must not go beyond what is necessary in order to attain it. This expresses the proportionality principle of Community law. In this regard the Court in *Laval* has conceded that "the right to take collective action for the protection of the workers of the host State against *possible social dumping* may constitute an overriding reason of public interest within the meaning of the case-law of the European Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty."[40]

Another contention of the Swedish trade unions was that the objective of the blockade imposed on Laval was to give protection to the posted workers. The Court had no difficulty in accepting this view, since in many other cases the Court expressed similar opinions with respect to posted workers. The Court stated, however, that "as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such at issue in the case . . . cannot be justified with regard to such an objective."[41]

38. *Id.* ¶ 99 (italics added).

39. *Id.* ¶ 100 (italics added).

40. *Id.* ¶ 103 (italics added). Several references to the case law were made, such as Joined Cases C-369/96 and C-376/96 Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup, Sofrage SARL 1999 E.C.R. I-8453, Case C-165/98 André Mazzoleni and Inter Surveillance Assistance SARL 2001 E.C.R. I-2189, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte Sociedade de Construção Ld[a] and Others 2001 E.C.R. I-7831.

41. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 108.

The Court proceeded by stating that "As regards the negotiations on pay . . . it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means."[42] The Court pointed out, however, that the collective action was not justified by the public interest objective in cases "where the negotiations on pay . . . form part of a national context characterised *by a lack of provisions, of any kind, 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."[43]

Based on the foregoing, the first question referred to the European Court must be answered in the following way. Article 49 and Directive 96/71 preclude a trade union from attempting, by means of collective action in the form of a blockade, 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 whose terms lay down more favorable conditions than those resulting from the relevant legislative provisions.[44]

The second question posed by the Swedish Labour Court related to the so-called Lex Britannia legislation and its *compatibility with Community law* is answered in the following way. Although the European Court acknowledges that the provisions of the JRA introduce a system to combat social dumping, that purpose evaporates in the course of the Court's analysis. The Court states that "it is clear" from settled case law that the freedom to provide services implies, in particular, "the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the services is provided."[45] The Court further points out that "[i]t is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations."[46] Consequently, the Court feels obliged

42. *Id.* ¶ 109, see, e.g., the earlier mentioned case, Case C-113/89 Rush Portuguesa Ld[a] v. Office national d'immigration, 1990 E.C.R. I-1417, ¶ 18, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=
CELEX:61989J0113:EN:HTML.

43. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet, 2007 ECR I-00000, ¶ 110 (italics added).

44. *Id.* ¶ 111.

45. *Id.* ¶ 114.

46. *Id.* ¶ 115.

to point out that "national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement."[47] The Court also failed to establish that considerations underlying such legislation as the Lex Britannia, aiming to create a climate of fair competition and ensure enforcement of the equal treatment principle, "constitute grounds of public policy, public security and public health within the meaning of Article 46 EC. . . ."[48]

In light of the foregoing, the conclusion regarding the second question is that where there is a prohibition in a Member State against trade unions taking collective action in order to set aside or amend a collective agreement between other parties, Articles 49 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.[49]

VII. A FEW REMARKS

When I first read the ECJ ruling in *Laval*, I was confused and understood nothing. After the second reading I realized that something odd and unexpected had happened. After the third reading, I was on the turf again. But having read it five times, I finally understood the full meaning and significance of the Court's ruling: although couched in the dignified language of law, it amounted to no more nor less than prizing open the casket of economics and social policy issues.

In *Laval* the Court did not show much self-restraint with respect to the national social model adopted in Sweden concerning the organization of its national labor market, especially when we compare it to a very different approach adopted in a very similar case (the

47. *Id.* ¶ 116.

48. *Id.* ¶¶ 118–19. Why the Court here applied the stricter test laid down in Article 46 of the Treaty instead of the more flexible test as developed by court practice, i.e., asking the question whether the Lex Britannia pursues a legitimate objective and can be justified by overriding reasons of public interest is not easy to know.

49. *Id.* ¶ 120.

Viking Line case[50]), a ruling handed down by the Court only one week before the *Laval* ruling.[51] In the *Viking Line* case the International Transport Workers' Federation had issued a circular at the request of the Finnish Seamen's Union (FSU), following ITF's policy with respect to vessels flying a flag-of-convenience, regarding planned re-flagging of one of the passenger ferries (the Rosella), owned by Viking Line and sailing between Finland and Estonia. The *Viking Line* case involved the application of Article 43 (free establishment) of the Treaty. Even here the Court recognized the right to take collective action as a general principle of Community law. Similarly to *Laval*, the Court found that the collective action constituted a restriction on the freedom of establishment within the meaning of Article 43 of the Treaty. Using basically the same phraseology as that used in *Laval*, the Court pointed out that "the right to take collective action for the protection of workers is a legitimate interest that, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty . . . and that the protection of workers is one of the overriding reasons of public interest recognised by the Court . . ."[52] In the *Viking Line* case the Court stopped at that, however, holding that "it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers."[53] In the *Viking Line* case the Court showed respect for the traditional division of powers between national courts and the European Court of Justice; in the *Laval* case, the same Court failed to do so! The answer to the question as to why the Court has departed from the traditional mode of analysis in *Laval* is written in quicksand!

Although the European Court did admit in *Laval* that the objective of the Swedish Lex Britannia legislation was to combat social dumping, it dismissed this scheme as discriminatory. The Court did not time to analyze the Lex Britannia with reference to the protection of workers, i.e., posted workers, which is one of the overriding reasons of public interest recognized by the Court in a huge number of cases involving Article 49 of the Treaty and Directive 96/71.

50. Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, 2008 All. E.R. (EC) (judgment 11 Dec. 2007).

51. The only difference is that the reporters are different. In *Laval* the reporter was an Estonian judge, in *Viking Line* the reporter came from Luxembourg.

52. *Viking*, ¶ 77. References are made to *Schmidberger, Arblade and Others, Mazzoleni and ISA* and *Finalarte and Others*, i.e., the same cases as those referred to by the Laval Court, see n.30 and n.44 respectively.

53. *Viking*, ¶ 80. The parties in *Viking Line* later settled the dispute out of court.

In fact, the whole outcome of *Laval*, with its downgrading of the protection accorded to posted workers by the Directive, and in particular a total disregard of Article 3(7) of the Directive, is remarkable. Equally remarkable is the pronouncement that the Directive is also a maximum Directive—as if the floor could be placed at the same level as the ceiling. More favorable provisions may not be introduced. Provisions other than those listed in Article 3(1) may not be applied to posted workers either. One of the objectives of Directive 96/71 is to achieve "fair competition" between domestic and foreign providers of services in the host State.[54] The ECJ ruling in *Laval* opens the door for wage dumping in the EU. The Court has adopted a libertarian approach to workers' rights in Europe, and so a "race to the bottom," to use the jargon of economics, can begin, and tip the balance in favor of the employers.[55]

The Court has also shown a strange attitude when examining the collective action taken by the trade unions from the point of view of whether the employer has suffered because of the restrictions imposed by the collective action. The Laval judgment is clear on this point. The Court's question was: Why should a provider of services from another Member State bother to devote time for negotiations of unspecified duration in order to sign a collective agreement with the host country's trade union? The Court's answer is that it should not

54. Recital 5 of Directive 96/71/EC ("Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.").

55. In a more recent preliminary judgment by the European Court of Justice, Case C-346/06 Dirk Rüffert v. Land Niedersachsen (3 Apr. 2008), another decision sustaining the libertarian approach was handed down. The Land (Lower Saxony) had sustained minimum wage provisions applying to public works contracts in a regional collective agreement exceeding those by the national standard. The wage level in Lower Saxony was well above that required by the minimum wage required throughout Germany under the national collective agreement. The European Court of Justice disapproved of the minimum wage standard set forth in Lower Saxony by means of a strictly "literal" interpretation of the Directive 96/71. The Court stated at paragraph 36, which is revealing, that the Directive 96/71 "seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty." Accordingly, the lower minimum wage level by the national standard gave the Polish building company a competitive advantage that was sustained by Community law. This is, however, another deviation from what the same Court enunciated in Case C-60/03 Wolff & Müller, [2004] ECR I-9553, ¶ 42 wherein the Court of Justice, in another German case, stated that "there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly." *Rüffert* is enunciating a new doctrine wherein priority is given to the freedom to provide of services in Article 49 of the Treaty at the behest of the protection of workers. This is something that must be considered against the background that, in particular, Germany was an ardent defender of Directive 96/71 inasmuch almost the entire new Berlin after the fall of the Berlin wall was built by a labor force remunerated far below the minimum wage standard that applied to German building workers at the time. *See* Ronnie Eklund, *Utstationering av arbetstagare*, 85 SvJT 260 (2000).

bother because it will only make the undertaking less competitive and make it more difficult for it to carry out the construction work in another Member State. This response can only be understood in light of the *economic freedoms*, as specified by the Treaty. The property rights inherent in Article 49 favor the employer side. These rights *are given right of way* before any other rights, such as human rights and other fundamental freedoms, as established in the Member States' constitutional traditions and international instruments protecting these rights and values, such as, for example, Convention No. 87 of the International Labour Organisation on Freedom of Association and Protection of the Right to Organise (1948), Convention No. 98 of the International Labour Organisation on the Right to Organise and Collective Bargaining (1949), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), European Convention on Human Rights and Fundamental Freedoms, ECHR (1950), and the European Social Charter (1961).

This is not a place to give a detailed presentation of these instruments, the case law or established practice.[56] Suffice it to say that in some of these instruments the right to collective action is not unfettered. Legislation is usually designed in such a way as to limit any restriction of the basic rights that are prescribed by law and that 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.[57] To my knowledge, there is nothing in those international instruments that speaks in favor of the application of an *economic defense* by the employer, such as the one propounded by the ECJ in *Laval*, i.e., that it takes time to negotiate, which makes it in turn less attractive and more difficult to provide services in another country. The approach of the European Court as demonstrated in *Laval* is not so different from the way in which American courts used to act in the past, issuing labor injunctions to prevent irreparable damage to property and property rights in order to break up strikes.[58]

Tonia Novitz wrote, "The European Court of Justice has no ostensible jurisdiction to enforce the protection of the right to strike in

56. For a recent review, see in particular TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE (2003) and P. HERZFELD OLSSON, FACKLIG FÖRENINGSFRIHET SOM MÄNSKLIG RÄTTIGHET (2003).

57. European Social Charter, Oct. 18, 1961, art. 31, ETS No. 35, wherein the right to collective action is expressly spelled out, Article 6(4).

58. On the abuse of the "labour injunction" in the United States, see CHARLES O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW 95–104 (3d ed. 1979).

Member States, by virtue of the lack of EC law on this subject. However, there remains the potential for the Court to develop its influence through the 'back door'. This can occur when a litigant challenges national labour laws which clash with corresponding EC law. This is a prospect which many view with concern and trepidation, for this will not be a representative democratic process, but the opposite. It may allow the desires of the populace, as expressed in national political processes within each State, to be subsumed by the economic goals of European market integration as perceived by the ECJ."[59] The prospect is dismal, says the same author, "The danger is that the ECJ will decide independently of the findings of other international supervisory bodies on the scope and content of the right to strike, as it has been shown to do in the past in relation to other rights set out in the ECHR. Given the Court's limited experience in the labour law field, due to the restrictions on EU competence to date, this may be a cause for concern."[60]

It took only five years for this very danger to materialize. The references in *Laval* to the international instruments are merely lip service. To be sure, the Court did recognize the right to take collective action as a fundamental right, since it forms part of the general principles of Community law. Having said that, the same right is siphoned through the lens of the four freedoms of the Treaty.[61] It is like putting the cart before the horse! Very little is left of the fundamental right to take collective action after the Laval ruling. It is obvious to me that international labor law on industrial action is very different from what *Laval* propounds.

The Court tries to send a message that we still have a European *Economic* Union. I admit that I do not trust the European Court of

59. NOVITZ, *supra* note 56, at 258 n.57.

60. *Id.* at 259.

61. Giovanni Orlandini has pointed out the clash between the economic freedoms in the Treaty and industrial conflict devoted basically to a study of the freedom of movement of goods and the so-called "Strawberry case", Case C-262/95 Commission v. France [1997] ECR I-06959 and the subsequent Reg. No. 2679/98 of 7 Dec. 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, Giovanni Orlandini, *The Free Movement of Goods as a Possible "Community" Limitation on Industrial Conflict*, 6 EUR. L.J. 341 (2000). He states on page 352 that, "Far from being neutral in relation to exercise of the right to strike, then, market integration involves a tension between economic freedoms and industrial conflict; the latter is not tolerated to the extent that it sets up barriers to freedom of trade, which does not in itself admit of interruptions. What is taking shape in the Community system is a supranational limit on industrial action." He goes on, at page 361, "It may be stated in conclusion that the internal-market integration process (and the full promotion of the economic freedoms that are the motor of that process) interferes with the areas of practicability of industrial conflict, or in other words, that the exercise of collective action may clash with the regular functioning of the common market."

Justice in matters relating to human rights and other fundamental freedoms found in the international instruments on the same issues.

The outcome would probably have certainly been different if the employee parties or the Swedish Government in *Laval* had tried to defend the collective action taken by the Swedish trade unions with reference to Article 307 of the European Community Treaty.[62] This Article provides in essence that if a Member State has undertaken obligations by means of ratification of international instruments, such as those mentioned above, e.g., Convention No. 87 of the International Labour Organisation on Freedom of Association and Protection of the Right to Organise (1948), these obligations must be honored by the Member States even if they are not in compliance with Community law. It may be interesting to note that all the EU countries have ratified the majority of these international documents and are, accordingly, obligated under public international law to honor their commitments. Both France and Belgium had once successfully defended with the help of Article 307 their commitments under the provisions of the ILO Convention (C-89) concerning Night Work for Women Employed in Industry, which were later found to be contrary to the provisions of the EC Directive (76/207EEC) on equal treatment for men and women as regards access to employment.[63]

With respect to the Court's analysis of the content of Article 3(8) it can easily be seen that the collective agreement has been greatly *tarnished as a regulatory instrument* on the Swedish (and also the Danish) labor market, if the intent of the Court has been to establish that trade unions should not even have a chance to secure a fair position at the negotiation table with respect to foreign providers of services. One may wonder on what basis the European Court considers itself to be competent to do away with a national social model. It is amazing, however, that the Court of Justice, having regard to what is provided in Article 136(1) in the Treaty, i.e., that the Community and the Member States "shall have as their objectives the promotion of employment, improved living and working conditions," and in Article 136(2) that both the Community and the Member States "shall implement measures which take account of the diverse forms of national practices, in particular, in the field of contractual

62. Article 307, first paragraph provides: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

63. Case C-158/91 Levy [1993] ECR I-4287 and Case C-13/93 Minne [1994] ECR I-371, respectively.

relations," is neglecting totally the command of the Treaty in this respect. One may question after this whether Article 136(2) is a dead letter?

Professor Christian Joerges from European University Institute recently submitted a paper[64] wherein he discusses the same issue. He found that the European Court had shown "judicial self-restraint" in *Viking*, but in *Laval* "such prudence is no longer visible." The Court has gone too far. He argues that the Court's arguments imply "that European economic freedoms, tamed only by an unspecified 'social dimension' of the Union, trump the *Arbeits-* and *Sozialverfassung* of a Member State, even though the Treaty expressly restricts Community competences in this field. In view of the obstacles to the establishment of a comprehensive European welfare state, the respect of the common European legacy of *Sozialstaatlichkeit* seems to require the acceptance of European diversity and an exercise of judicial self-restraint where economic freedoms come into conflict with national welfare traditions." Joerges concludes that: the Court "is not legitimated to re-organise the interdependence of Europe's social and economic constitutions, let alone to replace the variety of European social models. . . . It should therefore refrain from 'weighing' the values of *Sozialstaatlichkeit* against the value of free market access. . . . [W]hat was at issue in *Laval* was not the soundness of the posted workers directive, but the strategic use of wage differences within the EU. What the trade unions employed was a means to counter the increase in power accrued by the employer due to the European Economic freedoms. To argue that the right to collective action to national constellations is subject to a European freedom is not only to confirm the *de facto* decoupling of the social from the economic constitution, but also subject the former *de jure* to the latter."[65] In other words, *Laval* has tipped the balance decisively in favor of the economic freedoms.

This raises the question of whether the Laval ruling also shall be applicable to collective agreements with universal (*ergo omnes*) application, which are frequent in the continental countries, and that may stipulate more favorable terms and conditions of work than those determined by national laws and regulations. The Laval Court has not addressed this issue at all, but judging by the unequivocal and

64. C. Joerges, *A new alliance of de-legalisation and legal formalism? Reflections on the responses to the social deficit of the European integration project after* Viking *and* Laval 14–19 (paper presented at a seminar held at the Faculty of Law, Stockholm University on Feb. 11, 2008).

65. *Id.* at 14, 18–19.

emphatic language used by the Court with respect to the analysis of Article 3(7), it is only logical to conclude that the principles established in *Laval* should apply even to *erga omnes* collective agreements. The Court adjudged that the Lex Britannia was discriminatory toward another foreign employer bound by a collective agreement in the home state. The main objective of the Lex Britannia is, however, making it possible to apply existing national collective agreements in concrete cases to foreign providers of services, but the legislation was struck down by the Court. This scheme is essentially not so dissimilar to the effects obtained by the extension of collective agreements in countries where this is practiced. The basic difference between the models is found from another angle, and that is that the Swedish law enforcement system is governed by private law (through the trade unions), whereas the continental *erga omnes* model is governed by public law (government authorities).

The only conclusion that can thus be drawn from the European Court's ruling in *Laval* is that the European legislature must take the initiative to restore the original intent of Directive 96/71, which is to combat social dumping and enforce an equal treatment principle with respect to terms and conditions of work for posted workers. The ruling has provoked a huge response in Sweden and sparked off a debate that will continue for a long time to come.[66] I am inclined to submit the view that the posted workers were better off under the case law of Article 49 of the Treaty[67] than they are under the regime of the Directive 96/71 after *Laval* and *Rüffert*. In both these cases the Court of Justice adopted a "literal" interpretation of the Directive 96/71 instead of looking at the purpose of the same Directive, which is to protect the posted workers. As said before, the Court of Justice has given the right of way to the economic freedoms of the Treaty at the behest of the weaker party, i.e., the posted workers.

66. *See*, *e.g.*, L. MAIER, UTSTATIONERING AV ARBETSTAGARE OCH DET SVENSKA KOLLEKTIVAVTALSSYSTEMET (June 2005); T. Sigeman, *Fri rörlighet för tjänster och nationell arbetsrätt*, 8 EUROPARÄTTSLIG TIDSKRIFT 465–95 (2005); L. Maier, *Tjänstedirektivet, social dumpning och de nationella arbetsmarknadssystemen*, 8 EUROPARÄTTSLIG TIDSKRIFT 729–50 (2005); RONNIE EKLUND, FRI RÖRLIGHET AV TJÄNSTER OCH SKYDDET AV ARBETSTAGARE, IN EN GRÄNSLÖS EUROPEISK ARBETSMARKNAD? EUROPAPERSPEKTIV 195–220 (S. Gustafsson, L. Oxelheim & N. Wahl eds., 2006); Ronnie Eklund, *The Laval Case*, 35 INDUS. L.J. 202 (2006); T. Sigeman, *Lavaldomen sätter spärr mot social protektionism*, 31 LAG & AVTAL 34 (January 2, 2008), and Ronnie Eklund, *EG-domstolen i ett nyliberalt horn*, 31 LAG & AVTAL 32 (May 2008).

67. *See*, *e.g.*, 62 and 63/81 Seco [1982] ECR 223, Case C-113/89 Rush Portuguesa (footnote 18), Case C-272/94 Guiot [1996] ECR I-1905, Cases C-369 and 376/986 Arblade (footnote 40), Cases C-49/98 Construções Lda Finalarte (see footnote 27), Case C-165/98 Mazzoleni (see footnote 40), Case C-164/99 Portugaia [2002] ECR I-787 and Case C-60/03 Wolff & Müller (footnote 55).