View of the Swedish Trade Union Movement

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First of all, thank you for giving the Swedish Trade Union movement the opportunity to comment on recent developments in Community Law here today.

I share most of the views expressed by professor Bruun, but also much of what professors Lyon-Caen, Rebhahn and Bercusson said this morning, in particular concerning the problems caused by the new interpretation of the Posting Directive and the new restrictions on collective actions introduced on Community level by the European Court of Justice.

It is our belief that the ECJ, through its recent case law, has planted a time-bomb under the European Union. The fire will start when workers see their wages undercut by posted workers. It might even be so that the fire has already started. The "no" in the referendum in Ireland could be interpreted in such a way. Community law cannot only be interpreted narrowly through contradictory legal texts. Political and social realities must always be a factor.

The EU was at a crossroad six months ago. The ECJ could have chosen another path. The Court had alternative routes, which the Advocate Generals showed in all four cases. The road chosen was neither "the only one" nor "necessary". Free movement without responsibility was not the answer to all the questions ECJ had been asked.

The EU is founded upon compromises. One important compromise, if not the most important one, is the balance between two conflicting views – EU as an instrument for companies to compete on an international arena with free movement as the primary tool – and the other view – EU as an instrument for Trade Unions and Governments to create a countervailing force to companies and capital which acts on a global scene. These two perspectives could also be described as EU's economic and social dimensions.

A sound balance between the social and economic dimensions is crucial for the EU. Jaques Delors struck a compromise with the European Trade Union movement when he relaunched the Internal Market in the late 80's. The European Trade Union movement promised not to oppose the Internal Market and got an "Espace social" in return. This "gentlemen's agreement" was simple – no internal market without a social dimension. This agreement has been revoked by the ECJ through its recent case law. The social dimension has been severely undermined.

Swedish Trade Unions fought for equal treatment in Laval. But instead of "equal pay for equal work" we got "minimum pay for equal work". We expected double demands to be forbidden, and had already started our work to prevent this. We knew that our system had some transparency problems, but we had also initiated a process to improve the situation. But the ECJ did much more than necessary in the Laval case. Carefully devel-

oped balances in national industrial relations systems have been distorted. One should keep in mind that the EU has 27 different labour market models. They all reflect different balances of power between Capital and Labour. The ECJ will become largely unpopular as it moves delicately balanced power between the social partners in the Members States.

Let me also in this context comment on the German employers' representative who claimed that Laval went bankrupt. This claim is not true. It was their letter box company, Baltic Bygg, without employees or assets, their "door-opener" to undercut conditions on the Swedish labour market that went bankrupt. Laval is still doing business in Latvia. Let me also, as a comment to the German employers' representative concerning Lex Britannia, state that this law is not remarkable or protectionist in any way, it is not more than a functional equivalent to a mechanism which declares collective agreements generally binding. An industrial relations system, such as the Swedish, based on the autonomy of the social partners must have such a mechanism.

All recent case law from the ECJ can be analysed both from a narrower national perspective and a more overarching European perspective. For example the horizontal direct effect for trade union activities which was introduced in the Viking and Laval cases. The ECJ could have given, as for Competition law, a larger scope of autonomy to the social partners in line with the Albany judgement.

The ECJ does not appear to trust Member States, as the recent Luxemburg case illustrates well. Neither can regional authorities be trusted by the ECJ, what the rationale of the Rüffert case seems to be. The ECJ has also redefined the Posting of Workers directive into a maximum Directive. And the Court also struck an illusory balance between free movement and fundamental rights, which in practise subordinates fundamental rights to free movement. However, I will not have time to discuss this further now.

I will stick to the Swedish perspective, but one should keep in mind, that even though many consequences can be solved on national basis, structural general problems on European level remain – if equal treatment of workers, the rationale under article 39, should be restored also for posted workers. The new industrial relations system constructed by the ECJ on Community level, which restricts the right to collective action in the Member States should also be abolished. The recommendation by Professor Bercusson, to use the Keck-option should be seriously considered by the ECJ. If not, The Court will have to deal with a potential flood of cases where political, economical and social tensions are very high. The EU runs a great risk of getting even more unpopular. This would be ironic in a time when EU is needed more than ever to face challenges on a global scale.

The Swedish autonomous collective bargaining model consists of strong social partners, who regulate the labour market more or less independently of the State. This is in contrast with the so called continental models where the State have a more primary role in the regulation of the labour market. It appears as if the ECJ measures the Swedish (or Scandinavian) autonomous labour market models through a lens shaped by a continental

view. This has created a number of problems in Sweden. Let me name some, beside the fact that the right to industrial action has been restricted by Community law.

Collective wage formation on the Swedish labour market might be severely disturbed. Decentralized and local bargaining will probably become difficult. Many sectors and branches do not have minimum wages, and where such are to find, they are seldom in use due to local and flexible collective bargaining. It is ironic that the rationale of the ECJ, a naïve concept of minimum wages, is most likely to create a less flexible and more rigid wage formation, as there will be a pressure upwards on minimum wages in the years to come, this while the legislative institutions in Brussels cherish the Scandinavian flexicurity models. Posted workers, which constitute a minor part of the labour market, could thus affect the whole system for wage formation in Sweden.

Another problem is to restore collective agreements as the primary regulatory instrument also for posted workers. We don't want the state to interfere with the labour market. No matter if it is the Swedish or the European State. The social partners should be the principal actors when it comes to the regulation of relations between workers and their employers.

The social dimension of the EU has been severely damaged. Political action is needed. A first step must be to open the Posting of Workers directive for revision. It needs a broader legal base, a pluralistic view on national labour market systems and to re-establish its character as a minimum Directive. Secondly, Heads of States and Prime Ministers need to adopt the Social Progress Clause which the ETUC have proposed. Action is needed urgently.

A Europe built solely on free movement, where Member States are prevented from protecting its own and foreign workers have no future. The EU is needed and it is too important to be jeopardized through bad judgements. Future challenges must be met with both a social and economic dimension.