Scope of Action at the European and National Level from the Perspective of the European Commission

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First, let me thank the Federal Ministry of Employment and Social Affairs for the opportunity given to the Commission to express our views in such an important debate.

I am afraid however that I shall not be able to comment on most points raised in Prof. Bercusson's very challenging paper. He suggests a number of fundamental changes in the Treaty, in the wake of the Irish referendum, as a remedy for the difficulties in conciliating the economic freedoms with the social rights that the recent rulings of the ECJ made more apparent. For the Commission, as it was clearly stated before the European Council last week by President Barroso, the priority is to carry on the ratification of the Lisbon Treaty as it stands, while opening a period of reflection on the reasons and consequences of the Irish vote with the purpose of finding an institutional and political solution. The contribution of the Irish government to this reflection is fundamental.

In the meantime, the policy-making process should continue, on the basis of the existing Treaty, with a particular emphasis on those dossiers that are important for meeting the social concerns of EU citizens, such as employment, social inclusion, anti-discrimination, health, and education. The social package that the Commission intends to adopt next Wednesday, 2nd July, under the heading of a renewed Social Agenda, shall include legislative and non-legislative policy proposals in these areas and will make therefore a major step towards reviving the confidence of citizens in the EU capacity to deliver in those areas that are closest to the citizen.

In my presentation, I shall focus on three questions:

- How does the Commission consider the recent ECJ rulings on Viking, Laval, Rüffert and Luxembourg?
- What consequences do we attach to such rulings ?

– What difficulties does the Commission identify in the application of the POW Directive 96/71 and how can we solve them?

I. The ECJ Rulings

The rulings on Viking, Laval and Rüffert, and now the most recent one on the case Commission vs Luxembourg, deal with the issue of how to balance the protection of workers' rights and working conditions with the safeguard of fundamental freedoms as established by primary and secondary EU law.

– The Viking case is about whether it is legitimate for an international trade union to use collective action in order to force a ferry company to drop its plans to re-flag a ship from Finland to Estonia.
– The Laval case is about whether it is legitimate for a Swedish trade union to use collective action to force a Latvian company to enter a collective agreement setting work and pay conditions that go beyond the core mandatory rules established in the Posting of Workers Directive:
– The Rüffert case is about whether public procurement rules in a German Land can impose to a Polish undertaking higher wages than those set by the federal collective agreement that is universally applicable.
– The Luxembourg case is about whether it is legitimate for a member State to impose to foreign service providers employment conditions that go well beyond the same core of mandatory rules on the grounds that they are necessary for public order, as well as the obligation to have a domiciled representative or to issue an ex ante declaration.

The two first rulings recognize the right to take collective action as a fundamental right which forms an integral part of the general principles of Community law. They also confirm that the trade unions will continue to be able to take action to protect workers' interests and combat social dumping. However, the exercise of such right should be done in compliance with the Treaty and the fundamental freedoms of establishment and of service provision.

Collective trade union action does not fall outside the scope of the Treaty despite the lack of competence of the Community to legislate on these matters, by virtue of Article 137.5. Member States must therefore comply with Community law when exercising their competence in setting rules in the area of industrial relations. This confirms existing jurisprudence in the areas of taxation and social security, such as in Walrave and Koch, Bosman, and Wouters et al.

The way the Court dealt with the issue of the horizontal effect of EU primary law is in our view relatively more innovative and will certainly deserve a far-reaching debate, which will stress its legal as well as political consequences. In Viking and in Laval, Ar-

ticles 43 and 49 of the Treaty were considered as not applying only to the actions of public authorities, but also to any rules that aim at regulating employment conditions in a collective manner, such as those established by the social partners in their role of agents to which national authorities delegate the task to implement EU directives.

The Court found therefore that the classical tests of necessity and proportionality should be applied in both cases in order to determine whether the restriction imposed to the freedom of establishment or the freedom to provide services was justified. However, while in the Viking case, the Court considered that it was for the national Court to judge on that matter, in the Laval case, it carried out directly such verification and found out that the union action was not proportionate in relation to the objective of upholding the protection of workers.

Another innovative aspect in the Court rulings, also deserving wide debate, is the interpretation in the Laval ruling, of Article 3.7 of the Posting of Workers Directive as meaning that the scope of employment conditions guaranteed to posted workers should be limited to the core of mandatory rules defined in Article 3.1. This question should be discussed against the background of the twofold purpose of the Directive: to ensure a level-playing field between domestic and foreign providers of services; and to offer minimum protection to workers who are temporarily posted to a country without participating permanently in its labour market.

In the Rüffert ruling, the Court declared illegitimate a legislative measure that did not fix a rate of pay in accordance with any of the procedures laid down in the POW Directive: whereas Germany has a system for declaring collective agreements universally applicable and has used this faculty for the construction sector, the law in question applies only to public contracts and not to private ones, and enforces a collective agreement which has not been declared generally applicable.

Finally, in the Luxembourg case, the Court recognized all the items of non-conformity raised by the Commission. It confirmed that Member States should not unilaterally interpret the concept of public policy provisions used in Article 3.10 of the POW Directive in order to apply to undertakings employment conditions on top of those included in the hard core. Especially when some of such conditions are ruled by laws whose verification falls upon the authorities of the country of origin. It also confirmed that Member States should not impose control measures that are disproportionate to the objective of protecting workers, in line with previous case law and the guidelines set out by the Commission in 2006.

II. Consequences of the ECJ rulings

The rulings will affect most directly the countries involved: Sweden, Germany and Luxembourg. They should bring their legislation in line with Article 49 of the Treaty

and the POW Directive. This, in our view, does not appear as an impossible task. The rulings do not oblige to review the fundamental principles on which the industrial relations systems of these countries are based. Also, the rulings make it clear that the POW directive is not intended to harmonise the employment rules, but rather to coordinate them in order to establish a level-playing field. In particular, Articles 3.1 and 3.8 allow for a multiple choice of possibilities to determine the way by which minimum rates of pay are determined.

However, it is clear that the rulings will have consequences that extend well beyond these three countries. First, because other countries, where minimum wages are set neither by law nor by universally applicable collective agreements, may find themselves in the same situation. It is the case of Denmark, where a consultative tripartite commission already proposed an amendment to Danish legislation which aims at ensuring that the POW directive could be fully implemented in Denmark while maintaining the specific characteristics of the Danish model of industrial relations.

Second, and more importantly, because significant sectors of the public opinion call for measures to reverse what they see as the two major consequences of the rulings: to subordinate the fundamental right to collective action by trade unions to economic considerations and to facilitate social dumping.

We have difficulty in seeing these rulings as reversing a long established tradition of EU jurisprudence in favour of social rights. In the Laval case, the collective action was considered as non-proportionate because the obstacle that it created to the free provision of services could not be justified by its goal which was to impose employment conditions going beyond what the Directive considers as necessary to grant protection to workers. In other cases, such as in Schmidberger and in Omega, the Court considered that the protection of fundamental rights is a legitimate interest that justifies a restriction of the obligations imposed by Treaty-based economic freedoms. And the right to launch a collective action to protect host country workers from social dumping is recognised by case law, since Arblade, as an imperative reason of general interest that can justify a restriction of economic freedoms. This is not deadwood.

As to social dumping, I would like to underline that the POW Directive is the most effective instrument in the EU legal framework to prevent social dumping. It is based on the principle of primacy of the law and collective agreements in the host country as the regulating framework for the employment conditions of posted workers, who can benefit automatically from such conditions without having to bargain. However, such primacy only applies to a core of mandatory rules defined in Article 3.1. What is the reason for such limitation? The temporary nature of posted work. Posted workers are not part of the host country labour market. They have not made the choice to establish themselves and to follow a professional career there. He/she was posted by a decision of his/her employer which is part of the material conditions ensuring the provision of a service.

The application to posted workers of the whole range of employment conditions in force in the host country would create far more costs for the service provider, who would have to become aware of all employment legislation in force in every EU country in which he would like to do business. Would that be justified in terms of workers' protection? Would such obligation entail more benefits for workers who are temporarily posted across borders? This is the key question around which the necessary debate should turn. It is fair to say that, so far, the cases that have been examined by the Court – the compulsory contributions for the national training funds (in Laval) or the obligation to have a written statement from the employer (in Luxembourg) - have not provided sufficiently convincing justifications. . In the first case (Laval), because the posted workers would not have the possibility to benefit from such training. In the second case (Luxembourg) , because it is for the national authorities of the home country to control the respect of an obligation that is established by EU directive 91/533.

III. Difficulties with the application of the POW Directive

The Commission recognizes that the application of the POW Directive has given rise to a number of difficulties. For instance,

- Abuses in the form of successive postings of the same worker, who, for that reason would tend to have a quasi-permanent connection with a certain labour market;
- Abuses in the form of undertakings functioning as letter-box companies with the sole purpose of posting workers to a certain destination, as a way to evade from the application of national rules;
- Insufficient respect of host country rules as regards wages and health and safety conditions by foreign undertakings;
- Non-respect of social security obligations in the home country;
- Insufficient information of workers and companies about their rights and obligations in the context of posting;
- Insufficient administrative cooperation between national authorities of home and host countries;
- Lack of effective cross-border enforcement mechanisms in case of unlawful behaviour by undertakings.

These difficulties can be overcome by an efficient working of the labour inspectorates and other bodies responsible for a correct enforcement of the legislation, provided their action is proportionate and non-discriminatory. Also important is a more effective administrative cooperation between such authorities.

These difficulties, as well as those created for some countries by the recent Court rulings, can be handled in the context of the present POW Directive. Priority should be

given to remedy shortcomings in the implementation and enforcement of the Directive. With this purpose the Commission adopted on 3 April a recommendation which aims at enhancing administrative cooperation between Member States in order to ensure better protection of posted workers' rights and more effective cross-border enforcement. It sets the basis for enhanced fight against disrespect of workers' rights and undeclared work.

We are satisfied that the EPSCO Council on 9 June has endorsed this recommendation, and on this basis we are ready to carry on with its practical consequences: the creation of an expert Committee on posting of workers, with the participation of social partners, which will be responsible for the exchange of good practice, and within this setting, a working group to start developing an electronic information exchange system.

We are very much aware of the political and legal importance of the recent Court rulings. It is therefore important to give sequence to open debates such as this one, here in Berlin. The Commission is planning a Forum in October involving major stakeholders, such as member States, social partners and legal and economic experts, to debate key issues about the new challenges raised by increased workers mobility for fundamental social rights, including collective bargaining and collective action, and will continue to address their concerns in a constructive and balanced way.