

OPINION OF ADVOCATE GENERAL

MENGOZZI

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<sup>1</sup> — Original language: French.

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## I — Introduction

1. By its two questions, the Arbetsdomstolen (Labour Court) (Sweden) asks the Court, in essence, whether, where a Member State has no system for declaring collective agreements to be of universal application, Article 12 EC, Article 49 EC and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>2</sup> must be interpreted as preventing trade unions of a Member State from taking, in accordance with the domestic law of that State, collective action designed to compel a service provider

from another Member State to sign a collective agreement for the benefit of workers posted temporarily by that provider to the territory of the first Member State, including where that provider is already bound by a collective agreement concluded in the Member State in which it is established.

2. The present case raises numerous legal questions that are far from easy to resolve and the most complex of which call for divergent interests to be reconciled.

2 — OJ 1997 L 18, p. 1.

3. Thus, in order to give a ruling in the present case it will be necessary to weigh the exercise by trade unions of their right to resort to collective action to defend workers' interests — a right which, as I suggest in this Opinion, should be regarded as one of the general principles of Community law — against the exercise, by an undertaking established in the Community, of its freedom to provide services, a fundamental freedom guaranteed by the EC Treaty.

4. It will also be necessary to strike a balance between the protection of workers temporarily posted to the territory of a Member State in the context of cross-border services, the fight against social dumping and the need to ensure equal treatment as between domestic undertakings of a Member State and providers of services from other Member States.

5. In addition, in my view, this case calls for a detailed examination of the relationship between Directive 96/71 and Article 49 EC, having regard to the particular model of collective employment relations that prevails in Sweden, a model which, according to the analysis undertaken in this Opinion, should not be undermined by the application of Community law but must nevertheless ensure that the collective action which it authorises complies, in particular, with the principle of proportionality.

6. Finally, the present case may give the Court an opportunity to clarify its case-law concerning the horizontal direct effect of Article 49 EC, an effect which, I shall suggest, should be upheld.

## II — Legal background

### A — *Community law*

7. Article 12 EC states that, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

8. The first paragraph of Article 49 EC provides that restrictions on freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

9. The first paragraph of Article 50 EC defines as 'services' services that are normally

provided for remuneration, in so far as they are not governed by the provisions relating, in particular, to freedom of movement for capital and persons. Under the last paragraph of Article 50, a person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

10. According to Article 55 EC, the provisions of Articles 45 EC to 48 EC are to apply to the chapter concerning the freedom to provide services. Also applicable to that chapter are both Article 46 EC, which grants the Member States the right to apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health, and Article 47(2) EC, which enables the Council, acting in accordance with the procedure referred to in Article 251 EC, to issue among other things directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the provision of services.

11. Thus, on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now Article 55 EC), the Council and the

Parliament adopted Directive 96/71 on 16 December 1996.

12. Observing, in the third recital in its preamble, that the internal market offers a dynamic environment for the transnational provision of services, in which undertakings may post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed, Directive 96/71 seeks, as emphasised in its fifth recital, to reconcile promotion of the freedom to provide transnational services with the need for 'fair competition' and 'measures guaranteeing respect for the rights of workers'.

13. As is noted in the 8th and 10th recitals in the preamble to Directive 96/71, the Rome Convention of 19 June 1980 on the Law applicable to Contractual Obligations<sup>3</sup> provides that, in the absence of choice made by the parties, the contract of employment is to be governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or by the law of the country in

3 — OJ 1980 L 266, p. 1.

which the place of business through which he was engaged is situated, without prejudice, however, to the possibility, subject to certain conditions, of effect being given, concurrently with the law declared applicable to the contract, to the mandatory rules of the law of another country, in particular the law of the Member State to whose territory the worker is temporarily posted.

14. In that connection, as indicated in the 6th and 13th recitals in its preamble, the purpose of Directive 96/71 is to coordinate the law of the Member States that is applicable to the transnational provision of services by laying down the terms and conditions governing the employment relationship envisaged, including in particular a ‘nucleus’ of mandatory rules for minimum protection to be observed in the host country by employers that post workers to perform temporary work in the territory of a Member State where the services are provided.

15. Article 1 of Directive 96/71 provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of [another] Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a

worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

— by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

...'

16. Article 3 of Directive 96/71, concerning terms and conditions of employment, is worded as follows:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

— by law, regulation or administrative provision, and/or

(e) health, safety and hygiene at work;

- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; the posting, such as expenditure on travel, board and lodging.

- (g) equality of treatment between men and women and other provisions on non-discrimination.

8. “Collective agreements or arbitration awards which have been declared universally applicable” means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of

- 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 organisations at national level and which are applied throughout national territory, ...

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

17. According to Article 4(1) and (3) of Directive 96/71, in the context of cooperation on information, each Member State may designate one or more liaison offices in its territory and take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

18. Moreover, under the second paragraph of Article 5 of Directive 96/71, Member States must in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the directive.

B — *National law*

1. National law on the posting of workers

19. Also, the 21st and 22nd recitals in the preamble to Directive 96/71 indicate, respectively, that Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community<sup>4</sup> lays down the provisions applicable with regard to social security benefits and contributions, and that Directive 96/71 is without prejudice to the law of Member States concerning collective action to defend the interests of trades and professions.

21. Paragraph 5 of the Law on the posting of workers (lagen (1999:678) om utstationering av arbetstagar) ('the Swedish Law on the posting of workers'), which transposed Directive 96/71 in Sweden, indicates the terms and conditions of employment applicable to posted workers, regardless of the law applicable to the contract of employment itself. In so doing, that paragraph refers to the terms and conditions of employment in relation to the matters listed in Article 3(1)(a) to (g) of Directive 96/71, with the exception of the minimum rate of pay referred to in point (c). The Swedish Law on the posting of workers is in fact silent regarding remuneration, which is traditionally governed in Sweden by collective agreements. Nor does it refer to terms and conditions of employment relating to matters other than remuneration that are governed by collective agreements.

20. Finally, the annex to Directive 96/71 refers to all building work, including work relating to the construction, repair, and alteration of buildings.

22. It is common ground that this situation derives from the characteristics of the Swedish system, which grants collective agreements concluded by both sides of industry a dominant role in providing workers with the protection afforded to them by legislation in the other Member States. Since the cover provided by collective agreements

<sup>4</sup> — OJ, English Special Edition 1971 (II), p. 416.

is extensive in Sweden, in that they apply to more than 90% of workers in the private sector, and the mechanisms and procedures available to both sides of industry satisfactorily ensure compliance with the minimum rules laid down by the collective agreements, the Swedish legislature did not consider it necessary to extend the effect of those agreements by means of a declaration of universal application. According to the Swedish legislature, a declaration of universal application covering only foreign service providers carrying on an activity in Sweden temporarily would have had the effect of creating discrimination between those providers and Swedish undertakings, in so far as the collective agreements never apply automatically to the latter. In Sweden, there is thus no system of the kind mentioned in Article 3(1) and (8) of Directive 96/71 for declaring collective agreements to be of universal application.

23. According to Paragraph 9 of the Swedish Law on the posting of workers, the liaison office set up in accordance with Article 4 of Directive 96/71 must draw attention to the existence of collective agreements that may be applicable in the event of workers being posted to Sweden and refer all interested parties to the relevant collective agreement for further information.

## 2. Collective agreements in Sweden

24. Collective agreements, which are agreements governed by civil law, may be

concluded at different levels between employers and trade unions, in accordance with the Law on workers' participation in decisions (lagen (1976:580) om medbestämmande i arbetslivet ou medbestämmandelagen) ('the MBL').<sup>5</sup> As indicated above, the coverage of collective agreements in the Swedish private sector is very extensive.

25. Collective agreements are generally concluded at national level between employers' and workers' organisations, in various spheres of activity. They are then binding on all employers that are members of the organisation concerned. An undertaking which is not a member of the employers' organisation that signed the agreement, including a foreign undertaking, may also be bound by a collective agreement if it concludes what is known as a 'tie-in' agreement ('hängavtal' in Swedish) ('a tie-in agreement' or 'a tie-in') at local level, with the local branch of the trade union in question. By signing a tie-in agreement, the employer undertakes to comply with the collective agreements generally applied in the sector to which it belongs. That agreement implies that the parties are bound by an obligation to ensure good labour relations, enabling them then, in particular, to open negotiations on the wage levels to be applied to the workers concerned.

5 — Paragraph 23 of the MBL defines a collective agreement as a written agreement between an employers' organisation or an employer and a workers' organisation concerning working conditions or relations between employers and workers.

26. In addition, numerous collective agreements contain 'fall-back clauses' ('stup-stocksregel' in Swedish), which envisage last-resort solutions for problems on which the parties negotiating at local level have been unable to reach agreement within a specified period. Such fall-back clauses may, in particular, concern remuneration.

27. Under the MBL, a collective agreement signed by an employer at national level, or with which an employer associates itself by a tie-in agreement at local level, applies to all workers in the workplace, whether or not they are affiliated to a trade union.

### 3. National law concerning collective action

28. The right to undertake collective action in Sweden is a constitutional right, guaranteed in Chapter 2 of the Swedish Basic Law laying down organisational rules for the public authorities (Regeringsformen 1974:152). Paragraph 17 of that law authorises workers' and employers' organisations to take collective action, unless otherwise provided by a law or an agreement.

29. The MBL sets out the limitations on the right to resort to collective action, which include cases where there are good labour relations between employers and workers bound by a collective agreement.

30. According to the first subparagraph of Paragraph 42 of the MBL, as interpreted by the case-law, taking collective action with the aim of obtaining the repeal of or amendment to a collective agreement between other parties is prohibited. In a judgment of the Arbetsdomstolen of 1989, known as the *Britannia* case,<sup>6</sup> it was held that that prohibition extended to collective action undertaken in Sweden in order to obtain the repeal of or amendment to a collective agreement concluded between foreign parties, in a workplace abroad, if such collective action is prohibited by the foreign law applicable to the signatories to that collective agreement.

31. In order to limit the scope of the principle expounded in the *Britannia* judgment, the Swedish legislature adopted a law known as the 'Lex Britannia', which entered into force on 1 July 1991 and inserted three provisions in the MBL, namely Paragraphs 25a, 31a and 42, third subparagraph.

<sup>6</sup> — AD 1989:120. The dispute concerned working conditions for the crew of a container ship named *Britannia*, flying a foreign flag.

32. Paragraph 25a of the MBL provides that 'a collective agreement which has become invalid under foreign law on the ground that it was concluded after collective action shall nevertheless be valid in Sweden if the collective action in question is authorised under Swedish law'.

If any illegal collective action is commenced, third parties shall be prohibited from participating in it.

33. Under Paragraph 31a of the MBL, 'in the event that an employer bound by a collective agreement, to which the present Law would not apply directly, thereafter concludes a collective agreement in accordance with Paragraphs 23 and 24 of this Law, the subsequent collective agreement shall apply whenever the agreements contain provisions conflicting with each other'.

The provisions of the first two sentences of the first subparagraph shall apply only if an organisation commences collective action by reason of employment relationships falling directly within the scope of the present Law.'

34. Paragraph 42 of the MBL provides:

35. The collective actions to which the MBL relates include, in addition to strikes and lock-outs, blockades, that is to say boycotting measures taken by a trade union against an employer in order to prevent it from using workers who are members of that union, and also 'solidarity action' ('sympatiätgård'), which involves, in particular, the giving of support by a trade union that is not itself a party to an industrial dispute to another union, by the taking of action directed towards the same end.

'Employers' organisations or workers' organisations shall not be entitled to organise or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way ... .

### **III — The dispute in the main proceedings and the questions referred**

36. In early May 2004, Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law whose registered office is in

Riga, posted several dozen workers from Latvia to work on Swedish building sites. The works were undertaken by a subsidiary company, L&P Baltic Bygg AB ('Baltic Bygg'). The work included the renovation and extension of school premises in the town of Vaxholm, in the Stockholm area. Baltic Bygg was awarded the public works contract following a tendering procedure. The contract concluded between the municipal administration and the undertaking provided that Swedish collective agreements and tie-in agreements would be applicable to the building site but, according to Laval, the parties subsequently agreed not to apply that clause.

Byggnadsarbetareförbundet and the Swedish building employers' association (Sveriges Byggindustrier) ('the Byggnadsarbetareförbundet collective agreement'). The tie-in agreement would have resulted in extending the application of the Byggnadsarbetareförbundet collective agreement to the workers posted by Laval to the building site in the municipality of Vaxholm. However, no agreement was reached. According to the information provided by the national court in its order for reference, the local trade union branch required, first, conclusion of the tie-in agreement in respect of the building site in question and, second, the guarantee of an hourly wage of SEK 145<sup>8</sup> for workers on the site, which, according to the local trade union branch, represented an average hourly wage. No such agreement having been reached, the local trade union branch indicated that Byggnadsarbetareförbundet would be prepared to take collective action.

37. In June 2004, contacts were established between a representative of Laval and of Baltic Bygg on the one hand, and, on the other, a delegate of (local) trade union branch No 1 (Svenska Byggnadsarbetareförbundet avdelning 1) ('the local trade union branch') of the Swedish building and public works trade union (Svenska Byggnadsarbetareförbundet) ('Byggnadsarbetareförbundet').<sup>7</sup> Negotiations were commenced with the local trade union branch with a view to concluding a tie-in to the collective agreement for the building sector, signed between

38. According to the information in the file, at the end of 2004 the local trade union branch stated that it was prepared to abandon its claim for a wage of SEK 145 an hour, provided that Laval signed the tie-in agreement. In such a case, Laval would have had the benefit of good labour relations and wage negotiations could have started in accordance with the Byggnadsarbetareförbundet collective agreement.<sup>9</sup> If those nego-

7 — According to the information provided by it, Byggnadsarbetareförbundet has 128 000 members of whom 95 000 are of working age. Byggnadsarbetareförbundet represents more than 87% of building sector workers in Sweden. It is made up of 31 local trade union branches. Byggnadsarbetareförbundet is a member of the national confederation of Swedish trade unions (Landsorganisationen i Sverige) ('the LO'), which brings together more than 1 860 000 workers.

8 — That is to say about EUR 16 an hour, on the basis of the average rate of exchange for the euro and the Swedish krona which, in 2004, was EUR 1 = SEK 9.10.

9 — The collective agreement in question is drafted in such a way that the incentive wage corresponds to the normal wage scale for the building industry. The employer and the local branch concerned may, however, agree on the application of an hourly wage.

tiations had failed, first at local level with the local trade union branch and then centrally with Byggnadsarbetareförbundet, Laval would still have been able to take advantage of the wage fall-back clause included in the Byggnadsarbetareförbundet collective agreement, which set a basic wage of SEK 109 an hour<sup>10</sup> for the second half of 2004.

39. In September and October 2004, Laval signed two collective agreements with the building sector's trade union in Latvia. Its posted workers were not affiliated to the Swedish trade unions.

40. Collective action by Byggnadsarbetareförbundet and its local trade union branch started on 2 November 2004 following advance notice of a blockade of all work at all Laval construction sites. As from 3 December 2004, the Swedish electricians' trade union (Svenska Elektrikerförbundet) ('the SEF')<sup>11</sup> joined in to express solidarity. All electrical work being carried out on the Vaxholm building site was thus halted. After the work on that site had been interrupted for some time, Baltic Bygg became the subject of liquidation proceedings. In the

meantime, the Latvian workers posted by Laval to the Vaxholm site returned to Latvia. According to information given by the national court in its order for reference, the trade union collective action was still ongoing in September 2005.

41. In December 2004, Laval commenced proceedings before the Arbetsdomstolen seeking, first, a declaration as to the illegality both of the collective action by Byggnadsarbetareförbundet and its local trade union branch, affecting all Laval's worksites, and of the solidarity action by the SEF in relation to the blockade; second, an order that such action should cease; and, finally, an order that the trade unions pay compensation for the loss suffered by it. Laval also sought from the Arbetsdomstolen an interim order that the collective action should be brought to an end. That application was rejected by an order of 22 December 2004.

42. In its decision on the merits, the Arbetsdomstolen concluded that its examination of the legality of the collective action described above raised questions of interpretation of Community law and referred the following two questions to the Court of Justice for a preliminary ruling:

10 — About EUR 12 an hour. According to the information given by the defendants in the main proceedings, the fall-back clause is contained in Article 3(c)(12) of the Byggnadsarbetareförbundet collective agreement, the basic wage of SEK 109 being arrived at by application of the additional protocol to that agreement, applicable in 2004.

11 — According to the file, that union has 26 500 members. Like Byggnadsarbetareförbundet, it is a member of the LO.

'(1) Is it compatible with rules of the EC Treaty 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 industrial action in the form of a blockade, to force a foreign temporary 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 [order for reference], if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

the provisions of Directive 96/71 constitute an obstacle to an 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 Swedish trade unions against a foreign temporary provider of services in Sweden?

#### **IV — Procedure before the Court of Justice**

- (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

43. In its order for reference, the Arbetsdomstolen asked the Court to deal with the case under an accelerated procedure, in accordance with the first paragraph of Article 104a of the Rules of Procedure.

44. By order of 15 December 2005, the President of the Court of Justice rejected that application.

45. Pursuant to Article 23 of the Statute of the Court of Justice, written observations were submitted by the applicant and the defendants in the main proceedings, 14 Member States, namely the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Ger-

many, the Republic of Estonia, the Kingdom of Spain, the French Republic, Ireland, the Republic of Latvia, the Republic of Lithuania, the Republic of Austria, the Republic of Poland, the Republic of Finland and the Kingdom of Sweden, and by the Commission of the European Communities, the Republic of Iceland, the Kingdom of Norway and the EFTA Surveillance Authority.

46. Those parties presented oral argument at the hearing on 9 January 2007, with the exception of the Kingdom of Belgium and the Czech Republic, which did not send representatives. In addition, the United Kingdom of Great Britain and Northern Ireland presented oral argument at that hearing.

## V — Legal analysis

### A — *Preliminary observations*

47. Before the questions are analysed, it is necessary to respond to the objections of a general nature raised by the Danish and Swedish Governments as to the applicability of Community law and to the more technical objections raised by the defendants in the main proceedings regarding the admissibility of the request for a preliminary ruling.

### 1. The applicability of Community law

48. The Danish Government considers that the right to take collective action in order to force an employer to conclude a collective agreement, under national legislation, falls outside the scope of Community law since, in accordance with Article 137(5) EC, the Community has no power directly or indirectly to regulate any such action.

49. It also submits, with the Swedish Government, that the inapplicability of Community law, and in particular of the freedoms of movement provided for by the Treaty, derives from the fact that, by virtue, in particular, of various international instruments concerning the protection of human rights, the right to resort to collective action is a fundamental right.

50. As regards, first, the first argument put forward by the Danish Government, it will be seen that, contrary to the suggestion made by certain parties participating in the hearing, its objection does not amount to maintaining that the social sphere, as such, falls outside the scope of Community law. Apart from the difficulties inherent in precisely defining the expression 'social sphere', such a position would be manifestly indefensible and anachronistic: first, the social laws of the Member States do not enjoy any general

exemption from the application of the Treaty rules, in particular those concerning the freedoms of movement provided for by the Treaty, and in exercising the powers they retain in that sphere the Member States must comply with Community law;<sup>12</sup> and, second, the Community, under Chapter 1 of Title XI of the Treaty, also has powers, albeit limited, in the social sphere, which are intended to support and supplement the action of the Member States, under the conditions laid down in Articles 137 EC to 145 EC.

51. Those two aspects of Community integration, often described, respectively, as 'negative integration', namely, in particular, an obligation of the Member States not to oppose the application of the freedoms of movement provided for by the Treaty, and 'positive integration' do not, however, conflict with each other, as is illustrated, in particular, by Article 136 EC, since the development of social policy in the Community<sup>13</sup> is seen as capable of deriving 'not only

from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in [the] Treaty and from the approximation of provisions laid down by law, regulation or administrative action'.<sup>14</sup>

52. In those circumstances, the objection raised by the Danish Government to the applicability of Community law in the present case is based more precisely on Article 137(5) EC, which provides that 'the provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

53. However, that provision does not, I believe, have the general scope attributed to it by the Kingdom of Denmark.

54. It is clear from its actual wording that Article 137(5) EC seeks only to exclude from measures which may be adopted by the Community institutions in the fields listed in Article 137(1), in accordance with the arrangements laid down in Article 137(2) (qualified majority or unanimity within the

12 — See, *inter alia*, with regard to the freedom to provide services, Case C-158/96 *Kohl* [1998] ECR I-1931, paragraphs 17 to 21; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; and Case C-56/01 *Intizan* [2003] ECR I-12403, paragraph 17. That statement is similar to the one used by the Court in relation to direct taxation: see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, and Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 15 and the case-law there cited.

13 — Under Article 3(1)(j) of the Treaty, the activities of the Community include a 'policy in the social sphere ...', and Title XI of the Treaty uses the expression 'social policy'.

14 — See also in that regard, in relation to Article 117 EC, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 25 and the case-law there cited, according to which that article 'relates only to social objectives the attainment of which must be the result of Community action, close cooperation between the Member States and the operation of the common market'.

Council and procedures for co-decision with or consultation of the European Parliament, as the case may be), the aspects of the social policy of the Member States relating to pay, the right of association, the right to strike and the right to impose lock-outs.

55. That wording, and also the part of the Treaty in which paragraph 5 of Article 137 EC is located, thus hardly lends itself to an extensive interpretation of that paragraph whereby it would determine the scope of all provisions of the Treaty.

56. Moreover, it is not certain that the reservation in Article 137(5) EC regarding the right to strike and impose lock-outs extends more generally to all collective action. It must be noted that, under Article 137(1)(f) EC, the Community may supplement action taken by the Member States in the sphere of 'representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5'. The function of the latter paragraph therefore seems to be to limit the attribution of legislative powers to the Community in fields which are listed exhaustively.

57. Nevertheless, even if it were permissible to interpret the reference to the right to

strike and to impose lock-outs in Article 137(5) EC as extending more generally to the right to take collective action, the fact would nevertheless remain that that provision does no more than exclude the adoption by the Community institutions of the measures referred to in Article 137(2), in particular the adoption of directives laying down minimum requirements governing the right to take collective action. If the effectiveness of Article 137(5) EC is to be upheld, the Community institutions could not of course resort to other legal bases in the Treaty in order to adopt measures designed to approximate the laws of the Member States in this field.

58. It may be appropriate to point out that Directive 96/71, for example, does not fall within that case, being based on the Treaty provisions governing the freedom to provide services, and the purpose of which is to coordinate the conflict-of-laws rules of the Member States in order to determine which national law should apply to the provision of cross-border services where workers are posted temporarily abroad within the Community, without harmonising either the substantive rules of the Member States as regards employment law and the terms and conditions of employment relating, in particular, to rates of pay, or the right to resort to collective action.

59. That said, even if Article 137(5) EC were interpreted as reserving exclusive competence to the Member States regarding regulation of the right to resort to collective

action, that provision would not mean that, in the exercise of that competence, the Member States did not need to satisfy themselves that the fundamental freedoms of movement provided for by the Treaty are respected within their territory.

60. It must next be established — and I must now examine the objection raised by both the Danish and the Swedish Governments regarding the applicability of Community law to this case — whether the right to resort to collective action, as guaranteed by their respective national laws, may nevertheless fall outside the scope of the freedoms of movement provided for by the Treaty by reason of its alleged status as a fundamental right.

61. This question is of very great importance because, if the application of the freedoms of movement provided for by the Treaty, in this case the freedom to provide services, were to undermine the very substance of the right to resort to collective action, which is protected as a fundamental right, such application might be regarded as unlawful, even if it pursued an objective in the general interest.<sup>15</sup>

15 — See, to that effect, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126, in relation to the right to property. See also point 133 of the Joined Opinion of Advocate General Jacobs covering Case C-67/96 *Albany* [1999] ECR I-5751, Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025 and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

62. Apart from the references to the right to strike and the right to impose lock-outs discussed above, the Treaty makes no reference whatsoever to any right — which is more fundamental — to resort to collective action in order to defend the interests of trades and professions pursued by union members.

63. Under Article 6(2) EU, ‘the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

64. Even though, in terms of international instruments, that article mentions only the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’), its wording is inspired by the case-law of the Court of Justice to the effect that that Treaty has ‘special significance’,<sup>16</sup> in order to enable the Court to identify the general principles of Community law.

16 — See, for example, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paragraph 37; and Case C-229/05 *P PKK and KNK v Council* [2007] ECR I-439, paragraph 79 and the case-law there cited.

65. The Court is entitled, in so doing, to draw inspiration from instruments for the protection of human rights other than the ECHR.

66. As regards the question before us, it will be observed that the preamble to the EU Treaty and Article 136 EC refer both to the European Social Charter signed at Turin on 18 October 1961, which was concluded under the aegis of the Council of Europe, and the 1989 Community Charter of the Fundamental Social Rights of Workers, which is not legally binding, in affirming that the rights enshrined in those instruments have the status of 'fundamental social rights'. The Court has also referred in its case-law to the European Social Charter<sup>17</sup> and to the Community Charter of the Fundamental Social Rights of Workers.<sup>18</sup>

67. The Court's concern to accord 'special significance' to the ECHR, without thereby

excluding other sources of inspiration, found expression in the Charter of Fundamental Rights of the European Union solemnly proclaimed on 7 December 2000 in Nice by the European Parliament, the Council and the Commission, after approval by the Heads of State or Government of the Member States<sup>19</sup> ('the Charter of Fundamental Rights').

68. Admittedly, the Charter of Fundamental Rights is not a legally binding instrument. However, the Court has already emphasised that its principal aim, as is apparent from its preamble, is to 'reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe, and the case-law of the Court ... and of the European Court of Human Rights'.<sup>20</sup>

69. With regard to trade union freedom and the right to resort to collective action, it will first be observed that Article 11 of the ECHR, relating to freedom of assembly and of association — of which trade union freedom is merely one special aspect —<sup>21</sup>

17 — Case 149/77 *Defrenne* [1978] ECR 1365, paragraph 28, concerning the status as a fundamental right of the abolition of all discrimination on grounds of sex; Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 17, regarding Article 10 of that charter, which includes university education amongst the various types of vocational training; and Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 107, concerning the reference made by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), according to which that directive is to be without prejudice to more favourable provisions of the European Social Charter.

18 — Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 39; Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 47; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 91, concerning points 8 and 19, first subparagraph, of that charter, referred to in the fourth recital in the preamble to Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

19 — OJ 2000 C 364, p. 1.

20 — *Parliament v Council*, paragraph 38.

21 — See Eur. Court HR *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A No 21, § 34.

states, in paragraph 1, that everyone has the right ‘to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests’. Paragraph 2 states that ‘no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others ...’.

70. Article 11(1) of the ECHR protects both the freedom to join a union (the ‘positive’ aspect of freedom of association) and the right not to join one or to withdraw from one (the ‘negative’ aspect of that freedom).<sup>22</sup> In that regard, the European Court of Human Rights has held that, although compulsion to join a particular trade union may not always be contrary to the ECHR, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 of the ECHR will constitute interference with that freedom. National authorities may therefore be obliged in certain circumstances

to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right not to join a union.<sup>23</sup>

71. Although Article 11(1) of the ECHR does not explicitly mention the right to resort to collective action, the European Court of Human Rights has taken the view that the words ‘for the protection of his interests’ contained in it ‘show that the [ECHR] safeguards freedom to protect the occupational interest of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible’.<sup>24</sup>

72. However, it is apparent from the case-law of the European Court of Human Rights that Article 11(1) of the ECHR, by leaving each Member State free to choose the means to be used for that purpose, does not necessarily imply a right to strike, since the interests of union members may be defended by other means and, moreover, the right to strike is not expressly upheld by Article 11 of

22 — See Eur. Court HR *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A No 264, § 35; *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 637, § 45; and *Sørensen and Rasmussen v. Denmark*, judgment of 11 January 2006, not yet reported, § 54.

23 — *Gustafsson v. Sweden*, § 45, and *Sørensen and Rasmussen v. Denmark*, § 57.

24 — See Eur. Court HR *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, Series A No 19, § 39; *Swedish Engine Drivers’ Union v. Sweden*, judgment of 6 February 1976, Series A No 20, § 4; *Schmidt and Dahlström v. Sweden*, § 36; *Gustafsson v. Sweden*, § 45; and *Wilson, National Union of Journalists and Others v. the United Kingdom*, judgment of 2 July 2002, *Reports of Judgments and Decisions* 2002-V, § 42.

the ECHR and may be subject under national law to regulation of a kind that limits its exercise in certain instances.<sup>25</sup> Similarly, the European Court of Human Rights has recognised that the conclusion of collective agreements may also constitute a means of defending the interests of the members of a union,<sup>26</sup> whilst at the same time rejecting any right, on which a union might purport to rely vis-à-vis the State, to conclude such agreements.<sup>27</sup> Until now, the only form of collective action which has been expressly upheld by the European Court of Human Rights, as a fully-fledged right, is the right to be 'heard' by the State.<sup>28</sup>

73. That case-law could thus be summarised as meaning that Article 11(1) of the ECHR requires the Contracting Parties to enable trade unions to strive to defend their members' interests,<sup>29</sup> without thereby imposing on them the means to be used to that end.

74. It must then be observed that, under Article 6(4) of the European Social Charter,

the Contracting Parties recognise 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'. The appendix to the charter, which forms an integral part thereof,<sup>30</sup> states, with regard to Article 6(4), that 'it is understood that each Contracting Party may, in so far as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31'. It is clear from Article 31(1) that the effective exercise of the rights and principles set forth in the European Social Charter is not to be subject to any restrictions or limitations not specified in Parts I and II of the charter, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

75. Moreover, paragraph 13 of the Community Charter of Fundamental Social Rights provides that 'the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the

25 — See *Schmidt and Dahlström v. Sweden*, § 36.

26 — See *Swedish Engine Drivers' Union v. Sweden*, § 39, and *Gustafsson v. Sweden*, § 45.

27 — *National Union of Belgian Police v. Belgium*, § 39, and *Swedish Engine Drivers' Union v. Sweden*, § 39.

28 — *National Union of Belgian Police v. Belgium*, § 39; *Swedish Engine Drivers' Union v. Sweden*, § 40; and *Wilson, National Union of Journalists and Others v. the United Kingdom*, § 42.

29 — *Ibid.*

30 — Article 38 of the European Social Charter.

obligations arising under national regulations and collective agreements’.

constitutional instruments of numerous Member States explicitly protect the right to establish trade unions<sup>31</sup> and the defence of their interests by collective action,<sup>32</sup> the right to strike being, in that connection, the method most regularly referred to.<sup>33</sup>

76. Finally, Article 28 of the Charter of Fundamental Rights provides that ‘workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right ... in cases of conflict of interest, to take collective action to defend their interests, including strike action’. Article 52(1) of that charter states that ‘any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.

78. This analysis prompts me to consider that the right to resort to collective action to defend trade union members’ interests is a fundamental right.<sup>34</sup> It is therefore not

77. As regards the constitutional traditions of the Member States, whilst I am not of the view that they must be examined exhaustively, in view of the fact that, as emphasised in point 68 of this Opinion, the Charter of Fundamental Rights, although not binding, is principally intended to reaffirm the rights resulting in particular from those traditions, I would nevertheless point out that the

31 — See Paragraph 9(3) of the German Basic Law; Article 49(1) of the Bulgarian Constitution; Article 21(2) of Annex D, second part, to the Cypriot Constitution; Article 29 of the Estonian Constitution; Article 13 of the Finnish Constitution; the preamble to the French Constitution; Article 40(6)(1)(iii) of the Irish Constitution; Article 39, first paragraph, of the Italian Constitution; Article 50 of the Lithuanian Constitution; Article 59(1) of the Polish Constitution; Article 55(1) of the Portuguese Constitution; Article 40(1) of the Romanian Constitution; Article 29 of the Slovak Constitution; and Article 76 of the Slovenian Constitution.

32 — See Paragraph 9(3) of the German Basic Law; Article 37(2) of the Spanish Constitution; the preamble to the French Constitution; Article 59(3) of the Polish Constitution; Article 56 of the Portuguese Constitution; and Paragraph 17 of Chapter 2 of the Swedish Basic Law.

33 — See Article 50 of the Bulgarian Constitution; Article 27(1) of Annex D, second part, to the Cypriot Constitution; Article 29 of the Estonian Constitution; the preamble to the French Constitution; Article 23(2) of the Greek Constitution; Article 70C(2) of the Hungarian Constitution; Article 40 of the Italian Constitution; Article 108 of the Latvian Constitution; Article 51 of the Lithuanian Constitution; Article 59(3) of the Polish Constitution; Article 57(1) of the Portuguese Constitution; Article 43(1) of the Romanian Constitution; Article 30(4) of the Slovak Constitution; and Article 77 of the Slovenian Constitution.

34 — See also, to that effect, point 159 of the Joined Opinion of Advocate General Jacobs in *Albany*, *Brentjens*’ and *Drijvende Bokken*.

merely a 'general principle of labour law', as the Court has already held in relatively old case-law in Community staff cases,<sup>35</sup> but rather a general principle of Community law, within the meaning of Article 6(2) EU. That right must therefore be protected in the Community.

79. However, contrary to the suggestion of the Danish and Swedish Governments, to recognise such a status and such protection for the right to take collective action does not result in the inapplicability of the EC Treaty rules on freedom of movement in circumstances such as those of the main proceedings.

80. In the first place, as the international instruments cited above and the case-law of the European Court of Human Rights make clear, it is necessary to distinguish between the right to resort to collective action and the means of exercising it, which may differ from one Member State to another and do not automatically enjoy the protection enjoyed by that right itself. Thus, whilst such an assessment appears valid regarding the right

to strike, which, although regularly mentioned as one of the most important means of taking collective action, is generally guaranteed subject to recognition of an equivalent right for employers,<sup>36</sup> most often in the form of a lock-out, it is in any event relevant, in my opinion, in relation to the considerably less common forms of action represented by the collective action in the main proceedings, namely a blockade and solidarity action.

81. Next, by way of corollary, the above-mentioned instruments protecting human rights and the constitutions of the Member States examined above all recognise the possibility of imposing certain restrictions on the exercise of the right to take collective action. It can be inferred from those documents that such restrictions must be laid down in a legislative or regulatory measure, must be justified by the pursuit of an overriding general interest and must not affect the 'essence' of that right, to use the term appearing in Article 52 of the Charter of Fundamental Rights, or impair the very substance of the right or the freedom thus protected.<sup>37</sup>

35 — Case 175/73 *Union syndicale and Others v Council* [1974] ECR 917, paragraph 14; Case 18/74 *Syndicat général du personnel des organismes européens v Commission* [1974] ECR 933, paragraph 10; and Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union v Court of Auditors* [1990] ECR I-95, paragraph 13.

36 — This derives in particular from Article 6(4) of the European Social Charter. See also, in that connection, Eur. Court HR *Schmidt and Dahlström v. Sweden*, § 36.

37 — See, in particular, Eur. Court HR *Gustafsson v. Sweden*, § 45. The Court of Justice also adopts a criterion of that kind: see, in particular, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 80 and the case-law there cited.

82. I do not see why only restrictions of a solely national origin may be imposed on the exercise of the right to take collective action where, as in this case, the action in question is designed to compel a foreign service provider to sign a collective agreement and, consequently, that operator, in order to oppose such collective action, seeks to rely, inter alia, on one of the fundamental freedoms of movement provided for by the Treaty, which does not appear to be manifestly unconnected with the case before the referring court, as I shall make clear in the second part of the present introductory observations.

83. It is true that it is incontestably incumbent on the Member States to ensure that trade unions are able to defend their members' interests by collective action within their territory.<sup>38</sup> Provided that the Member States authorise one or more forms of such action within their territory, they also have the right to define the limits and the conditions for taking such action, in accordance with the instruments for the protection of human rights referred to earlier. However, they must also ensure that the obligations they have decided to assume

under the Treaty, including, in particular, respect for the fundamental freedoms of movement which it enshrines, are observed within their territory.

84. To reject in all cases the applicability of the freedoms of movement provided for in the Treaty with the aim of guaranteeing the protection of fundamental rights would in reality amount to upholding a hierarchy between the rules or principles of primary law which, if not necessarily entirely inapposite, is not allowed as Community law stands at present.<sup>39</sup>

85. Thus, far from being excluded in this case, application of the fundamental freedoms of movement provided for by the Treaty must, in fact, be reconciled with the exercise of a fundamental right.

86. That specific necessity to 'weigh' those requirements was upheld by the Court in the *Schmidberger* judgment, to which I shall return later, in a context in which the national authorities, having authorised a demonstration on a motorway route of central importance to transalpine traffic,

38 — In particular, according to the case-law of the European Court of Human Rights (see, notably, *Gustafsson v. Sweden*, § 45, and *Wilson, National Union of Journalists and Others v. the United Kingdom*, § 41), Article 11 of the ECHR may imply a positive obligation on the State to ensure effective enjoyment of the rights which it enshrines.

39 — See, to that effect, point 177 of my Opinion in Case C-354/04 P *Gestoras Pro Amnistia and Others v Council* [2007] ECR I-1579 and Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657.

relied on the need to respect fundamental rights guaranteed both by the ECHR and by the constitution of the Member State concerned to allow a limitation to be placed on one of the fundamental freedoms of movement enshrined in the Treaty.<sup>40</sup>

87. Apparently, the Court did not consider at all that, by reason of the fundamental rights whose exercise was at issue in that case, namely freedom of expression and freedom of assembly, as covered by Articles 10 and 11 of the ECHR respectively, the rules of the Treaty on the free movement of goods were inapplicable.

88. Moreover, to accept the inapplicability of the Treaty rules and principles in a situation such as the present case, as contended for by the Danish and Swedish Governments, would, in my opinion, be liable to conflict with the case-law of the Court which makes it clear that provisions in collective agreements do not fall outside the scope of such precepts, in particular as regards observance of the principle of non-discrimination,<sup>41</sup> which finds expression in particular in the principle of equal pay for men and women.<sup>42</sup>

40 — Paragraphs 76, 77 and 81.

41 — See, in particular, Case C-15/96 *Schönning-Kougebetopoulou* [1998] ECR I-47, paragraph 12; Case C-35/97 *Commission v France* [1998] ECR I-5325, paragraphs 36 and 37; and Case C-400/02 *Merida* [2004] ECR I-8471, paragraphs 19 and 21.

42 — See, inter alia, Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 45, and Case C-381/99 *Brunthofer* [2001] ECR I-4961, paragraphs 28 to 32.

89. Indeed, in my opinion it would be inconsistent, or indeed contradictory, to exclude from the scope of the Treaty collective action, in the form of a blockade or solidarity action, whose aim is to compel an employer to sign a collective agreement and yet, possibly at the same time, to require such an agreement to comply with the principle of non-discrimination, as specifically embodied in the provisions of that Treaty.

90. Finally, although this argument is not decisive in itself, let me nevertheless point out, in view of the exceptional number of parties that have submitted observations to the Court, that of the 17 States which have participated in these proceedings, 15 did not raise any doubt as to the applicability of Community law and, in particular, that of the freedom to provide services, in this case.

91. I therefore propose that the Court rule that the exercise by trade unions of a Member State of their right to take collective action in order to compel a foreign service provider to conclude a collective agreement in the Member State in which the service provider seeks to avail itself, in particular, of the freedom to provide services embodied in the Treaty falls within the scope of Community law.

92. It is now necessary to examine the objection made by the defendants in the main proceedings regarding the admissibility of the request for a preliminary ruling.

2. The admissibility of the request for a preliminary ruling

93. The defendants in the main proceedings contend that the request for a preliminary ruling is inadmissible. In support of that view, they submit that the questions submitted by the referring court have no bearing on the factual circumstances of the case before the national court: because Laval is established in Sweden through its subsidiary, neither Directive 96/71 nor Article 49 EC can be applicable. The factual situation giving rise to the dispute is thus, in their view, based on an artificial construct designed to evade the application of Swedish labour law, in that ultimately Laval seeks access for Latvian workers to the labour market of the host Member State whilst at the same time seeking to escape the obligations deriving from the application of the labour law of that State.

94. In my view, that argument must be rejected because, essentially, it seeks to call in question the assessment of the facts made by the national court.

95. According to the case-law, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to give judgment and the relevance of the questions which it submits to the Court.<sup>43</sup>

96. As the Court has also indicated, the presumption of relevance attaching to questions submitted by national courts for a preliminary ruling can be overturned only in exceptional cases, namely where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, required to give a ruling on questions submitted to it for a preliminary ruling.<sup>44</sup>

43 — See, inter alia, Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 32.

44 — See Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 30; and *Chacón Navas*, paragraph 33.

97. In this case, as I have already said, the national court seeks an interpretation of Articles 12 EC and 49 EC, and provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services. It is apparent from the order for reference that those questions have been submitted in the context of the dispute between Laval, a company established in Latvia, and the Swedish trade union Byggnadsarbetareförbundet, its local trade union branch and the SEF, concerning collective action taken by the latter following Laval's refusal to sign the Byggnadsarbetareförbundet collective agreement to govern terms and conditions of employment of Latvian workers posted by Laval to a building site in Sweden and in relation to work carried out by an undertaking belonging to the Laval group. It is common ground that, following collective action and suspension of the works, the posted workers returned to Latvia.

98. The interpretation of Community law sought by the national court does not appear to be manifestly unconnected with the circumstances or subject-matter of the dispute in the main proceedings and does not appear to be of a hypothetical nature.

99. I would add that, having regard to the information in the file, the national court is right to consider that Laval's economic activity constitutes a provision of services within the meaning of Article 49 EC and Directive 96/71.

100. In that connection, and having regard also to the argument put forward by the defendants in the main proceedings, according to which Laval's aim in posting workers abroad was to secure access for Latvian workers to the Swedish employment market, I consider it appropriate at this stage to make a number of observations on the relationship between the Treaty provisions referred to by the national court and those of the Act concerning the Conditions of Accession of the Republic of Latvia to the European Union<sup>45</sup> ('the 2003 Act of Accession'), which, it will be remembered, at the material time also governed relations between the Republic of Latvia and the other Member States, but is not mentioned in the order for reference.

101. Under Article 2 of the 2003 Act of Accession, the provisions of the original Treaties<sup>46</sup> and the acts adopted by the institutions before accession are to be binding on the new Member States and to apply to those States under the conditions laid down in those Treaties and that Act.

45 — Act concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (O) 2003 L 236, p. 33).

46 — According to Article 1 of the 2003 Act of Accession, 'original Treaties' means (a) the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community (Euratom), as supplemented or amended by treaties or acts which entered into force before that accession; and (b) the Treaty on European Union, as supplemented or amended by treaties or other acts which entered into force before that accession.

102. The Treaty provisions, in particular those relating to freedom to provide services, therefore apply in principle to relations between the Republic of Latvia and the other Member States as from the date of accession, namely 1 May 2004, subject to the conditions laid down in the 2003 Act of Accession.

103. Article 24 of the 2003 Act of Accession refers to the annexes to that Act which list, for each of the 10 new Member States, the transitional provisions that are to apply to them and the conditions for their application.

104. Annex VIII to the 2003 Act of Accession, which applies to the Republic of Latvia, specifically refers to Article 39 EC, the first paragraph of Article 49 EC and Directive 96/71.

105. However, the conditions for the application of those provisions, as set out in Annex VIII to the 2003 Act of Accession, have no impact on the circumstances of the present case.

106. As regards, first, the first paragraph of Article 49 EC and Directive 96/71, it is clear from paragraph 13 of Annex VIII to the 2003 Act of Accession that the transitional provi-

sions derogating from full application of that article and that directive relate only to the temporary movement of workers in the context of the provision of services, by undertakings established in Latvia, within the territory of Germany and Austria, under the conditions set out in that paragraph. Paragraph 13 of Annex VIII to the 2003 Act of Accession is not therefore applicable from the territorial point of view to the facts of this case.

107. Since Directive 96/71 may apply to Laval's economic activity, it is important to note that, by virtue of Article 1(3)(b) of that directive, it covers the business of an undertaking established in a Member State which posts a worker to the territory of another Member State, to an establishment or to an undertaking owned by the group, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting.

108. According to the order for reference, that would indeed seem to be the situation in which Laval and the Latvian workers whom that company temporarily posted to Sweden found themselves. It should also be noted that it is common ground that the activities for which Laval posted Latvian workers to Sweden fall within the scope of the annex to Directive 96/71, that is to say they are carried out in the building sector.

109. Next, as regards freedom of movement for workers, it will be observed that, at the material time, the Member States were entitled, under paragraph 2 of Annex VIII to the 2003 Act of Accession, by way of derogation from Articles 1 to 6 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community,<sup>47</sup> and until the end of the two-year period following the date of accession (namely 30 April 2006), to apply national measures or measures resulting from bilateral agreements governing access by Latvian nationals to their labour market.<sup>48</sup> Admittedly, the Member States were entitled to decide, in the same way as the Kingdom of Sweden, to liberalise access to their labour markets as from 1 May 2004.<sup>49</sup> However, any such decision was to be adopted under national law and not under provisions of Community law.<sup>50</sup>

110. It is at this stage of my Opinion that there comes into play the argument of the defendants in the main proceedings, referred to above, that the aim of Laval's posting of

workers to its subsidiary was to secure access for Latvian workers to the Swedish labour market.

111. That argument appears to be prompted by the statement made by the Court of Justice in its judgment in *Rush Portuguesa* to the effect that the derogation provided for in Article 216 of the Act of Accession of the Portuguese Republic from the freedom of movement for workers provided for by the Treaty precluded the making available of workers from Portugal in another Member State by an undertaking providing services.<sup>51</sup> According to the Court's reasoning, such an undertaking, although a provider of services within the meaning of the Treaty, sought in fact to secure access for workers to the employment market of the host Member State, in disregard of the derogation provided for in the Act of Accession.

112. In this case, however, the argument of the defendants in the main proceedings does not appear to be supported by anything in the file, there being nothing to indicate that the aim of Laval's activity was to enable Latvian workers to gain access to the Swedish employment market.<sup>52</sup>

47 — OJ, English Special Edition, Series I, 1968 (II), p. 475.

48 — It should be noted that this first phase of the transitional measures was applicable to 8 of the 10 Member States which acceded to the European Union on 1 May 2004, the Republic of Malta and the Republic of Cyprus being excluded.

49 — With regard to the state of liberalisation of the labour markets in the 15 older Member States of the Community during and at the end of the first phase of the transitional measures, see the Commission press release of 28 April 2006 'Transitional measures for the free movement of the workers forming the subject of the Accession Treaty of 2003' (Memo/06/176), <http://www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/176&format=HTML&aged=1&language=EN&guilLanguage=en>.

50 — As is emphasised in paragraph 12 of Annex VIII mentioned above.

51 — Case C-113/89 [1990] ECR I-1417, paragraphs 13 and 16.

52 — In fact, as I made clear earlier, according to the file all the workers posted by Laval returned to Latvia following the collective action taken by the defendants in the main proceedings.

113. For the sake of completeness — even though this observation also falls outside the question of the admissibility of the preliminary questions in the strict sense, but I shall not return to it — the argument of the defendants in the main proceedings prompted by the *Rush Portuguesa* judgment has the effect, in my opinion, of undermining and, ultimately, negating their argument, as set out in their written observations, that the present case should be examined only in relation to freedom of movement for workers provided for in Article 39 EC and not in the light of Article 49 EC and/or of Directive 96/71.

114. It need merely be observed that, simply because of the application of the first stage of the transitional measures provided for in Annex VIII to the 2003 Act of Accession at the material time, and even though the Kingdom of Sweden had decided, under its national law, to open its labour market to all workers from States that became members of the European Union on 1 May 2004, Latvian workers could not directly rely on the provisions of Article 39 EC.

115. Finally, contrary to the impression the defendants in the main proceedings seek to give, there is nothing in the file to prove or even indicate that Laval's activities were wholly or mainly directed towards Swedish

territory with a view to evading the rules that would have been applicable to it if it had been established in Sweden.<sup>53</sup>

116. To conclude these preliminary observations, I consider that Community law is applicable to this case and that the request for a preliminary ruling must be declared admissible. It must nevertheless be emphasised that the answers I propose to give to the questions analysed below are not necessarily valid for all cases, in particular where there are different factual situations liable to render applicable the provisions of the 2003 Act of Accession.

## B — *The questions referred for a preliminary ruling*

### 1. General observations

117. As is apparent from the wording of the two questions, the national court seeks from the Court of Justice an interpretation of Articles 12 EC and 49 EC and of Directive 96/71.

<sup>53</sup> — See, in that regard, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 32.

118. So far as concerns Article 12 EC, which imposes a general prohibition on any discrimination on grounds of nationality, that provision is applicable, as it states, 'without prejudice to any special provisions contained [in the Treaty]', which implies, in accordance with the case-law, that it falls to be applied autonomously only in situations governed by Community law for which Community law does not lay down specific anti-discrimination rules.<sup>54</sup>

119. That general principle was implemented and shaped both by Article 49 EC<sup>55</sup> and by Directive 96/71, Article 3 of which provides essentially that the terms and conditions of employment laid down in the host Member State, which fall within the matters listed in that directive or to which the directive refers, apply to service providers that post workers temporarily to the territory of that Member State and to national undertakings that are in a similar situation with regard to equal treatment.

54 — See, in particular, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 64; Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 16; Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 61; and Case C-185/04 *Öberg* [2006] ECR I-1453, paragraph 25.

55 — *Vestergaard*, paragraph 17, and Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 26; see also *Skandia and Ramstedt*, paragraphs 61 and 62.

120. It is not therefore necessary, in my view, for the Court to give a ruling on Article 12 EC in the present case.

121. As to Directive 96/71 and Article 49 EC, I must point out that the great majority of the parties that have submitted written observations in this case have suggested that the Court should examine the questions in the light both of Directive 96/71 and of Article 49 EC, regardless of the answers that those parties suggest be given to those questions.<sup>56</sup> A minority of the parties participating in these proceedings examined the questions only in the light of Article 49 EC,<sup>57</sup> whereas only the Commission and the Norwegian Government base their analysis of the questions referred by the national court on the provisions of Directive 96/71 alone.

122. In view of those very different positions, it would be helpful to eliminate certain matters from the debate.

56 — That applies to Laval, the German, Austrian, Belgium, Estonian, French, Icelandic, Latvian, Lithuanian (which proposes one answer for the two questions) and Polish Governments, and also the Spanish Government and Ireland whose observations are, however, limited to the first question.

57 — That applies, as a (very remote) alternative, to the defendants in the main proceedings (which propose one answer for both questions), the Danish Government (which examined only the first question), the Finnish Government (which does not give views as to how the two questions should be answered), the Swedish and Czech Governments, and also the EFTA Surveillance Authority, which nevertheless limited its answer to the first question.

123. As regards Directive 96/71, several parties that have submitted observations to the Court, among which the defendants in the main proceedings, the Swedish Government and the EFTA Surveillance Authority stand out, have maintained that there is no point in examining it because it is common ground, first, that the dispute giving rise to the questions is between private persons and, second, that, under the case-law of the Court of Justice, the provisions of a directive cannot have any direct 'horizontal' effect.

124. That argument is only partly well founded, since I do not think that it can have the effect of excluding Directive 96/71 from the examination which the Court is asked to undertake.

125. In that connection, in a concern for clarity of reasoning, it is appropriate to expound the logic underlying the questions submitted by the national court in relation to Directive 96/71 and its transposition by the Kingdom of Sweden, in particular in so far as that court refers, in its first question, to the fact that the Swedish Law on the posting of workers contains no express provision on the application of terms and conditions of employment in collective agreements.

126. I would remind you that Article 3 of Directive 96/71, a fundamental provision of that instrument, requires the Member States to ensure that workers posted temporarily to their territory for the provision of services are guaranteed terms and conditions of employment covering the matters listed in paragraph 1 of that article. Those matters include, among other things, minimum rates of pay.

127. The matters listed in Article 3(1) of Directive 96/71 are laid down by law, regulation or administrative provision and/or, *as regards activities in the building sector*, such as those at issue in the main proceedings, by collective agreements or arbitration awards which have been declared to be of universal application within the meaning of Article 3(8).

128. The first subparagraph of Article 3(8) makes it clear that the agreements that have been declared universally applicable are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

129. The second subparagraph of Article 3(8) allows the Member States, in the absence of a system for declaring collective

agreements to be of universal application, to take as a basis, if they so decide: (a) collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or (b) collective agreements which have been concluded by the most representative employers' and labour organisations at national level provided, in each such case, that their application ensures equality of treatment between foreign service providers and national undertakings that are in a similar position.

employment laid down in collective agreements, including, in principle, those relating to rates of pay, consists in leaving it to the workers' union organisations, if those agreements have not been signed by a service provider, to initiate collective action with a view to compelling that employer to sign those agreements either directly or by means of a tie-in agreement, including where — and this is relevant to the second question from the national court — that provider is already bound by a collective agreement concluded in the Member State of its establishment.

130. It is common ground, as I emphasised when setting out the legal background above, that the Kingdom of Sweden has no system for making declarations of universal application within the meaning of the first subparagraph of Article 3(8) of Directive 96/71 and that it did not avail itself of the second subparagraph of that provision. Moreover, as already indicated in point 21 above, the majority of the terms and conditions of employment concerning the matters listed in Article 3(1) of Directive 96/71 have been adopted by the Swedish Law on the posting of workers which transposes that directive.

132. It should also be pointed out that the application of the 'core' terms and conditions of employment that must be guaranteed by the host Member State to workers temporarily posted to its territory, under Article 3 of Directive 96/71, constitutes a derogation from the principle of application of the legislation of the Member State of origin to the situation of the service provider of that Member State that posts those workers to the territory of the first Member State.

131. On the other hand, the method chosen by the Kingdom of Sweden, which seeks to ensure that workers posted temporarily to its territory enjoy the terms and conditions of

133. Consequently, by seeking guidance from the Court of Justice on whether Article 3 of Directive 96/71 may have been incorrectly transposed into Swedish domestic law, the national court is essentially asking the Court of Justice to enable it to determine whether Laval may set up against the trade unions which are the defendants in the main

proceedings the fact that the Kingdom of Sweden did not make use of the arrangements provided for in Article 3 of the directive to extend or endorse, by a measure vested with public authority, the application of collective agreements concluded in its territory to foreign service providers which post workers there temporarily. According to the argument defended by Laval, which also underlies the two questions submitted by the national court, that inaction on the part of the Kingdom of Sweden implies, in this case, that only Latvian legislation and collective agreements are applicable to the posting so that, as a result, the Swedish trade unions are deprived of the possibility of seeking to compel Laval, through collective action, to sign the Byggnadsarbetareförbundet collective agreement at issue in the main proceedings.

134. It is therefore true, as contended by the defendants in the main proceedings, the Swedish Government and the EFTA Surveillance Authority, that the interpretation of Directive 96/71 requested by the national court might result in the direct application of that directive by that court as between Laval and the trade unions which are the defendants in the main proceedings.

135. However, the Court of Justice now seems firmly opposed to the view that a directive might impose obligations on an

individual and could therefore be invoked, as such, against that individual.<sup>58</sup>

136. Moreover, I do not believe that that obstacle can be overcome by the attempt, appearing in Laval's written observations, to widen the concept of a State in such a way that, in the present case, trade unions are regarded as a subdivision of the Swedish State, against which Laval could then directly invoke Directive 96/71, provided that the latter meets the substantive tests of direct effect.

58 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56; *Pfeiffer and Others*, paragraph 108; Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 70. That refusal applies in any event to the so-called 'classic' directives; on the other hand, the Court has conceded, by way of exception, that an individual who relies on a technical rule of a Member State which has not been notified to the Commission, at the draft stage, in accordance with the procedures laid down in Articles 8 and 9 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), amended and repealed by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), the purpose of which is to prevent possible future restrictions on the free movement of goods, may have relied upon against him, in a dispute with another individual, that Member State's failure to notify that technical rule: see Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 48, 54 and 55; Case C-443/98 *Unilever* [2000] ECR I-7535, paragraphs 49 and 50; and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paragraphs 49 and 50.

137. Those unions are certainly not public authorities<sup>59</sup> and they are not entrusted, by an act of a public authority, with performing, under the latter's control, a service of public interest, nor are they vested, for such a purpose, with powers that go beyond the rules applicable to relations between private individuals.<sup>60</sup>

138. Moreover, the problems associated with the direct horizontal effect of Directive 96/71 would arise only if the Court were persuaded to find that the Kingdom of Sweden incorrectly transposed Article 3 of that directive.

139. That means, first, that Directive 96/71 is not excluded from the review which the Court must undertake since, in its first question, the national court raises, indirectly but necessarily, the question whether the Kingdom of Sweden did correctly transpose that measure.

140. Secondly, even if it were assumed that the measure was incorrectly transposed and it was not possible to apply Directive 96/71 directly in the main proceedings, it must be borne in mind that, under the case-law, national courts must interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by the directive.<sup>61</sup> The obligation on the national courts to interpret national law in conformity with Community law, *which extends to all provisions of national law*, whether adopted before or after the directive in question, is intended to enable them to ensure the full effectiveness of Community law when they determine the disputes before them by applying methods of interpretation upheld in domestic law.<sup>62</sup>

141. Admittedly, according to the case-law, the obligation to interpret national law in conformity with Community law is delimited by the general principles of law, in particular those of legal certainty and non-retroactivity, and it cannot serve as a basis for an interpretation *contra legem* of national law.<sup>63</sup>

59 — In contrast to the position of decentralised territorial authorities of the Member States, against which, the Court has conceded, a directive may be directly relied on by a private party; see, inter alia, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 31, and Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 46.

60 — In contrast, therefore, to the situation prevailing in Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraphs 20 and 22. See also Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 69; and Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 70.

61 — See, inter alia, *Pfeiffer and Others*, paragraph 113, and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 108.

62 — See, to that effect, *Pfeiffer and Others*, paragraphs 114, 115, 116, 118 and 119, and *Adeneler and Others*, paragraphs 108, 109 and 111 (emphasis added).

63 — *Pupino*, paragraphs 44 and 47, and *Adeneler and Others*, paragraph 110.

142. In the present case, that limitation certainly means that the interpretation of national law in conformity with Community law which the national court might adopt should not lead it to impair the very substance of the right to take collective action to defend the interests of workers, which, in my preliminary observations above, I have recognised as constituting a general principle of Community law, also upheld by the Swedish Constitution. Moreover, no risk of that kind could derive from an interpretation of national law in conformity with Directive 96/71 because it is stated, superabundantly, in the 22nd recital in its preamble, that the measure is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.<sup>64</sup>

143. Although its provisions cannot be held to have direct horizontal effect, examination by the Court of Directive 96/71 is thus far from irrelevant, a point which I shall return to below.

144. It remains to be determined whether the Court can dispense with an analysis of the questions in the light of Article 49 EC or whether it must examine them in the light of that provision as well.

64 — The redundancy of that recital is apparent from the fact that Community law, including therefore primary law, cannot affect the very substance of the right to resort to collective action. That limitation therefore necessarily extends to secondary law.

145. It should be remembered in that connection that Directive 96/71, as is claimed, in essence and correctly, by a number of the parties that have submitted written observations in this case, represents a specific interpretation of Article 49 EC in the light of the case-law of the Court.

146. Starting from the premiss, recognised by the Court in its interpretation of Article 49 EC<sup>65</sup> and referred to in the 12th recital in the preamble to Directive 96/71, that Community law does not prevent Member States from extending the scope of their legislation or collective employment agreements concluded by both sides of industry to any person who is employed, even temporarily, although his employer is established in another Member State, Directive 96/71 seeks, by means of Article 3 thereof, to lay down the mandatory minimum protection rules for workers which must be respected by foreign service providers that post workers to the host Member State and which, therefore, may not be inimical to the freedom to provide cross-border services.

65 — *Rush Portuguesa*, paragraph 18; Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paragraph 29; Case C-244/04 *Commission v Germany* [2006] ECR I-885, paragraphs 44 and 61; and Case C-168/04 *Commission v Austria* [2006] ECR I-9041, paragraph 47. It should be noted that those judgments, and likewise the 12th recital in the preamble to Directive 96/71, accept the principle that collective agreements in general may be extended to the situation of service providers, whereas the grounds of earlier or contemporary judgments relate only to the extension of the minimum rate of pay provided for by the host Member State: see, in particular, Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 14; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 23; *Arblade and Others*, paragraph 41; and Case C-341/02 *Commission v Germany* [2005] ECR I-2733, paragraph 24.

147. However, by virtue of its ‘minimalist’ character, Directive 96/71 does not exhaust the application of Article 49 EC.<sup>66</sup>

148. In short, the answer to the question raised in point 144 above depends, in my view, essentially on the outcome of the analysis to be made on the basis of Directive 96/71.

149. A measure that is incompatible with Directive 96/71 will, a fortiori, be contrary to Article 49 EC, because that directive is intended, within its specific scope, to implement the terms of that article.<sup>67</sup>

150. On the other hand, to hold that a measure conforms with Directive 96/71 does not necessarily mean that it meets the requirements of Article 49 EC, as interpreted by the Court.

151. In particular, although Directive 96/71 accepts that the Member States may apply to

a service provider of a Member State that posts workers temporarily to the territory of another Member State terms and conditions of employment that are more favourable for the workers than those referred to in particular in Article 3(1) of Directive 96/71, the granting of that option must nevertheless respect the freedom to provide services guaranteed by Article 49 EC.<sup>68</sup>

152. Similarly, the Court has taken the view that, by virtue of a combined reading of Articles 3(1) and 5 of Directive 96/71, the Member States must ensure, in particular, that posted workers have available to them adequate procedures to ensure that they receive the minimum wage, which implies that the discretion granted to the Member States by Article 5 should be exercised in conformity with the freedom to provide services guaranteed by the Treaty.<sup>69</sup>

153. Since, as will be explained in greater detail in points 194 to 217 of this Opinion, certain aspects of the problem raised by the national court fall outside the scope of Directive 96/71 or are tolerated by it, I

66 — See also, to that effect, footnote 15 to the Opinion of Advocate General Léger in *Commission v Austria*, and point 27 of the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 14 December 2006 in Case C-490/04 *Commission v Germany* (currently pending before the Court).

67 — See, in that connection, Case C-341/02 *Commission v Germany*, paragraphs 41 and 42.

68 — See, by analogy, in relation to the free movement of goods, Case C-71/02 *Karner* [2004] ECR I-3025, paragraphs 33 and 34.

69 — Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 28 to 30.

consider that the questions should also be examined in the light of Article 49 EC.

154. For the sake of completeness, I do not consider that assessment to be undermined by the argument put forward by the defendants in the main proceedings to the effect that Laval cannot invoke Article 49 EC directly against them, if only because of the obligation, referred to above, attaching to the national court to interpret domestic law in conformity, as far as possible, with Community law.

155. But I also consider, in line with the detailed submissions of Laval, the Estonian Government and the EFTA Surveillance Authority, that Article 49 EC is capable of being directly applied in the present case.

156. In that connection, it must be emphasised that the Court has recognised on several occasions that compliance with the prohibition of discrimination laid down in Article 49 EC applies not only to public authorities, but also to rules of a non-public nature which are intended to regulate, collectively, the work of self-employed persons and the provision of services. According to the case-law, the abolition as between Member States of obstacles to the free

movement of services would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or bodies which do not come under public law.<sup>70</sup>

157. The Court also justifies that approach on the ground that working conditions in the different Member States are governed sometimes by means of provisions laid down by law or regulation and *sometimes by agreements and other acts concluded or adopted by private persons*. To limit the prohibition of discrimination to acts of a public authority would risk creating inequality in their application.<sup>71</sup>

158. I willingly accept that the present case differs from the situations at issue in the judgments in which the Court has so far held that Article 49 EC was applicable to private persons. In those cases, it was the legality of the regulations and other rules drawn up by the entities in question that was examined. By contrast, in the present case it is the

70 — See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17, 18, 23 and 24; Case 13/76 *Donà* [1976] ECR 1333, paragraphs 17 and 18; Joined Cases C-51/96 and C-191/97 *Deliege* [2000] ECR I-2549, paragraph 47; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 35; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120; and Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paragraph 24.

71 — See *Walrave and Koch*, paragraph 19 (emphasis added).

exercise by the trade unions of their right to resort to collective action against a foreign service provider, in order to compel it to sign a Swedish collective agreement that is at issue.

159. However, that difference is important, in my view, only in determining whether the collective action at issue constitutes an obstacle to the freedom to provide services. It has no bearing on the question whether trade unions are in principle obliged to comply with the prohibitions laid down in Article 49 EC. It must also be borne in mind that, for the purpose of determining the terms and conditions of employment in the Member States, the Court considers that the principle of non-discrimination implemented by Article 49 EC applies to private persons as regards the drawing-up of (collective) agreements and the conclusion or *the adoption of other acts*.<sup>72</sup>

160. In this case, as has already been pointed out, the Swedish model of collective employment relations grants considerable autonomy to both sides of industry, guided by the principle that such parties are responsible for

and regulate their own conduct.<sup>73</sup> Trade unions enjoy in particular wide powers enabling them to extend the scope of collective agreements adopted in Sweden to employers not affiliated to an employers' organisation that is a signatory thereto in that Member State, including the power to take collective action if necessary. Those powers and the exercise of them thus have a collective effect on the Swedish employment market. Recourse to collective action ultimately represents a manifestation of the exercise by trade unions of their legal autonomy with the aim of regulating the provision of services, within the meaning of the case-law referred to above.

161. Article 49 EC is therefore, in my opinion, capable of direct application in the case before the national court.

162. It follows from these general observations that, by its two questions, which can in my opinion be considered together, the national court seeks essentially to ascertain whether, in circumstances where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71 and Article 49 EC must be

73 — See, in particular, Fahlbeck, R., 'Labour and Employment Law in Sweden', *Acta Societatis Juridicae Lundensis* No 125, Juristförlaget i Lund, Lund, 1997, p. 27; Rönmmar, M., 'Mechanisms for establishing and changing terms and conditions of employment in Sweden', *JILPT Comparative Labour Law Seminar*, JILPT Report, No 1, 2004, p. 96; Bruun, N. and Malmberg, J., 'Ten years within the EU — Labour Law in Sweden and Finland following EU accession', in Wahl, N. and Cramér, P., *Swedish Studies in European Law*, Hart, Oxford, 2006, pp. 79-81; and Dolvik, J.E. and Eldring, L., *The Nordic labour market two years after the EU enlargement*, TemaNord 2006:558, Norden, Copenhagen, 2006, p. 24.

72 — *Ibid.*

interpreted as preventing trade unions of a Member State from taking, in accordance with the domestic law of that State, collective action designed to compel a service provider of another Member State to subscribe, by means of a tie-in agreement, to a collective agreement for the benefit of workers posted temporarily by that provider to the territory of the first Member State, including cases where that provider is already bound by a collective agreement entered into in the Member State where it is established.

163. As stated earlier, this question must first of all prompt us to consider whether recourse to such collective action is based on a correct implementation of Directive 96/71 in Swedish domestic law. If the answer is affirmative, it will then be necessary to analyse it in the light of Article 49 EC.

## 2. The interpretation of Directive 96/71 and its implementation in Sweden

164. As I have already pointed out, it is common ground that, in implementing Directive 96/71 in domestic law, the Swedish legislature, following the tradition prevailing in Swedish collective employment relations

and in the absence of a declaration of universal application of collective agreements, allowed both sides of industry to determine the principal terms and conditions of employment laid down in collective agreements, including those relating to pay, in Sweden.

165. According to the Swedish Government, Directive 96/71 does not require the Member States to include a minimum rate of pay in their legislation. In the Swedish Government's view, Directive 96/71 enables the Member States to grant to workers temporarily posted to the territory of one of them protection greater than that provided for in that instrument. Workers temporarily posted to the territory of another Member State in the context of the provision of cross-border services must therefore be able, in the Swedish Government's opinion, to enjoy the conditions concerning pay laid down or referred to in the collective agreements in that Member State.

166. It is precisely the mechanisms and the procedures that are available to both sides of industry and are guaranteed by law, in particular the right to resort to collective action, which, in the Swedish Government's opinion, ensure compliance with the terms and conditions of employment laid down by the collective agreements. Accordingly, those mechanisms and those procedures facilitate attainment of the objective referred to in Article 3(1) of Directive 96/71 which, moreover, is without prejudice to the right to take

collective action. The Swedish Government adds that there was absolutely no need for the Kingdom of Sweden to avail itself of the second subparagraph of Article 3(8) of that directive because that provision merely grants an option to Member States that have no system for declaring collective agreements to be universally applicable. In those circumstances, the method adopted by the Kingdom of Sweden to transpose Directive 96/71 into domestic law meets the objectives of the directive.

167. The Austrian, Danish, Finnish, French, Icelandic and Norwegian Governments support essentially the same conclusion.

168. Whilst following the same general line of reasoning, the German and Spanish Governments, Ireland and the Commission add, essentially, that the terms and conditions of employment laid down in the collective agreements must either relate to the matters listed in Article 3(1) of Directive 96/71 or be covered by public policy provisions, within the meaning of Article 3(10).

169. For their part, Laval and the Estonian, Latvian, Lithuanian, Polish and Czech Governments are of the opinion that the Kingdom of Sweden transposed Directive 96/71

incorrectly. First, those parties consider, having regard to a communication of 25 July 2003 adopted by the Commission,<sup>74</sup> that the Kingdom of Sweden, not having availed itself of the second subparagraph of Article 3(8) of Directive 96/71, waived the right to apply to workers posted temporarily to its territory by a foreign service provider the terms and conditions of employment laid down in collective agreements. They also consider that the Swedish method does not ensure equal treatment between service providers and domestic undertakings and is a clear source of legal uncertainty in that, in particular, the service providers are not apprised of all the terms and conditions of employment, in particular those concerning pay, which will apply to them when they temporarily post workers to that Member State. Finally, they consider that the Swedish legislation allows foreign service providers to be made subject to terms and conditions of employment, laid down in collective agreements, which do not correspond to the list in Article 3(1) of Directive 96/71 or to the limits laid down in Article 3(10) of that directive.

170. For my part, I tend to share the view put forward by the German and Spanish Governments, Ireland and the Commission.

<sup>74</sup> — Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — The implementation of Directive 96/71/EC in the Member States (COM(2003) 458 final).

171. As already stated, Article 3 of Directive 96/71 has a twofold aim of providing minimum protection for posted workers and equal treatment as between service providers and domestic undertakings in similar circumstances. Those two requirements must be pursued concurrently.

172. As regards the first aim, Article 3 of Directive 96/71 requires Member States to ensure that workers posted temporarily to their territory are guaranteed a minimum level of terms and conditions of employment in relation to the matters listed in Article 3(1), including minimum rates of pay, at the same time authorising them, first, to apply terms and conditions of employment which are more favourable to workers, in accordance with Article 3(7), and, second, to impose terms and conditions of employment in relation to matters other than those referred to in Article 3(1), in so far as public policy provisions are involved.

173. In order to ensure equal treatment as between service providers that post workers abroad temporarily and domestic undertakings, Article 3(1) of Directive 96/71 provides that the guarantees given to such workers are to be laid down by law, regulation or administrative action and/or, *in the building*

*sector*, by collective agreements or arbitration awards that have been declared universally applicable within the meaning of the first subparagraph of Article 3(8), namely that they are '*observed by all undertakings* in the geographical area and in the profession or industry concerned'.<sup>75</sup>

174. It is apparent from the second and third subparagraphs of Article 3(8) of Directive 96/71 that, in the absence of a system for declaring collective agreements to be universally applicable, the Member State to whose territory workers are posted *may, if it so decides, take as a basis* collective agreements which are generally applicable to all similar undertakings or are concluded by the most representative organisations of both sides of industry and are applied throughout national territory, provided that the Member State *ensures equal treatment* between service providers that post such workers to its territory and domestic undertakings in a similar position, that is to say, in particular, that those undertakings have the same obligations imposed on them and the effects thereof are the same.

175. It may be legitimately inferred from that provision that the Community legislature sought to avoid a situation in which collective agreements that were not legally

<sup>75</sup> — Emphasis added.

binding in the building sector in a host Member State were imposed on foreign service providers, whilst a great majority of domestic employers would, in practice, not be covered by them.

176. Moreover, I should point out that, by virtue of Article 5 of Directive 96/71, the Member States must ensure in particular that adequate procedures are available to workers and/or their representatives for the enforcement of the obligations imposed by the directive.

177. That provision must, in my view, be read in the light both of the final part of the 12th recital in the preamble to Directive 96/71, which states, in harmony with the case-law of the Court of Justice on Article 49 EC,<sup>76</sup> that ‘Community law does not forbid Member States to guarantee the observance of [rules for the protection of workers] by the appropriate means’, and of the 22nd recital which, it will be remembered, states that Directive 96/71 is ‘without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’.

178. A combined reading of those provisions prompts me to set out the following considerations.

179. In the first place, I do not think that, in the absence of a system for declaring collective agreements to be of universal application, the Kingdom of Sweden is obliged to have recourse to the option provided for in the second subparagraph of Article 3(8) of Directive 96/71. That option, as the wording of that provision indicates, is merely a possibility offered to Member States that have no system for declaring collective agreements to be of universal application.

180. The fact that the Kingdom of Sweden leaves it to both sides of industry to determine the terms and conditions of employment, in particular rules on pay, by means of collective agreements cannot in itself constitute inadequate implementation of Directive 96/71, to such an extent that Sweden waived the right to apply those terms and conditions to foreign service providers.

181. In general, it will be remembered that the Court has held that Member States may leave the implementation of the objectives pursued by Community directives to both sides of industry through collective agreements.<sup>77</sup>

76 — See, in particular, *Rush Portuguesa*, paragraph 18, and *Vander Elst*, paragraph 23.

77 — See, to that effect, Case 143/83 *Commission v Denmark* [1985] ECR 427, paragraphs 8 and 9; Case 235/84 *Commission v Italy* [1986] ECR 2291, paragraph 20; and Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 19.

182. Admittedly, it has also been held that, in such situations, the Member State is still responsible for fulfilling its obligation to ensure that directives are fully implemented by adopting all such provisions as may be appropriate.<sup>78</sup>

183. In the present case, I do not believe, in the first place, that the Kingdom of Sweden failed in its obligation to ensure that workers posted to its territory enjoy the terms and conditions of employment concerning the matters listed in Article 3(1) of Directive 96/71.

184. Whilst the Kingdom of Sweden directly imposes compliance with the terms and conditions of employment relating to the matters listed in Article 3(1)(a) and (b) and (d) to (g) of Directive 96/71 through national legislation, it is by its acceptance of the right of trade unions to take collective action that it ensures that those unions may ultimately impose the wage conditions laid down or provided for by collective agreements, if a foreign service provider does not voluntarily subscribe to those conditions.

185. Although, as the referring court observes, such recognition is not expressly apparent from the Swedish Law on the posting of workers, it derives, on the other hand, implicitly but necessarily from the MBL, which provides that collective action designed to compel a foreign employer to conclude a collective agreement which is effective in Sweden may be taken where that provider is bound by a collective agreement in its State of origin. A fortiori, that legislation applies to every service provider of a Member State which is not bound by any collective agreement concluded in that State. Ultimately, therefore, it guarantees trade unions the opportunity to impose, through recourse to collective action, the wage conditions laid down or governed by Swedish collective agreements on any foreign service provider who does not voluntarily subscribe to those conditions, with the aim of guaranteeing to workers temporarily posted to Sweden the benefit of the wage conditions applicable to Swedish workers in the sector in question.

186. I would add that Paragraph 9 of the Swedish Law on the posting of workers, in so far as it provides that the liaison office is to inform foreign service providers of the applicability of collective agreements in the sector and refer those providers for further information to the trade unions, also means that it was not the intention of the Kingdom of Sweden to decline to ensure that workers temporarily posted to its territory should be guaranteed the wage conditions applicable

<sup>78</sup> — *Fernández de Bobadilla*, paragraph 19 and the case-law there cited.

under collective agreements concluded in Sweden.

present case, Laval posted Latvian workers employed in that sector to Sweden.

187. It is therefore beyond doubt, in my view, that the right to take collective action granted by Swedish law to trade unions to enable them to impose the wage conditions laid down or governed by Swedish collective agreements provides a suitable means of attaining the aim of protecting posted workers laid down in Article 3 of Directive 96/71.

188. Second, the problem remains of the implementation of the second objective pursued by Article 3 of Directive 96/71, namely that of ensuring equal treatment between foreign service providers and domestic undertakings.

189. This examination may be limited to the building sector. First, the obligation on host Member States, under Article 3(1) of Directive 96/71, to ensure compliance with the terms and conditions of employment relating to the matters listed in that provision, provided for in collective agreements in their territory, extends only to that sector and, second, it is common ground that, in the

190. First of all, it must be borne in mind, as pointed out by the national court, that it is precisely in order to ensure equal treatment with domestic undertakings that the Swedish legislature considered that it could not require foreign service providers to observe automatically, possibly by means of a declaration of universal application or in accordance with the procedure envisaged in the second subparagraph of Article 3(8) of Directive 96/71, the terms and conditions of employment laid down or governed by collective agreements, since domestic employers are not subject to any such automatic procedure.

191. Next, it is apparent from the information provided by the Swedish Government in its answers to the written questions put to it by the Court that, first, there are around 9 800 undertakings in Sweden with more than three employees, whereas around 11 200 undertakings — and that figure thus includes undertakings employing fewer than three employees — are bound by collective agreements in the building sector. Second, the Swedish Government has also confirmed that Swedish employers not affiliated to an employers' organisation may be compelled, by collective action by trade unions, to subscribe to an agreement of that kind by signing a tie-in agreement. Furthermore, it is clear from the general principles of Swedish employment law that employers that have signed a collective agreement or a tie-in

agreement in Sweden must grant uniform terms and conditions of employment to their workers, regardless of whether or not the latter are affiliated to the trade union that signed the collective agreement, and any individual contract of employment contrary to that agreement is, moreover, by virtue of Paragraph 27 of the MBL, automatically void. The latter characteristics, in particular, prompt certain Swedish authors to consider that collective agreements are in practice effective *erga omnes* in Sweden.<sup>79</sup> In addition, as the Swedish Government has essentially observed, the only way in which a Swedish undertaking, with an employed workforce, or a foreign undertaking which wishes temporarily to post workers in the building sector to Sweden may avoid collective action being taken against them is to agree to conclude, either directly or through a tie-in agreement, the collective agreement which the trade unions seek to have applied.

192. Lastly, it is also clear from the file that Byggnadsarbetareförbundet is one of the most representative trade unions, as it represents more than 87% of workers in the Swedish building sector, and that Laval has posted several dozen Latvian workers to that Member State, including to the Vaxholm building site.

193. Thus, in view of those characteristics as a whole and, in particular, the extent of the coverage of collective agreements in the Swedish building sector and the possibility, deriving from the regime established by the MBL, of compelling domestic employers not affiliated to an employers' organisation to conclude an agreement of that kind by means of the right granted to trade unions to take collective action, the Swedish system appears, by subjecting a foreign service provider to the latter regime, to ensure the equal treatment provided for by Article 3 of Directive 96/71 as between that provider and the domestic undertakings carrying on business in the Swedish building sector which are in a similar situation.

194. In my view, that assessment is not affected either by the fact that the Swedish system allows the application of a rate of pay which does not, properly speaking, constitute the minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 or by the fact that the MBL, where appropriate, makes it possible to impose such rules on a foreign service provider which is already bound by a collective agreement concluded in the Member State where it is established.

195. As I shall make clear below, those two points fall, in my opinion, within the scope of Article 49 EC.

79 — See the articles by Rönmar, M., p. 98, and by Malberg, J., 'The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions', *Scandinavian Studies in Law*, Vol. 43, 2002, Stockholm, p. 208.

196. As regards the first question, it must first be noted that, under the second subparagraph of Article 3(1) of Directive 96/71, the concept of minimum rate of pay is defined by the *national law and/or practice* of the Member State to whose territory the worker is posted. That article accepts that Member States with no domestic legislation on minimum rates of pay are not, first, under any obligation by virtue of Directive 96/71 to introduce such a provision into their domestic law,<sup>80</sup> and, second, may entrust to both sides of industry, in the context of collective agreements, the task of defining what should be understood by 'minimum rate of pay', or of fixing such a rate in the sector concerned.

197. Next, it should be borne in mind that, under Article 3(7) of Directive 96/71, paragraph 1 of that article is not to prevent application of terms and conditions of employment that are more favourable to workers.

198. That latitude implies that Directive 96/71 does not prevent a rate of pay determined in accordance with a collective agreement concluded in the host Member State, which applies in practice to domestic undertakings in the sector concerned, from

being extended, through recourse to collective action, to service providers from another Member State which, having posted workers to the territory of the first Member State, are operating in the same sector and are in similar circumstances.

199. However, as I have already indicated in point 151 of this Opinion, that option must be exercised in conformity with Article 49 EC.

200. As regards the second question, and as rightly argued by the Commission in its written observations, since the host Member State must ensure that posted workers in the building sector enjoy the terms and conditions of employment in relation to the matters listed in Article 3(1) of Directive 96/71 provided for by collective agreements, regardless of the law applicable to the employment relationship, the existence of a foreign collective agreement binding a service provider from another Member State that is carrying on its business in that sector is of no immediate relevance as far as the application of those conditions is concerned.

201. Thus, that provider will have, in the same way as domestic undertakings in

<sup>80</sup> — See, in that regard, Case C-341/02 *Commission v Germany*, paragraph 26, in which the Court held that the adoption of legislative provisions governing minimum rates of pay within national territory was optional. See also Declaration No 5 of the Council and the Commission, annexed to the Council's minutes on the adoption of Directive 96/71 (Document 10048/96 add. 1, 20 September 1996).

similar circumstances operating in the same sector and if it wishes to pursue its activity in the host Member State, to guarantee to workers posted temporarily to the host Member State the *mandatory* terms and conditions of employment relating to the matters listed in Article 3(1) of Directive 96/71 laid down in that Member State, including, therefore, those determined by collective agreements which are in practice applicable to domestic undertakings in that sector, but which, in the absence of voluntary acceptance by the employer, regardless of his nationality, will be imposed on him by trade unions following the taking of collective action.

202. I am therefore of the view that Directive 96/71 does not prevent the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings carrying on business in the building sector in Sweden from being, as a result in particular of the exercise of the right guaranteed to trade unions to take collective action, extended to a foreign service provider that temporarily posts workers in that sector of activity to Swedish territory and is in a similar situation, including where that provider is already bound by a collective agreement concluded in the Member State where it is established.

203. Such a situation must nevertheless be examined in the light of Article 49 EC.

204. Finally, it is necessary to examine, in the light of Directive 96/71, the problem associated with the situation, permitted under the Swedish system, of the extension to a foreign service provider of all the conditions laid down in a collective agreement that is in practice applicable to domestic undertakings in the same sector and in a similar situation.

205. It must be pointed out that the Swedish system makes it possible to compel a foreign service provider, through the exercise of collective action, to subscribe to all the conditions contained in a collective agreement which is applicable in practice to domestic undertakings in the building sector that are in a similar situation, without any guarantee that those conditions fall either within the scope of the matters listed in the first subparagraph of Article 3(1) of Directive 96/71 or, in the case of matters other than those listed in that article, within 'public policy provisions' in accordance with Article 3(10) of that directive.

206. By imposing strict equality of treatment between foreign service providers and those domestic undertakings, the Swedish system appears in fact to disregard the very characteristics of the freedom to provide services

by fully assimilating the temporary posting of workers by a service provider of a Member State to Sweden to a permanent activity carried on by undertakings that are established in Swedish territory.<sup>81</sup>

referred to in Article 3(1), which are more favourable for posted workers, to be imposed in the host Member State. As indicated earlier, such conditions must nevertheless be in conformity with Article 49 EC.

207. However, even in that situation, there still remains to be considered the question of the relationship between the provisions of Directive 96/71 and those of Article 49 EC.

210. As regards conditions relating to matters other than those listed in the first subparagraph of Article 3(1) of Directive 96/71, there are two possible hypotheses.

208. In my view, it is necessary to draw a distinction in that connection depending on whether the service provider is, specifically, compelled to subscribe to terms and conditions of employment relating to the matters listed in the first subparagraph of Article 3(1) of Directive 96/71 or is forced to observe conditions relating to matters other than those listed in that provision.

211. The first concerns terms and conditions which do not, strictly, have any bearing on employment but cover the performance of an economic activity by the service provider, including, where appropriate, in relation to protection of posted workers. In my opinion, those conditions do not fall within the scope of Directive 96/71 and must, therefore, be examined in the light of Article 49 EC.

209. In the first case, as I have already pointed out, Directive 96/71, by virtue of Article 3(7) thereof, allows terms and conditions of employment relating to the matters

212. The second hypothesis concerns terms and conditions *of employment* which do not relate to matters listed in the first subparagraph of Article 3(1) of Directive 96/71. The latter provides that such conditions, if they are imposed in the host Member State in the same way on foreign service providers as on domestic undertakings in similar circumstances, must be within the scope of public policy provisions. Admittedly, as is apparent from Article 3(10) of Directive 96/71 and the

81 — See, in that regard, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 16; Case C-294/89 *Commission v France* [1991] ECR I-3591, paragraph 26; and Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 23.

case-law on Article 49 EC, the fact that domestic rules belong to the category of public policy provisions or mandatory rules does not make them exempt from compliance with the provisions of the Treaty.<sup>82</sup> However, it is very clear that such terms and conditions of employment, stipulated in a collective agreement, which are imposed on a foreign service provider and do not fall within the scope of public policy provisions in the host Member State, would in themselves already be contrary to Article 3(10) of Directive 96/71.

213. In the main proceedings, I consider that it will be for the national court to interpret the MBL, so far as possible, in the light of the abovementioned requirement laid down in Article 3(10) of Directive 96/71.

214. Thus, it will have to satisfy itself that domestic law does not allow the extension of terms and conditions of employment which do not relate to matters listed in the first subparagraph of Article 3(1) of Directive 96/71, which may be provided for by a

82 — See, in that connection, *Arblade and Others*, paragraph 31. In that case, the Court defined the concept of public order legislation as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present in the national territory of that Member State and all legal relationships within that State (paragraph 30).

collective agreement such as the Byggnadsarbetareförbundet collective agreement — to which the defendants in the main proceedings demanded, in the context of the collective action undertaken by them, adhesion on the part of Laval even before moving on to the possibility, at an initial stage, of negotiating a rate of pay in accordance with the terms of that agreement or, failing agreement and at a second stage, subscribing to the rate determined in accordance with the fall-back clause of that agreement<sup>83</sup> — unless those conditions meet the test laid down in Article 3(10) of Directive 96/71. If that were to be the case, the national court would still have to verify whether those conditions conform to the requirements of Article 49 EC.

215. Let me also say, in relation to the additional conditions contained in the Byggnadsarbetareförbundet collective agreement, that the national court referred to a number of contributions that Laval would have had to make if it had not, following the collective action taken by the defendants in the main proceedings to compel it to sign a tie-in to that collective agreement, abandoned the posting of Latvian workers to the building site in the municipality of Vaxholm.

216. As is apparent from the observations of the parties to the main proceedings, those

83 — As regards the fall-back clause, see point 26 of this Opinion.

contributions are in respect of insurance premiums to be paid by the employer, so-called 'surcharges' paid by the employer to various Swedish organisations, and a commission paid by the employer to Byggnadsarbetareförbundet with a view to paying for the monitoring of wages carried out by the local branches of that trade union.

217. In my view, given that the first two contributions do not fall within the scope of terms and conditions of employment mentioned by Directive 96/71 and that the third is intrinsically linked to the application of the (more favourable) rate of pay provided for by the Byggnadsarbetareförbundet collective agreement, the requirement that a foreign service provider make those payments in accordance with a collective agreement to which it may be compelled to subscribe following collective action must also be examined in the light of Article 49 EC.

### 3. Intermediate conclusion

218. To summarise the foregoing considerations concerning the interpretation of Directive 96/71 and its implementation in Sweden, my intermediate views are as follows:

- first, Directive 96/71 does not prevent the rate of pay laid down in or determined in accordance with a collective agreement which is applicable in practice to domestic undertakings carrying on business in the building sector in Sweden from being extended, in particular through the exercise of the right guaranteed to trade unions to take collective action, to a foreign service provider that temporarily posts workers in that sector to Sweden and that is in a similar situation, including where that provider is already bound by a collective agreement concluded in the Member State in which it is established. It is necessary, however, to examine that situation and the conditions concerning the monitoring of the application of that rate of pay in the light of Article 49 EC;
- second, Directive 96/71 requires that, in order for the terms and conditions of employment relating to matters other than those mentioned in the first subparagraph of Article 3(1) provided for in a collective agreement that is applicable in practice to domestic undertakings carrying on business in the building sector in Sweden to be able to be imposed on a foreign service provider in a similar situation in the context of the exercise of the right granted to trade unions in that Member State to take collective action, those conditions must be within the scope of

public policy provisions, within the meaning of Article 3(10) of that directive. It is incumbent on the national court to interpret the MBL, so far as possible, in the light of the abovementioned requirement. If that is the case, the subjection of a foreign service provider to such conditions must, in any event, fulfil the requirements laid down by Article 49 EC;

#### 4. Article 49 EC

##### (a) General observations

- third, there do not fall within the scope of Directive 96/71 and must therefore be examined in the light of Article 49 EC terms and conditions other than those relating to employment, provided for by a collective agreement applicable in practice to domestic undertakings in the building sector in Sweden and to which a foreign service provider that temporarily posts workers in that same sector and is in a similar situation would be compelled to subscribe following collective action taken by trade unions.

220. According to the case-law, Article 49 EC requires not only the elimination, against a person providing services who is established in another Member State, of all discrimination on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to domestic service providers and to those of other Member States, when it is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where he lawfully provides similar services.<sup>84</sup>

221. The Court has also held that the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent to which it involves expenses and additional administrative and economic burdens.<sup>85</sup>

219. It is now necessary to examine those points in the light of Article 49 EC.

<sup>84</sup> — See, in particular, *Vander Elst*, paragraph 14; *Arblade and Others*, paragraph 33; Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16; and *Wolff & Müller*, paragraph 31.

<sup>85</sup> — *Portugaia Construções*, paragraph 18, and *Wolff & Müller*, paragraph 32.

222. As I indicated in point 161 of this Opinion, I consider that Article 49 EC can be applied directly to the present case.

223. It must, admittedly, be pointed out that the case-law on the direct horizontal effect of Article 49 EC seems a priori to have placed more emphasis on attributing such an effect to the principle of non-discrimination on grounds of nationality embodied in that article.<sup>86</sup>

224. However, a more detailed analysis of that case-law makes it apparent that the direct horizontal application of Article 49 EC is not limited to discrimination engaged in by private persons having a collective effect on the labour market vis-à-vis service providers of the Member States.

225. Thus, in the *Deliège* case,<sup>87</sup> the Court examined in the light of Article 49 EC certain selection rules laid down by a sports federation, which determined the conditions for the participation of top athletes in international competitions in their own right, despite the fact that those rules did not include a nationality clause and did not

determine the conditions governing access of sportsmen to the labour market. Although the Court admittedly excluded the possibility that the rule at issue might constitute a restriction on the freedom to provide services, it nevertheless did not base that assessment solely on the fact that the rule in question did not include a nationality clause.

226. Similarly, in its judgment in *Wouters and Others*, the Court likewise did not rule out the possibility that, on the assumption that the freedom to provide services might be applicable to a prohibition imposed on members of the bar and accountants of forming multidisciplinary partnerships, of the kind provided for in the rules of the Netherlands Bar Council which applied regardless of nationality, that prohibition might amount to a restriction of that freedom.<sup>88</sup>

227. Moreover, in the context of sports rules adopted by the International Olympic Committee and the International Swimming Federation, the Court considered that whilst the exercise of the sporting activity in question was to be assessed in the light of the Treaty provisions on freedom of movement for workers or the freedom to provide services, it was then necessary to verify whether the rules governing that activity

<sup>86</sup> — See, in that regard, the nuanced approach taken in *Walrave and Koch*, paragraph 34.

<sup>87</sup> — Paragraphs 60 to 69.

<sup>88</sup> — Paragraph 122.

fulfilled the conditions for the application of Articles 39 EC and 49 EC, that is to say whether they might not constitute *restrictions* prohibited by those articles.<sup>89</sup>

and, if that is the case, whether that restriction might be justified by overriding requirements in the general interest.

228. Furthermore, in so far as a fundamental Treaty freedom is involved, any attempt to delimit the horizontal effect of the obligation it imposes according to whether the obstacles raised against it are or are not discriminatory is in my opinion somewhat misconceived. If such an approach were upheld, there would then be complex debates as to whether a particular action or set of rules adopted by private persons should be seen as indirect discrimination based on nationality, a restriction, a barrier or a deterrent to the freedom to provide services. As is already apparent from the case-law, since the line of demarcation between those different classifications is in practice far from being entirely clear, to impose such a delimitation of the horizontal scope of Article 49 EC would affect the legal certainty of operators.

(b) The existence of a restriction of the freedom to provide services

230. First, it is, in my opinion, undeniable that, despite the absence of any contractual link between the defendants in the main proceedings and Laval and despite the fact that the collective action (a blockade and solidarity action) *directly* targeted members of the unions which are the defendants in the main proceedings, who had to decline to respond to any offer of recruitment or employment with Laval, the collective action taken had the effect of compelling Laval to give up the performance of its contract on the Vaxholm site and the posting of Latvian workers to that site.

229. Those clarifications having been made, it is necessary to determine, with regard to the three points listed in point 218 of the present Opinion, whether the exercise of collective action by trade unions against a service provider in a situation such as that in the main proceedings constitutes a restriction within the meaning of Article 49 EC

231. In my view there is, therefore, a sufficient causal link between the taking of such action and the stoppage of Laval's economic activity in Swedish territory.

232. That moreover, in general terms, is one of the results which may flow from the exercise of collective action with a view to

<sup>89</sup> — *Meca-Medina and Majcen v Commission*, paragraph 29.

compelling a service provider to enter into a collective agreement applicable in Sweden, since either that provider will subscribe, voluntarily or following collective action, to the collective agreement which the trade unions seek to have applied, or else it will have to give up the provision of its service.

233. The taking of such collective action, even if also directed against undertakings established in the territory of the Member State in question, is liable to give rise to significant costs for the foreign service provider, whatever the outcome of such action, so that in my view it constitutes a restriction on the freedom to provide services.

234. Indeed, in a case where, as here, the service provider is ultimately compelled to abandon performance of a public works contract because it is rendered incapable of carrying on business unless it subscribes to the conditions of the collective agreement which it is being called on to apply, that provider will in principle have to bear all the costs arising from non-performance of the contract. The systemic nature of such a mechanism, allowed by Swedish domestic law, is also liable to dissuade undertakings established in other Member States from exercising their freedom to provide services in the Kingdom of Sweden.

235. In a case where, following collective action orchestrated by trade unions, the foreign service provider subscribes to the collective agreement at issue, that provider — as would have happened in this case if Laval had agreed to sign a tie-in to the Byggnadsarbetareförbundet collective agreement — would be obliged, first, to abide by all the conditions laid down in that agreement, including the various contributions mentioned in point 216 of this Opinion, in the same way as undertakings in the same sector established in Sweden and bound by that agreement, and, second, to pay wages at a rate no lower than that determined in accordance with the provisions of that agreement.

236. It must be borne in mind, first, that, according to the case-law, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.<sup>90</sup>

237. Second, whilst the Court has accepted that the application by the host Member

<sup>90</sup> — See, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 13; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 29; and *Portugaia Construções*, paragraph 17.

State of its minimum wage legislation to providers of services established in another Member State may in principle be allowed, it has nevertheless emphasised that such rules must pursue an objective of public interest and the possibility cannot be ruled out that, in certain circumstances, the application of those rules might be incompatible with Article 49 EC.<sup>91</sup>

238. What is valid for the Member States must also be valid, in my view, for private persons whose action has a collective effect on the labour market and the cross-border provision of services, like the action taken by the defendants in the main proceedings.

239. The fact that, in the second hypothesis under review here, the service provider may continue to carry out its economic activity in the territory of the host Member State does not detract from the restrictive nature of the conditions imposed on it.

240. In those circumstances, I consider that the collective action taken by the defendants in the main proceedings constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

(c) Possible justifications for the restriction

241. It is clear from the case-law applicable to regulations of the Member States that, where such regulations apply without distinction to any person or undertaking carrying on an activity in the territory of the host Member State, they may be justified where they reflect overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established and provided that they are appropriate for securing attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.<sup>92</sup>

242. Having regard to the specific features of the present case, a first problem to be dealt with is that of identifying the objectives pursued.

243. First, I consider it appropriate to examine not the aim pursued by the Swedish authorities in authorising, or at least failing to prohibit, the collective action taken by the defendants in the main proceedings, but

91 — See *Portugaia Construções*, paragraphs 21 to 23 and the case-law there cited.

92 — See, in particular, *Arblade and Others*, paragraphs 34 and 35; *Portugaia Construções*, paragraph 19; *Wolff & Müller*, paragraph 34; and *Commission v Luxembourg*, paragraph 21.

rather the aims pursued by the defendants when they commenced such action.

244. In that respect, the present case is to be distinguished from the situation in *Schmidberger*, in which the Court examined only the aim pursued by the national authorities, prompted by considerations associated with observance of fundamental rights in relation to the freedom of expression and of assembly of the demonstrators who blocked the Brenner motorway, since, in those proceedings, Schmidberger sought to invoke the liability of the Republic of Austria by alleging that it had infringed its obligations under Community law by failing to prevent an obstacle being placed in the way of the free movement of goods. The Court thus took the view that the specific aims pursued by the participants in the demonstration were not, as such, decisive in the context of court proceedings of the kind brought by Schmidberger.<sup>93</sup>

245. On the other hand, the aims pursued by the collective action taken by the defendants in the main proceedings are, in my opinion, decisive in the context of a dispute to which only private persons are parties.

246. In that regard, although the order for reference is not particularly explicit, the national court mentions, among the aims underlying the collective action taken, the protection of workers and the fight against social dumping.

247. Those two aims might seem to go beyond the scope of the purpose of trade union activity, which in principle is to defend the occupational interests of its own members.

248. However, that fact is no reason for disregarding the possibility that collective action taken by trade unions, of the kind at issue in this case, might truly be directed towards the two abovementioned aims, in that, as we saw earlier with regard to the implementation of Directive 96/71 in Swedish law, the specific issue is the method adopted by the Kingdom of Sweden in ensuring that the terms and conditions of employment relating to the matters referred to in that directive and laid down in the collective agreements that in practice apply within its territory to domestic undertakings in the building sector can be extended to foreign service providers which temporarily

93 — *Schmidberger*, paragraphs 66 to 68.

post workers to Sweden in that sector. In any event, there is nothing to prevent those objectives being invoked by private individuals.<sup>94</sup>

249. However, as we know, the Court has accepted that the overriding reasons relating to the public interest that are capable of justifying a restriction on the freedom to provide services include both the protection of workers and the fight against social dumping,<sup>95</sup> requirements which also underlie Directive 96/71.<sup>96</sup>

250. It is therefore necessary to verify whether the exercise of the right to take collective action in order to compel a foreign service provider already bound by a collective agreement in the Member State of origin to accept all the conditions of a Swedish collective agreement that is applicable in practice to domestic undertakings in the same sector is liable to achieve the aims pursued without going further than is necessary for that purpose.

94 — See, to that effect, with regard to justifications based on public policy, public safety and public health, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 86.

95 — See, in particular, with regard to the protection of workers, *Arblade and Others*, paragraph 36; *Finalarte and Others*, paragraph 33; *Portugaia Construções*, paragraph 20; and *Wolff & Müller*, paragraph 35. As regards the fight against social dumping, see Case C-244/04 *Commission v Germany*, paragraph 61.

96 — See Article 3 of Directive 96/71 and Case C-244/04 *Commission v Germany*, paragraph 61.

251. In general, it is important to bear in mind that Article 49 EC cannot impose obligations on trade unions which might impair the very substance of the right to take collective action.<sup>97</sup> That assessment must, in my view, be extended to a situation where, as would appear to be the case here, the right to take collective action is allowed not only in order to defend the interests of trade union members but also to enable them to pursue legitimate objectives recognised by Community law, such as the protection of workers in general and the fight against social dumping in the Member State concerned.

252. Nevertheless, since that right is not absolute, its exercise must be reconciled with the Community public interest requirement represented by the freedom to provide services in the Community.

253. As regards the three matters listed in point 218 of this Opinion, and in the light of the case-law of the Court on Article 49 EC, the need to balance the interests involved prompts me to make the following observations.

97 — See the preliminary observations above and, in particular, *Schmidberger*, paragraph 80 and the case-law there cited.

(i) The proportionality of collective action in so far as it is intended to impose the rate of pay determined in accordance with the Byggnadsarbetareförbundet collective agreement

action indirectly caused the Latvian workers to lose their temporary employment in that Member State.

254. First, I consider that Article 49 EC does not in principle preclude the taking of collective action in order to compel a service provider of a Member State to agree to pay the remuneration determined in accordance with a collective agreement that is applicable in practice to domestic undertakings in a similar situation in the building sector in the Member State to which that service provider is temporarily posting workers.

257. However, as will be made clear below, that situation derives, in my view, not from the pay claims of the defendants in the main proceedings in the strict sense but rather, in the particular circumstances of this case, from the other conditions laid down in the Byggnadsarbetareförbundet collective agreement that the defendants wanted Laval to sign, in the context of the collective action which they took and which that undertaking regarded as disproportionate.

255. First of all, such an approach is, in general, appropriate to attaining the objectives pursued, since the mere threat of collective action by trade unions will in most cases encourage employers to enter into the collective agreement which they are under pressure to sign. Moreover, as is apparent from information given by the Swedish Government and details contained in the file, recourse to collective action for failure to sign a collective agreement is rare in Sweden.

258. Next, exercise of the right to take collective action in order to compel a service provider to subscribe to the rate of pay applied in the sector in question in the host Member State is, in principle, a less restrictive measure than automatic subjection to a similar rate of pay which, without being a minimum rate of pay, is set by national legislation, since it enables the service provider, within the framework of negotiation with the relevant trade unions, to arrive at a rate of pay that takes account of its own costs, without allowing it to apply, in any event, a rate of pay lower than that determined in accordance with the fall-back clause in the collective agreement.

256. Admittedly, it must be borne in mind that, in this case, the taking of collective

259. Admittedly, such a system is liable to produce unforeseeable results or indeed, in certain circumstances, to allow wage claims that might be excessive.

260. However, those circumstances are inherent in a system of collective employment relations which is based on and favours negotiation between both sides of industry and, therefore, contractual freedom, rather than intervention by the national legislature. I do not think that, at its present stage of development, Community law can encroach upon that approach to employment relationships through the application of one of the fundamental freedoms of movement provided for in the Treaty.

261. It is true that, in the circumstances of this case, Laval was compelled either to sign the Byggnadsarbetareförbundet collective agreement or, as turned out to be the case, to refuse to sign such an agreement and ultimately to stop the execution of works at the Vaxholm building site, without itself being able to resort, for example, to a lock-out of the workers.

262. Nevertheless, I consider that, in such a situation, to allow the employer to take that approach would not make collective action any less restrictive because, in particular,

execution of the remaining works would still continue to be suspended.

263. Against that background, it is clear from the case-law on Article 49 EC, and on the proportionality of restrictions applied to the freedom embodied in it by means of rules imposed by Member States for the protection of workers, that the extension of the (minimum) rate of pay provided for by those rules, or by a collective agreement declared to be of universal application in a Member State, *to every person* in paid employment, even on a temporary basis, *within its territory* is possible where it is established that the protection conferred by those restrictions is not guaranteed by *identical or essentially similar* obligations by which the undertaking is already bound in the Member State where it is established.<sup>98</sup>

264. That case-law thus requires host Member States, and in particular their courts, to assess the equivalence or essential similarity of the protection already available to posted workers under legislation and/or collective agreements in the Member State where the service provider is established, in particular as regards the pay such workers receive.

98 — Case C-272/04 *Guiot* [1996] ECR I-1905, paragraphs 16 and 17; *Arblade and Others*, paragraph 51; *Commission v Luxembourg*, paragraph 29; and Case C-244/04 *Commission v Germany*, paragraph 44.

265. As is apparent from the case-law, that comparison must take account of the gross amounts of wages.<sup>99</sup>

267. Two observations may be made concerning this factual background.

266. In this case, and regardless of the question of Laval's obligation to subscribe to all the conditions provided for by the Byggnadsarbetareförbundet collective agreement by signing a tie-in agreement before the commencement of negotiations on pay, it must be borne in mind that the defendants in the main proceedings initially called on that undertaking to pay to the Latvian workers posted temporarily to Sweden the average rate of pay applied by building companies in the Stockholm region, of SEK 145 an hour (about EUR 16 an hour), a claim that was open to negotiation but of which the failure would have resulted in Laval being allowed to apply a rate of pay of SEK 109 an hour (about EUR 12 an hour), under the fall-back clause in the Byggnadsarbetareförbundet collective agreement as it applied at the material time.

268. First, it will be noted that the rate of pay claimed by the defendants in the main proceedings is not the one applicable to all persons (in the sector of activities involved) in Swedish territory, to use the terminology employed in the case-law cited in point 263 above. However, I do not think that, in this case, that fact is decisive because it does not appear to be disputed before the national court that that rate of pay was required of all undertakings in that sector in the region to which Latvian workers were posted at the material time, which were in a similar situation to that of Laval. Furthermore, I am of the view that that point is rendered irrelevant because it was open to Laval, under the Byggnadsarbetareförbundet collective agreement itself, to oppose such a wage claim.

269. Second, it is apparent from the circumstances of this case, as indeed has been conceded by the defendants in the main proceedings in their written observations, that if the collective action taken by them had resulted in Laval's signing a tie-in to the Byggnadsarbetareförbundet collective agreement, Laval could have caused negotiations on the average rate of pay to fail and applied the rate of SEK 109 an hour determined in accordance with that agreement.

<sup>99</sup> — See Case C-341/02 *Commission v Germany*, paragraph 29. It should be noted that, in *Mazzoleni and ISA*, the Court asked the national court to take account of net wages in its comparison of wage conditions, but in my view that approach is accounted for by the very particular circumstances of the case then before the Court, which involved an undertaking established in a border area some of whose employees might be prompted, for the purpose of services provided by the undertaking, to perform some of their work on a part-time basis for very short periods in the bordering territory of a Member State other than the one in which the undertaking was established.

270. It follows that, provided that that pay is the gross amount, it falls to the national court to compare it with the rate of pay applied by Laval to the Latvian workers.

271. In that connection, it must also be borne in mind that, as is apparent from the order for reference, Laval paid its workers a monthly rate of SEK 13 650 (or approximately EUR 1 500), supplemented by various benefits in kind.

272. Therefore, I consider that, if the national court were to compare the gross amounts of pay, and if the pay mentioned above in fact corresponds to the gross amounts of pay, the national court should verify whether the wages paid by Laval were the same as or essentially similar to those determined in accordance with the fall-back clause in the Byggnadsarbetareförbundet collective agreement, as applicable at the material time. In that regard, the national court should also verify that the various benefits in kind paid by Laval do not constitute allowances paid to cover expenses incurred by reason of the posting.

273. If the gross wage paid by Laval was not the same as or essentially similar to that

determined in accordance with the Byggnadsarbetareförbundet collective agreement fall-back clause, which I believe to be the case but cannot be certain, it could in my view be concluded that the collective action, in so far as it sought to impose the rate of pay provided for by the Byggnadsarbetareförbundet collective agreement, would not be disproportionate to the objectives of protecting workers and combating social dumping.

274. For the sake of completeness, I would add that, contrary to the contentions of certain parties involved in the proceedings before the Court, including Laval, there is no implication in that assessment of any impairment of the negative aspect of the freedom of association of the service provider or of the workers posted by it, namely the right not to join, or to withdraw from, a union,<sup>100</sup> the observance of which, the Court must in my opinion ensure.

275. In that regard, it is important to note that, in the case of *Gustafsson v. Sweden*, the European Court of Human Rights considered that the Kingdom of Sweden had not failed in its obligation to uphold the applicant's rights, under Article 11 of the ECHR, in circumstances in which a Swedish employer in the catering sector had been compelled, following collective action, in the form of a blockade and solidarity action initiated by several trade unions with a view

100 — With regard to that aspect of freedom of association, see the case-law mentioned in point 70 of this Opinion.

to persuading it to subscribe to a collective agreement, ultimately to cease its activity in that sector. In its assessment, the European Court of Human Rights laid particular emphasis on the fact that, despite the pressure brought to bear on the applicant, the applicant had not been obliged to join the signatory employers' organisations but could have chosen to sign the tie-in to the collective agreement in question, an option which would have enabled it to ensure that provisions appropriate to the particular nature of its activities were included and did not appear to present, from the economic standpoint, disadvantages which would have compelled it to join the employers' organisation.<sup>101</sup>

276. As I see it, that is also Laval's situation: it has never maintained that signature of the tie-in to the Byggnadsarbetareförbundet collective agreement appeared to involve such economic problems that it would have felt it necessary to join the Swedish building employers' association (Sveriges Byggindustrier).

277. Furthermore, it likewise cannot be validly contended that the negative aspect of the Latvian workers' freedom of association would have been encroached upon, since, in accordance with the principles applicable to collective labour relations in

Sweden, an employer who signs a tie-in agreement must afford to all the workers he employs, regardless of whether or not they are members of the signatory trade unions, the terms and conditions of employment provided for by the collective agreement in question.

278. That clarification having been made, it is nevertheless quite possible that the comparison of gross pay mentioned in points 272 and 273 above might not ultimately be necessary in the main proceedings, in view of the particular circumstances of the case,<sup>102</sup> whereby Laval, even before being able to apply the rate of pay determined in accordance with the fall-back clause in the Byggnadsarbetareförbundet collective agreement, had to subscribe to all the conditions laid down by that agreement.

(ii) The proportionality of the collective action in so far as it sought to impose all the terms and conditions of the Byggnadsarbetareförbundet collective agreement

279. Second, it was Laval's refusal to accept all the terms and conditions of the Bygg-

102 — It is clear from the answers of the defendants in the main proceedings to the written questions put to them by the Court that the practice of making application of the rate of pay provided for, in or arrived at in accordance with a collective agreement, conditional upon acceptance by the employer of all the conditions of that agreement is not a characteristic of the Swedish model of collective labour relations.

nadsarbetareförbundet collective agreement, which it regarded as excessive, that prompted (and allowed) the defendants in the main proceedings to take the collective action involved. More specifically, if Laval had signed the tie-in to the Byggnadsarbetareförbundet collective agreement, it would thereby have obtained the benefit of good labour relations, in accordance with the MBL, and that in turn would have enabled it to start negotiations on the rate of pay, in accordance with the provisions of that agreement.

280. In that connection, it seems to me that the fact of making the very possibility of applying a given rate of pay conditional upon prior signing up to all the conditions of a collective agreement that apply in practice to undertakings established in Sweden in the same sector and in a similar situation goes beyond what is necessary to ensure the protection of workers and to prevent social dumping.

281. That assessment extends a fortiori to a situation in which, as in this case, the undertaking which temporarily posts workers to the host Member State is bound by a collective agreement legally entered into in another Member State. In such a situation, it would in my view be contrary to the principle of proportionality to seek, even following collective action taken in accordance with domestic law, to make a service provider of another Member State

comply either with conditions which are not designed to attain the objects for which the taking of collective action is justified or with conditions that duplicate those to which that provider is subject in the Member State in which it is established, in particular under the collective agreement concluded in that Member State.

282. That approach is, in my view, consonant with the case-law which requires, first, that the conditions laid down by the rules of the host Member State for the provision of services in the context of posting of workers entail, for the workers concerned, a real advantage which contributes significantly to their social protection<sup>103</sup> and, second, as stated earlier, that the protection offered by such conditions is not already guaranteed by obligations that are the same or essentially similar to those by which the service provider is already bound in the Member State in which it is established.

283. Nothing prevents that case-law from being extended to a situation like the one in this case. The limits which that case-law imposes on collective action taken in a

103 — See *Wolff & Müller*, paragraph 38.

Member State in accordance with domestic law do not constitute disproportionate and unacceptable interference with the exercise of the right to take such action such as to impair the very substance of the rights guaranteed.<sup>104</sup>

subjection of Laval to those conditions did not go further than was necessary to attain the objectives pursued by the collective action concerned;

284. In order to assess the proportionality of the collective action taken by the defendants in the main proceedings, the national court, when considering the conditions of the Byggnadsarbetareförbundet collective agreement that the collective action was intended to induce Laval to sign, even before starting any negotiation as to the applicable rate of pay or applying the rate of pay determined in accordance with the fall-back clause in that agreement, should:

- second, with regard to the other conditions of the Byggnadsarbetareförbundet collective agreement, verify whether those conditions involved a real advantage that made a significant contribution to the social protection of posted workers and did not duplicate any identical or essentially similar protection offered to them by the legislation and/or collective agreement applicable to Laval in the Member State in which it is established.

- first, with regard to possible terms and conditions of employment provided for in the Byggnadsarbetareförbundet collective agreement — which, as we have seen in the part of this Opinion concerning Directive 96/71, relate to matters other than those listed in the first subparagraph of Article 3(1) — verify whether, in so far as those conditions are governed by public policy provisions in Sweden within the meaning of Article 3(10) of that directive, the

285. In that connection, I consider it appropriate to make a number of observations concerning some of the conditions contained in the Byggnadsarbetareförbundet collective agreement, which the parties have debated at length before the Court, namely the contributions for insurance premiums that must be paid by the employer, the payments known as ‘surcharges’ made by the employer to various Swedish bodies, and the commission paid by the employer to Byggnadsarbetareförbundet which, at least apparently, covers payment for the monitoring of wages carried out by local branches of that union.

104 — See *Schmidberger*, paragraph 80.

286. First, with regard to the first-mentioned contributions, it is apparent from the observations of the parties to the main proceedings, and from their replies to the questions put to them in writing by the Court, that those contributions covered five types of insurance which must be effected with a Swedish company and added up to a total cost, at the material time, of 5.9% of the wage bill. More specifically, they comprised a collective group insurance known as 'AGS', providing sickness benefits; a supplementary retirement insurance, known as 'SAF-LO', which may be available to a worker from the age of 55; an insurance known as 'AGB', which provides benefits in the event of unemployment; a group life insurance known as 'TGL', guaranteeing financial assistance to the survivors of a worker who dies; and an insurance covering accidents at work, known as 'TFA'. The abovementioned AGS and SAF-LO insurance premiums amounted respectively to 1.2% and 4.2% of the wage bill, that is to say a total of 5.4%. The premiums for the other three insurances amounted in the aggregate to 0.5% of the wage bill.

287. It will be observed that, both before the national court and before the Court of Justice, Laval voiced firm opposition to the obligation to subscribe to the first two insurances. In the case of the first, its opposition is based on the fact that a worker's entitlement to benefit from the AGS is conditional upon receipt of income giving rise to entitlement to sickness insurance within the meaning of the Swedish Law on social insurance (*lagen (1962:381) om allmän försäkring*), whereas under Commu-

nity law a worker temporarily posted to the territory of a Member State retains his membership of the social security scheme of his Member State of residence. As regards the second, Laval doubts whether it assists posted workers since the benefits available under such an insurance presuppose, first, that the worker attains the age of 55, which means in general that the benefit is very remote in terms of time, and imply, second, active intervention in the management of capital which is liable to give rise to numerous practical and financial problems, including the cumulative administration of funds in various Member States. Moreover, Laval drew attention to the fact that supplementary occupational retirement pension schemes are explicitly excluded from the minimum rate of pay referred to in Article 3(1)(c) of Directive 96/71.

288. I am not unmoved by those arguments, at least as regards the AGS insurance, provided that the interpretation of the Swedish Law on social insurance put forward by Laval is correct; that interpretation has not been challenged by the defendants in the main proceedings but is a matter to be examined by the national court.

289. As noted in the 21st recital in the preamble to Directive 96/71, Regulation No 1408/71 lays down provisions applicable to social security benefits and contributions for employed persons moving within the Community. Article 14(1)(a) of that regula-

tion provides, in accordance with the principle underlying that regulation that the legislation of a single Member State is to apply, that a worker of a Member State who is temporarily posted by his undertaking to the territory of another Member State to perform work there for a period not anticipated to exceed 12 months is covered by the social security legislation of the first Member State.<sup>105</sup>

290. Therefore, subject to the interpretation of the Swedish Law on social insurance, it seems to me that the defendants in the main proceedings were not entitled to insist, in the context of the collective action taken by them, that Laval should subscribe to the AGS insurance referred to in the Byggnadsarbetareförbundet collective agreement.

291. I do not consider that assessment to be affected by the argument of the defendants in the main proceedings in their reply to the written questions from the Court, which relies on the fact that Laval could have sought exemption from payment of the AGS insurance premiums. Not only did such a possibility appear to be unavailable at the material time, but in any event it appears to be based on a principle contrary to Article

14(1)(a) of Regulation No 1408/71, which provides for the application of the social security law of the Member State in the territory of which a worker normally carries out his activities as an employee to workers temporarily posted to another Member State for a period not exceeding 12 months.

292. As regards the other three insurance premiums, I shall merely observe that to me it seems at least unusual that the above-mentioned AGB premiums should be levied in order to cover the risk of unemployment, whereas, by definition, posted workers do not aspire to form part of the employment market of the host Member State.

293. Nevertheless, it is for the national court to verify, having regard to all the relevant circumstances of the case before it, whether the insurances which Laval was called on to pay satisfy the tests set out in point 284 above.

294. Second, so far as concerns the so-called 'surcharges', I would observe that, according to the explanations given by the defendants in the main proceedings in their answer to the written questions from the Court, which has not been challenged, those payments amounted to 0.8% of the employer's wage bill. They were made to a Swedish insurance company in favour of various beneficiaries, in accordance with the following apportionment: about 0.4% was paid to a Swedish insurance company providing life and social

<sup>105</sup> — See, in relation to Article 14 of Regulation No 1408/71, the recent judgment in Case C-2/05 *Herbosch Kiere* [2006] ECR I-1079.

welfare insurance for the survivors of workers and insurance covering accidents occurring outside working time; about 0.3% was used to finance the Swedish building industry research fund (Svenska Byggbranschens Utvecklingsfond (SBUF)) in order to promote research and development and new processes in the building sector; about 0.03% was paid to a Swedish company entrusted with the adaptation of workplaces for persons with reduced mobility and the re-education of such persons; about 0.04% subsidised vocational training and the promotion of such training in the building sector; finally, 0.02% financed the management and administration costs incurred by the abovementioned Swedish insurance company responsible for making the four payments listed above to their respective payees.

295. It seems to me that some of the payments claimed from Laval in the context of the collective action taken by the defendants in the main proceedings, in particular those subsidising the SBUF and vocational training in the building sector, display no connection with the protection of workers or any real advantage significantly contributing to the social protection of posted workers.

296. Third, as regards the commission paid to Byggnadsarbetareförbundet local branches for the monitoring of wages, it should be

observed that, as is apparent from the observations of the defendants in the main proceedings in their answer to the written questions from the Court, that commission, which represented 1.5% of the wage bill of building workers for each monitoring period, is used for several purposes, the first of which is to verify whether employers are paying the remuneration agreed between both sides of industry, having regard, in particular, to the special characteristics of the building sector, in which there is great mobility of workers and diverse methods of remuneration. The monitoring of pay is carried out every four to eight weeks on the basis of lists of names sent by employers to Byggnadsarbetareförbundet local branches. According to the defendants in the main proceedings, that periodical monitoring has made it possible to increase the rate of pay of several hundred workers, including non-unionised workers, following annual wage increases that had been agreed but were not being paid by employers. In addition to specific checking of the payment of wages, such monitoring also makes it possible to draw up wage statistics to serve as a basis for collective bargaining with employers' organisations. The defendants in the main proceedings also stated that the monitoring activity incurred a large deficit for the period between 2001 and 2005 and that the sums paid by employers represent payment for real work which benefits workers, whether or not they are union members.

297. In general, it seems to me that monitoring of that kind, as provided for in the

Byggnadsarbetareförbundet collective agreement, is intrinsically linked to application of the rate of pay determined in accordance with that agreement. Therefore, subject to acceptance of the principle that Article 49 EC does not mean that trade unions cannot, by collective action, require a foreign service provider to apply a rate of pay determined in accordance with a collective agreement applicable in practice to domestic undertakings in the same sector which are in a similar situation, Community law should guarantee such unions the opportunity to ensure by appropriate means that such rules are complied with.

298. The question remains whether, in circumstances like those of this case, the requirement that Laval make a payment for wage monitoring, to be passed on to the Byggnadsarbetareförbundet local branch, went further than was necessary to attain the aim of guaranteeing posted workers the rate of pay determined in accordance with the Byggnadsarbetareförbundet collective agreement.

299. Although such an assessment is somewhat hypothetical and, in view of my earlier observations, is not strictly necessary for the decision to be given in the main proceedings,

a number of general considerations may nevertheless be put forward.

300. In my view, such a commission can be collected only for monitoring actually carried out. That implies, in view of the temporary nature of the posting of workers and the aim pursued by the activity of wage monitoring, that the monitoring should be able to be carried out during that period, so that its results can significantly help to protect the posted workers.

301. Such a commission should therefore reflect the real costs of the wage monitoring activity and not serve to finance trade union activities unconnected with that purpose. If that were not the case, there would be a risk, in particular where the commission was deducted from the wages of posted workers under the provisions of the collective agreement, of interference in relation either to the negative aspect of the freedom of association of those workers or, at the very least, to their freedom to dispose as they will of their wages, thus depriving them of their property within the meaning of Article 1 of Protocol No 1 to the ECHR.

302. In that connection, I should point out that the European Court of Human Rights, in its recent judgment in the case of *Evaldsson and Others v. Sweden*, held that

deductions made by a Swedish employer from the wages of workers not affiliated to the Byggnadsarbetareförbundet trade union, in order to finance the monitoring of the wages agreed under the Byggnadsarbetareförbundet collective agreement, constituted such interference in a context where the lack of adequate transparency of the accounts of the Byggnadsarbetareförbundet local union branch meant that, at the material time, those workers could not be told how the deductions made from their wages were being used, thus depriving them of the possibility of checking that they were not financing trade union activities unconnected with the monitoring of pay, in a manner conflicting with their convictions.<sup>106</sup>

303. The European Court of Human Rights thus took the view that such interference in workers' peaceful enjoyment of their property was disproportionate in relation to the objective, recognised as being of public interest, of protecting workers in the building industry in the broad sense, pursued by the wage monitoring undertaken by the trade union in question, interference which the Kingdom of Sweden should have opposed in order to protect the rights of the workers concerned under Article 1 of Protocol No 1 to the ECHR.<sup>107</sup>

304. In the present case, the national court should, in my view, also take that case-law

into account, in so far as it considers that the decision to be given in the main proceedings depends also on an examination of the proportionality of the requirement that Laval pay a contribution to wage monitoring, an obligation that would have been imposed on Laval under the Byggnadsarbetareförbundet collective agreement which the defendants in the main proceedings sought to compel Laval to sign by means of their collective action.

305. Finally, for the sake of completeness with regard to the problem of the proportionality of restrictions deriving from the collective action in question in this case, I do not think that, in the context of the review that the national court should carry out in that connection — including its assessment of the well-foundedness of the action for damages brought by Laval against the trade unions in this case — it need treat the defendants in the main proceedings differently by drawing a distinction between, first, Byggnadsarbetareförbundet and its local branch, which initiated the blockade, and, second, the SEF, which carried out the solidarity action.

306. Although it was the latter action that caused the stoppage of work on the Vaxholm building site and mainly contributed to Laval's terminating the posting of Latvian workers to that site, the fact nevertheless remains that, in law, that action was

<sup>106</sup> — Judgment of 13 February 2007, not yet reported, §§ 8, 61 and 62.

<sup>107</sup> — *Ibid.*, §§ 54, 55 and 63.

necessarily dependent upon the setting-up of the blockade.

307. For all those reasons, I consider that, where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71 and Article 49 EC do not prevent trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the

protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives. When examining the proportionality of the collective action, the national court should, in particular, verify whether the terms and conditions of employment laid down in the collective agreement at issue in the case before it, and upon which the trade unions made the application of the abovementioned rate of pay conditional, were in conformity with Article 3(10) of Directive 96/71 and whether the other conditions, upon which application of that rate of pay was also conditional, involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.

## VI — Conclusion

308. In view of all the foregoing considerations, I suggest that the Court reply as follows to the questions submitted to it by the Arbetsdomstolen for a preliminary ruling:

Where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71/EC of the European Parliament and of the

Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and Article 49 EC must be interpreted as not preventing trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives.

When examining the proportionality of the collective action, the national court should, in particular, verify whether the terms and conditions of employment laid down in the collective agreement at issue in the case before it, and upon which the trade unions made the application of the abovementioned rate of pay conditional, were in conformity with Article 3(10) of Directive 96/71 and whether the other conditions, upon which application of that rate of pay was also conditional, involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.