

JUNE 2007

An Analysis of Recent Developments & Trends

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Preliminary Opinions By European Court of Justice Top Advisors Tilt Slightly In Favor of Trade Union Rights

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Summary: Does the right of trade unions to defend their members' pay and working conditions trump the free movement of labor in the European economy? Does European Community law allow trade unions to block a company from relocating to another member state in order to take advantage of a lower cost base? How can the freedom of companies to set up business and provide services anywhere in the European Union – principles that underpin the concept of a single European market – be reconciled with the fundamental right of trade unions to take collective action that can effectively block the exercise of those freedoms? Can collective action, such as a strike or boycott, be justified as an overriding "fundamental right" even if it has a directly discriminatory effect? Top legal advisors at the European Court of Justice grappled with these and other thorny questions implicating core European legal principles late last month. In two recently issued advisory opinions, the Advocates General responsible for two critical labor law cases offered clues as to how the European Court of Justice may rule on these weighty questions in the coming months.

Senior legal officials at the European Court of Justice (ECJ) recently issued advisory rulings in two landmark cases with sweeping implications for labor rights and the free movement of capital and services in the European Union (EU). Both cases pit Nordic trade unions against companies that have tried to replace their workers with staff from Baltic states who are willing to perform the same jobs for less pay. More broadly, the test cases require the ECJ to reconcile fundamental but potentially conflicting principles of European Community (EC) law, including the rights of EU employers to establish a business in any member state and to post workers abroad versus the right of workers to take collective action such as boycotts and blockades.

In the first case, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, a Latvian construction firm's attempt to perform work at a Swedish building site using Latvian workers at wage rates lower than those customarily seen in the Swedish building sector was met with a union blockade that eventually forced the firm into bankruptcy. In the second case, *International Transport Workers' Federation & Finnish Seamen's Union v. Viking Line ABP & Ou Viking Line Eesti*, a Finnish shipping company's effort to re-flag a passenger ferry and employ lower-paid Estonian workers was thwarted by a coordinated cross-border union boycott.

The ECJ Advocates General assigned to each case issued separate opinions almost simultaneously late last month that leaned in favor of the rights of trade unions. The Advocates General were careful, however, to temper their rulings by reaffirming the fundamental importance of the guarantees contained in the EC Treaty and in other EU legislation con-

cerning the freedom of establishment and the rights of employers to provide services and post workers abroad. Although not legally binding upon ECJ, the preliminary opinions are likely to raise a storm across the EU. They also are sure to renew the considerable controversy surrounding the EU-wide services directive recently negotiated by member states that was supposed to remove national barriers in order to bolster the EU single market. Finally, the two cases, in which ECJ is expected to hand down judgments in two to three months, resonate with the consequences of EU enlargement. The socio-political issues presented highlight the simmering tension between old EU member states, such as Germany, France and Scandinavian countries that tend to favor a pro-social policy position in industrial relations, and newer EU entrants like Poland and Estonia that have advocated a more business-friendly stance.

Factual Background of the *Laval* Case

In early May 2004, only days after Latvia joined the EU, Latvian building firm Laval un Partneri Ltd ("Laval") won a contract to renovate a school on the Swedish island of Vaxholm, near Stockholm. The work was undertaken by a Laval subsidiary, L&P Baltic Bygg AB ("Baltic Bygg"), which posted several dozen Latvian workers on the island and paid them below the local rates.

In June 2004, Baltic Bygg and Laval entered into collective bargaining negotiations with the local trade union branch and the public works trade union. No agreement was reached, and the unions gave notice that they would initiate a blockade of

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all work at all Laval construction sites, in accordance with Swedish law. The unions began collective action in early November 2004. One month later, the Swedish electricians trade union joined in to express solidarity, thereby halting all electrical work at the building site. After work on the site had been interrupted for some time, the Latvian workers were forced to return home and Baltic Bygg entered into liquidation proceedings.

In December 2004, Laval lodged a claim against the unions in the Swedish Labor Court seeking: (1) a declaration that the industrial action in the form of a blockade was illegal; (2) an order directing the action to cease; and (3) compensation for the loss caused by the blockade. The Swedish court asked the ECJ to rule on whether EC law precluded the collective action. The central question presented to ECJ is whether the EU's single-market rules, which permit EU employers to set up business in any member state, prevent a union of one member state from compelling an employer of another member state to subscribe to local rates of pay by means of collective action.

Collective Action Must Be "Motivated By Public Interest Objectives" and Carried Out in a Proportionate Manner, Advocate General Rules

In his opinion, the Advocate General first considered the procedural question of whether EU law applied to a trade union's right to take collective action under these circumstances. Answering this question in the affirmative, the Advocate General determined 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 ... falls within the scope of EU law."

The Advocate General next considered

whether the unions' actions were in conflict with the freedom to provide services, contained in Article 49 of the EC Treaty, or with Directive 96/71, legislation that concerns the terms of employment applicable to workers temporarily posted abroad. (See Directive 96/71 of the European Parliament and of the Council of 16 December 1996, OJ 1997 L 18, p. 1.) According to the Advocate General, EC law does "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 a rate of pay ..." Such industrial action, however, must be motivated by public interest objectives, and must not be carried out in a manner that is disproportionate to the attainment of those objectives. Legitimate public interest objectives would include the protection of workers and the fight against a race to the bottom in wages resulting from cross-border provision of services (sometimes referred to as "wage dumping"). When examining the proportionality of the collective action, the Advocate General proposed that the Swedish court verify whether the terms and conditions of employment sought by the Swedish building sector unions involve a "real advantage" significantly contributing to the social protection of the posted Latvian workers, or conversely, whether they merely duplicate identical or essentially comparable protections available under Latvian law.

Factual Background of the *Viking Line* Case

Viking Line ABP ("Viking"), a Finnish-registered shipping company, operates a passenger and cargo ferry, the *Rosella*, between Finland's capital, Helsinki, and Tallinn, the Estonian capital. The crew of the *Rosella* are members of the Finnish Seamen's Union (FSU). FSU is the Finnish affiliate of the International Transport Workers' Federation (ITF), a coalition

of 600 transport workers' unions in 140 countries.

In 2003, when the dispute began, the *Rosella* was operating at a loss, due to competition with Estonian-flagged vessels on the same route between Tallinn and Helsinki. Because the *Rosella* sailed under the Finnish flag, Viking was obliged by Finnish law and by the terms of its collective bargaining agreement to pay the crew at Finnish wage levels. In October 2003, Viking decided the *Rosella* could better compete if it were registered as an Estonian ship. The re-flagging would allow Viking to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate less costly terms and conditions of employment with an Estonian trade union. At this time, average monthly labor costs in Estonia were less than one-fifth of those in Finland.

FSU and its international affiliate, ITF, opposed the re-flagging. In November 2003, ITF sent a circular to all its members stating that the *Rosella* was beneficially owned in Finland, and therefore the FSU retained the right to negotiate terms and conditions of employment for the *Rosella's* crew. Affiliated unions were called upon not to enter into negotiations with Viking. Noncompliance with the circular could lead to sanctions, and potentially exclusion from ITF. This action effectively prevented Viking from dealing with an Estonian union – or any trade union other than FSU.

In August 2004, Viking brought the matter before the courts in England, where ITF is based. Viking obtained an injunction from the Commercial Court in London that required ITF to withdraw the circular and FSU not to interfere with Viking's rights to freedom of movement in relation to the re-flagging of the *Rosella*. In late June 2005, ITF and FSU appealed the judgment before the court of appeal (England and Wales) (Civil Division), which in turn referred a series of questions to ECJ.

continued from page 2

Advocate General Finds Trade Unions May Take Collective Action to Dissuade a Company from Relocating Within the European Community, Provided No Discriminatory Effect

As the Advocate General noted in his preliminary ruling, the issues presented to ECJ are “of high legal complexity and great socio-political sensitivity.” In effect, ECJ must resolve a direct clash between two founding EU principles: the right to free movement of labor and capital, as provided under Article 43 of the EC Treaty, and the right of workers to take collective action, including strikes and boycotts.

In his opinion addressed to ECJ, the Advocate General first considered whether the EC Treaty rules on freedom of movement apply to the situation in question. As was concluded in *Laval un Partneri Ltd*, the Advocate General similarly stated that in his view the Treaty rules apply to the Viking dispute. He further found that public interests relating to social policy – such as the right of workers to strike and bargain collectively – may justify certain restrictions on the freedom of movement, as long as they do not go beyond what is necessary. In particular, the Advocate General determined that EC Treaty provisions on the freedom of establishment are implicated in a dispute between private parties where one party raises an obstacle to the freedom of movement that the other party cannot reasonably circumvent. This was the case here, where the practical effect of the coordinated actions of FSU and ITF rendered Viking’s right to freedom of establishment subject to FSU’s consent.

As to whether the unions’ actions struck a fair balance between the right to take collective action and the freedom of establishment, the Advocate General noted that a coordinated policy of collective action

among unions ordinarily constitutes a legitimate means to protect the wages and working conditions of its members. Collective action, however, that has the effect of partitioning the labor market, or that impedes the hiring of workers from some member states in order to protect the jobs of workers in other member states would be inconsistent with the EU single-market’s founding principle of nondiscrimination.

In examining the propriety of the collective action, the Advocate General pointed out that the court of appeal first must determine whether the unions complied with domestic law. The court of appeal may then consider EC law. In that respect, the Advocate General noted that EC law allows unions to take collective action to dissuade a company from relocating within the EU, in order to protect the company’s workers. Following relocation, however, collective action that prevents the relocated company from lawfully providing its services would be incompatible with EC law. Finally, the Advocate General recognized that just as there are limits to collective action at national levels, limits also exist at the European level. An obligation on all national unions to support collective action by any of their fellow unions “could easily be abused.” By contrast, the opinion suggested, if unions were free to choose whether or not to participate in a given collective action, this danger could be prevented.

Impact of the Rulings and Further Proceedings Before the European Court of Justice

The role of Advocates General is to propose to ECJ independent and objective legal solutions to the cases for which they are responsible. While the preliminary opinions in the *Laval* and *Viking Line* cases are not binding on the court, ECJ follows the

recommendations of Advocates General in about 70% of the cases it decides. Oral arguments in the two cases were held in early January of this year before an unusually large panel of 13 judges. As if to underscore the amount at stake in the controversies, more than half of the EU’s member states filed written submissions with ECJ over the issues raised. Somewhat predictably, the opinions are largely divided between older EU states, where wage rates are higher and workers’ rights more entrenched, and newer Eastern European member countries that offer pools of less costly labor. Judges at ECJ are now beginning deliberations in both cases, and judgments are expected in the next several months.

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