JUDGMENT OF THE COURT (Grand Chamber)

18 December 2007 *

In Case C-341/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden), made by decision of 15 September 2005, received at the Court on 19 September 2005, in the proceedings

Laval un Partneri Ltd

v

Svenska Byggnadsarbetareförbundet,

Svenska Byggnadsarbetareförbundets avd. 1, Byggettan,

Svenska Elektrikerförbundet,

* Language of the case: Swedish.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts, U. Lõhmus (Rapporteur) and L. Bay Larsen, Presidents of Chambers, R. Schintgen, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Levits and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2007,

after considering the observations submitted on behalf of:

— Laval un Partneri Ltd, by A. Elmér and M. Agell, advokater,

— Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan and Svenska Elektrikerförbundet, by D. Holke, legal adviser, and by P. Kindblom and U. Öberg, advokater,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Belgian Government, by M. Wimmer and L. Van den Broeck, acting as Agents,

— the Czech Government, by T. Boček, acting as Agent,

— the Danish Government, by J. Molde and J. Bering Liisberg, acting as Agents,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Estonian Government, by L. Uibo, acting as Agent,

— Ireland, by D. O'Hagan and C. Loughlin, acting as Agents, and by B. O'Moore, SC, and N. Travers, BL,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the French Government, by G. de Bergues and O. Christmann, acting as Agents,

— the Latvian Government, by E. Balode-Buraka and K. Bārdiņa, acting as Agents,

— the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

— the Austrian Government, by C. Pesendorfer and G. Hesse, acting as Agents,

— the Polish Government, by J. Pietras, K. Korolec and M. Symańszka, acting as Agents,

— the Finnish Government, by E. Bygglin and J. Himmanen, acting as Agents,

— the United Kingdom Government, by E. O'Neill and D. Anderson, acting as Agents,

— the Icelandic Government, by F. Birgisson, acting as Agent,

— the Norwegian Government, by K. Waage, F. Sejersted and E. Jarbo, acting as Agents,

— the Commission of the European Communities, by J. Enegren, E. Traversa and K. Simonsson, acting as Agents,

— the EFTA Surveillance Authority, by A.T. Andersen, N. Fenger and B. Alterskjær, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 May 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 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 (OJ 1997 L 18, p. 1).

2 The reference was made in the context of proceedings between Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law and having its registered office in Riga (Latvia), on the one hand, and Svenska Byggnadsarbetareförbundet (Swedish building and public works trade union, 'Byggnads'), Svenska Byggnadsarbetareförbundet avdelning 1, Byggettan (local branch No 1 of that trade union, 'Byggettan') and Svenska Elektrikerförbundet (Swedish electricians' trade union, 'Elektrikerna'), on the other, brought by Laval for the purposes of obtaining, first, a

declaration that the collective action by Byggnads and Byggettan affecting all Laval's worksites and the Elektrikerna sympathy action consisting of blockading all electrical work being carried out is unlawful, second, an order that such action should cease, and, third, an order that the trade unions pay compensation for the loss suffered by Laval.

Legal context

Community law

3 Recitals 6, 13, 17 and 22 in the preamble to Directive 96/71 state:

'... the transnationalisation of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; ... it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

... the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; ... such coordination can be achieved only by means of Community law;

... the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

... this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions'.

4 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 a 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) ...

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

...'

5 Article 3 of that directive provides:

'Terms and conditions of employment

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:

— by law, regulation or administrative provision,

and/or

— 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:

(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;

(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;

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

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.

...

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 the posting, such as expenditure on travel, board and lodging.

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.

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:

— 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.'

6 According to Article 4 of Directive 96/71:

'Cooperation on information

1. For the purposes of implementing this directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for

monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.'

National law

The transposition of Directive 96/71

7 It is apparent from the Court's file that Sweden does not have a system for declaring collective agreements universally applicable, and, in order to avoid the creation of

discriminatory situations, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not all Swedish employers are bound by a collective agreement.

8 Directive 96/71 was transposed in Sweden by the Law on the posting of workers (lag om utstationering av arbetstagare (1999:678) ('Law on the posting of workers')). According to the procedural documents, terms and conditions of employment applicable to posted workers in relation to Article 3(1), first subparagraph, (a), (b) and (d) to (g) of Directive 96/71 are laid down by law within the meaning of the first indent of the first subparagraph of Article 3(1) of the directive. The Swedish legislation does not provide, however, for minimum rates of pay as referred to in the Article 3(1), first subparagraph, (c).

9 It is clear from the file that the liaison office (Arbetsmiljöverket, 'the liaison office'), set up in accordance with Article 4(1) of Directive 96/71, is responsible, inter alia, for informing interested persons of the existence of collective agreements that may be applicable in the event of workers being posted to Sweden and for referring such interested persons to the parties to the collective agreement for further information.

The right to take collective action

10 Chapter 2 of the Swedish Basic Law (Regeringsformen) sets out the freedoms and fundamental rights enjoyed by citizens. Under Article 17 thereof, workers' associations, employers and employers' associations have the right to take collective action, unless otherwise provided by law or agreement.

11 The Law on workers' participation in decisions (Medbestämmandelagen, 'the MBL') of 10 June 1976 lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right of trade unions to take collective action.

12 It is apparent from Article 41 of the MBL that there is a mandatory social truce between employers and workers bound by a collective agreement and it is prohibited, inter alia, to take collective action with the aim of obtaining amendments to the agreement. However, collective action is authorised where management and labour have not entered into a collective agreement between themselves.

13 Article 42 of the MBL provides:

'Employers' or workers' associations 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. An association which is itself bound by a collective agreement shall also, in the event of collective action which its members are preparing to take or are taking, seek to prevent such action or help to bring it to an end.

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

The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the present Law.'

14 As the case-law on the first paragraph of Article 42 of the MBL, it is prohibited to take collective action with the aim of having a collective agreement between other parties set aside or amended. In the *'Britannia'* judgment (1989, No 120), the Arbetsdomstolen held that that prohibition extends to collective action taken in Sweden in order to have a collective agreement concluded between foreign parties in a workplace abroad set aside or amended, if such collective action is prohibited by the foreign legislation applicable to the signatories to that collective agreement.

15 By the 'Lex Britannia', which entered into force on 1 July 1991, the legislature sought to reduce the scope of the principle expounded in the *Britannia* judgment. The Lex Britannia consists of three provisions inserted into the MBL, namely Articles 25a, 31a and the third paragraph of Article 42.

16 It is apparent from the explanations provided by the national court that, since the introduction of the third paragraph of Article 42 of the MBL, collective action against a foreign employer carrying out temporary activities in Sweden is no longer prohibited where, considered as a whole, the particular situation suggests that the link with that Member State is too tenuous for the MBL to be deemed to apply directly to the terms and conditions of employment in question.

The collective agreement for the building sector

17 Byggnads is a trade union which groups together workers in the construction sector in Sweden. According to Byggnads' observations, in 2006, it comprised 31 local sections, including Byggettan, and had a membership of 128 000, 95 000 being of working age. Its membership included carpenters and builders, masons, parquet layers, workers in the construction and road sector, and plumbers. Around 87% of building sector workers were affiliated to that trade union.

18 A collective agreement was entered into between, on the one hand, Byggnads, in its capacity as the central organisation representing building workers, and the central organisation for employers in the construction sector (Sveriges Byggindustrier) ('the collective agreement for the building sector').

19 The collective agreement for the building sector contains specific rules relating to working time and annual leave, matters in which collective agreements may depart from the legislative provisions. In addition, the agreement includes provisions relating to temporary unemployment and waiting time, reimbursement of travelling expenses and subsistence allowances, employment protection, training leave and training.

20 Being a party to the collective agreement for the building sector also requires the undertakings concerned to accept a number of pecuniary obligations. Thus, they are required to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section of the trade union carries out, and to the insurance company, FORA, sums representing first, 0.8% of total gross wages for

the purposes of a charge 'Tilläggsören' [penny supplement] or 'special building supplement', and, second, a further 5.9% for the purposes of a number of insurance premiums.

21 The 'tilläggsören' or 'special building supplement' is intended to finance group life insurance contracts, contingency contracts and insurance contracts covering accidents occurring outside working hours, the research fund for Swedish building undertakings (Svenska Byggbranschens Utvecklingsfond), the Galaxen organisation, managed by employers and which has as its objective the adaptation of work places for persons with reduced mobility and the re-training of such persons, the promotion of training development in building trades and administrative and management costs.

22 The various insurance contracts proposed by FORA guarantee workers supplementary retirement insurance, payment of health benefits, unemployment benefits, compensation for accidents at work, and financial assistance for survivors in the event of the death of the worker.

23 After signing the collective agreement for the building sector, employers, including those who post workers to Sweden, are, in principle, bound by all the terms of that agreement, although some of those rules are applicable on a case-by-case basis according to, in essence, the nature of the site and the way in which the work is carried out.

Determination of wages

24 It is apparent from the observations of the Swedish Government that, in Sweden, employees' remuneration is decided on by management and labour by way of

collective negotiation. Generally, collective agreements do not provide for a minimum wage as such. The lowest level of pay appearing in numerous collective agreements is aimed at employees without qualifications or work experience, which means that, as a general rule, it concerns only a very small number of persons. As regards other employees, their pay is determined by way of negotiations conducted at the place of work, having regard to the qualifications of the particular employee and the tasks performed by the latter.

25 According to the observations submitted in this case by the three defendant trade unions, in the collective agreement for the building sector, performance-related pay follows the usual model of remuneration in the construction sector. The rules on performance-related pay require new pay agreements to be concluded in respect of each construction project. It is open to the employers and the local branch of the trade union, however, to agree on the application of an hourly wage in respect of a specific site. No system of monthly wages is applicable to the type of workers concerned in the main proceedings.

26 According to those trade unions, negotiations on pay are conducted in the context of a social truce which must follow the conclusion of a collective agreement. The agreement on pay is concluded, in principle, at local level between the trade union and the employer. If management and labour fail to reach an agreement at this level, negotiations on pay are centralised, at which point Byggnads acts as the principal party on the side of the employees. If management and labour still do not reach an agreement in such negotiations, the basic wage is then determined according to the 'fall-back clause'. According to those trade unions, the 'fall-back' wage, which in fact represents only a negotiating mechanism of last resort, and does not constitute a minimum wage, amounted to SEK 109 approximately (EUR 12) per hour for the second half of 2004.

The dispute in the main proceedings

27 It is apparent from the order of reference that Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB ('Baltic'), a company incorporated under Swedish law whose entire share capital was held by Laval until the end of 2003, inter alia, for the purposes of the construction of school premises in Vaxholm.

28 Laval, which had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector's trade union, was not bound by any collective agreement entered into with Byggnads, Byggettan or Elektrikerna, none of whose members were employed by Laval. Around 65% of the Latvian workers concerned were members of the building workers' trade union in their State of origin.

29 It is clear from the file that, in June 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval's signing the collective agreement for the building sector. Laval asked for wages and other terms and conditions of employment to be defined in parallel with the negotiations, so that the level of pay and terms and conditions of employment would already be fixed by the time that agreement was signed. Byggettan agreed to this request, even though, generally, the negotiation of a collective agreement needs to have been completed before discussions on wages and other terms and conditions of employment are entered into in the framework of the mandatory social truce. Byggettan refused to allow the introduction of a system of monthly wages, but did agree to Laval's proposal on the principle of an hourly wage.

30 According to the order for reference, during the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Vaxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm (Sweden) region for the first quarter of 2004, relating to professionally-qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this.

31 According to the documents on the file, during the procedure before the Arbedstomstolen, Laval stated that it would pay its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

32 If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to Byggettan and FORA set out in paragraph 20 of this judgment. A proposal to subscribe to insurance contracts with FORA was made to Laval by way of a declaration form sent to it in December 2004.

33 Since those negotiations were not successful, Byggettan requested Byggnads to take measures to initiate the collective action against Laval announced at the meeting of 15 September 2004. Notice was given in October 2004.

34 Blockading ('blockad') of the Vaxholm building site began on 2 November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site,

placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

35 At the end of November 2004, Laval spoke to the liaison office referred to in paragraph 9 above in order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. By letter of 2 December 2004, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers, and that, if a foreign employer was having to pay double contributions, the matter could be brought before the courts. In order to ascertain what provisions under the agreements were applicable, Laval had to speak to management and labour in the sector concerned.

36 At the mediation meeting arranged on 1 December 2005 and at the conciliation hearing held before the Arbetsdomstolen on 20 December 2005, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

37 In December 2004, the collective action directed against Laval intensified. On 3 December 2004, Elektrikerna initiated sympathy action. That measure had the

effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question.

38 In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State. In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 24 March 2005 the latter was declared bankrupt.

The questions referred

39 On 7 December 2004, Laval commenced proceedings before the Arbetsdomstolen against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the national court dismissed Laval's application for an interim order that the collective action should be brought to an end.

40 Since it wished to ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Arbetsdomstolen decided on 29 April 2005 to make a reference to

the Court of Justice for a preliminary ruling. In its order for reference, of 15 September 2005, the national court refers the following questions for a preliminary ruling:

'(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 collective action in the form of a blockade ("blockad"), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule — which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded — to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?'

41 By order of the President of the Court of Justice of 15 November 2005, the application for a ruling to be given in this case under the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure was dismissed.

Admissibility

42 Byggnads, Byggettan and Elektrikerna challenge the admissibility of the reference for a preliminary ruling.

43 First of all, they claim that there is no link between the questions referred and the facts of the case in the main proceedings. The national court asks the Court of Justice to interpret provisions relating to freedom to provide services and Directive 96/71, although Laval is established in Sweden, in accordance with Article 43 EC, through its subsidiary, Baltic, in which it held 100% of the share capital until the end of 2003. Since the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

44 Secondly, they submit that the purpose of the dispute in the main proceedings is to enable Laval to circumvent Swedish law and, for that reason, the dispute,at least in

part, is artificial. Laval, whose activity consists of placing, on a temporary basis, staff of Latvian origin with companies which carry on their activities on the Swedish market, is seeking to escape all the obligations under Swedish legislation and rules relating to collective agreements and, by relying on the provisions of the Treaty on services and on Directive 96/71, is making an improper attempt to take advantage of the possibilities offered by Community law.

45 In this regard, it must be recalled that, 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. Similarly, 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 deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19).

46 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra*

[2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, and *Conseil général de la Vienne*, paragraph 20).

47 Furthermore, it must be borne in mind that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, inter alia, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46, *Conseil général de la Vienne*, paragraph 24).

48 In this case, as the Advocate General pointed out in point 97 of his Opinion, the national court seeks an interpretation of Articles 12 EC and 49 EC, and of the 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 and Byggnads, Byggettan and Elektrikerna concerning collective action taken by the latter following Laval's refusal to sign the collective agreement for the building sector, that the dispute concerns the terms and conditions of employment applicable to Latvian workers posted by Laval to a building site in Sweden, the work being carried out by an undertaking belonging to the Laval group, and that, following collective action and suspension of the work, the posted workers returned to Latvia.

49 Accordingly, it is clear that the questions referred do have a bearing on the subject-matter of the case in the main proceedings, as described by the national court, and that the factual context in which the questions put to it are set does not support the view that the dispute in question is artificial.

50 It follows that the reference for a preliminary ruling is admissible.

The first question

51 By its first question, the national court is asking whether it is 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 collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

52 It is clear from the order of reference that the collective action initiated by Byggnads and Byggettan was motivated by Laval's refusal to guarantee its workers posted in Sweden the hourly wage demanded by those trade unions, even though that Member State does not provide for minimum rates of pay, and Laval's refusal to sign the collective agreement for the building sector, some terms of which lay down, in relation to certain matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in that article.

53 Accordingly, the national court's first question must be understood as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first

subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The relevant provisions of Community law

54 In order to ascertain the provisions of Community law applicable to a case such as that in the main proceedings, it must be noted that, according to the settled case-law of the Court, Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57).

55 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

56 As regards the temporary posting of workers to another Member State so that they can carry out construction work or public works in the context of services provided

by their employer, it is clear from the settled case-law of the Court that Articles 49 EC and 50 EC preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and also preclude that Member State from making the movement of staff in question subject to more restrictive conditions. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12).

57 Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (see, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, to that effect, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35 and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 24).

58 In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.

59 It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60 Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law (Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 19).

61 Consequently, since the facts at issue in the main proceedings, as described in the order of reference, occurred in 2004, that is to say, on a date subsequent to the expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999, and since those facts fall within the scope of that directive, the first question must be examined with regard to the provisions of that directive interpreted in the light of Article 49 EC (Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself.

The possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay

62 In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, and in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (Case C-334/95 *Krüger* [1997] ECR I-4517,

paragraph 22; Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 23), it is appropriate to examine the possibilities available to the Member States for determining the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), including minimum rates of pay, which undertakings are to guarantee workers they post in the framework of the transnational provision of services.

63 It is clear from both the order for reference and the observations submitted in the course of the present proceedings that underlying the dispute is, first, as regards the determination of the terms and conditions of the employment of posted workers relating to those matters, the fact that minimum rates of pay constitute the only term of employment which, in Sweden, is not laid down in accordance with one of the means provided for in Directive 96/71 and, second, the requirement imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector.

64 According to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, the terms and conditions of employment covering the matters referred to in (a) to (g) thereof are established, in relation to the transnational provision of services in the construction sector, either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable. Collective agreements and arbitration awards for the purposes of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

65 The second subparagraph of Article 3(8) of Directive 96/71 also gives Member States the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned

or those which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory.

66 It is clear from the wording of that provision that recourse to the latter possibility requires, first, that the Member State must so decide, and second, that the application of collective agreements to undertakings which post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 between the latter undertakings and national undertakings in the profession or industry concerned which are in a similar position. Equality of treatment, within the meaning of Article 3(8) of the directive, is deemed to exist where national undertakings are subject to the same obligations, as regards those matters, as posting undertakings, and where each are required to fulfil such obligations with the same effects.

67 It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. It is also not disputed that the collective agreements have not been declared universally applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.

68 It must be noted, in this respect, that since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States.

69 It is clear from the file that the national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.

70 As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive.

71 It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

72 It is necessary to assess further, the obligations on undertakings established in another Member State which stem from such a system for determining wages with regard to Article 49 EC.

Matters which may be covered by the terms and conditions of work applicable to posted workers

73 In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination.

74 That provision seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, in so far as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards within the meaning of Article 3(8) of Directive 96/71, which constitute mandatory rules for minimum protection.

75 That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States

would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

76 Secondly, that provision seeks to ensure that posted workers will have the rules of the Member States for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State.

77 The consequence of affording such minimum protection — if the level of protection resulting from the terms and conditions of employment granted to posted workers in the Member State of origin, as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, is lower than the level of minimum protection afforded in the host Member State — is to enable those workers to enjoy better terms and conditions of employment in the host Member State.

78 However, in the case in the main proceedings, it is apparent from paragraph 19 of this judgment that, in respect of some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, in particular as regards working time and annual leave, certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.

79 It is true that Article 3(7) of Directive 96/71 provides that paragraphs 1 to 6 are not to prevent application of terms and conditions of employment which are more favourable to workers. In addition, according to recital 17, the mandatory rules for

minimum protection in force in the host country must not prevent the application of such terms and conditions.

80 Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81 Therefore — without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable — the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

82 Moreover, it must be pointed out that, pursuant to the first indent of Article 3(10) of Directive 96/71, Member States may apply terms and conditions of employment on matters other than those specifically referred to in Article 3(1), first subparagraph, (a) to (g), in compliance with the Treaty and, in the case of public policy provisions,

on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States.

83 In the main proceedings, certain terms of the collective agreement for the building sector relate to matters which are not specifically referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71. In that regard, it follows from paragraph 20 of this judgment that signing that collective agreement entails undertakings accepting pecuniary obligations such as those requiring them to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section trade union carries out, and to the insurance company, FORA, first, 0.8% of total gross wages for the purposes of a charge called the 'special building supplement', and, second, a further 5.9% for the purposes of a number of insurance premiums.

84 It is common ground, however, that those obligations were imposed without the national authorities' having had recourse to Article 3(10) of Directive 96/71. The terms of the collective agreement for the building sector in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.

85 It is also necessary to assess from the point of view of Article 49 EC the collective action taken by the trade unions in the case in the main proceedings, both in so far as it seeks to force a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers and in so far as it seeks to force that service provider to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those stemming from the relevant legislative provisions, while other terms cover matters not referred to in that provision.

Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article 49 EC

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

87 In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (see, by analogy, as regards social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; as regards direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

88 Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.

90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 — to which, moreover, express reference is made in Article 136 EC — and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 — and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

91 Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right — which, in that Member State, covers the blockading of worksites — may be exercised unless otherwise provided by law or agreement.

93 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the

Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

94 As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97 It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a

Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect (see, inter alia, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26; Case 13/76 *Donà* [1976] ECR 1333, paragraph 20; Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 16; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 67).

98 Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99 In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector — certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision — is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100 The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 17), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37, and Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 61).

102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law

of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; 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 33, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 77).

104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

106 In the case in the main proceedings, Byggnads and Byggettan contend that the objective of the blockade carried out against Laval was the protection of workers.

107 In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108 However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109 Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14; *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).

110 However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part

of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The second question

112 By the second question, the national court is asking, in essence, whether, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly, thereby making it impossible for an undertaking which posts workers to that Member State in the framework of the provision of services and which is bound by a collective agreement subject to the law of another Member State to enforce such a prohibition vis-à-vis those trade unions.

113 That question concerns the application of the provisions of the MBL which introduced a system to combat social dumping, pursuant to which a service provider is not entitled, in the Member State in which it provides its services, to expect any account to be taken of the obligations under collective agreements to which it is already subject in the Member State in which it is established. It follows from such a system that collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement.

114 It is clear from settled case-law that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided (see, inter alia, Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 15; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 16, and Case C-490/04 *Commission* v *Germany,* paragraph 83).

115 It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraph 27).

116 In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to

discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

117 It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see Case C-490/04 *Commission* v *Germany,* paragraph 86).

118 It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

119 Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

120 In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

Costs

121 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 49 EC and Article 3 of 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 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.**

2. **Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.**

[Signatures]