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TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

WRITTEN OBSERVATIONS

submitted pursuant to the third paragraph of Article 23 of the Protocol on the Statute of the Court of Justice, by the

Government of Iceland

represented by Mr. Finnur Þór Birgisson, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent, in

Case C-341/05

Laval un Partneri Ltd.
Against
Svenska Byggnadsarbetareförbundet,
Svenska Byggnadsarbetareförbundets avd. 1 and
Svenska Elektrikerförbundet.

In which the Arbetsdomstolen in Sweden has lodged a request for preliminary ruling pursuant to Article 234 EC.

The Government of Iceland has the honour of submitting the following written observations:

INTRODUCTION

1. In an application dated 15 September 2005, Arbetsdomstolen in Sweden has requested the Court of Justice of the European Communities (hereinafter, the Court) to give a preliminary ruling pursuant to Article 234 EC. The main proceedings concerns an action brought by the Applicant, a Latvian company with its head office in Riga, Latvia, before the Arbetsdomstolen against the Defendants, the Swedish trade union for the constructions and public works sectors, one of its sections and the Swedish electricians' trade union. In the main proceedings the Applicant seeks a declaration from the Arbetsdomstolen that industrial actions by two of the Defendants and supporting action by the third Defendant are unlawful and must be lifted. For a further description of the facts of the case, the Government of Iceland respectfully refers to the aforementioned request of the Arbetsdomstolen.

2. The Arbetsdomstolen has referred the following questions to the Court of Justice of the European Communities

> "1. Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions 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 provisions of services for trade unions to attempt by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?
> 2. The Swedish Medbestämmandelagen (Law on workers' participation in decisions) prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provisions contained in part of the law know as the "lex Britannia", only where a trade union takes measures in respect of industrial relations to which the Medbestammandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial 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 on discrimination on grounds of nationality and the provision of Directive 96/71 constitute an obstacle to an application of the latter rule – which, together with

other parts of the lex Britannia also means in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?

FIRST QUESTION OF THE ARBETSDOMSTOLEN

3. The first question referred to the Court by the *Arbetsdomstolen* essentially concerns the relations between Community law and the employment law of the Member States of the European Union. The right to take industrial action is a fundamental principle of the employment law of the Member States of the European Union – and indeed the Contracting Parties to the Agreement on the European Economic Area (hereinafter the EEA Agreement), as it is an integral part of the right of collective bargaining and thereby closely linked to the Freedom of Association. It should also be emphasised that the social partners, *i.e.* trade unions and employers organisations, play an active role in regulating the terms and conditions of employment in individual Member States of the European Union and the EEA. In particular, a tradition for strong organisations of the social partners which are entrusted to regulate pay and working conditions on the labour market is one the main characteristic of the labour markets of the Nordic Countries.

4. The importance of the right to collective action is *inter alia* reflected in Article 6(4) of the European Social Charter, which specifically recognises "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into". The text of Article 6(4) of the European Social Charter was the inspiration for Article 28 of the Charter of Fundamental Rights of the European Union of 2000, which states that "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action." Furthermore, Article 8(1.4) of the United Nations International Covenant on Economic, Social and Cultural rights declares that the parties to the

Covenant undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country.

5. The European Court of Human Rights (hereinafter the ECHR) has also recognised the importance of the right of trade unions to take industrial actions. In Wilson, National Union of Journalist and others v The United Kingdom, paragraph 45, the ECHR stated that:

   "The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests."[1]

6. It can therefore be concluded that the right to take collective action represents one the most fundamental rights of employees and their organisations. However, that right is not unconditional as it is subject to the laws and regulations of individual states, which *inter alia* regulate when and under what circumstances such collective actions are lawful. Generally speaking, collective actions are unlawful when trade unions and employers are under a so-called "peace obligation", (in German, "Friedenspflicht", in Danish, "Fredspligt") - whereby parties to a collective agreement are under an obligation to maintain industrial peace for the duration of the agreement in question.

7. The EC Treaty does not contain any provisions on collective bargaining nor does it assign any powers to Community institutions to regulate collective bargaining within the Member States. It therefore falls under the competence of the Member States to regulate industrial relations within their respective territories. Consequently, the rules that apply to industrial relations –*inter alia* the use of collective action in support of any demands put forward in connection with collective bargaining – may vary between individual Member States. The Member States must, however, use their discretions in a manner consistent with Community law.

8. It can therefore be concluded *a priori* that collective actions do not by their nature constitute a restriction on the fundamental freedoms guaranteed by the Treaty - nor do they imply any discrimination on the grounds of nationality. It

[1] See also the ECHR´s decision in Schmidt and Dahlström af 19. januar 1976, para.36; Unison against United Kingdom af 10. januar 2002; Federation of Offshore Workers' Trade Unions and Others against Norway af 27. juni 2002.

should also be observed that Directive 96/71/EC does not limit the right to take collective actions. Consequently, what remains to be examined is the question whether the collective actions taken by the Defendants against the Applicant *in this particular* case were in breach of Community law.

9. The Applicant apparently argues that the collective actions taken by the Defendants were in breach of Community law on the grounds that it had entered into a collective agreement with a trade union established in Latvia, and that the provisions of that collective Agreement entitles it to industrial peace when providing temporary service in Sweden. This raises the question whether it follows from Community law that a collective agreement entered into by a service provider with trade unions operating in the Member State of Establishment, will automatically apply in the host Member State, thereby extending the peace obligation applicable in the Member State of establishment across the border to the host Member State.

10. Essentially, this is a question of choice of law when applying collective agreements. When discussing that issue, it must however be borne in mind that collective agreements are fundamentally by their nature *sui generis* and cannot be equated with regular commerical contracts. The whole logic behind collective agreements is that organised labour is generally speaking in a stronger position when it comes to bargaining with employers than individual employees. Collective agreements have therefore the overt purpose of providing a minimum protection to the interest of employees. The very idea behind collective bargaining is consequently an essential part of the social model of many EU Member States.

11. The Court implicitly recognised this in *Rush Portuguesa,* where it observed that Community law does not preclude Member States from extending their legislation, or collective agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.[2]

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[2] Cf. case C-113/89 *Rush Portuguesa Ld[a] v Office national d'immigration* [1990] ECR-I 1417. See also joined cases C-62 and 63/81 Société anonyme de droit français Seco et Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité [1982] ECR-I 223.

12. The Court's ruling in *Rush Portuguesa* is relevant for the present case for two reasons. Firstly, the Court equates collective agreements with the provisions of national laws for the purpose of regulating the terms and conditions of employment. Secondly, the Court clearly ruled that the laws or collective agreements of the host Member State will take precedence over the laws or collective agreements applicable in the Member State of establishment, when determining what law should be applicable as regards the terms and conditions of employment. *Rush Portuguesa* therefore establishes a clear rule for the choice of law applicable to the terms and conditions of employment. This rule has been reaffirmed in the provisions of Directive 96/71/EC, which *inter alia* stipulates that it is the law of the Member State where the work of a posted worker is carried out that shall apply to the terms and condition of employment of the posted worker.[3] Article 3(1) of Directive 96/71/EC makes it clear that this rule shall apply whatever law would otherwise be applicable to the employment relationship. This implies that the rule contained in Article 3(1) of Directive 96/71/EC contains a distinct rule concerning the choice of law that applies to the terms and conditions of employment, which applies independently from any rule that would otherwise determine the choice of laws concerning the employment relationship.

13. As all standards governing the terms and conditions of employment are by their nature *minimum standards*, irrespective of whether they are defined in laws or collective agreements, this approach is only reasonable. A different approach would result in a situation where persons employed in a Member State could not enjoy protection from those standards that are in place in that particular Member State. Such a situation would certainly raise concerns of "social-dumping" or a "race-to-the-bottom".

14. It is important to emphasise that both the *Rush Portuguesa* case law and Directive 96/71/EC explicitly recognise the role of collective agreements in defining what standards are applicable to terms and conditions of employment within the territories of any given Member State. There is nothing that indicates that either the case-law of the Court or any provision of Community law limits the use of collective action as a tool in negotiating such collective agreements.

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[3] The term *"terms and condition of employment"* is defined further in Article 3(1) of Directive 96/71/EC, and most importantly includes the minimum rate of pay.

15. It should be noted that Article 3(1) of Directive 96/71/EC applies to collective agreements "which have been declared universally applicable". This provison should, however, not preclude trade unions from taking collective actions in circumstances where there are no "universally applicable collective agreements" in place. As has been described above, it is for individual Member States to regulate industrial relations, including collective bargaining, within their respective territories.

16. Apparantely, the labour market system in Sweden does not forsee such a universal applicablilty of collective agreements, but rather prescribes that trade unions should enter into collective agreements with any employer operating in Sweden. The presumption that a service provider must enter into a collective agreement in Sweden to determine the terms and conditions of employment of any of its employees that work, even temporarily, in Sweden, cannot be considered to be liable to prohibit or impede the provision of service of a service provider established in another Member States, as the service provider is anyhow subject to the standards applicable in Sweden as regards the terms and conditions of employment of its workers. It would be illogical to dictate that, while service providers established in another Member States should respect the terms of collective agreements; they should be exempted from having to negotiate such agreements.

17. The Government of Iceland is therefore of the opinion that service providers established in another Member State should not only be subject to the collective agreements applicable in the host Member State, but they should also be subject to the rules applicable in that Member State concerning collective bargaining. Should the temporary service provider not be party to a collective agreement in force in the host Member State, it cannot rely on a collective agreement in force in a different Member State to insist upon industrial peace in the host Member State.

18. It should be noted that there is nothing that implies that the Defendants made claims against the Applicant that it paid its employees higher wages than provided for in those collective agreements that the Defendants had entered into with employers established in Sweden. The Defendants did therefore not attempt to discriminate against the Applicant vis-à-vis service providers established in Sweden. As the Applicant was not a party to any prior collective agreement that

was in force in Sweden at the time, the Defendants were in a position to exercise its right to take collective action in order to get the Applicant to negotiate with them.

19. The Government of Iceland would therefore respectfully submit that the answer to the first question should be that Community law does in principle not prevent collective action against a service provider established in another Member State, which is not a party to collective agreement in force in the host Member State, as it is for the Member States to regulate under what conditions such collective actions can be taken. Consequently, it is for the national Court to determine whether the collective action taken by the Defendants against the Applicant were compatible with national laws on collective bargaining applicable in Sweden.

SECOND QUESTION OF THE ARBETSDOMSTOLEN

20. In its second question, the Arbetsdomstolen essentially asks whether a provision in the Swedish Law on workers´ participation in decisions (Medbestämmandelagen), referred to as the "lex Britannia", which in principle states that Swedish collective agreements shall take precedence over foreign collective agreements, including any collective agreement that has been negotiated in another Member State, is compatible with Community law.

21. As has been argued in the context of the first question submitted by the Arbetsdomstolen, it can be concluded both from the *Rush Portuguesa* case law and Article 3(1) of Directive 96/71/EC, that the standards applicable to the terms and conditions of employment in the host Member State shall apply to any posted worker, irrespective of what standards applies in the Member State where the employer of the posted worker is established. It has also been demonstrated that both the *Rush Portuguesa* case-law and Directive 96/71/EC explicitly acknowledge that collective agreements can equally define what standards are applicable as the provisions of national law.

22. In the light of the above, the Government of Iceland would respectfully contends that the provision referred to in the second question of the Arbetsdomstolen only defines the choice of law rule applicable to the terms and conditions of employment that can be inferred from the *Rush Portuguesa* case and Directive 96/71/EC. Consequently, Community law does not preclude a Member State

from giving precedence to collective agreements negotiated in it over collective agreements concluded in other Member States, for the purpose of defining the terms and conditions of employment.

CONCLUSIONS

23. Based on the aforesaid, the Government of Iceland respectfully suggests the following reply to the questions referred to the Court by the Arbetsdomstolen:

1. Neither the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality nor the provisions of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers, preclude trade unions in the host Member State to attempt by means of industrial actions to force a temporary provider of services established in another Member State to sign a collective agreement in respect of terms and conditions of employment of workers who are temporarily employed within their territory of the host Member State, provided that such industrial actions are lawful under the laws governing collective bargaining in the host Member State.

2. Community law does not preclude Member States from giving precedence to collective agreements negotiated in the host Member State over collective agreements concluded in other Member States, for the purpose of defining the terms and conditions of employment of workers who are temporarily employed within their territory of the host Member State.

Reykjavík, 25 January 2006

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