



14 January 2011

### **ETUC CONFERENCE ON RECONCILING FUNDAMENTAL SOCIAL RIGHTS AND ECONOMIC FREEDOMS AFTER VIKING, LAVAL AND RÜFFERT**

#### **ADDRESS BY MR MAXIME CERUTTI**

Commissioner, General Secretary, Ladies and Gentlemen,

I would like to thank ETUC for its invitation to participate in this conference today.

Commissioner Andor has announced that the Commission's legislative proposal on posting of workers will in principle be published in the last quarter of 2011.

By then, the European Commission will have to make up its mind on the scope, the legal basis, and the type of instrument for this proposal. It will have to take into account the new context of the Lisbon Treaty, including the EU Fundamental Rights Charter. Moreover, a public consultation will be carried out in the course of 2011.

Therefore, this conference is timely.

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I will start with some preliminary comments on our joint work with ETUC on the ECJ rulings. Following the Viking, Laval, Ruffert and Luxembourg rulings, European social partners were asked to undertake a joint analysis on their impact on the right to take collective action and on the posting of workers directive. We produced a joint report.

Our points of agreement show the Commission the possible frame for a future EU initiative on posting of workers. In today's difficult economic times, it is important that both sides agreed on the need to develop Single Market integration. We also acknowledged the need to combat abuses. Hence, our joint acknowledgement of the importance of fostering better information through improved administrative cooperation.

The points on which we could not agree are also meaningful. They can help the Commission to understand the two sides of the same coin. European social partners have contributed to a balanced debate, which should help the Commission to choose its own actions on posting of workers.

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I will now outline BUSINESSEUROPE's views on the issues raised by the ECJ rulings.



First, on the Single Market. Lifting barriers to further Single Market integration is essential to create more growth and jobs in Europe. The Single Market's untapped potential is evaluated at between 275 and 350 billion euros!

With the Single Market Act, the Commission has taken steps in the right direction. BUSINESSEUROPE gives its full support.

Out of the 50 key recommendations made by the Commission in the Single Market Act, nine deal with social aspects. This is a significant number. Two of those address future EU action on trade unions' right to collective action and on posting of workers. I will now focus on these two issues.

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The right to take collective action is a national competence. The Treaty clearly excludes EU action in this area. ETUC believes that the ECJ rulings have undermined this right. We do not agree with this interpretation, rather the reverse! Why?

The proportionality test proposed by the ECJ in the Viking and Laval rulings is not a novelty. Already in 2003, when the Fundamental Rights Charter was not yet enshrined in the Treaty, the ECJ asserted that the right to strike, unlike other fundamental rights such as the right to life or the prohibition of torture, is not absolute. EU law has allowed limitations on the right to strike for many years.

Moreover, different types of limitations existed in many Member States long before the ECJ rulings. For example, proportionality is an overriding principle developed in the jurisprudence of the German Federal Labour Court. Likewise, article 11 of the Estonian Constitution sets out a proportionality principle, which applies to the right to strike.

Swedish trade union action in the Laval case aimed to impose on Laval, a foreign service provider, conditions going beyond the minimum requirements of the posting directive. This action has led to the bankruptcy of Laval. In these circumstances, employers are convinced that the application of a proportionality principle was fair.

In fact, the real novelty of the Viking and Laval rulings is that the right to strike has been recognised as an EU fundamental right for the first time.

In this context, contrary to ETUC, we believe that a social clause aiming to protect the right to take collective action is not necessary.

In the Single Market Act, the Commission has proposed to conduct an in-depth analysis of the social impact of all proposed legislation concerning the single market to ensure effective implementation of the rights guaranteed in the Charter, including the right to take collective action. This should not lead to further EU action on the right to strike, which would contravene the clear exclusion of the right to strike from EU competences in article 153.5 in the Treaty.

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What are the implications of the ECJ rulings for the Posting of Workers Directive?

In 1996, this directive was a smart compromise. Its aim was to facilitate cross-border provision of services. And to do so in a way which does not harm the working conditions of posted workers or threaten those of workers in the host country.

In 2011, after the ECJ rulings, there is no doubt that the directive still represents a good compromise. Any other would be very difficult to achieve.

Trade unions believe that the ECJ rulings have undermined the possibility in the directive for Member States to agree on more favourable working conditions than the nucleus of the directive. Here again, we do not share this analysis.

The directive allows Member States and social partners to go beyond the nucleus. This must be done in line with the provisions of the Posting of Workers Directive. Those Member States and social partners that did not have national mechanisms to implement the directive - such as generally applicable collective agreements - have taken action to conform to the directive. Therefore, BUSINESSEUROPE believes that there is no need for EU action on this issue.

Likewise, we believe that the possibility, envisaged by trade unions, to add in the directive a provision allowing Member States to impose the nucleus of rules through collective agreements that are not generally applicable is a bad idea. It would allow some companies to compete with others without being bound to the same obligations with respect to posted workers. By so doing, the directive would make unfair competition lawful, which is totally unacceptable.

The only area for which there is a clear need of EU action is to ensure a better enforcement of the posting of workers directive. This requires better information to employers and workers on the working conditions that must be observed with respect to posted workers in the 27 EU member states. And the only way to do so is to improve administrative cooperation. With one condition which is to avoid imposing excessive administrative burdens on companies.

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To conclude:

The ECJ rulings did not undermine trade unions' right to take collective action. Therefore, no EU action is necessary on this issue, which should remain a national competence.

It is true that the ECJ rulings have underlined some problems concerning the way in which the Posting of Workers Directive has been transposed in some Member States. But the affected Member States have taken action to improve their national transposition rules in light of the ECJ rulings without calling into question their national industrial relations systems fundamentally.



The only area for which EU action is needed is to improve administrative cooperation between the Member States. There is some way to go to ensure better compliance with the directive in practice. That being said, we believe that improving administrative cooperation between the Member States can be done without revising the posting of workers directive.

Finally, EU action to improve administrative cooperation on posting will have to be based on Single Market Treaty provisions. Nevertheless, considering that posting of workers is an issue in the remit of social partners' competences, BUSINESSEUROPE stresses the importance of involving European social partners closely throughout the Commission's preparations in 2011.

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