Lorenzo Vecchi – Matricola n°106434

Laval case discussion (C-341/05)

The event

Laval case concerned a Latvian company, which won a contract to refurbish a school in Sweden using its own Latvian workers who earned about 40 per cent less than comparable Swedish workers. The Swedish construction union wanted to Laval to apply the Swedish collective agreement but Laval refused, in part because the collective agreement was unclear as to how much Laval would have to pay its workers, and in part because it imposed various supplementary obligations on Laval such as paying a "special building supplement" to an insurance company to finance group life insurance contracts.
There followed a trade union picket at the school site, a blockade by construction workers, and sympathy industrial action by the electricians' unions. Although this industrial action was permissible under the Swedish law, Laval brought proceedings before the Swedish labour court, because of the negative economic consequences suffered, including the bankruptcy of the Swedish branch of the company, where the workers were posted.
Laval claimed that the action undertook by the Swedish trade unions, was contrary to Article 56 TFEU and the Posted Workers Directive (PWD - 96/71).

The preliminary ruling

After the proceedings starts, the Swedish court made a references for a preliminary ruling to the European Court of Justice (ECJ), based in Luxembourg.
The ECJ is the highest court in the EU in matters of Union law, it is tasked with interpreting EU law and ensuring its equal application across all EU member states.

The preliminary ruling (ART 267 TFEU) is a decision of the ECJ on the interpretation of EU law, made at the request of a court of a EU member state. The final decision of the case remains with the referring court to be decided after it received the preliminary ruling. Questions are not answered in abstraction, but rather are submitted together with the circumstances leading up to their being asked.
If the national law is contrary to the Union law, must be disapplied by the court in the decision of the case.

The Swedish court refers the following questions for a preliminary ruling:

- "Is compatible with rules of the TFEU 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, 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?"

- "The Swedish law 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 "lex britannia", only where a trade union takes collective action in relation to conditions of work

to which the law 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 the special provision 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?"

The decision of the ECJ

Two distinct legal issues were posed by this case. The first related to the Posted Workers Directive and whether this could offer a legal basis to justify the collective action. In brief, this Directive was designed to address the employment law situation of workers who are temporarily posted to work in another Member State (such as the Latvian workers posted by Laval to Sweden). The Directive requires that posted workers are granted the same level of employment protection as workers in the host state in relation to a list of issues, such as minimum rates of pay or maximum working periods. Two difficulties arose in relation to Laval's workers. First, Swedish law did not provide for any minimum rate of pay and, secondly, the building sector collective agreement covered topics which were not specifically mentioned in the Posted Workers Directive.

In relation to the minimum rate of pay, the Posted Workers Directive does allow states to declare that certain collective agreements are 'universally applicable', in which case their terms and conditions must be applied also to posted workers. Alternatively, the state can rely on the collective agreements which are 'generally applicable' in a given sector. The Swedish system of industrial relations places considerable emphasis on the autonomy of the social partners to regulate pay rates through collective bargaining. Accordingly, Sweden had neither designated specific collective agreements as universally applicable, nor had it decided to rely on those, which were generally applicable. As a result, the Court of Justice held that the facts of the dispute in Laval did not fall within the terms of the Directive and therefore it did not provide a justification for collective action to enforce adherence to a collective agreement (including minimum rates of pay).

In addition, the building sector collective agreement in Sweden included obligations, which are not mentioned in the Posted Workers Directive. For example, had Laval joined the collective agreement, it would have been required to make payments to an insurance fund for building workers. Although there is a possibility within the Posted Workers Directive for states to extend its application to other terms and conditions of employment, Sweden had not done this. Therefore, the Directive could not be a justification in relation to the unions' actions to compel Laval to accept these elements of the collective agreement.

The second legal issue posed by this case was whether the collective action was in breach of Article 56 of the TFEU. This states that '*restrictions on freedom to provide services within the Community shall be prohibited ...*'. As with the *Viking* case, a preliminary issue was whether the actions of *trade unions* fell within the scope of Article 56 (as opposed to restrictions imposed by *states*). In similar terms to the *Viking* judgment, the Court held that Article 56 was not limited in its application to public (ie state) rules; it also covered obstacles to free movement caused by non-state actors. In the Court's view, the collective action of the unions was likely to make it more difficult for firms from other Member States to carry out construction work in Sweden and therefore it was a restriction contrary to Article 56. Nevertheless, there remains the possibility to justify a restriction

on the free movement of services if:

- it pursues a legitimate aim compatible with the TFEU and it is justified by overriding reasons of public interest;
- it is suitable for securing the objective pursued;
- it does not go beyond what it necessary to achieve that objective.

The Court accepted that the protection of workers against 'social dumping' was a legitimate aim, however, it reached the surprising conclusion that the collective action of the Swedish unions could not be justified by that objective. Here, it focused on the fact that the collective action sought to compel Laval to adhere to a collective agreement, which would then provide the framework for pay negotiations. The Court felt that this would result in uncertainty for the service- provider who could not predict in advance exactly what obligations it would have to assume.

Finally, another part of the judgment in Laval concerned a prohibition in Swedish law on collective action, which was designed to compel parties to a collective agreement to have that amended or set aside. For example, it would be unlawful for one trade union to take collective action with a view to getting an employer to terminate an existing collective agreement with a different trade union. This rule did not, though, apply where the collective agreement in question was not subject to Swedish law. In other words, Laval could not oppose the unions' collective action on the basis that it already was party to a collective agreement in Latvia.

The Court held that this was a form of nationality discrimination because collective agreements formed in other Member States were not treated in the same way as Swedish collective agreements. It was not possible to justify such discrimination, which was consequently unlawful.

The decision doesn't follow the indications of the general advocate Paolo Mengozzi. The general advocate is responsible to follow the judgment and to express a legal opinion (not binding for the judge), which contain possible solutions for the matter of law of the judgment.

He used some arguments in favour of the trade union in his conclusion, claiming that the PWD and the article 56 TFEU "must be interpreted as not preventing trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives".

What happened after the decision of ECJ?

When the case returned before the Swedish court, exemplary damages where were awarded to Laval of about 60,000€ and the trade union had to pay Laval costs of about 230,000€.

After this important case in the history of the European industrial relations, many labour lawyers of all Member States hardly criticized this decision.
In fact, was said that the judgment has favoured too much economic rights and freedom and

neglected the social ones.
Why this criticism? Because, in this decision, the judges made a control about the motivation of the collective action (strike and collective bargaining). This type of control could be potentially harmful to the collective autonomy and also it doesn't deal with the European legal tradition.
The control is also questionable because its goal is not to ensure the exercise of the collective action in accordance with fundamental rights and the public policy, such as in the national court decisions, but is to protect the economic freedom enshrined in the TFEU.