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Stockholm, 9 June 2011

**SA.32824 – ALLEGED UNLAWFUL AID TO KORMAL SPOLKA ZOO**

Dear Sirs,

By letter of 26 April 2011, the European Commission has offered the Complainant, the Swedish trade union Byggnads, the opportunity to comment on the preliminary view of DG Competition and DG Employment regarding the above mentioned matter.

As regards Article 45 TFEU, it is common ground that Directive 96/71 seeks to coordinate the substantive national rules on the terms and conditions of employment of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored. It follows that those measures may be freely defined by the Member States, in compliance with the Treaty and the general principles of European Union law (see Cases C-341/05 Laval un Partneri [2007] ECR I-11767, paragraph 60 and Case C-515/08 Dos Santos Palhota and Others [2010] ECR I-0000, paragraphs 26-27).

It is also settled case-law 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

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those provided for in that directive, provided that it does not hinder the provision of services between the Member States (Case C-341/05 Laval un Partneri, paragraph 68).

Even though the Court of Justice has repeatedly assessed the posting of workers under Article 56 TFEU, it has never actually acknowledged that this case-law allows Member States to derogate from Article 45 TFEU and from the principle of equal payment for equal work by adopting secondary law on the basis of Articles 42, 57 (2), 66 and/or 308 of the Treaty establishing the European Community. The Case-law cited to this effect by DG Competition and DG Employment (Case 35/70 Manpower [1970] ECR 1251, Case C-202/97 Fitzwilliam Technical Services [2000] ECR I-883 and Case C-178/97 Banks and Others [2000] ECR I-2005), does not support the conclusion that the Court has acknowledged the aims and legitimacy of the posting provisions under articles 45 and 48 TFEU.

This issue, which was actually raised before the Court by the Complainant in its written pleadings in Case C-341/05 Laval, was explicitly left open in that case by Advocate General Mengozzi (see paragraphs 113 and 114 of his Opinion), and was not adressed by the Court in its judgment.

Moreover, the national measure subject to complaint should be assessed in the context of Regulation No 883/2004,[1] which only *coordinates* the Member States' social security systems. Although regulations are directly applicable in the Member States and therefore need not be implemented in national law, Member States may still adopt complementing measures to Regulation No 883/2004 and enjoy a margin of appreciation in this respect. In the present case, it is undisputed that the measure subject to complaint *per se* corresponds to Article 12(1) in the Regulation as regards the applicable social security legislation.

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[1] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, p. 1–123.

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However, the Article 12 must be understood and interpreted in the light of the purpose behind and the other provisions in Regulation No 883/2004 as well as Article 45 TFEU. Without doubt, the purpose of Regulation No 883/2004 is to guarantee equal treatment of migrant workers and to contribute towards improving the standard of living and the conditions of employment. In the view of the Complainant, Article 12 in the Regulation must be read so as to take into account the purpose of the Regulation, the case-law of the Court in i.a. Case C-165/98 *Mazzoleni* and the principle of equal pay for equal work enshrined in Article 45 TFEU.

Obviously, there is no possible remedy under Regulation No 883/2004 or Article 45 TFEU against Polish social security contributions in general being lower than Swedish ones, just as there is no remedy under European State aid law against Polish taxes being lower than Swedish ones. This is not – and has never been – the subject-matter of the complaint.

In the view of the Complainant, the interpretation and application of the Swedish provisions which are subject to the complaint, fall within the margin of appreciation of the Swedish Authorities. The Swedish Authorities' exemption of Polish employers from having to pay Swedish social security contributions, without taking into consideration the particularities of the Polish social security system, offers these employers a massive competitive advantage, and places the Polish members of Byggnads in a crippling financial situation. Indeed, where Swedish employers pay social security contributions *on top of* the gross salary, Polish employers are thus allowed to *deduct* most social security contributions from the salary of the workers, thus undermining the fundamental principle of equal pay for equal work.

In their preliminary assessment, the Commission services question whether the measure complained of is imputable to the Member State in question. Referring to the judgment of the Tribunal in Case T-351/02 *Deutsche Bahn*,[2] the Commission services advance that the Swedish authorities have only implemented Community provisions in accordance with their

[2] ECR [2006] II-1047.

obligations stemming from the Treaty, and that the provision at issue would therefore not be imputable to the State and does not constitute State aid under Article 107 TFEU.

The Complainant does not agree with this assessment of the national measure in question. In the Complainant's view, there are strong reasons to distinguish between the situation at hand in *Deutsche Bahn*, and the situation at hand in the present complaint. Moreover, the Complainant question whether the ruling of the Tribunal is compatible with the case-law of the Court of Justice, and have serious doubts that the latter would endorse the application of this case-law to the present situation by analogy.

Indeed, *Deutsche Bahn* concerned the implementation in national law of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils.[3] Under Article 8(1) of this Directive, the Member States were to exempt from the harmonised excise duty inter alia "mineral oils supplied for use as fuels for the purpose of air navigation other than private pleasure flying".

The Tribunal found that the provision in question imposed on the Member States a clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of commercial air navigation. In transposing the exemption into national law, the Member States were only implementing Community provisions in accordance with their obligations stemming from the Treaty, and the provision at issue was therefore not imputable to the German State (paragraph 102). Even though there was a certain degree of latitude afforded to the Member States by the introductory wording of Article 8(1) in the Directive, this latitude applied only to the wording of the conditions for implementing the exemption and did not affect the unconditional nature of the obligation imposed by that provision to grant the exemption (paragraph 105).

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[3] OJ 1992 L 316, p. 12.

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*Deutsche Bahn* thus concerned a *harmonisation* Directive in the field of excise duty with a clearly worded obligation not to levy duty in a particular situation. The Complainant does not question that judicial deference is called for in such a situation, where the Union legislator enjoys a wide margin of appreciation in order to decide upon and harmonise which products, and in which sectors, excise duty is to be levied. This is confirmed by the analysis of this case-law by at least one prominent Member of the Commission's own Legal Service.[4] The Tribunal's reasoning in *Deutsche Bahn* cannot be transferred to the present complaint.

Indeed, the present complaint does not concern a national measure implementing a Union *harmonisation* directive, but a *coordination* directive and a regulation on the *coordination* of social security systems.

Article 12 in Regulation No 883/2004 must be interpreted in this light, and the Member States must apply Article 12 and supplementing national measures in a more nuanced manner and in accordance with the EU Treaties. As Article 12 leaves a margin of appreciation on behalf of the Member States, Sweden cannot be said only to be implementing Union law provisions in accordance with its obligations stemming from secondary law. Accordingly, and contrary to the preliminary view of DG Competition and DG Employment, the provision at issue is indeed imputable to Sweden.

Even if Article 12 is to be interpreted as a harmonisations measure, leaving no room for interpretation or exempting any margin of appreciation on behalf of the Member States, it follows from the case-law of the Court that provisions in Regulation No 883/2004 that infringe provisions in the Treaties must be set aside. In this case, Article 12 must be seen as infringing Article 45 TFEU as well as Article 107 TFEU. The Complainant therefore reserves the right in future proceedings to invoke the inapplicability of Article 12 in the Regulation, in

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[4] See C. Giolito, La procédure de contrôle des aides d'État peut-elle être utilisée pour contrôler la bonne application d'autres dispositions de droit communautaire?, EC State Aid Law: Liber Amicorum in Honour Francisco Santaolalla, Kluwer 2008, p. 154-155.

accordance with Article 277 TFEU, and plead the grounds specified in Article 263, second paragraph TFEU.

Indeed, the Complainant have serious doubts as to the viability on appeal of the reasoning of the Tribunal in *Deutsche Bahn*, should it be applied by the Commission to the present situation by analogy.

Even though Advocate General Trstenjak recommended to endorse the Tribunal's approach in her opinion in Case C-431/07 P, Bouygues and Bouygues Télécom,[5] the Court did not follow its Advocate General in this respect. Instead, the Court held that the measure in question was inevitable because of the general scheme of the system.[6] Indeed, even though judicial deference is reasonable in the case of harmonising measures in the field of e.g. tax and excise duty law, there is no reason why any national measure stemming more or less from Union legislation should generally be exempted from the scope of application of Article 107 TFEU.

To exempt, generally and for all, all measures adopted through secondary law by the Union legislature, and implemented more or less precisely by Member States, would furthermore upset the principle of institutional balance between the executive and legislative powers of the Union under the Treaties. Indeed, according to Article 109 TFEU, the Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure. This procedure does not exempt all other secondary legislation adopted by the Member States in the Council from State Aid scrutiny.

According to the case-law of the Court, Article 107 TFEU refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give, by

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[5] Opinion of Advocate General Trstenjak delivered on 8 October 2008 in Case C-431/07 P, Bouygues SA and Bouygues Télécom SA v Commission, paragraph 112-117.
[6] Case C-431/07 P Bouygues and Bouygues Télécom v Commission [2009] ECR I-2665, paragraph 103.

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unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought (Case 61/79 Denkavit italiana [1979] ECR 1205, paragraph 31).

In the present case, Sweden has exempted Polish employers posting workers to Sweden from the obligation to pay social security contributions in Sweden in order to ensure these employers access to the Swedish market. By doing so, Sweden confers a considerable financial advantage through State resources to these employers, active predominantly in the construction sector. The result is a significant distortion of competition and effect on trade.

Irrespective of whether Article 12 in Regulation No 833/2004 leaves room for interpretation or not, the Swedish provision constitutes a normative choice made by the Swedish Government. As this choice is incompatible with Article 107 TFEU as well as Article 45 TFEU, the Applicant requests the Commission to initiate the formal investigation procedure provided for in Article 108 paragraph 2 TFEU in order to undertake a complete investigation of the matter.

The Complainant therefore requests separate meetings with DG Competition and DG Employment respectiveley, preferably before July 1st 2011, or at a date and a time of your convenience after the summer vacations, in order to explore if there is any additional information or legal analysis which would be useful for the Commission services, before the Commission forms its definitive views on the present Complaint.

Should the Commission endorse the preliminary view of DG Competition and DG Employment, the Complainant whishes to engage a dialogue with the Commission Services already at this stage, regarding possible legislative amendments to Directive 96/71 and Regulation No 883/2004 within the framework of the relaunch of the Single Market, the possible review of Directive 96/71, and any forthcoming modifications to the modernised EU social security coordination Regulations.

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The information provided in this letter is non-confidential and may thus be made public.

Yours faithfully,

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