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ERA ANNUAL CONFERENCE ON EUROPEAN LABOUR LAW 2009
“RECENT DEVELOPMENTS IN LEGISLATION AND JURISPRUDENCE”

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INTRODUCTION

- The latest Commission forecasts expect employment growth to turn negative in 2009, with overall employment contracting by 1.6 % or some 3.5 million jobs, which it is expected will lead to an average unemployment rate of 9,5% in the EU and 10,25% in the euro area by 2010.
- BUSINESSSEUROPE advocates a four-pillar strategy to deal with the crisis:
 1. Companies' access to finance must be improved
 2. Member states must support growth and jobs with stimulus measures
 3. The implementation of structural reforms must be accelerated
 4. We must resist all forms of protectionism
- On the labour markets, we must speed up the implementation of the flexicurity approach. Special attention should be paid to three aspects of flexicurity in particular:
 1. Working time flexibility: this is a good way to allow companies to keep their workforce in a downturn;
 2. Labour costs: keeping them under control is essential to avoid even higher unemployment;
 3. Education and training: the next economic upswing will be impossible if companies lack a sufficiently qualified work force.

PRELIMINARY REMARKS

- We are invited to discuss today recent developments in legislation and jurisprudence at European level. It is important to distinguish between the four topics which are addressed today, in particular considering:

1. The actual stage in European decision making process

- The Temporary Agency Work Directive and the European Works Councils recast Directive have already been agreed upon at European level and are now to be transposed by the Member States in their national legislation. However, the recast directive on European works councils still needs to be formally approved by the Council.
- The Working Time Directive is currently being the subject of a conciliation procedure between the European Parliament and the Council.
- The recent ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases are about interpreting the provisions of the Posting of Workers Directive, in light of issues which have emerged in the Member States during the implementation process.

2. The role played by European social partners

- The Temporary Agency Work Directive has been the subject of social partner negotiations, which failed in 2000. Following this, the Commission made a proposal in 2002, which has been adopted by the Council and the European Parliament at the end of 2008.
- The Commission 2004 proposal for a revised Working Time Directive has not been addressed in the framework of the European social dialogue.
- On European Works Councils, ETUC could not agree to open negotiations. However, European social partners have played an important role in enabling the swift adoption of the directive by adopting a joint advice on the basis of the Commission proposal for a recast directive that was published in July 2008.
- European social partners are going to start very soon a joint analysis of the legal, economic and social consequences of the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases.

SPECIFIC COMMENTS

1. On the Posting of Workers and the ECJ rulings

- In the course of 2007 and 2008, the Court of Justice of the European Communities (ECJ) has delivered a series of judgements concerning the relationship between social rights and fundamental principles of the internal market, in particular the



freedom of establishment (Viking case) and the freedom to provide services (Laval, Rüffert and Commission vs. Luxembourg cases).

- BUSINESSEUROPE is convinced that the ECJ judgements in these cases will contribute to a better functioning of the internal market whilst at the same time protecting workers' rights.
- A well-functioning Single Market is crucial to increase prosperity for companies, workers, citizens and the economy in general. By contributing to an increase in welfare of 480 euro per head in 2006 compared to a scenario with no Single Market and to the creation of 2.75 million additional jobs, the Single Market is not only an economic success. It is also a key instrument for social progress in Europe. However, there are still many remaining barriers and unjustified restrictions which must be removed in order for the internal market to achieve its full economic and social potential for European citizens and for companies.
- The Single Market has played a central stabilising role and must continue to do so. Employers and trade unions agree that protectionism can only damage companies and workers. More than ever, there is a need for strong leadership both at national and European level to explain the benefits of the single market. The European Commission, as guardian of the Treaties, should give a clear signal that violations of fundamental treaty freedoms cannot be tolerated. National authorities should rigorously defend the free movement of people, services, goods and capital within the European Union.
- Contrary to what is sometimes claimed, the ECJ rulings do not affect the right to conclude or the content of collective agreements. Neither does the ECJ's interpretation of the PWD open the door for social dumping as service providers have to guarantee clearly defined terms and conditions of employment to employees during their period of posting abroad.
- BUSINESSEUROPE strongly believes that there is no need for a revision of the Posting of Workers Directive. Both its general approach and provisions remain valid. Rather than requiring changes in the EU text itself, the problems that have occurred should be solved in the countries concerned.
- Uniform application and sound and effective enforcement of the provisions of the PWD is particularly important for companies' ability to provide cross-border services through the posting of workers. It is imperative to improve administrative cooperation between national authorities. Likewise, companies and workers must be better informed about their obligations and their rights. Improving information is a pre-condition to ensure good compliance.
- BUSINESSEUROPE will actively participate in the work of the Committee of Experts on the Posting of Workers that was established by the European Commission to look at technical issues with regard to the implementation of the Posting of Workers Directive.
- In addition, we are looking forward to upcoming discussions with the European Trade Union Confederation regarding the consequences of the ECJ rulings.

2. On the Temporary Agency Work Directive

- Temporary agency work is an important flexible form of employment, which plays a positive role in the labour market, in particular to match the demand and supply of labour.
- Between 1996 and 2006, the number of temporary agency workers in Europe has more than doubled, from 1,5 million to 3,3 million workers. Temporary agency work is an engine for employment growth and therefore contributes to achieving the goals of the Lisbon strategy.
- BUSINESSEUROPE never questioned the principle of protecting temporary agency workers against discrimination. However, it would have been more adequate to leave it to the Member States to decide whether to establish the equal treatment principle in comparison to a comparable worker in the user undertaking or in the agency, in particular with regard to pay.
- The Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work now needs to be transposed into national law within a three-year delay.
- In this context, it is essential that Member States lift unjustified restrictions on the use of temporary agency work. In addition, social partners have an important role to play to define arrangements concerning the working and employment conditions of temporary agency workers along the lines of the Directive, including regarding the possibility to foresee a qualifying period for equal treatment.
- The Temporary Agency Work directive was adopted by the European Parliament on the basis of the compromise reached in the Council. We regret that the Council's package deal on agency work and on working time has not been respected by the European Parliament.

3. On the Working Time Directive

- The proposal for a Working Time Directive is subject to a conciliation procedure between the European Parliament and the Council. The opt-out and the definition of on-call time as working time are the two main issues of disagreement between the Council and the European Parliament.
- The use of the opt-out has become more widespread across the EU, particularly for specific sectors which have been impacted upon by the rulings in the European Court of Justice (Simap and Jaeger). The opt-out is important in terms of giving companies flexibility to deal with fluctuations in demand. This will be even more important in the current economic crisis.
- Europe is faced with a tremendous amount of challenges in order to recover from the current economic and financial crisis and to respond to the challenge of a rapidly increasing global competition. It is important to avoid introducing measures that could hamper the competitiveness of companies and therefore a rapid recovery of the



European Union. In this context, companies and workers need to be given the flexibility they need and want as regards the organization of working time.

- Classifying all on-call time as working time will have a negative impact on the private sector and hamper the effective provision of public services across the EU, in particular in the healthcare sector.
- BUSINESSEUROPE supports the Council's common position. It was disappointed with the outcome of the European Parliament vote on 17 December and gives a negative assessment of the Commission's opinion on the EP report. We do not agree with the proposed trade-off between the three key issues of the opt-out, on-call time and compensatory rest periods. Retention of the opt-out alone is not a satisfactory solution as the issue of whether in-active on-call time is classified as working time is also important for companies.

4. On the recast Directive on European Works Councils

- The recast Directive on European works councils was approved by the Council and the European Parliament in December 2008. Its formal adoption in the Council is foreseen in April 2009.
- BUSINESSEUROPE believes that the recast directive on European works councils represents a balanced outcome as it rightly puts the emphasis on the central role of social dialogue at company level to determine the procedures governing the functioning of European works councils.
- To remain effective, procedures governing EWCs have to be flexible, adapted to the situations of companies and not disruptive to business's capacity to take quick decisions, which is crucial for companies to remain competitive in a fast changing global economy.
- Well-functioning European works councils can play an important role in identifying adequate solutions for companies to deal with the social implications of the economic and financial crisis. For this reason, it is essential that national implementing laws respect the word and the spirit of the recast Directive and therefore do not impose on companies excessive and/or additional obligations with regard to the operation of their European works councils.
- In particular, the continuity of existing EWCs agreements, which was agreed upon in the recast Directive, needs to be ensured in practice.



CONCLUSIONS

- BUSINESSEUROPE is strongly concerned about the negative impact on employment of the crisis. The preservation of employment and fostering an environment conducive to the creation of new jobs is important.
 - In the context of the economic crisis, the EU should avoid introducing measures that could hamper the competitiveness of companies and therefore a rapid recovery of the European Union.
 - The European social partners can show the way forward. We have a good basis to do so: our joint labour market analysis of October 2007. The economic situation has evolved but the flexicurity approach which both sides support remains valid. European social partners will discuss the social implications of the crisis at the Tripartite Social Summit on 19 March and will actively contribute to the special Jobs Summit in May.
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