

Luxembourg case accelerates 'race to the bottom'

The Luxembourg case involved important questions of interpretation of the Posting of Workers Directive, 96/71/EC (PWD). The European Commission argued that the Luxembourg legislation transposing the PWD violated the terms of the Directive. Luxembourg will now have to pay a fine and amend its legislation. The Commission considered that Luxembourg's national legislation violated the PWD on four points.

1. A too extensive interpretation of the 'public policy' provision (Article 3.10 PWD)

The PWD aims to establish a set of mandatory provisions which the host Member State must guarantee to the posted worker, regardless of the law otherwise applicable to the employment contract (usually the law of the country of origin). According to Article 3.10 of the PWD, a Member State may guarantee workers posted to their territory terms and conditions of employment other than those expressly listed in the Directive *if they constitute public policy provisions*. According to the legislation of Luxembourg, certain terms and conditions of employment are to be considered as public policy provisions, including the following:

- requirement of a written employment contract or a written document established in accordance with Directive 91/533
- automatic indexation of remuneration to the cost of living
- the regulation of part-time work and fixed-term work
- respect for collective agreements

An employer established outside Luxembourg and posting workers to that country must therefore comply with the above requirements in addition to the terms and conditions already listed in Article 3.1 of PWD. The Commission argued, and the ECJ agreed, that such an interpretation of public policy provisions is excessive and the legislation of Luxembourg goes beyond what is admitted in the PWD.

Luxembourg responded that these rules are of a public policy nature because they aim to protect workers. At the time of the adoption of the PWD, the Council and the Commission had signed a declaration (declaration number 10) which provides that public policy must be understood as those mandatory provisions which cannot be derogated from and which, by their nature and objectives, respond to imperative requirements of public interest.

The Court concluded that a Member State cannot oblige foreign service providers to comply with the entire national labour law provisions. The public policy prerogatives be examined on a case by case basis, having regard to what is indispensable for national legal orders.

2. Minimum rest periods (Article 3.1.a of the PWD)

The PWD foresees that the rules on minimum rest of the host Member State must be guaranteed to the posted worker. The Commission argues that Luxembourg has improperly transposed this provision as only minimum weekly rest is provided for in national legislation. Rest periods should also include other types of rest such as daily rest and daily breaks. Luxembourg legislation has in the meantime been amended accordingly.

3. Information to be provided to labour inspectorates

Luxembourg law provides that the employer of the posted worker must provide information which is indispensable for a labour inspection to the relevant authorities upon their request. As this provision increases the risk of undertakings being found in breach of the law, the Commission considered that it is a barrier to the free movement of service and therefore Article 49 EC has been infringed.

Luxembourg, on the other hand, pleaded that its law is sufficiently precise: information can be made available at the beginning of the first day of the service being performed by the worker and only upon request from the labour inspectorates. National employers are also subject to the same requirements.

However, the Court considered that such requirement may constitute an additional burden for foreign service providers which may render the posting of workers less attractive. It was noted that where the employer does not provide the requested information, labour inspectors may order the immediate cessation of the activities .

4. The requirement of a representative on the territory of Luxembourg

Luxembourg legislation requires that a representative nominated by the service provider, with residence in Luxembourg, should keep the documents necessary to labour inspections. The Commission argues that such requirement is excessive given the cooperation system between public authorities established by Article 4 of the PWD and would generate costs for the undertakings, thereby constituting a barrier to the free provision of services. Article 49 EC would therefore have been violated. Luxembourg however, considered that the cooperation system established by the PWD is not sufficient to secure adequate controls. National undertakings are also subject to the same requirements.

THE IMPORTANCE OF THE CASE

This case raises important questions of interpretation of the PWD in particular with regard to the issue of public policy. Whilst the content of labour law varies from one country to another, many Member States, such as France, have a similar approach

to public policy as Luxembourg. The ECJ ruling will therefore have a huge impact throughout Europe.

In the recent Laval and Rueffert judgments, the ECJ has considerably restricted the possibilities for Member States and trade unions to guarantee equal terms and conditions of employment for migrant workers regardless of nationality.

The ECJ has now substituted its own assessment for that of national authorities in determining which labour law provision should be of mandatory application in order to respond to requirements of national public interest.

The notion of public policy often corresponds to well matured socio-economic choices and varies considerably from one Member State to another. It serves as a bulwark against social dumping and exploitation by unscrupulous employers. The ECJ is continuing along the well-worn path of extending its competences incrementally – the hallmark of a developing federal structure. In doing so, it privileges market forces above workers' rights and, in so doing, accelerates the race to the bottom