

The Luxembourg Case

Another turn of the screw: the ECJ further limits the scope for Member States to enforce national labour law and industrial relations for foreign service providers!



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In June 2008, exactly one week after the Irish electorate had rejected the Lisbon Treaty, the European Court of Justice (ECJ) in Luxembourg issued its judgement in a case brought by the European Commission.¹ The ECJ considered that the way in which Luxembourg had implemented the Posting Directive was an obstacle to the free provision of cross-border services. This ruling shows yet again that the right of business to do what it wants, when it likes, overrides trade union rights.²

This judgment, the latest in the series *Laval*, *Viking*, *Rüffert*, clearly demonstrates that the ECJ and the European Commission are consistently implementing a programme designed to narrow the scope for Member States to ensure a proper functioning of their labour markets in the context of foreign companies posting workers to their territory. It entrenches the ECJ's narrow interpretation of the Posting of Workers Directive (PWD) as in the previous cases, allowing only for a limited number of host-country rules to apply.

In this particular case, the ECJ refuses to recognize the autonomous right of Luxembourg to decide which national public policy provisions are so important that they should apply to both national and foreign service providers on an equal footing in order to counter unfair competition on wages and working conditions by cross-border service providers. It has ruled that Luxembourg's national labour laws protecting foreign workers are an obstacle to the free provision of cross-border services. The Confederation of European Business agrees, maintaining that Luxembourg had exercised an 'overly wide interpretation of the PWD and unclear and unjustified control measures'.³

This ECJ judgement will have an enormous impact,⁴ as it challenges the scope for all Member States – acting in the general interest – to secure decent wages for all workers on their territories, demand respect for collective agreements, and devise effective mechanisms for the monitoring and enforcement of the workers' rights which it was believed were provided for in the Posting Directive (PWD).

John Monks, General Secretary of the ETUC said: 'This is another hugely problematic judgement by the ECJ, *asserting the primacy of the economic freedoms over fundamental rights*⁵ and respect for national labour law and collective agreements. It turns the Posting Directive from an instrument that was intended to protect workers, companies and labour markets against unfair competition on wages and working conditions into an aggressive internal market tool. This is unacceptable and must be repaired as soon as possible by the

¹ Commission v. Luxembourg C-319/06.

² The text of the judgment is available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?&docjo=docjo&numaff=C319/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

³ 7 October 2008.

⁴ In particular in Member States such as France, Belgium and Italy which have a similar approach to public policy as Luxembourg.

⁵ The ECJ has already made it clear in at least two cases that 'the fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market ...' (Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, C-5/88, summary, para. 2, and grounds, para. 18) and in a later case stated that 'it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market ...' (Kjell Karlsson and Others, C292/97, grounds, para. 45).

European legislators, notably by a revision of the Posting Directive to clarify and safeguard its original meaning. In addition, the ETUC urges the European institutions to adopt a *Social Progress protocol ...*'

The Main Points of the Judgment.

- ***The interpretation of the notion of 'public policy' (Art 3.10 PWD)***

The ECJ acknowledges that a Member State may impose upon foreign service-providers the respect of terms and conditions of employment other than those contained in the exhaustive list of Art 3.1 Posting of Workers Directive (PWD) if they constitute public policy provisions.⁶

The Court noted that *public policy provisions* are those that are deemed to be so crucial for the protection of the political, social or economic order as to require compliance by all persons present on the national territory, regardless of their nationality. The Court also noted that the public policy exception is a derogation from the fundamental principle of freedom to provide services, which must be interpreted strictly and cannot be determined unilaterally by the Member State.

The Court therefore examined each provision which Luxembourg had classified as public policy:

- ***The requirement of a written contract or equivalent written document***

As compliance with the requirements of the contested national provision *was monitored in the Member State in which the undertaking wishing to post workers to Luxembourg was established*, Luxembourg could not rely on the public policy exception in of Article 3(10) of PWD in order to justify the national measure in question.

⁶ Article 3 PWD – Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
- by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (g) equality of treatment between men and women and other provisions on non-discrimination
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

- ***The requirement of equal treatment for part-time workers and fixed-term workers***

The Court pointed out that the PWD, which seeks to guarantee compliance with a set of rules for the protection of workers, rendered the existence of such an additional obligation redundant. The Court found the requirement likely to dissuade undertakings established in another Member State from exercising their freedom to provide services and therefore found that the requirement for a written contract did not comply with Article 3(10) of the PWD, in so far as it was not applied in compliance with the Treaty (Directive 91/533).

Because of existing Community law, the ECJ ruled that BOTH these requirements are redundant as posted workers enjoy the same protection in their country of origin⁷ as that offered by the Luxembourg requirement.

- ***The requirement relating to the automatic indexation of wages to the cost of living***

The ECJ considered that Luxembourg had failed to establish that a serious threat to a fundamental interest of society was at stake. Luxembourg cited the objectives of protecting purchasing power and good labour relations, without providing evidence that mandatory indexation is necessary and proportional.

However, the Court ruled against Luxembourg on the basis that such an indexation involved all wages, *including those which do not fall within the minimum wage category*, despite the fact that it is covered by point (c) of the first subparagraph of Article 3(1) of the PWD.

- ***The requirement that Luxembourg's collective agreements are complied with by foreign service providers***

The Court considered that it is the actual content of collective agreements that may be defined as public policy, as opposed to collective agreements *per se* and went on to find that classification as public policy provisions can only apply to collective agreements which have been declared universally applicable.

- ***The requirement for monitoring arrangements***

Luxembourg law requires service providers to make available to labour inspectorates on demand, basic information necessary for the monitoring of posted workers. The ECJ considers that this law is not sufficiently clear to secure legal certainty for foreign service providers. The Court found that their rights and obligations were not clearly apparent and that failure to comply with the legal obligations resulted in considerable penalties. As a result, Luxembourg law was ruled to be incompatible with Art 49 EC.⁸

⁷ Directive 91/533 obliges an employer to inform employees of the conditions applicable to the contract or employment relationship.

⁸ Article 49. Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

- ***The requirement for an ad hoc agent residing in Luxembourg to retain the documents necessary for monitoring***

The Court found that this obligation created additional burdens for foreign service providers as the agent must reside in Luxembourg and the period over which documents must be retained is not defined. Quoting previous case law,⁹ the ECJ found that Luxembourg failed to establish that national authorities could not carry out their supervisory task unless the undertaking has designated an agent.

Furthermore, the retention of documents in the host Member State after the employer has ceased to employ workers there is superfluous given the organised system of cooperation and exchanges of information between Member States provided for in the PWD, and concluded that an obligation on the service provider to provide these documents prior to the commencement of work constituted an obstacle to freedom to provide services.

The Case brought by the Commission

In July 2006, the Commission of the European Communities brought an action against Luxembourg, claiming that Luxembourg had failed to fulfil its obligations under the PWD and under Article 49 and 50¹⁰ EC concerning the freedom to provide services.

The Commission claimed that Luxembourg – by wrongly describing national provisions as mandatory provisions falling under national public policy, and requiring undertakings which post workers to its territory to comply with them – imposed obligations on those undertakings which went beyond those laid down by PWD.

The judgment of the ECJ

In its judgment, the ECJ first examined whether the national provisions could be considered as mandatory provisions falling under the notion of public policy in Article 3(10) of the PWD.¹¹

Referring to its judgment in the *Laval* case, the Court stated that the laws of the Member States must be coordinated in order to lay down mandatory rules for minimum protection to be observed in the host country, by employers who post workers there. The Court noted that

⁹ Proceedings against Arblade and Others [2001] ICR 434, (Cases C-369 and 376/96). The advocate-general in the Luxemburg case stated that it is standing case law (related to article 49 EU) that ‘all restrictions, even if these are mandatory for domestic service providers’ have to be abolished (Considerations 56 advocate-general Luxemburg case). In line with this reasoning the Court states that this type of national mandatory rules, ‘hinders the free provision of services’ as these provisions are not ‘crucial for the protection of the political, social and economic order’ – a wording that goes back to the Arblade Case and others 1999.

¹⁰ Art. 50. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, have an order for its enforcement issued there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to *public policy* in the State in which enforcement is sought.

¹¹ The Court referred to a declaration made by the Council and the Commission according to which the expression ‘*public policy provisions*’ is to be interpreted as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest.

Article 3(1)¹² therefore sets out an exhaustive list of measures in respect of which, priority may be given to the rules in force in the host Member State.

The Court added that according to article 3(10) of the PWD, the Member States are nevertheless authorised to apply, in a non-discriminatory manner, national terms and conditions of employment on matters other than those referred to in Article 3(1) *in the case of public policy provisions*.

However, the Court stated that Article 3(10) constitutes a derogation from the exhaustive list set out in article 3(1), of matters in which the host Member State may apply its legislation – and also a derogation from the fundamental principle of freedom to provide services,. In the Court’s view, Article 3(10) should therefore be *interpreted strictly and cannot be determined unilaterally by the Member State*.

Finally, the Court noted that, in any event, Article 3(10) of the PWD does not exempt the host Member State from complying with its obligations under the EC Treaty and, in particular, those relating to the freedom to provide services in article 49 EC.

The Court observed that there was no reason why provisions which encompass the drawing up and implementation of collective agreements, should *as such* fall under the definition of public policy. The Court argued that such a finding must be made as regards the *actual provisions* of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either.

The ECJ found that the national provision did not refer to collective agreements *which have been declared universally applicable*, but to mere collective labour agreements falling outside the scope of Art. 3(10), of the PWD – (public policy provisions). The Court concluded that the national provisions applied by the national authorities to undertakings posting workers in Luxembourg could not constitute public policy exceptions within the meaning of Article 3(10) of PWD.

The salient details of the Judgement

After its already restrictive judgments in the Laval and Rüffert Cases, the ECJ has in its judgment in Commission v Luxembourg even further reduced the remaining possibility, provided for by Article 3(10) of PWD, to impose national labour law standards on employers from other Member States posting of workers to a host Member State.

The following points must be highlighted:

The Court seized the opportunity to develop far-reaching preliminary observations, in order to justify a very strict and narrow interpretation of Article 3(10).

The first indent of Article 3(10),¹³ constitutes a derogation from the principle that the items to which the host Member State may apply its legislation to undertakings which post workers to

¹² As outlined in note 4 above.

¹³ - by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable ...

its territory are set out in an exhaustive list in the first subparagraph of Article 3(1).¹⁴ The first indent of Article 3(10) must therefore be interpreted strictly.

The ‘preparatory works’ to PWD¹⁵ – which the Court refused to acknowledge the existence of in the *Laval* Case – may in this case be relied upon in support of a strict and narrow interpretation of the expression ‘public policy provisions’. According to the preparatory works to the PWD, that Directive *does not require the Member States to introduce rules concerning minimum wages or declare collective agreements universally applicable*.

*This follows explicitly from the common declaration given by the Council and the Commission on the adoption of the Posting of Workers Directive.*¹⁶

The Court ruled that since employers are subject to EC labour law directives by virtue of the laws of the Member State in which they are established, compliance is ensured by the *Member State of origin* of the posted workers. So, any supplementary control in the *Member State where the work is carried out* is considered to be unacceptable, since it is likely to dissuade undertakings established in another Member State from exercising their freedom to provide services.

The ECJ has in effect, reintroduced *a version of the country-of-origin principle* enshrined in the Services Directive.

The Court furthermore considered that it was intended, by means of point (c) of Article 3(1) of PWD, to limit the possibility of the Member States intervening as regards *pay to matters relating to minimum rates of pay only*.

It further narrowed the freedom of action of Member States on the basis of Article 3(10) of PWD, by introducing a new standard of judicial review. The reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an *analysis of the expediency and proportionality*¹⁷ of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.

¹⁴ In Note 6 above

¹⁵ These rules must be laid down by the legislations of the host country and/or by collective agreements or arbitration awards which have been declared universally applicable in the case of activities in the building work sector, while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work.

They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions.

¹⁶ Declaration 10, referred to by the Court and 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 Advocate General considered in her conclusions published on 13 September 2007 that whilst national authorities do benefit from a certain margin of appreciation in defining what constitutes public interest, the notion of public policy is an autonomous principle of Community law and can be monitored by the European judge accordingly.

The Advocate General concludes that national labour law as a whole cannot constitute public policy. In other words, a Member State cannot oblige foreign service providers to comply with the entire national labour law provisions. The public policy prerogatives should be examined on a case by case basis, having regard to what is indispensable for national legal orders.

¹⁷ *Official Journal C 321 E*, 29/12/2006 P. 0308 – 0311 Protocol (No 30) 2. The application of the principles of subsidiarity and proportionality ... shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article 6(4) of the Treaty on

The Court excludes the application to posted workers of public policy provisions in collective agreements, which have *not* been declared universally applicable. It establishes a principle that Article 3(10) relates exclusively to the terms and conditions of employment laid down in collective agreements *which have been declared universally applicable*.

The Court does not accept that provisions concerning collective agreements, namely provisions which encompass their drawing-up and implementation, should *per se* fall under the definition of public policy. Such a finding must, according to the Court, be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either.

There is disingenuous circular reasoning on the part of the Court concerning public policy provisions under Article 3(10). In PWD Article 3(1) it is stated that Member States shall ensure that the minimum conditions set out in Articles (a) to (g) are upheld whenever they are laid down in laws, regulations or administrative provisions, and/or universally-applicable collective agreements.

The purpose of Article 3(10) PWD was to *extend* the possibilities of applying provisions that were not already covered by Article 3(1) or 3(8).¹⁸ However, the Court in the Luxembourg judgment by restricting the application of 3(10) to provisions in universally applicable collective agreements, makes that Article redundant.

This outcome is hardly surprising in the light of the Court's previous case law in the *Laval*, *Rüffert* and *Viking* Cases. Through this judgment, the ECJ has taken another step in its serial reinterpretation of the PWD which it commenced with the *Laval* Case. *It has fundamentally transformed the PWD into an instrument for restricting rights to take action to ensure equal pay for equal work*.

This latest ECJ judgment is likely have an enormous impact, far beyond Luxembourg, and increases the spectre of social dumping for all workers. *It effectively challenges the scope for member states to secure decent wages for all workers in their territory, demand respect for*

European Union, according to which 'the Union shall provide itself with the means necessary to attain its objectives and carry through its policies'.

¹⁸ '*Collective agreements or arbitration awards which have been declared universally applicable*' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

- are required to fulfil such obligations with the same effects.

collective agreements and devise effective mechanisms for the monitoring and enforcement of workers' rights. The court is effectively saying that any national laws that blocks 'free movement' within the EU must be struck down as they conflict with EU rules on the free movement of goods and services. In effect, it is slowly imposing, through case law, the 'country of origin' principle supposedly removed from the Services Directive in 2005.

The ECJ, abetted by the unelected EU commission is now actively acting against the interests of workers in Ireland and throughout the EU. The Irish people's stance in defending democracy and workers rights by rejecting the Lisbon Treaty in 2008 has, following the Luxembourg judgment, surely been vindicated.

The European Union Intensifies its Attack on Worker's Rights: A summary of ECJ judgments in the Laval, Viking, and Ruffert cases

In December 2007, the European Court of Justice (ECJ) ruled that a trade union campaign to stop a Latvian firm paying low wages in the Swedish town of Vaxholm was in breach of EU rules. Earlier in the month, the same court ruled that an international trade-union campaign against 'flag of convenience' shipping was also in breach of EU rules. The latter case involved Finnish ferry company Viking Line, which in 2003 attempted to re-flag one of its ships to Estonia and replace Finnish seafarers with cheaper Estonian labour.

Protesting against this clear case of social dumping, the UK-based International Transport Workers Federation (ITF) instructed its affiliates not to negotiate with the Finnish ferry line. Viking then began legal proceedings against the ITF and the ECJ sat on the case for over three years. It then declared that EU rules on free movement of goods, services, capital and labour gives private firms protection against trade unions in the interests of 'freedom of establishment'.

The European Commission similarly claimed the Viking judgment was 'balanced' and had laid down specific principles, including the principle that collective action can in theory restrict 'the freedom of establishment, a cornerstone of the EU's internal market'. But, on the other hand, any industrial action must be for reasons of 'over-riding public interest' as well as being 'suitable and proportionate'.

Clearly, the Viking ruling means that the right to take industrial action is not recognised as a fundamental right by the ECJ. This is reflected in the commission's declaration that 'freedom of establishment' is 'a cornerstone of the EU's internal market', but the right to take collective action is not accorded the same status.

In an earlier judgment the court itself also ruled: 'it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market' (Kjell Karlson and others, case C292/97 par. 45). So, in the opinion of the ECJ, human rights such as trade union rights are subordinate to the good of the 'market'.

The Viking judgment similarly states that exercising the right to strike action is 'subject to certain restrictions', where the strike is 'prohibited under national law or European Community law' or is '*contra bonos mores*' (contrary to good morals).

In summary, trade unionists have the right to strike action unless it is illegal under any domestic or EU law, affects the 'operation of the market', or is 'immoral'. There are, of course, other EU restrictions on trade union rights in the offing, should we accept the Lisbon Treaty in the forthcoming referendum.

It is no accident that both the Viking and Vaxholm cases attack trade union collective bargaining rights in Scandinavian countries, where they are enshrined in law and the national constitutions. This is the social model which is most at odds with the EU for which the 'smooth operation of the market' overrides any other rights or considerations.

Following these landmark cases, the ECJ delivered a ruling in the so-called 'Rüffert case'. The case concerned a conflict between the German *land* of Lower Saxony and the construction firm Objekt und Bauregie GmbH. In the state law of Lower Saxony it is stated in tenders for public contracts that companies and their sub-contractors must pay their employees the salary fixed according to collective agreements.

This provision was incorporated in the contract between Lower Saxony and the firm, but it was broken when a Polish sub-contractor of the latter – PKZ – only paid their 53 employees 46.57% of the fixed minimum salary. However, the court has determined that the EU rules concerning free exchange of services prevents local authorities demanding that posted workers from another EU state employed by an employer from the host EU state must be paid according to the current agreement in the area where they are currently working.

With the Rüffert judgment the EU court has rejected the principle that municipalities or other public authorities can demand suppliers and sub-suppliers to live up to current salary and working conditions in the geographic area in question.

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