European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Commission v Luxembourg C-319/06
Briefing note

The Commission v Luxembourg case involves 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 violates the terms of the Directive. The Commission has therefore introduced an action against Luxembourg for failure to fulfil its obligations under the Treaty.
On 13 September 2007, the Advocate General Verica Trstenjak gave her opinion, which is explained in more detail below.
On 19 June, the judgment of the ECJ was published, upholding the Commission's complaint on all points (see attached summary).

I. BACKGROUND TO THE CASE

The Commission considers that the national legislation violates 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 Art 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, a certain number of terms and conditions of employment are to be considered as public policy provisions*, including in particular the following prescriptions:

- 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 of collective agreements

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An employer established outside Luxembourg and posting workers to that country must therefore comply with the above prescriptions in addition to the terms and conditions already listed in Art 3.1 of PWD[1]. The Commission argues that such an interpretation of public policy provisions is excessive and the legislation of Luxembourg goes beyond what is admitted in the PWD.

Luxembourg responds 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 the notion of 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 constitute 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. The Advocate General considers that with the exception of automatic indexation of remuneration Luxembourg has exceeded what is allowed under the PWD.

2. the notion of minimum rest periods (Art. 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 has recognised the incomplete transposition with regard to rest and national legislation has in the meantime been amended accordingly.

1 i.e.: Maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay; conditions of hiring out workers; health, safety and hygiene; protective measures with regard to pregnant women or women who have recently given birth; of children and young people; non discrimination

3. **Information to be provided to labour inspectorates: uncertainties for businesses**

The national 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. *According to the Commission, this legal requirement is not sufficiently precise* to guarantee foreign service providers the necessary legal certainty. As this provision increases the risk of undertakings being found in breach of the law, the Commission considers that it is a barrier to the free movement of service and therefore Art 49 EC has been infringed.

Luxembourg, on the other hand, pleads 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 Advocate General considers that such requirement may constitute an additional burden for foreign service providers which may render the posting of workers less attractive. She notes that where the employer does not provide the requested information, labour inspectors may order the immediate cessation of the activities until all documents have been provided. The Advocate General concludes that the national measure in question implies prior authorisation before workers can be posted. She argues that such a measure is excessive and less restrictive measures could have been envisaged by Luxembourg to control potential abuses. As a result, Art 49 EC would have been breached.

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 Art 4 of the PWD and would generate costs for the undertakings, thereby constituting a barrier to the free provision of services.

Luxembourg considers that the cooperation system established by the PWD is not sufficient to secure adequate controls. In addition the requirement is not excessive given that no particular legal form is required for the representative in question. Again, national undertakings are also subject to the same requirements.

The Advocate General, quoting ECJ case law (Arblade case), recalls that requiring a representative with a residence in Luxembourg may constitute a burden for the service providers. She acknowledges that controls on the place of work are indispensable but considers that Luxembourg fails to establish that such controls could be carried out with less restrictive means. Art 49 EC would therefore have been violated.

II. THE IMPORTANCE OF THE CASE

This case, especially the first point raised by the Commission, 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 narrowed down the possibilities for Member States and trade unions to guarantee equal terms and conditions of employment for migrant workers regardless of nationality. In the light of these rulings, Art 3.10 of the PWD can constitute a last resort for national authorities to impose the respect of labour law provisions which go beyond the minimum standards recognised by the PWD. For instance, collective agreements which have not been declared generally applicable cannot apply to posted workers if they are not considered by the national legislator as public policy provisions.

It seems that the ECJ will substitute its own assessment to the one of national authorities in determining which labour law provision should be of a mandatory application in order to respond to requirements of national public interest. Such an interpretation would constitute a likely infringement of the subsidiarity principle. The notion of public policy often corresponds to well matured socio-economic choices and varies considerably from one Member State to another. The ETUC therefore considers that Member States must benefit from a wide margin of appreciation in defining public interest. A case by case assessment of public policy provisions by the European judge would also be a source of major legal uncertainty, which will generate a flow of litigation.

With regard to the third and the fourth questions (information to be supplied to the relevant authorities and the requirement of a representative in Luxembourg), the ETUC has repeatedly stressed the importance of the PWD in the fight against social dumping and the promotion of a climate of fair competition. Member States must therefore be allowed to devise effective mechanisms for the monitoring and enforcement of the PWD, including the kind of mechanisms used by Luxemburg.

Links:

Advocate General Conclusions (13 September 2007):
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-319/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

The Posting of Workers Directive 96/71/EC: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=E

N&numdoc=31996L0071

Background information on the Rueffert and Laval rulings: http://www.etuc.org/r/846