



Commission v Luxembourg C-319/06 Summary of the judgment (19 June 2008)

Background to the case

This case raises important questions of interpretation of the Posting of Workers Directive, in particular with regard to the issue of public policy provision contained in Article 3.10 of the Directive. This case has an important impact throughout Europe as several Member States, such as France, Belgium and Italy have a similar approach to public policy as Luxembourg.

The Commission argued that the Luxembourg legislation transposing the Posting of Workers Directive exceeds what is allowed under Community law. In its judgment of 19 June 2008, the ECJ upheld the Commission's complaint on all points, considering that the way in which Luxembourg has implemented the Posting Directive is an obstacle to the free provision of cross border services. Luxembourg will now have to amend its legislation accordingly.

Main points of the judgment

The ECJ is of the opinion that Luxembourg legislation violates the Posting of Workers Directive (PWD) on several points.

- The interpretation of the notion of "public policy" (Art 3.10 of the Directive)

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 PWD if they constitute public policy provisions. The Court recalls that public policy provisions are those which 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 recalls 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 MS.

The Court therefore examines each provision which Luxembourg has classified as public policy:

- on the requirement of a written contract or equivalent written document, and on the requirement of equal treatment for part time workers and fixed term workers

Because of existing Community law, the ECJ ruled that these requirements are redundant as posted workers enjoy the same protection in their country of origin.

- on the requirement relating to the automatic indexation of wages to the cost of living

The Commission challenged the fact that indexation of wages concerns all wages, including those going above the minimum wage category foreseen in Art 3.1 of the PWD. The ECJ considered that Luxembourg 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.

- on the requirement that Luxembourg collective agreements are complied with

The Court considers that it is the actual content of collective agreements that may be defined as public policy, by opposition to collective agreements per se. In any case, the ECJ clarified that classification as public policy provisions can only apply to collective agreements which have been declared universally applicable.

- The notion of minimum rest periods

The Luxembourg interpretation of the notion of minimum rest period did not grant sufficient protection to workers, as provided for in the Working Time Directive. Luxembourg had acknowledged that the definition of rest periods was too restrictive and had since then amended its legislation in a way which secures better protection for workers. This point is therefore not challenged.

- Lack of clarity of the 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. On the one hand, the extent of their rights and obligations is not clearly apparent. On the other hand failure to comply with the legal obligations incur not inconsiderable penalties. As a result, Luxembourg law is incompatible with Art 49 EC.

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

The Court notes that this obligation involves 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 (the Arblade case), the ECJ considers that Luxembourg failed to establish that national authorities could not carry out their supervisory task unless the undertaking has designated an agent.

The ECJ also rules that other measures less restrictive of freedom to provide services could have been envisaged such as entrusting a worker present in the place with the necessary documents.

In any case, the retention of documents in the host Member State after the employer has ceased to employ workers there is superfluous in the eye of the Court, given the organised system of cooperation and exchanges of information between Member States provided for in the PWD.

Lastly, the Court emphasises that an obligation to retain documents prior to the commencement of the work constitutes an obstacle to freedom to provide services.

Links:

The text of the judgment is available at: <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>