CONFERENCE:
EVALUATING APPLICATION OF THE DIRECTIVE ON THE POSTING OF WORKERS WITHIN THE FRAMEWORK OF THE PROVISION OF SERVICES

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THE COMMISSION V LUXEMBOURG JUDGEMENT AND THE ARBITRARY AND PEREMPTORY CURTAILMENT OF THE POWER OF THE STATES TO ISSUE SOCIAL STANDARDS

NIKITAS ALIPRANTIS

Democritus University of Thrace (Greece)

Preliminary observations

In the cascade of judgements by the ECJ, which systematically eradicate national labour law rules, it is clear that the Commission v Luxembourg[1] judgement was chosen as an example, as it appears to have been less widely commented than rulings such as Laval or Rüffert. The following analysis therefore applies, mutatis mutandis, to all rulings using a similar or comparable argument.

The path which the ECJ has chosen in recent years, arbitrarily compromises the social future of Europe, all the more so as it is a jurisdictional body endowed with exorbitant[2] and unchecked power. It would be misleading to believe that this path has a sound basis in economic freedoms. It is in fact underpinned by arguments that are frequently biased, formalistic expedients as well as aberrant and distorted application of major legal principles such as that of proportionality: all of these a means employed in the jurisdictional policy of the Court to reach an interpretation of the freedom of establishment, the free provision of services and, in particular, of directive 96/71, casually abolishing the rules of national labour law.

We will successively raise the various points of the Luxembourg regulations (Law of 20 December 2002) and the critical assessment of the foundation of the judgement. However, an initial general critical observation is required.

[1] Judgement of 19 June 2008, C-319/06
[2] See article 164 CEE, which became article 19 TUE, enshrining the law as a distinct criterion to be used as a guideline when interpreting treaties

A. A general observation

This observation concerns what I consider to be a crucial misunderstanding on the part of the Court as to the notion of violating a rule of law. In concrete terms, the Court considers – and this has almost become generally accepted – that the freedom of establishment and the freedom of provision of services (articles 49 and 56 TFUE) are breached and thus restricted as soon as there is any impediment, even if simply potential, which could make their exercise less attractive (sic!) and possibly discourage those interested. However, the restriction of a freedom (and thus the breach of the relevant rules) presupposes actions or measures which have the certain – rather than simply the possible – effect of exerting strong and actual – rather than simply virtual – pressure, necessarily leading the parties concerned to abandon use of this freedom. The extraordinary laxity concerning what constitutes a breach, in particular of the free provision of services, would seem to us to be a fundamental error in the Court's case law. This error is the main cause of national labour law rules being dismissed as non compliant with the "posting" directive and thus of their widespread and even systematic overruling. The Latin would have us believe that "error communis non facit jus" but this is only valid for the man in the street and not for judges…

It should be pointed out that this conceptual error appears several times in the judgement commented on (points 41, 58, 81, 85).

B. Detailed criticism of the judgement

1- First point: the requirement for the contract of employment to be in the form of a written document

The Court underlines the fact that on this matter there is directive 91/533 which Member States are obliged to adopt and "consequently all employers are subject to the obligations laid down by that directive" (point 39); thus "compliance with the (Luxembourg) requirement is ensured by the Member State of origin of the posted workers" (point 40). The Court then concludes that such requirement was superfluous and liable to have the above-mentioned dissuasive effect on the exercise of the freedom to provide services (point 41).

One is struck by the ease with which the Court moves from (Community) legal obligations to the level of legal sociology, taking as an established fact something which is simply postulated. Can one truly state with absolute certainty, firstly, that all Member States have fully adopted directive 91/533; secondly, that all the employers of all Member States comply with the obligations of the said directive? The answer and the conclusion are obvious: insofar as it is objectively impossible to confirm that the obligation of the directive in question is complied with for all posted workers of a given Member State, it is essential to reverse the terms of the judgement: not only is the Luxembourg requirement not superfluous but is even necessary for compliance with the treaty. It aims to ensure compliance in all cases with directive 91-533,

justified "by imperative requirements in the general interest" …. "as regards the protection of workers guaranteed by (it)" (see points 43-44)[3].

2- Second point: the requirement concerning the automatic adjustment of rates of pay to changes in the cost of living

On this point, it is important to criticise three aspects of the judgement concerning:

a) Given that adjustment concerns all rates of pay and not simply minimum wages, the Court believes that it can use this to corroborate the tendentious interpretation of directive 96/71 employed in the Laval and Rüffert judgements, in order to make it impossible for a State to offer conditions that are more favourable than the minimum rates of pay. In the two judgements mentioned, it invoked art. 3, par. 7, whereas in the judgement commented on, it invokes article 3, par.1, first indent, under C, which mentions minimum pay rates. The Court then peremptorily concludes – invoking the (alleged?, presumed?) intention of the Community legislator – that it "intended to limit the possibility (sic!) of the Member States intervening … on minimum rates of pay" (point 47). In other words, the fact of obliging the States to ensure that minimum rates of pay are applied would be akin to prohibiting more favourable regulations! It remains to be explained what reasoning justifies this logical leap, which smacks of sophistry.

b) The consequence of this interpretation by the Court is clear: if it is to be justified, the automatic adjustment of rates of pay must be for pressing reasons of public interest (article 3, par. 10, first indent), a notion strictly interpreted and under the control of the Community institutions (judgement of 14 October 2004, Omega, (C-36/02, point 30, to which the commented judgement refers)[4].

   It is clear that this Luxembourg measure was aimed at protecting workers against the effects of inflation and preventing a resulting drop in their purchasing power. To ignore the fact of this worker protection being compliant with Community law, the Court fails to refer to the Arblade and Finalarte judgements, which reasonably invoke "imperative requirements of the public interest"[5]; it nonetheless does invoke the terms of the "Church of Scientology" judgement[6] which, in a completely different context, stated that "public policy may be relied on only if there is a genuine and sufficiently serious threat (sic) to a fundamental interest of society"! (judgement commented on, end of point 50). The tendentious nature of invoking this judgement aimed at protecting the purchasing power of workers is perfectly self-evident.

c) As is this were not enough, to strike a final blow at the automatic adjustment of rates of pay, the Court resorts to the principle of proportionality.
   This major legal principle, which expresses the idea of justice and comes primarily from criminal law, has for some time been misused by being applied to a wide

[3] The same reasoning and therefore the same conclusion, are valid for the Luxembourg provision as regards the regulations on part time work and fixed term employment, contrary to the Court's claims (see points 57-61).
[4] Point 50 of the judgement commented on
[5] See point 43 of the judgement commented on
[6] Judgement of 14 March 2000, C-54/99, point 17

variety of completely unrelated subjects. Furthermore, given its conceptual nature, it can be used to draw conclusions in completely opposite directions.

Focusing on the judgement commented on, the Court should simply have observed that the public interest requirements are met because the goal is to preserve the purchasing power of workers. Instead, it hides behind the principle of proportionality. Yet it failed to examine whether in this particular case this principle is followed – as it did in other cases, for example recently in the Michaeler & Subito judgement, albeit in a manner that defies all logic[7]; it decided to avoid such an examination and, claiming the lack of proof provided by Luxembourg, concluded as to a violation of directive 96/71… (point 52-55).

3- Third point: public order nature a) of the legal provision concerning collective working agreements and b) of the provisions of the latter.

The Court rejects en bloc their qualification as provisions of public order, which deserves a critical commentary.

a) With regard to the legal arrangements concerning collective agreements, the Court states, with disarming simplicity, that "per se and with no other clarification, nothing justifies" such a qualification (point 65). However, if there is a common social foundation within the countries of the EU, it is precisely the fact that the legal regulations of collective agreements constitute tangible evidence of the fundamental right to collective negotiation, whereby the legislator or custom aims to set working conditions – certainly not primarily by non mandatory rules! – considering that this fulfils “imperative requirements of the public interest”.

b) As regards the provisions of the collective work agreements, the Court refuses to admit that they come within the scope of the public policy as they are not declared as being of a generally binding nature. This argument was also used in the Rüffert judgement where it led to an actual collective agreement not being applied, whereas in this case the argument in reality generally and abstractly refutes the imperative nature of the provisions of the collective agreements. Clearly, an impetus in this direction is provided by the directive itself, as it requires that collective agreements be “extended” (based on the French word “étendues” which is more terse!). This requirement set by the directive seems to give public authority the discretion to decide upon the imperative nature in the public interest of collective agreements. In the alternative, (where there is declaration that the work agreements are generally binding) it gives the same effect to general collective agreements and particularly those made by the most nationally representative trade unions and which are applicable throughout the country (art. 3, par. 8, indent. 2). The directive thereby implicitly admits that even without State approval, major collective agreements negotiated by large trade unions are considered as imperative standards of public policy, even though they may exceptionally contain provisions which are not of an imperative nature. In the light of this indirect recognition, at least for “major” collective agreements, the Court could and should have admitted the fact that the latter are imperative standards of

[7] Judgement of 24 April 2008, Michaeler & Subito, C-55/2007 and C-56/2007, point 26. See the conclusions of the Advocate General Colomer, a monument to ideological and tendentious deviation of legal discourse (points 46-47). See our comments to the Panhellenic Congress of Labour and Social Security Law, Thessalonika 2009 (to be published in Greek).

public policy, which is common ground since collective agreements have come to exist and is even their very purpose. Nonetheless the Court preferred to shrink away from this…

4- Fourth point: the obligation, before work starts, for companies on a request from the Inspectorate of Labour and Mines, to give access to essential information regarding workers who "carry out an activity in Luxembourg" or who are posted there (article 7 of the Luxembourg law).

In order to qualify this obligation as incompatible with article 49 EC (56 TFEU), the Court, supported by the Advocate General, provides pedantic and irrelevant arguments. It firstly states that it is difficult to understand how the Luxembourg Inspectorate can request the above mentioned information before the work starts as it would not be aware of the presence of the company in Luxembourg. But this is not an issue for the Court, as it is a matter for the Luxembourg Inspectorate – and not for the Court – to decide how to inform itself of the presence of such companies. And it can do so by any means as it sees fit! The Court is even less qualified for enquiring as to the role of the company wishing to post its workers, as it may be of any nature whatsoever and for the moment (before the work starts) indifferent, the only requirement being that information about the workers be provided. The Court also points out, following the Advocate General, the penalties generally applied when the requested information is not provided.

The Court goes on to conclude, based on the elements mentioned, that the requirement to provide the essential information requested and the respective penalties for non fulfilment of this obligation are not free of ambiguity (sic). Sure of this "statement" the Court believes it can apply the "same old tune": "these ambiguities …are likely to dissuade companies wishing to post workers in Luxembourg to exercise their freedom of provision of services" (point 81). We believe no comment is needed as to the relevance of the arguments and the conclusion!

Conclusions?

Instead of concluding, I decided to continue and finish the pedantic analysis and arguments of the commented judgement by criticising the last contention. It deals with the obligation for companies to appoint an ad hoc agent, resident of Luxembourg, who is responsible for keeping the documents required in the event of controls by the relevant national authorities.

I will bypass the sociological question as to whether the cooperation and exchange of administrative information, provided for under article 4 of directive 96/71 is still efficient everywhere which would render the Luxembourg obligation superfluous, as the commented judgement affirms axiomatically (point 92), by repeating the peremptory statement of the Arblade judgement (point 79).

Lastly I will emphasise on what the Court deems to have become an obvious reality, and what I view to be the beginning of the end of national labour law. The mere fact of appointing a resident of the host country and of keeping documents required in the event of inspection is considered by the Court as incurring "additional

administrative and financial expenses" (one can only be deeply moved by the Community judges' solicitude as regards this formality!) The Court draws the terrible consequences of these "expenses" on the grounds that the companies subject to this obligation "are not on an equal footing, as regards competition" with companies not subject to the same obligation and "they may be dissuaded to provide their services" in Luxembourg (point 85).

This is why the "same old tune" marks the beginning of the end of Member States' labour law: any rule, even of minor scope, in force in a Member State, which is more favourable for workers or more demanding for companies than existing rules in other Member States, would violate equal conditions of competition and freedom of establishment and freedom to provide services!

Beware any national legislators who do not take heed!

Solutions?

Firstly there is the classic solution which gives the legislator (in the wide sense of the term) the right, when it deems that the courts apply a given legal provision incorrectly, or deform it, to undermine the case law in question by drafting a differing rule which reflects the legislator's view. The Commission should take responsibility for applying this solution, applied traditionally in internal legal order by the legislator but applicable for any lawmaker as regards the agent of their application. Could the European Commission be expected to act in such a way?

Another solution, which is closer to what is actually possible but still remains theoretical, is provided by the Constitutional Courts or other national Supreme Courts. In the internal order, they could declare that a given legal act (even jurisdictional) is inapplicable if they consider that it infringes upon fundamental principles or that it arbitrarily reduces the legislative powers of the State.