The Rüffert and Luxembourg cases: is the European social dimension in retreat?

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Introduction

Between December 2007 and June 2008, the Court of Justice of the European Communities (ECJ) delivered several judgments in which it was called upon to rule on the relationship between the economic freedoms guaranteed by the Treaty (freedom of establishment and freedom to provide services), on the one hand, and social protection (application of the rules on minimum rates of pay) and fundamental trade union rights (collective action and collective agreements), on the other. Those judgments have given rise to indignation amongst trade union organisations at such 'judicially imposed European liberalization' (Höpner, 2008) and raised eyebrows in many Member States. In Social Developments in the EU 2007, we had the opportunity to explore the *Laval* and *Viking* cases (Ghailani, 2008). We propose now to continue in that vein by focusing this year on the *Rüffert* and *Luxembourg* cases.

The *Rüffert* judgment turned on whether or not the application of minimum pay rules is compatible with Article 49 on the freedom to provide services. We shall see that the judgment delivered on 8 April 2008 falls entirely within the approach adopted by the Court in *Viking* and *Laval* and has already been much written about. A few weeks later, the ECJ delivered a second ruling, this time against Luxembourg, concerning the transposition of Directive 96/71/EC on the posting of workers, in which it found against Luxembourg on all the points at issue. That judgment, concerning the Law of 20 December 2002 transposing Directive 96/71/EC, prompted a wide-ranging debate about its implications for Luxembourg employment law and for Social Europe. The ruling adds a further strand to the definition of national social public policy seen from a European perspective. The question posed was the extent to which national social public policy could call into question application of the fundamental freedoms under the Treaty.

1. The *Rüffert v Land Niedersachsen* case[1]

The Law of Land Niedersachsen (Germany) on the award of public contracts[2] provides in paragraph 3(1) that contracts for building work are to be awarded only to companies which undertake in writing to pay their employees at least the remuneration prescribed by the applicable collective agreement. The contractor must also undertake to impose that obligation on all subcontractors (paragraph 4(1)) and to monitor its compliance. Failure to comply with that undertaking triggers payment of a contractual penalty (paragraph 8). Pursuant to those provisions, the company Objekt und Bauregie GmbH undertook to Land Niedersachsen to pay workers employed on the site of the Göttingen-Rosdorf prison the wages laid down in the applicable 'Buildings and public works' collective agreement. It transpired that a Polish undertaking, a subcontractor of Objekt und Bauregie, had paid its 53 workers employed on the site only 46.57 % of the minimum rates of pay set, as indicated in a notice issued against the person primarily responsible for the Polish undertaking. The work contract having been terminated following criminal investigations, a dispute arose between Land Niedersachsen and the liquidator of the assets of Objekt und Bauregie as to whether that company had to pay a contractual penalty of € 84,934.31 (i.e. 1 % of the contract amount) for breach of the wages undertaking. At first instance, the *Landgericht Hannover* (Regional Court, Hanover) held that Objekt und Bauregie's claim under the work contract was offset in full by the contractual penalty in favour of Land Niedersachsen. It dismissed the remainder of the company's action.

Uncertain as to the legality of the provision imposing a contractual penalty, the *Oberlandesgericht Celle* (Higher Regional Court, Celle), hearing the case on appeal, enquired of the ECJ whether or not the fact that a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, in return

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1. Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG* v *Land Niedersachsen*, 8 April 2008, not yet published in the Court Reports.
2. The preamble to this Law states that it is intended to counteract distortions of competition resulting from the use of cheap labour, particularly in the construction sector, and to minimise costs to social security schemes.

for those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, amounts to an unjustified restriction on the freedom to provide services under the EC Treaty.

It is helpful to note that in Germany, setting the minimum rate of pay in the construction sector is a matter for collective bargaining. The collective agreement of 4 July 2002 (*Bundesrahmentarifvertrag für das Baugewerbe*), which establishes an overall framework for the building industry and is applicable throughout Germany, makes no provision for minimum rates of pay. Those rules are to be found, on the one hand, in a collective agreement declared to be universally applicable which lays down a minimum rate of pay in the construction sector for Germany (*Tarifvertrag zur Regelung der Mindestlöhne im Baugewerbe im Gebiet der Bundesrepublik Deutschland*, known as the '*TV Mindestlohn*') and, on the other, in specific collective agreements. The 2003 *Tarifvertrag zur Regelung der Löhne und Ausbildungsvergütungen* in force in Land Niedersachsen sets a higher rate of pay, but is not universally applicable (ETUC, 2008a).

The ECJ ruling

The Court of Justice based its reply on Directive 96/71 on the posting of workers (European Parliament and Council of the European Union, 1996), interpreted in turn in the light of Article 49 EC. The Court pointed out that under Article 3(1) of the Directive, Member States must ensure that undertakings which post workers guarantee, in relation to a number of areas including minimum rates of pay, the terms and conditions of employment applicable in their country, fixed by laws, regulations or administrative provisions and/or by collective agreements which have been declared universally applicable. The Court added that the second subparagraph of Article 3(8) of Directive 96/71 allows Member States, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to rely on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the sector concerned or agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

The Court noted that the Land legislation, since it did not itself set any minimum rates of pay, cannot be considered to be a law within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay. The Court pointed out that the AEntG, which transposed Directive 96/71 into German national law, extends application of provisions on minimum wages in collective agreements which have been declared universally applicable in Germany to employers established in another Member State which post their workers to Germany. The Land Niedersachsen confirmed however that the 'Buildings and public works' collective agreement was not a collective agreement declared universally applicable within the meaning of the AEntG. In addition, nor can the collective agreement be considered to constitute a collective agreement within the meaning of the second subparagraph of Article 3(8) or, more specifically, a collective agreement 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned'. The agreement in fact relates only to public contracts, and has not been declared universally applicable even though that possibility exists in Germany. 'Therefore, such a rate of pay cannot be considered to constitute a minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which Member States are entitled to impose, pursuant to that Directive, on undertakings established in other Member States, in the framework of the transnational provision of services'.

That reasoning is supported by an analysis of the Directive in the light of Article 49 EC which it is intended to implement. The Court took the view that the restriction on freedom to provide services resulting from the obligation to pay employees the remuneration laid down in the applicable collective agreement is not justified, in the case under analysis, by the objective of worker protection. It has not be established that the protection afforded by such a rate of pay which is, moreover, higher than the minimum rate of pay applicable under the German legislation on the posting of workers, is necessary to a worker employed in the construction sector only when that person is employed under a public works contract and not where they work under a private contract.

2. The *Commission v Luxembourg* case[3]

In April 2004, the European Commission reproached Luxembourg for failing correctly to transpose the Directive on the posting of workers in four respects.

2.1. Too extensive interpretation of the 'public policy' provision

According to Art. 3(10) of Directive 96/71, 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 Luxembourg legislation, a certain number of terms and conditions of employment are to be considered public policy provisions, including in particular:

1) an obligation to post only personnel linked to the undertaking under a written contract of employment or other document deemed to be analogous in accordance with Directive 91/533 (Council of the European Communities, 1991);

2) automatic adjustment of remuneration in line with changes in the cost of living, in relation to which the Commission submitted that the Luxembourg legislation conflicts with Directive 96/71 which provides for regulation of rates of pay by the host Member State only in relation to minimum rates of pay;

3) compliance with the rules on part-time and fixed-term working. The Commission asserted that it is not for the host Member State to impose its rules on part-time and fixed-term working on undertakings which post workers to its territory;

4) a duty to comply with collective labour agreements, the Commission arguing that they cannot be mandatory provisions forming part of national public policy.

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3. Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 19 June 2008, not yet published in the Court Reports.

An employer established outside Luxembourg and posting workers to that country must comply with these prescriptions in addition to the terms and conditions already listed in Article 3(1) of the Directive. The Commission argued that such a construction of public policy provisions goes beyond what is admitted in the Posted Workers Directive. Luxembourg maintained that those rules do fall within public policy since they seek to protect workers.

2.2. Minimum rest periods

According to the Directive, the host Member State's rules on minimum rest must be guaranteed to the posted worker. The Commission reproached Luxembourg for having incompletely transposed that provision, since only minimum weekly rest is provided for in national legislation.

2.3. Information to be provided to labour inspectorates: uncertainties for businesses

The obligation on all undertakings, prior to commencement of the work, to make available to the Labour and Mines Inspectorate on demand and within as short a period as possible the basic information necessary for monitoring purposes amounts, in the view of the Commission, where there is a posting, to a prior notification procedure incompatible with Article 49 EC. However, even were that not the case, the wording of the contested provision should be amended so as to rule out any legal ambiguity. Luxembourg 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.

2.4. Requirement to appoint an *ad hoc* agent with residence in Luxembourg

According to the Luxembourg legislation, an agent appointed by the service provider and residing in Luxembourg must retain the documents necessary for labour inspections. The Commission regarded that obligation as a restriction on the freedom to provide services, since the arrangements

for cooperation between public authorities put in place by Article 4 of Directive 96/71 are sufficient. Luxembourg claimed, on the one hand, that the cooperation system is not capable of ensuring adequate controls and, on the other, that the requirement is not excessive since no specific legal form is required for the agent in question. Furthermore, national undertakings are subject to the same requirements.

2.5. The Court of Justice judgment

The definition of public policy

The ECJ objected to the manner in which Luxembourg invoked the concept of public policy and stated at the outset that Directive 123/2006 on services in the internal market (Council of the European Union, 2006), on which Luxembourg relied in support of its interpretation, is irrelevant to assessing the scope of Directive 96/71, since the latter prevails over the former where it applies. Referring to its settled case law, the Court pointed out that 'the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'. The Court also mentioned Declaration No.10, added to the minutes of the Council on adoption of Directive 96/71 in order to define public policy. Although the Declaration was not published in the Official Journal, the Court would give it weight for the purposes of interpretation[4]. The Declaration spells out that 'the expression 'public policy provisions' should be construed 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. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions'. Public policy can only be relied upon therefore where there is a genuine and sufficiently serious threat to a fundamental interest of society. Where a Member State seeks to apply a measure which constitutes a derogation from the principle of freedom to provide services, that measure must be accompanied by an analysis of the

4. Recital 3 of the judgment.

expediency and proportionality of the restrictive measure being adopted by the State. The Court would therefore examine on a case-by-case basis whether the provisions applied by Luxembourg did in fact satisfy those requirements.

In relation to the obligation to post only workers linked by a written contract to the undertaking in the country of establishment, the Court found that if the written record of the employment relationship in accordance with Directive 91/533 is drawn up and monitored in the posting State in exercise of its monitoring powers under that Directive, there can be no question of the host State having competence under the Directive if it has been ensured in the posting State, as required by the Directive concerned, that the posted worker has previously been given written information about their employment relationship and additional information about the terms and conditions of posting. To add compliance with that Directive to the list of public order provisions is therefore contrary to Directive 96/71.

As regards the requirement for automatic adjustment of remuneration in line with changes in the cost of living, the Court held that 'the Community legislature intended to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay'. Here it criticised Luxembourg which, 'in order to enable the Court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, [...] should have submitted evidence to establish whether and to what extent the application to workers posted to Luxembourg of the rule concerning automatic adjustment of rates of pay to the cost of living is capable of contributing to the achievement of that objective'. Luxembourg therefore 'cannot rely on the public policy exception in order to apply to undertakings posting staff on its territory the requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living'. The Court therefore did not follow the Opinion of the Advocate General who had held that, at variance with the three other requirements in dispute, indexation was indeed a public policy obligation in the interests of protecting good labour relations[5].

5. Opinion of Advocate General Trstenjak in Case C-319/06, *Commission of the European Communities* v *Grand Duchy of Luxembourg*, 13 September 2007.

In relation to the requirement concerning the regulation of part-time and fixed-term working, the Court took the view that the fact that Directive 96/71 did not include regulation of those two kinds of working in the central core of generally applicable provisions supports the thesis that Directives 97/81 (Council of the European Union, 1997) and 1999/70 (Council of the European Union, 1999), which address those forms of working, already, in Community law, safeguard the rights of those workers, that section of Community law not being a matter of Community public policy precisely because it is not included in the main core of the 'posting' Directive. The Community rules on non-typical workers which are therefore transposed by all Member States, therefore apply to service providers from all Member States and accordingly, the Court contended, safeguard workers' interests. Luxembourg cannot therefore rely on overriding general interest grounds in order to classify national rules as public policy provisions.

As regards the requirement relating to imperative provisions of national law concerning collective labour agreements, the Court held that 'there is no reason why provisions concerning collective agreements, namely provisions which encompass their drawing up and implementation, should *per se* and without more clarification fall under the definition of public policy', and that the powers of Member States relate exclusively to the terms and conditions of employment laid down in collective agreements declared universally applicable.

Rest periods

The transposition of the posting Directive had confined the duty relating to minimum rest periods applicable also to posted workers to weekly rest periods. In the meantime, the Luxembourg Law of 19 May 2006[6] rectified the situation by including daily rest periods and breaks in the list of public order provisions. The finding against Luxembourg on that point is a formality although the rectification took place after expiry of the period of two months following the reasoned opinion.

6. Law of 19 May 2006 transposing Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Official Journal of the Grand Duchy of Luxembourg, 31 May 2006, pp.1806-1810.

Prior information to the Labour and Mines Inspectorate

According to the Court, the contested provision is not sufficiently clear to guarantee due legal certainty for foreign service providers. The ECJ found that those ambiguities as to the actual meaning of Article 7 'are likely to dissuade undertakings wishing to post workers to Luxembourg from exercising their freedom to provide services. On the one hand, the extent of the rights and obligations of those undertakings is not clearly apparent from that provision. On the other hand, undertakings which have failed to comply with the obligations laid down in that provision incur not inconsiderable penalties' and in its view infringe Article 49 EC. That obligation represents an additional burden on foreign service providers liable to render the posting of workers less attractive. The Court noted that where an employer does not make the requested information available, the Labour Inspectorate may order an immediate cessation of the work until all the documents are available, and that the provision of services is therefore in its view in fact subject to prior administrative authorisation.

The requirement to appoint an *ad hoc* agent with residence in Luxembourg and to retain documents

The Court held that the effective protection of workers may require that certain documents be kept available at the place where the service is provided or, at least, at an accessible and clearly identified place in the host Member State for the authorities of that State responsible for carrying out inspections. However, the Court also held that 'a requirement that a natural person domiciled in the territory of a host Member State should retain documents cannot be justified'. The Court further found that 'the organised system for cooperation and exchanges of information between Member States renders superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there'. Accordingly, Luxembourg cannot require 'undertakings which post workers to do what is necessary to retain such documents on Luxembourg territory when the provision of services comes to an end'. 'An obligation to retain such documents prior to the commencement of work would constitute an obstacle to freedom to provide services which the Grand Duchy of Luxembourg would have to justify by arguments other than mere doubts as to the effectiveness of the organised system of cooperation or exchanges of information between the Member States provided for in Article 4 of Directive 96/71'.

3. Commentary

Both judgments have prompted intense debate and heated reactions in trade union circles on account of their profound implications.

The *Rüffert* judgment plainly concerns the balance to be struck between economic freedoms and social rights, yet the Court went even further than it did in the *Laval* and *Viking* rulings. It did not refer to the Charter of Fundamental Rights which, nonetheless, in Article 31, upholds the right of workers to decent working conditions. Indeed, it interpreted Directive 96/71 restrictively or at least liberally when it found that the Directive sought 'in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty' (paragraph 36 of the judgment). In doing so, the Court overlooked the fact that the Directive declares clearly in its fifth recital that 'any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers'. The Directive is construed here as a measure which establishes 'the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe' (paragraph 33 of the judgment). In other words, the Directive sets maximum and not minimum social standards (Davies, 2008). The Court also refrained from any mention of Directives 93/37 and 2004/18 on the coordination of procedures for the award of public contracts, which uphold the right of the contracting authority to include social terms when awarding public contracts[7] or of the 'Services' Directive which, in Article 16(3), affords the host Member State the possibility of applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements (European Parliament and Council of the European Union, 2006).

The implications of the *Rüffert* judgment are numerous, as Silvia Borelli points out (Borelli, 2008). Article 49 EC supposedly allows the social protection guaranteed in the host State to be circumvented,

7. Article 23 of Directive 93/37/EEC (Council of the European Union, 1993); Article 26 of Directive 2004/18/EC (European Parliament and Council of the European Union, 2004).

thereby permitting all employers to reduce labour costs by subcontracting abroad. Whilst the phenomenon of companies relocating to poor countries continues, we are seeing an inflow of workers into rich countries where social standards are being progressively revised downwards by dint of an excessively liberal interpretation of Community law. The ruling also casts doubt on the nature of collective agreements and the entire industrial relations system. Where minimum rates of pay are not set by legislation they are generally the subject-matter of collective agreements, even if those agreements are not declared universally applicable. One of the mechanisms which indirectly enable such agreements to be effective is the inclusion of social clauses in public contracts. To classify that type of provision as a hindrance to the freedom to provide services would undermine collective bargaining and deter employers' organisations from participating in it, since employers would no longer be bound to comply with the collective agreements concluded by those organisations.

We would also draw attention to the fact that the judgment rests on a failure to understand the German system of collective bargaining. Collective agreements set minimum standards generally applicable to the employment relationships of the workers they cover. This means that such agreements are not only directly applicable, but they are also binding. Exceptions established by contractual agreement are only allowed where they are more favourable to the workers, never when they are to their detriment. Be that as it may, the judgment will enable the introduction of a statutory minimum wage to be put on the agenda in Germany and other Member States (Blanke, 2008). Lastly, *Rüffert* reveals the importance of social clauses in public contracts, allowing public authorities to guarantee a minimum level of social protection when they intervene to regulate an economic activity. Since the level of European harmonisation is insufficient to ensure adequate rules to preserve workers' rights, it seems crucial to preserve national social standards.

The reactions of both social partners came swiftly once the Court's judgment was announced. According to the European Trade Union Confederation (ETUC), the ruling confirms the ECJ's narrow interpretation of the Posting Directive in the *Laval* case and ignores the Public Procurement Directive of 2004 which explicitly allows for social clauses. It recognises neither the rights of Member States and public

authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers, nor the right of trade unions to demand equal wages and working conditions and the observance of collective standards applying at the place of work for migrant workers, regardless of nationality, beyond the minimum standards recognised by the Posting Directive. The judgment is a clear invitation to social dumping, threatening workers' rights and working conditions and the capacity of local companies to compete on a level playing field with foreign (sub)contractors. This is liable to feed into hostility towards open borders, which are a much stronger obstacle to the development of the single market and free movement (ETUC, 2008b).

Concern has also been felt on the employers' side. The CEEP (European Centre of Enterprises with Public Participation) is particularly affected by these rulings since, on the one hand, authorities and public enterprises are increasingly losing their freedom to include social considerations in public contracts, and, on the other, the autonomy of the social partners in collective bargaining is increasingly constrained. Rainer Plassmann, CEEP Secretary General, has expressed fear that freedom to provide services, representing economic growth and increasing public wellbeing, would become a problem for public authorities and enterprises as contracting bodies and as social partners. Mr Plassmann stated that in many service sectors 'it is of vital importance to work with a motivated, well trained and reliable work force. Decent pay resulting from what the social partners have negotiated independently in each Member State is one of the key factors to get high quality services'[8].

In his view the *Luxembourg* judgment has shaken both trade union and political circles in Luxembourg. The Luxembourg Minister of Labour and Employment, François Biltgen, in fact made a statement[9] on the day following the judgment, seeking to downplay its effects. He pointed out that two of the complaints tabled by the Commission related to the scope of the mandatory social provisions applicable to all workers,

8. http://www.euractiv.com/en/socialeurope/eu-court-ruling-slammed-invitation-social-dumping/article-171350.

9. Statement of the Minister of Labour and Employment, François Biltgen, on Case C-319/06, *Commission* v *Grant Duchy of Luxembourg*, 19 June 2008 (http://www.mte.public.lu/actualites/communiques/2008/06/20080619_arret_cje/index.html).

including therefore posted workers, whilst the other two related to the mechanisms for monitoring the application of those provisions. According to the Minister, the ECJ called into question neither employment law, nor above all the system of generally binding collective agreements concluded in the Grand Duchy. The judgment did not therefore undermine social legislation, but in fact confirmed its scope. The Court's reproaches did not in truth concern the extent of the Luxembourg social legislation applicable to posted workers, but rather the arrangements for monitoring the application of employment law in relation to posted workers, which the Court found were disproportionate. The Minister stressed that Luxembourg would implement the judgment by means of responses and measures more proportionate than those currently in force and which the ECJ had found to be non-compliant, measures to which the government had already given consideration whilst awaiting the judgment and which it intended to discuss with the social partners. The current monitoring measures were highly effective in the context of 'sting' actions and had enabled numerous cases of social dumping and unfair competition to be curbed. It was therefore necessary to replace them with a new system as quickly as possible. The Minister of Labour and Employment nevertheless sought to move the question of evolving case law on social public policy onto a European level, since recent precedents have aroused fears amongst the population as to the effectiveness of Social Europe. Already the Minister had, at the meeting of European Social Affairs Ministers in Luxembourg on 9 June, asked the Commission to analyse case law developments carefully in terms of the original intention of the European legislature.

The Luxembourg trade unions, for their part, have reacted more virulently. The *Confédération syndicale indépendante du Luxembourg* (OGB-L) and the *Fédération des syndicats chrétiens luxembourgeois* (LCGB) expressed their disagreement with the European verdict at a joint press conference held by their shared European secretariat on 20 June 2008[10]. According to the OGB-L president, Jean-Claude Reding, the ECJ ruling is a severe blow for Social Europe and follows directly on from the *Laval*, *Viking* and *Rüffert* judgments, representing a retreat for the social dimension in Europe. The Luxembourg unions had initially looked kindly upon Directive 96/71, which established minimum

10. http://www.europaforum.public.lu/fr/actualites/2008/06/detachement-syndicats/index.html.

standards for posted workers throughout the EU, whilst leaving Member States the option to set higher standards, a proviso of which Luxembourg had made use. The ruling turns that minimum protection introduced by the Directive into an upper ceiling of protection. What is more, the limitation imposed by the Court consisting of the automatic indexation of only statutory minimum rates of pay was liable to create discrimination against Luxembourg undertakings, which could become victims of social dumping. The judgment is seen as the European Commission meddling in national employment law which is in fact a matter for national competence. The LCGB strongly urged the Luxembourg unions to become involved at European level, even globally vis-à-vis the International Labour Organisation, described as the last bastion of workers' rights under international treaties. The Federation lamented that by means of its ruling, the ECJ was engaging politics and no longer merely delivering judgments. The two union organisations advocated joint government and union action and suggested that the Luxembourg Government should take measures to prevent further similar decisions in the future. In their view, the Commission's decision to mount a challenge against Luxembourg, a country with high social standards, before the ECJ was a political decision which will, by setting a precedent, open the door to numerous actions against higher social standards in all Member States.

At European level, the ETUC criticised the decision in that it reflected attempts by the Court of Justice and the Commission to reduce the ability of Member States and the social partners to ensure the normal functioning of their labour markets where foreign service providers post workers to their countries. John Monks described it as a problematic judgment, asserting the primacy of economic freedoms over fundamental rights and respect for national labour law and collective agreements. In his view, the ruling turns the Posting Directive – designed as an instrument intended to protect workers, companies and labour markets against unfair competition on wages and working conditions – into an aggressive internal market tool. He urged rectification of that tool by the European legislature as soon as possible, notably through a revision of the Posting Directive to clarify and safeguard its original meaning (ETUC, 2008c). The ETUC also called on the European institutions to adopt a '"Social Progress" Protocol' at the time of the next revision of the Treaty, confirming that the foremost objective of the EU is indeed the improvement of living and working conditions for its citizens and

workers, not a levelling down. Such a Protocol would allow for correction of the harmful effects of the judgments in question and restoration of a balance between economic freedoms and fundamental rights (ETUC, 2008d).

By way of conclusion, it should be noted that these various judgments have also aroused concern in the European Parliament. On 22 October 2008, it adopted by a large majority a report written by Jan Andersson (Party of European Socialists) on the challenges to collective agreements in the European Union (European Parliament, 2008a). In approving the report, Parliament expressed its fears about the recent Court of Justice decisions. It pointed out that economic freedoms, such as the freedom to provide services, were not superior to fundamental rights, including the right of trade unions to take collective action. Parliament stressed the right of the social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions for employees, and called on the Commission to draw up the necessary legislative proposals to help prevent a conflicting interpretation in the future. A partial review of the Posted Workers Directive could be envisaged, after thorough analysis of its current impact in Member States. Parliament also called for a re-assertion in primary law of the balance between fundamental rights and economic freedoms, in order to help avoid a race to lower social standards (European Parliament, 2008b)[11].

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