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Conflicting interpretations of the Posting of Workers Directive.

1. A short assessment of the ECJ cases.
Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, also called the Posting of Workers Directive (PWD), was an integral part of the EC Action programme linked to the Community Charter of Fundamental Rights of Workers and was meant to establish a legal framework for labour conditions of workers temporarily posted to another Member State. Its content is about a guarantee of minimum protection, fair competition and respect for the regulatory framework in the host country. The Directive has in recent times been subject of a series of ECJ cases. The outcome of this series of court cases has demonstrated that the ECJ and the European Commission work towards a narrow and restrictive interpretation of this Directive. The most recent case is an infringement procedure of the European Commission versus the Grand Duchy of Luxembourg. The judgement concerned aspects of the implementation of the PWD in Luxembourg.
Shortly before the summer, in a meeting of the Employment and Social Affairs committee of June 25th of the EP, the European Commission has declared that they fully back up the restrictive interpretation of the Court. This is alarming because the ECJ interpretation makes it almost impossible to apply important (other) parts of national and European labour law and statutory provisions. Let me start by an overview of the problematic points in the judgements against the background of the principles used during the drafting of the Directive in the early 1990s.

The general interpretation of the character of the PWD
According to the ECJ the list of prescriptions, regarding labour and working conditions, is exhaustive. Additional mandatory rules are limited to rules, "which, by their nature and objective, meet the imperative requirements of the public interest" (Observation 32 - Luxemburg case).
At the start the PWD had a relatively open character. The basic thought behind the PWD was to formulate a 'hard core' of minimum prescriptions combined with conditions of employment on matters other than those referred to, to be applied in a non-discriminatory manner, and based on mandatory rules (of labour law or general applicable collective agreements).

The conditions of labour most favourable for the worker are no longer the starting point.
Combined with the open character of the PWD the general approach was to compare the working conditions in the home and the host countries and to apply the conditions that were more favourable for the individual worker. Right after the conclusion of the PWD social partners in construction in the Member States started bilateral talks to practically implement that principle. The deliberations, in those days stimulated by the Commission’s services, lead to several bilateral agreements in the sector that were signed between social partners, unions and paritarian institutions of countries with frequent cross-border work. The content was often how to deal with the most favourable-principle, based on a recommendation formulated in the European Social Dialogue in construction. The court has restricted this principle in the Laval case to only more favourable conditions in the home country.
The legal motivation for the restrictive application of mandatory rules or public policy provisions

Luxemburg has implemented the PWD with additional obligations, mainly based on (national and European) labour law. The ECJ states that as these rules are not mentioned in the exhaustive list of the PWD these requirements have to be judged within the limits of the legislator's definition of mandatory rules. The ECJ applies for this definition Declaration nr.10 (of the Council). This declaration, recorded in the minutes of the Council, has never been discussed with the EP and was not published until 2003. In the interpretation of the ECJ of Declaration no10, backed up by the European Commission, Member States do not have the unilateral right to decide on the mandatory rules applicable within their territory, even if these mandatory rules would guarantee better provisions for the workers concerned. Declaration no10 as interpreted by the ECJ restricts the mandatory rules in such a way that the guiding principles of the PWD are no longer effective.

The equal footing for all potential providers has disappeared

The ECJ judgement creates a situation whereby foreign services providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore do have to be respected by domestic services providers. Luxemburg has implemented the PWD and added mandatory provisions applicable to all workers, irrespective of their nationality, performing an activity in the Luxemburg territory, including those temporarily posted to Luxemburg. To give one example: Luxemburg requests a written (labour) contract for all employees, independent of whether workers are national or foreign citizens. The advocate-general in the Luxemburg case states 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 case Arblade and others 1999). The ECJ thus concludes that this is not in compliance with the Treaty.
The fight against undeclared labour and/or illegal practices becomes completely impossible
The European Commission’s strategy with regard to the implementation of the PWD is dominated by infringement procedures aiming at the removal of every obligatory notification and registration of the service provider and the workers involved. As far as control is permitted this has to be guaranteed by the country of origin. As a result control on contract compliance and on the respect for workers rights, a basic element in the fight against bogus agencies and other undeclared practices that the EU wants to promote, is frustrated and can no longer be guaranteed by the Member States.

The respect for and compliance with the results of (generally binding) collective bargaining are no longer guaranteed
Given the restrictive interpretation of the mandatory rules the next step will be that the outcome of collective bargaining, made generally binding within the territory where the work is done, is no longer applicable for cross-border service providers and their workers. The European Commission has formulated in the plea in law to the advocate-general “that collective agreements, notwithstanding the material content, do not belong to the mandatory provisions falling under national public policy” (consideration 25 advocate-general Luxemburg case).

The enforcement of ratified ILO-conventions could even come in danger
Given the argumentation of the ECJ (only those minimum prescriptions listed in the PWD and mandatory rules as restricted by the famous declaration 10), backed up by the European Commission, several ILO-conventions even when these are ratified and implemented by Member States into national law can no longer be guaranteed. It seems logical that the next step will be that according to EU law and ECJ case law these conventions, being part of secondary legislation, cannot be seen as “crucial for the protection of the political, social and economic order” and therefore hinder the free provision of services.

2. Some fundamental questions
This leads to the second part of my contribution. I’m not a lawyer but an industrial relations activist and MEP. But, if we look at the development of the social policy in general and the
social legislation and jurisprudence of the last twenty years, an important shift in reasoning can be observed.

a. The basic principle of the famous European model was the respect for the very sophisticated regulatory framework for social policy that existed in the EU Member States. This regulatory framework was characterised by a balance between labour laws and (the outcome of) collective bargaining and as this balance was different in every country European social policy was also about how to live and deal with that diversity. Collective bargaining as such was seen as a constitutional right (and in some countries, indeed, it even had the same status), and not marginalised as so-called secondary legislation.

b. This principle was applied as the PWD was concluded (at least that was the guiding thought for the EP as co-legislator). There was a hard core of minimum prescriptions formulated and next to that Member States could decide on general mandatory rules (or public policy provisions) applicable within their territory as long as these rules did not lead to discrimination or protection of their market.

c. The European Commission and the ECJ have abandoned this principle by using an interpretation of Declaration no 10, a declaration formulated by the Council and the Commission at the moment that the Directive was concluded, but not published until 2003. This declaration says “The expression 'public policy provisions' should be construed as covering those mandatory rules from where there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest”. So far so good. But, the PWD was a Directive of the EP and the Council! And there has never been a democratic public debate about the consequences of this declaration. Therefore the first thing that I would like to question here is whether the EC and the ECJ can rely on this till recently unpublished declaration in support of an interpretation of the PWD given the fact that the co-legislator has never been asked, involved or consulted.

d. This is not the end of the affair. According to the European Commission it is not up to the Member States unilaterally to define the notion of public policy or to impose all the mandatory provisions of their employment law on suppliers of services established in another Member State. This leads to the question in whose hands the competence lies if not with the Member State. Is it the Court, is it the Commission, is it the Council and if so can that be based on an unpublished declaration that has not been
concluded with the co-legislator? The fundamental problem is of course that there has not been a democratic decision-making process or debate about what belongs to the public policy provisions. And there is an urgent need to start that debate if we don’t want to continue with an endless series of infringements procedures.
e. Let’s go back to the PWD for a moment. The Directive provides the possibility to apply, in a non-discriminatory manner, other conditions of employment that can be seen as public policy provisions. In the Arblade-case (mentioned before) provisions classified as public-order legislation are those provisions that are crucial for the protection of the political, social and economic order. This is an interesting statement, again used in the last Luxemburg-case, but then to restrict the possible derogation. And here again the ECJ states that the Member States cannot determine this unilaterally. This leads immediately to the question who can decide in this regard which provisions are crucial for the protection of the political, economic and social order in a Member State. I can imagine that there might be a difference in opinion between legislators, whether national or European, but one thing is clear: it is not up to the European Court of Justice. And the argument that a protest against declaration no 10 is in contradiction with the principle “venire contra factum proprium nemini licet” cannot be applied to a co-legislator that was not heard.
f. I want to repeat it here, I’m neither a lawyer nor a judge, but as co-legislator I have the feeling that there are important loopholes in this kind of reasoning. And as an industrial relations expert I must say that this is a reasoning that leads us away from the starting point of our European social model. As a result of a clash and conflict of law the balanced policy based on how to live with diversity has vanished. European law is no longer based on principles and rules that make different national social legislation within the EU compatible with one another. Member States are obliged to respect the primacy of the free provision of services principle. Their social legislation, except for the hard core of the PWD, can no longer be implemented at national level for all workers within their territory.
g. A last and provocative remark. If we look at the evolution of the ECJ cases the striking observation has to be mentioned that the application of and respect for (the outcome of) collective bargaining is slowly but steadily being dismantled. I know from
the beginning of the preparation of the Posting Directive that the conventional part of the existing regulatory frame in our countries never was a popular item for lawyers. Notwithstanding this, the fine-tuning of the Directive in those days included the respect for the legislative and the conventional parts of the framework, given the variety of the social and economic traditions in the Member States. The argument of the European Commission in the plea of the Luxemburg case that provisions concerning collective agreements, independent of their content, cannot be seen as provisions that fall under the definition of public policy demonstrates that the classical view that labour regulation is only identical to state based law (and in this case even supranational) is back on the scene. I have to admit that this phrase was modified in the judgement by adding “per se and without more”. But the crusade against the conventional part of our European social model demonstrates that there is weak commitment to this part of our industrial relations system. However, it can be seen as a constitutional right and as a building block of that European social model. The results of social dialogue and collective bargaining are crucial for the protection of the political, economic and social order in a Member State. Or should we have a public debate about that notion?

Perhaps I’m wrong, too sceptical and full of distrust. I’m more than willing to accept clear and convincing arguments in that direction.

But please, do it in an Annex to the Directive, based on the legal procedures that have lead to the Directive and with the EP as co-legislator.