

The ECJ's Interpretation of the Posting Directive in the Laval and Rüffert Judgements*

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I. Introduction

The relevance of the social dimension in European Union law and in the jurisprudence of the European Court of Justice is a topical and important issue, which is currently being keenly discussed, especially in the aftermath of some judgments delivered by the ECJ. This is not surprising. What matters in this respect is to find a fair balance between the diverse competing interests. It is with great pleasure that I have accepted the invitation to today's symposium – not only because of the relevance of the questions raised – but also because I am of the opinion that the representatives of the European Institutions should face a dialogue with science and the public.

However, the office I hold demands a certain reserve. Although I was not involved as an Advocate General in the Rüffert and Laval proceedings, which I am going to elaborate on, I may in future handle similar cases. Therefore, I will focus my deliberations on the basic ideas of the rulings of the European Court of Justice and refrain from commenting too much on the judgments.

The fundamental idea of European integration is to promote economic progress by diminishing national hurdles for the movement of persons, goods, services and capital, thus creating a Common Market. Ultimately, this progress is for the benefit of *all* citizens in *all* Member States.

* The author would like to thank her Référendaire Ms Ioanna Dervisopoulos for her support in preparing the manuscript.

However, smooth operation of this Common Market is a difficult undertaking. The strengthening of competition within the Community, despite being profitable for the national economies of the Union as a whole, may entail – at least temporary – disadvantages for individual players. The increased competitive pressure involves a risk for workers to have to accept changed terms and conditions of work or even to lose their jobs. It is therefore important to make specific efforts to protect their interests.

Especially when viewed against the background of the considerable gap in prosperity that currently still exists within the Union, the process of further developing European law involves particular challenges such as striking a fair balance between the realisation of fundamental freedoms on the one hand and the protection and further development of social standards on the other hand. According to Article 2 of the EU Treaty, the promotion of economic *and* social progress is one of the Union's basic objectives. Furthermore, it is an essential concern of the Lisbon Treaty to place more emphasis on the social dimension of the European Union.

II. Protection of workers in the rulings of the European Court of Justice

Before I embark on the subject of my lecture today, I would like to call to mind the diverse contributions that the European Court of Justice has made in the past decades to the protection of workers.

The European Court of Justice realised early on that social rights need strengthening on the way to a common market. In underlining social rights as an indispensable element of the European Union's legal order, it has strengthened a counterbalance to the market forces and thus played a vital part in shaping the social dimension of the European Union.

Worth mentioning in this respect are firstly the comprehensive rulings on the protection of workers in the different areas. I would like to quote as examples the Court's decisions on working hours¹, on the granting of holidays², on fixed-term employment³

1 See, inter alia, Case C-303/98 Simap [2008] ECR I-7963; Case C-151/02 Jaeger [2003] ECR I-8389; Joined cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835; Case C-484/04 Commission v United Kingdom [2006] ECR I-7471; and my Opinion of 9 March 2006 in the latter case.

2 See, inter alia, Case C-173/99 BECTU [2008] ECR I-4881; Case C-124/05 Federatie Nederlandse Vakbeweging [2006] ECR I-3423; and my Opinion of 12 March 2006 in the latter case.

3 See, inter alia, Case C-212/04 Adeneler and Others [2006] ECR I-6057; Case C-268/06 Impact [2008], not yet published in the ECR; as well as my Opinions of 27 October 2005 and 9 January 2008 respectively in these cases.

and on part-time employment⁴. Or think of the rulings of the Court of Justice, by which it imposed equal treatment of male and female workers.⁵

Also the basic principles of the treatment of posted workers were originally developed in rulings of the European Court of Justice. According to these, Community law does *not* in principle preclude the Member States from applying their legal provisions or the collective agreements on minimum wages concluded between trade unions and employers to any person who is employed, even temporarily, within their territory.⁶ However, the application of such provisions must serve the protection of workers and be proportionate.⁷

This jurisprudence has been considered in the 12th recital of the Posting Directive⁸, which I would now like to turn to. As was reconfirmed through the lengthy legislative procedure connected with this directive, we are faced with difficult issues: the realisation of the free movement of services⁹ must be harmonised with the protection of workers¹⁰ and fair competition¹¹, and thus with the prevention of social dumping.

III. Interpretation of the Posting Directive by the European Court of Justice

In the Rüffert case, the referring court had asked the Court of Justice whether a clause guaranteeing that collective wage rates are respected, as provided for in the Public Procurement Act of Lower Saxony, constitutes an unjustified limitation of the free movement of services. The Laval case, apart from touching upon the issue of workers' strikes, treated the question of whether the Swedish system for determining wage rates and other terms and conditions of work is in accordance with the guidelines of the Posting Directive and with the free movement of services.

According to Article 3 of the Posting Directive, Member States shall ensure that undertakings guarantee workers posted to their territory specific terms and conditions of

4 See, inter alia, Case 171/88 Rinner-Kühn [1989] ECR 2743, and Case C-300/06 Voß [2008], not yet published in the ECR.

5 See, inter alia, Case 43/75 Defrenne [1976] ECR 455; Joined Cases C-231/06 to C-233/06 Jonkmann and Others [2007] ECR I-5149; and my opinion of 29 March 2007 in the latter case

6 See, in particular, Joined Cases 62/81 and 63/81 Seco and Desquenne & Giral [1982] ECR 223, paragraph 14, and Case C-164/99 Portugaia Construções [2002] ECR I-787, paragraph 21.

7 Cf. in this respect Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 36, and Case C-341/02 Commission v Germany [2005] ECR I-2733, paragraph 24.

8 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997, L 18, p. 1, hereafter: Posting Directive or Directive 96/71.

9 See first recital of Directive 96/71.

10 See first recital of Directive 96/71.

11 See first recital of Directive 96/71.

work, which, in the recipient Member State, are laid down by law or collective agreements which have been declared universally applicable. Several terms and conditions of work are then listed in the directive, e.g. maximum work periods or minimum wages. Article 3, paragraph 7 of the Posting Directive states that it is possible to apply terms and conditions of work and employment that are more favourable to workers.

As I underlined at the beginning, I was *not* involved as an Advocate General in the cases under discussion. My colleague Advocate General *Bot* delivered the opinion in the Ruffert case. Advocate General *Bot* had pleaded that the Posting Directive be interpreted in such a way that it does not prevent a Member State from providing *improved* protection of the posted workers at national level¹². Advocate General *Mengozzi* argued in a similar way in the *Laval* case.¹³ I also strongly sympathise with this interpretation of the Posting Directive.

Advocate General *Bot* sees the directive as a “hard core” of protection provisions that must be regarded as mere *minimum* guarantees to the benefit of posted workers. In his view, the directive transformed an *option* for regulation, as it was given to the Member States until then, into an *obligation* for regulation. As I have set forth, the Court of Justice had found even before the Posting Directive was adopted that Member States may on certain conditions apply its legal provisions to posted workers as well. In the Advocate General’s opinion, the Posting Directive now turned this *permission* into an *obligation* with regard to certain *minimum* provisions for the protection of workers.¹⁴ In the Advocate General’s view, it can be concluded from the directive’s Article 3, paragraph 7 that Member States may grant posted workers protection exceeding these requirements.

A clause guaranteeing that collective wage rates are respected therefore constitutes, according to Advocate General *Bot*, an admissible additional means of protection at national level as defined by Article 3, paragraph 7 of the Posting Directive.¹⁵ Any protection measure taken by Member States that reaches beyond the directive’s provisions must, however, be compatible with fundamental freedoms as well. It is, in *Bot*’s view, beyond doubt that such a regulation is a limitation of the free movement of services. However, he regards this limitation as justified because it guarantees the protection of workers and prevents social dumping.¹⁶ Ultimately, Advocate General *Bot* had therefore proposed to the Court of Justice to interpret the Posting Directive and the free movement of services to allow a clause guaranteeing that collective wage rates are respected, provided that this clause respect the prohibition of discrimination based on nationality as well as the principle of transparency.

12 Opinion of Advocate General *Bot* in Case C-346/06 Ruffert [2008], not yet published in the ECR.

13 Opinion of Advocate General *Mengozzi* in Case C- 341/05 Laval [2007], not yet published in the ECR, in particular at points 147 and 151.

14 Opinion of Advocate General *Bot* in Ruffert (cited in footnote 13, point 70).

15 Opinion of Advocate General *Bot* in Ruffert (cited in footnote 13, point 94).

16 Opinion of Advocate General *Bot* in Ruffert (cited in footnote 13, points 114 et seq.).

The Court of Justice did not follow the Advocate General's suggestion. In the Court of Justice's opinion, the directive provides for a limited set of rules for the protection of posted workers. In its view, the directive lists those modalities that allow national legislators to extend their provisions on terms and conditions of work to include posted workers. According to this interpretation, a minimum wage can be determined either by law or by declaring a collective agreement universally applicable.¹⁷

In the Court of Justice's opinion, Article 3, paragraph 7 of the Posting Directive does not authorise Member States to impose terms and conditions of work and employment that are not listed in paragraph 1. In its view, only such interpretation of the directive prevents the directive from being to no avail. The listing of certain areas and certain modalities by which terms and conditions of work could be extended to include posted workers would be meaningless if, by means of paragraph 7, more favourable terms and conditions of work and employment, such as collective wage rates exceeding the minimum wage rates, could be imposed unilaterally using clauses guaranteeing that collective wage rates are respected. A different interpretation would result in depriving the Posting Directive of its effectiveness.¹⁸ According to the Court of Justice, any protection reaching beyond the provisions of Article 3, paragraph 1 of the Posting Directive seems therefore to be admissible only in exceptional cases pursuant to Article 3, paragraph 10 if they are provisions relating to the area of public order.¹⁹

Therefore, in the Court of Justice's opinion, the Posting Directive does not entitle a Member State to decree a clause guaranteeing that collective wage rates are respected. The Court subsequently examined whether this interpretation of the directive was confirmed by its appreciation in the light of the free movement of services.²⁰ The Court re-examines the clause guaranteeing that collective wage rates are respected once again on the basis of the free movement of services. Like Advocate General Bot, it affirms a limitation of the free movement of services. However, unlike the Advocate General, the Court denies the justification of the limitation for compelling reasons of the general good. It bases its arguments in particular on its opinion that the clause guaranteeing that collective wage rates are respected only applies to public contract awarders and not to private principals at the same time.²¹ This line of reasoning is certainly not compulsive.

It can be concluded from the Court of Justice's deliberations in the *Laval* and *Rüffert* judgments that it regards the options for regulation listed in the Posting Directive as final and considers in principle inadmissible any measures reaching beyond them. It

17 In case the national legal system does not provide for a declaration of universal application, Member States, pursuant to Article 3, paragraph 8 of Directive 96/71, can choose the following means: universally applicable collective agreements or representative collective agreements.

18 Case C-341/05 *Laval* [2007], not yet published in the ECR, paragraph 80, and Case C-346/06 *Rüffert* [2008], not yet published in the ECR, paragraph 33.

19 See *Laval* (cited in footnote 19, paragraph 82) and Case C-319/06 *Commission v Luxembourg* [2008], not yet published in the ECR, paragraph 27.

20 *Rüffert* (cited in footnote 18, paragraph 36 et seq.).

21 *Rüffert* (cited in footnote 18, paragraph 40).

therefore seems to me that, in the view of the Court of Justice, the directive constitutes a final codified weighing up of the free movement of services on the one hand and the protection of workers on the other hand.

In its Commission/Luxembourg judgment of last week the Court of Justice seems to substantiate its view of the final nature of the Posting Directive.²² This case was, among other things, about a Luxembourg provision which extended the automatic adjustment of wages to the level of the cost of living to include posted workers. The Commission did not find fault with the minimum wage rates being adjusted to the cost of living. In its view, this is admissible pursuant to the Posting Directive. However, it considered the fact that the indexation concerned all wages, including those that were not minimum wages, to violate the directive. This was confirmed by the Court of Justice.²³ In its view, such indexation measure is not provided for in the Posting Directive, which gives an exhaustive list of those aspects with regard to which Member States can extend their national provisions to include posted workers. Furthermore, the Court states that Luxembourg has not provided sufficient proof of the fact that this provision is a rule pertaining to the area of public order as defined by the Posting Directive.²⁴ In its judgment the Court of Justice now examines the measure only on the basis of the directive and, unlike in the Ruffert case, not additionally on the basis of the free movement of services.

What room for manoeuvre for the protection of workers does the Court of Justice's interpretation consequently leave to the Member States? What is undoubtedly admissible according to rulings of the Court of Justice are regulations regarding those aspects of the terms and conditions of work that are explicitly listed in the directive. As regards the manner in which these terms and conditions of work may be extended to include posted workers, Member States have two options to choose from: statutory regulation or a collective agreement declared universally applicable.²⁵

Posting undertakings certainly benefit from the Court of Justice's interpretation insofar as it provides increased legal certainty and predictability of the wages to be paid for services rendered in another Member State. There is, however, the risk of wages in the recipient Member State to drop to a minimum standard.

22 Commission v Luxembourg (cited in footnote 20, paragraph 26).

23 Commission v Luxembourg (cited in footnote 20, paragraph 47).

24 Commission v Luxembourg (cited in footnote 20, paragraph 54).

25 In case the national legal system does not provide for a declaration of universal application, Member States, pursuant to Article 3, paragraph 8 of Directive 96/71, can choose the following means: universally applicable collective agreements or representative collective agreements.

IV. Outlook

The Court of Justice's judgments in the *Viking*, *Laval* and *Rüffert* cases are currently strongly criticised. Previous speakers have also voiced various concerns today. Furthermore, the submissions of Advocates General *Bot* and *Mengozzi* show that there is no unanimous opinion even within the Court of Justice.

In this respect, I would like to emphasise one particular aspect to which many critics, who, for example, consider the *Laval* judgment an indicator of the demise of the right to strike, do not pay sufficient attention in my view. One should be aware of the fact that the Court of Justice, in the relevant judgments, ruled only on the particular question referred for a preliminary ruling. The origin of a preliminary ruling procedure is always a concrete legal dispute with its various particularities. When reading the judgments carefully, one establishes that the Court of Justice puts particular emphasis on these particularities and bases its judgment on them. For example, in the *Laval* judgment it underlined the national context in which the collective measures were embedded. It was characteristic of this specific context that there were no provisions that would have been sufficiently detailed and accessible to allow for an undertaking to establish which obligation it has to respect with regard to the minimum wage.²⁶

The Court of Justice has not made a *general* statement on the relation between fundamental freedoms and fundamental rights. In particular, it has not found in its recent rulings in question that the right to strike or, worse, human dignity must in principle take second place to fundamental freedoms. Rather, fundamental freedoms and fundamental Community rights are at the same level and must be harmonised.

By placing particular emphasis on the specific characteristics of the cases, the Court of Justice, in my view, clearly shows its intention to diversify its rulings on the basis of the particularities of future proceedings referred for preliminary rulings.

Let me stress the following in conclusion: in spite of all the criticism concerning the discussed judgments it must not be overlooked that in them the Court of Justice makes in principle also positive statements from a social point of view: it recognises the right to strike as a fundamental right. And, remarkably, in the *Laval* judgment it takes up the concept of social dumping and regards the right to strike for the protection of workers against social dumping as an overriding reason of public interest.²⁷

I am now coming to my concluding remarks. In my opinion, there is a risk, especially in public discussion, of overrating the *Rüffert* and *Laval* decisions. Both decisions are not turning points at the end of a long line of decisions by the Court of Justice per-

26 *Laval* (cited in footnote 19, paragraph 110).

27 Paragraph 103 of *Laval* (cited in footnote 19) states verbatim: "... that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest". In this respect, see currently only Case C-244/04 *Commission v Germany* [2006] ECR I-885, paragraph 61.

taining to the area of fundamental freedoms and social rights. As this symposium will also certainly show, it must rather be established that these decisions are examples of the European Court of Justice's rulings, striving to strike the right balance in a fast-evolving Union and to take new aspects into account on a case-by-case basis.

If we know one thing for sure, it is that the Court of Justice will further develop and differentiate its rulings. The public discussion among experts and discussion forums as we are having one here today make an important contribution in this respect. It is a valuable prospect that this event today opens up the opportunity to get to know not only the German point of view but, thanks to numerous participants from other Member States, also that of others.

Übersetzung: Bundesministerium für Arbeit und Soziales