OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 13 September 2007 (1)

Case C-319/06

Commission of the European Communities
v
Grand Duchy of Luxembourg

(Failure of a Member State to fulfil obligations – Article 226 EC – Freedom to provide services – Articles 49 EC and 50 EC – Article 3(1) and (10) of 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 – Public policy provisions – Application of national provisions concerning terms and conditions of employment – Obligation to designate an ad hoc agent resident in Luxembourg)

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I – Introduction

1. The present case is a Treaty infringement action under Article 226 EC whereby the Commission of the European Communities seeks a declaration from the Court that, by reason of the requirements that it imposes on undertakings established in another Member State and which post workers to Luxembourg for the purpose of the provision of services, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3(1) and (10) of 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 (2) ('Directive 96/71' or 'the Directive') and Articles 49 EC and 50 EC.

II – Legal framework

A – *Community law*

2. The first paragraph of Article 49 EC provides that restrictions on freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

3. The first paragraph of Article 50 EC defines as 'services' services that are normally provided for remuneration, in so far as they are not governed by the provisions relating, in particular, to freedom of movement for capital and persons. Under the last paragraph of Article 50 EC, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

4. Under the heading 'Terms and conditions of employment', Article 3(1) and (10) of Directive 96/71 provides as follows:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision, and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

…

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

– terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

5. At the time of the Directive's adoption, a declaration was recorded (Declaration No 10) in which it was stated 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.' (3)

B – *National law*

6. Article 1 of the Luxembourg Law of 20 December 2002 on the transposition of Directive 96/71 and on the monitoring of the implementation of labour law ('Law of 20 December 2002') (4) provides:

'(1) All the laws, regulations and administrative provisions and those resulting from collective agreements which have been declared universally applicable or an arbitration decision with a scope similar to that of universally applicable collective agreements which concern the following matters:

1. the written contract of employment or the document established pursuant to [Council] Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32);

2. the minimum rates of pay and automatic adjustment to reflect changes in the cost of living;

3. working time and weekly rest periods;

4. paid leave;

5. annual closure periods;

6. public holidays;

7. the rules on temporary work and the loan of workers;

8. the rules on part-time and fixed-term work;

9. the protective measures applicable to the terms and conditions of employment of children and of young people and of pregnant women or women who have recently given birth;

10. non-discrimination;

11. collective labour agreements;

12. enforced inactivity in accordance with the legislation on bad weather or technical layoffs;

13. clandestine or illegal work, including the provisions on work permits for workers who are not nationals of a Member State of the European Economic Area;

14. the safety and health of workers in the workplace in general and, in particular, the accident prevention rules of the Association d'assurance contre les accidents (Accident Insurance Association) issued in accordance with Article 154 of the Social Security Code and the minimum requirements concerning safety and health laid down by Grand-Ducal Regulation, adopted following the mandatory opinion of the Conseil d'État and with the approval of the Conference of the Presidents of the Chamber of Deputies on the basis of Article 14 of the amended Law of 17 June 1994 on the safety and health of workers in the workplace,

shall constitute mandatory provisions falling under national public policy as regards, in particular, collective labour agreements or contracts in accordance with the Law of 27 March 1986 approving the Convention of Rome of 19 June 1980 on the law applicable to contractual obligations and are as such applicable to all workers performing an activity in the territory of the Grand Duchy of Luxembourg, including those temporarily posted to Luxembourg, regardless of the duration or purpose of the posting.

(2) The provisions of paragraph 1 of this article shall apply to all workers irrespective of their nationality in the service of any undertaking, regardless of its nationality or the location of its registered or head office.'

7. Article 2 of the same Law provides as follows:

'(1) The provisions of Article 1 of this law shall also apply to undertakings, with the exception of merchant shipping crew, which in the framework of the transnational provision of services post workers to the territory of the Grand Duchy of Luxembourg.

(2) "Posting", for the purposes of paragraph 1 above, shall mean, in particular, the following operations performed by the undertakings concerned, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting:

1. the posting of a worker to the territory of the Grand Duchy of Luxembourg, even for a short or predetermined period for and under the direction of undertakings such as those referred to in paragraph 1 of this article, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, established or operating in Luxembourg;

2. the posting of a worker to the territory of the Grand Duchy of Luxembourg, even for a short or a predetermined period, to an establishment belonging to the undertaking making the posting or to an undertaking belonging to the same group as the undertaking making the posting;

3. without prejudice to the application of the Law of 19 May 1994 regulating temporary work and the temporary loan of manpower, the posting of a worker by a temporary employment undertaking, or under a loan of manpower, even for a short or a predetermined period, to a user undertaking established or operating on the territory of the Grand Duchy of Luxembourg.

(3) A posted worker shall be taken to mean any employee habitually working abroad and who for a limited period performs his work in the territory of the Grand Duchy of Luxembourg.

(4) The meaning of the term "employment relationship" shall be determined in accordance with Luxembourg law.'

8. Article 7 of the Law of 20 December 2002 provides:

‘(1) For the purposes of the application of this law, an undertaking, even if its seat is outside the territory of the Grand Duchy of Luxembourg or it habitually operates outside Luxembourg territory, which has one or more workers exercising an activity in Luxembourg, including those temporarily posted to Luxembourg in accordance with Articles 1 and 2 of this law, must, prior to the commencement of the work, make available to the Inspection du travail et des mines (Labour and Mines Inspectorate) on demand and within as short a period as possible the basic information necessary for monitoring purposes, including, in particular:

– the surname, first name, place and date of birth, marital status, nationality and occupation of each worker;

– the specific designation of the workers;

– the capacity in which they are engaged by the undertaking and the occupation to which they are regularly assigned in it;

– the domicile and, where appropriate, the habitual residence of the workers;

– residence and work permits, if necessary;

– the place or places of work in Luxembourg and the duration of the work;

– a copy of form E 101 or, where appropriate, precise information concerning the social security institutions providing cover for the workers during their stay on Luxembourg territory;

– a copy of the contract of employment or document produced by reason of Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship.

(2) A Grand-Ducal Regulation may give further details in respect of the application of this article.’

9. Article 8 of the Law provides as follows:

‘Any undertaking established and having its registered office abroad or having no fixed establishment in Luxembourg within the meaning of the tax law, one or more of whose workers carry out work in whatsoever capacity in Luxembourg, shall be required to retain in Luxembourg with an ad hoc agent resident there the documents necessary for monitoring its compliance with the obligations arising in application of this law and, in particular, of Article 7 above.

Those documents shall be produced to the Labour and Mines Inspectorate on demand and within as short a period as possible. The Labour and Mines Inspectorate must be informed in advance, by registered letter, with proof of receipt, sent by the undertaking or the representative referred to in the previous paragraph, at the very latest prior to the employment activities envisaged, of the exact location of the documents deposited.’

III – Pre-litigation procedure

10. By letter of formal notice of 1 April 2004, the Commission drew the attention of the Luxembourg Government to certain inconsistencies in the transposition of Directive 96/71 by means of the Law of 20 December 2002. With regard to a possible infringement of Directive 96/71 and Articles 49 EC and 50 EC, the Commission raised the following complaints:

– the Law of 20 December 2002 obliges undertakings established in a different Member State and which post workers to Luxembourg for the purpose of the provision of services to comply with terms and conditions of employment going beyond those required by Article 3(1) and (10) of Directive 96/71;

– the Law of 20 December 2002 constitutes incomplete transposition of Directive 96/71 inasmuch as national law restricts the concept of ‘minimum rest periods’ to the weekly rest period and excludes other rest periods such as the daily rest period or rest breaks;

– Article 7 of the Law of 20 December 2002, which imposes an obligation on undertakings whose workers perform an activity in Luxembourg on a permanent or temporary basis to provide to the Inspection du travail et des mines ‘prior to the commencement of work’, ‘on demand’ and ‘within as short a period as possible’ the basic information necessary for monitoring purposes, lacks the necessary clarity to ensure legal certainty;

– Article 8 of the Law of 20 December 2002 restricts freedom to provide services by requiring those undertakings to designate an ad hoc agent resident in Luxembourg whose task it is to keep the documents necessary for monitoring the obligations incumbent on the undertaking.

11. In its letter of reply of 30 August 2004 the Luxembourg Government argued that the legislative provisions contested by the Commission concerning the applicability of terms and conditions of employment constituted public policy provisions within the meaning of Article 3(10) of Directive 96/71.

12. In respect of the second complaint the Luxembourg Government acknowledged the incomplete transposition of Directive 96/71.

13. As regards the Commission’s third and fourth complaints, the Luxembourg Government considered the provisions in Article 7 of the Law of 20 December 2002 compatible with Community law, because the obligation to designate an ad hoc agent resident in Luxembourg whose task it is to store the documents necessary for monitoring the obligations incumbent on those undertakings neither requires prior notification nor constitutes a discriminatory obligation. Rather, they constitute measures without which the competent national authorities would be unable to exercise their monitoring role.

14. The Commission was not satisfied by that reply and accordingly decided to send the Luxembourg Government a reasoned opinion of 18 October 2005 in which it claimed that:

– by declaring points (1), (2), (8) and (11) of Article 1(1) of the Law of 20 December 2002 to be mandatory provisions falling under national public policy;

– by failing fully to transpose Article 3(1)(a) of Directive 96/71 in point (3) of Article 1(1) of that Law;

– by setting out, in Article 7(1) of that Law, conditions which are not sufficiently clear to ensure legal certainty;

– by requiring, in Article 8 of that Law, that documents necessary for monitoring purposes be kept in Luxembourg by an ad hoc agent resident there,

the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 3(1) and (10) of Directive 96/71 and Articles 49 EC and 50 EC.

15. The Commission called upon the Grand Duchy of Luxembourg to adopt the measures necessary to comply with the reasoned opinion within two months of its notification.

16. By letter of 22 December 2005, the Luxembourg Government requested an extension to that time-limit in order to set out its position. However, no reply to the reasoned opinion was received. The Commission accordingly commenced proceedings.

IV – Proceedings before the Court and forms of order sought

17. In its application which was lodged with the Court Registry on 20 July 2006 the Commission asks the Court to hold that:

1. by declaring the provisions of points (1), (2), (8) and (11) of Article 1(1) of the Law of 20 December 2002 to be mandatory provisions falling under national public policy;

2. by failing fully to transpose Article 3(1)(a) of Directive 96/71 in point (3) of Article 1(1) of that Law;

3. by setting out, in Article 7(1) of that Law, conditions which are not sufficiently clear to ensure legal certainty;

4. by requiring, in Article 8 of that Law, that documents necessary for monitoring purposes be retained in Luxembourg by an ad hoc agent resident there,

the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3(1) and (10) of Directive 96/71 and Articles 49 EC and 50 EC; and

– to order that the Grand Duchy of Luxembourg should pay the costs.

18. In its defence, lodged on 5 October 2006, the Luxembourg Government claims that the application should be dismissed as unfounded and that the Commission should be ordered to pay the costs.

19. The written phase of the proceedings was concluded following submission of the Commission's reply on 10 November 2006 and the rejoinder of the Luxembourg Government on 12 January 2007. There was no hearing.

V – Main arguments of the parties

20. The Commission bases its action on four complaints directed against the Luxembourg legislation transposing the Directive.

A – *First complaint: incorrect transposition of Article 3(1) and (10) of Directive 96/71*

21. The *Commission* complains that the Grand Duchy of Luxembourg has incorrectly transposed Directive 96/71, challenging by means of its first complaint four provisions contained in the Law of 20 December 2002. In its view, in wrongfully declaring all national provisions to be mandatory provisions falling under national public policy Luxembourg has imposed on undertakings posting workers to Luxembourg obligations in excess of the requirements of Directive 96/71. In its view, transposition is based on too broad an interpretation of the concept of 'public policy provisions' in Article 3(10) of Directive 96/71. Such provisions must be assessed in the light of Declaration No 10 on Directive 96/71 which clarifies that concept.

– Requirement of a written contract of employment or a corresponding document within the meaning of Directive 91/533 (point (1) of Article 1(1) of the Law of 20 December 2002)

22. This criticism concerns, first, the legal obligation only to post workers who are linked to the undertaking by a written contract of employment or corresponding document within the meaning of Directive 91/533. The *Commission* takes the view that, in a case where workers are posted, the monitoring of compliance with the obligations arising under Directive 91/533 is a task solely for the authorities in the State of establishment – which has an obligation to transpose the Directive – not for those of the host State.

– Automatic adjustment of rates of pay to reflect changes in the cost of living (point (2) of Article 1(1) of the Law of 20 December 2002)

23. The *Commission* takes the view that, in requiring the automatic adjustment of rates of pay to reflect changes in the cost of living, the Luxembourg legislation conflicts with Directive 96/71 which provides only for minimum rates of pay to be regulated by the State of origin.

– Compliance with rules on part-time and fixed-term work (point (8) of Article 1(1) of the Law of 20 December 2002)

24. According to the *Commission*, Directive 96/71 does not permit the host State to impose its legislation concerning part-time and fixed-term work on undertakings which post workers.

– Compliance with collective labour agreements (point (11) of Article 1(1) of the Law of 20 December 2002)

25. The *Commission* argues that, regardless of their substantive content, collective labour agreements cannot constitute administrative provisions of 'national public policy'.

26. The *Luxembourg Government* refers extensively to the observations made in its letter of reply of 30 August 2004, according to which the provisions of Article 1 of the Law of 20 December 2002 constitute public policy provisions because their aim is to guarantee worker protection. Although the Luxembourg Government considers the Commission's reference to Declaration No 10 on Directive 96/71 to be in principle correct, it recalls that the said declaration was not published in the *Official Journal of the European Communities* and, accordingly, that it may not be used as an aid to interpretation. In any event, it considers the provisions of Article 1 of the Law of 20 December 2002 to be justified by overriding reasons of public interest. Finally, in support of its view it refers to the legislative procedure which led to the Commission proposal for a directive on services in the internal market. (5)

B – *Second complaint: incomplete transposition of Article 3(1)(a) of Directive 96/71*

27. The *Luxembourg Government* acknowledges the incomplete transposition of Directive 96/71 and refers to the legislative amendment of 19 May 2006.

28. The *Commission* argues that it has not been informed thereof.

C – *Third complaint: lack of clarity concerning monitoring measures*

29. According to the *Commission*, Article 7(1) of the Law of 20 December 2002 is formulated in a manner which is insufficiently clear to guarantee the requisite legal certainty for undertakings wishing to post workers to Luxembourg. In increasing the risk of those undertakings infringing the law, that provision constitutes an unjustified restriction on freedom to provide services. In any event, the obligation to provide to the labour inspectorate prior to the commencement of work, on demand and within as short a period as possible, the information necessary for control purposes corresponds to a prior notification requirement incompatible with Article 49 EC.

30. By contrast, the *Luxembourg Government* considers the legislative provision to be sufficiently clear. At any rate, the wording of Article 7(1) of the Law of 20 December 2002 does not constitute a requirement of prior notification.

D – *Fourth complaint: requirement for an ad hoc agent*

31. The *Commission* takes the view that the requirement laid down in Article 8 of the Law of 20 December 2002 to nominate an ad hoc agent resident in Luxembourg whose task it is to keep the documents necessary for monitoring the obligations incumbent on those undertakings for a period extending even beyond the actual provision of services constitutes a restriction on freedom to provide services. That obligation is not only superfluous having regard to the cooperation on information provided for in Article 4 of Directive 96/71 but also results in costs for the undertakings concerned.

32. The *Luxembourg Government* considers, however, that the system of cooperation on information to which the Commission refers does not permit the competent authorities to carry out their monitoring with the necessary efficiency. For the remainder, the Law of 20 December 2002 does not require a particular legal form in order to act as agent. Moreover, deposit of the necessary documents with an agent is required only from the date on which the work begins, irrespective of the date of posting.

VI – Legal appraisal

A – *Introductory observations*

1. Legislative purpose of Directive 96/71

33. Directive 96/71 requires certain mandatory terms and conditions of employment of the host State to be applied to posted workers. The adoption of those minimum terms and conditions of employment is intended to achieve three very different objectives: to avoid distortions of competition, to guarantee the rights of posted workers and to eliminate barriers and ambiguities affecting the freedom to provide services.

34. In that connection, the starting point for the deliberations of the Commission and Council was the freedom to provide services resulting from Article 49 EC, which has been instrumental in prompting an increasing number of undertakings to post employees abroad on a temporary basis to perform work in the territory of a Member State other than the State in which they are habitually employed. According to the deliberations of the legislature, a precondition for the promotion of the provision of services was a climate of fair competition and the adoption of measures guaranteeing respect for the rights of workers. (6) Because of the differences between Member States concerning substantive employment conditions which must be respected, the situation is conceivable in which lower wages and different conditions of employment apply to posted workers than those applicable in the host State. That situation has an effect on the possibility of fair competition between undertakings and on the principle of equal treatment between foreign and domestic undertakings which, from a social point of view, is unacceptable. The aim pursued in extending the application of a ‘hard core’ of the host State’s employment law provisions to foreign undertakings is to avoid such distortions of competition.

35. Moreover, it was intended to resolve the problems with regard to the legislation applicable to the employment relationship which have arisen through the transnationalisation of the employment relationship. (7) In defining, as regards the posting of workers, which national provisions should have effect as mandatory rules within the meaning of Article 7 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (‘Rome Convention’), Directive 96/71 aimed to ensure the foreseeability of the applicable employment conditions and thus to increase legal certainty. (8)

2. Framework for legal assessment

36. As regards the substantive legal framework in the light of which the Court is called upon to determine the compatibility with Community law of the Luxembourg provisions in issue, I would point out that Directive 96/71 effects only partial harmonisation in the area of posting of workers. (9) It must be regarded primarily as a conflict-of-laws provision of Community employment law concerning the details and conditions of employment of posted workers. (10) The objective of Directive 96/71 does not extend, however, to the aspect of entering and staying in the territory of the host Member State, (11) so that restrictions on the freedom to provide services in the framework of the transnational posting of workers must, in principle, also be assessed in the light of the relevant Treaty provisions, above all Article 49 EC.

37. That means, as regards judicial review of the legality under Community law of national measures in the context of Treaty infringement proceedings under Article 226 EC, that in each case the question must be examined whether the alleged infringement concerns simply Directive 96/71 or instead relates directly to Article 49 EC. If national rules governing the transnational provision of services infringe the Directive, application of the Treaty is excluded, although, since the Directive has its legal basis in the Treaty, any infringement of the Directive must entail infringement of the Treaty. However, if the national rules contravene the Treaty directly and are not covered by the provisions of the Directive which gives it effect, the sole point of reference is the Treaty itself. (12)

38. As regards the allocation of the burden of proof, it must be noted that in proceedings for failure to fulfil obligations under Article 226 EC it is for the Commission to prove the allegation of infringement. Moreover, it must provide the Court with the evidence necessary for the Court to establish the Treaty infringement, and it may not rely on any presumption. (13) In that regard, it is

incumbent on the defendant Member State to contest substantively and in detail the information produced and the consequences thereof. (14)

B – *Examination of the complaints*

The first complaint

39. Inasmuch as the Commission's complaint relates to incorrect transposition of Article 3(1) and (10) of Directive 96/71, it concerns primarily an infringement of that secondary law rule.

1. The concept of public policy contained in Article 3(10) of Directive 96/71

40. The Luxembourg Government argues that, in declaring as mandatory requirements of domestic law all those provisions falling under the areas covered by Article 1(1) of the Law of 20 December 2002, it has availed itself of the authorisation given in Article 3(1) and (10) of Directive 96/71. That provision permits Member States to extend the matters governed to include other terms and conditions of employment if those additional terms and conditions constitute public policy provisions. (15) It also permits the terms and conditions of employment determined by way of universally applicable collective agreements and arbitral awards to be extended to activities other than the building work set out in the annex.

41. However, Member States may not take unlimited advantage of that possibility; in particular, they must in that regard take account of the fundamental freedoms and the objective which the Directive pursues. (16) This conclusion follows both from the primacy of freedom to provide services, a principle whose implementation Directive 96/71 seeks expressly to further, as stated in recital 5 in the preamble to the Directive, and from the principle that derogations from the fundamental freedoms are to be narrowly construed. (17) The latter point has been repeatedly emphasised in express terms by the Court in connection with the public policy exception. (18)

42. The concept of public policy constitutes an independent concept of Community law, which contributes to determining the scope of the fundamental freedoms and which, therefore, must be defined autonomously and not, for example, on the basis of one or more national legal systems. (19) As such, that concept is subject to the Court's interpretation, thus precluding Member States from unilaterally determining its scope without any review by the Community institutions. (20) That conclusion does not preclude the fact, however, that recourse to the concept of public policy is in particular circumstances justified, so that in certain cases Member States must be allowed a margin of discretion within the limits imposed by the Treaty. (21)

43. Notwithstanding those common principles, the concept of public policy may be accorded different meanings, however, depending on its schematic position within the Community legal order and the function of the rule at issue. (22) In the present case the concept of public policy as reflected in Article 3(10) of Directive 96/71 takes effect as a derogation, since it permits an extension to the nucleus of minimum protective requirements guaranteed by Article 3(1) of Directive 96/71 only where certain conditions are met.

44. As regards the precise conditions governing recourse to that discretion, Declaration No 10 of the Council and of the Commission made at the time of the adoption of Directive 96/71 clarified the concept of public policy in stating 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'.

45. In my view, there is no reason not to interpret Article 3(10) of Directive 96/71 in the light of that declaration. As regards the admissibility of using a declaration recorded in the minutes of the Council for the purposes of interpreting secondary law, the Court has held that possibility to be excluded only in such cases where no reference is made to the content of the declaration in the wording of the provision in question and thus it has no legal significance. (23) In that context it must be observed that Declaration No 10 does not conflict with the concept of public policy; rather it contributes to determining the content of the derogation. In referring to 'imperative requirements of the public interest' the declaration is in conformity with the case-law developed by the Court on the inherent

limits on the fundamental freedoms which are also applicable to cases of transnational posting of workers. Contrary to the argument advanced by the Luxembourg Government, the failure to publish Declaration No 10 in the *Official Journal of the European Communities* does not reduce its legal significance, especially as the Luxembourg Government, as the constitutional representative of a Member State represented in the Council, cannot deny having knowledge of the interpretative declarations which were recorded by that institution in the course of the legislative process. (24) Accordingly, it is admissible to have reference to Declaration No 10 as an aid to interpretation.

46. On the basis of the foregoing considerations, I take the view that it is not open to Member States to require service providers established in other Member States to comply with all binding provisions of their employment law. (25) In the interests of the broadest possible implementation of the principle of the freedom to provide services the Commission must be supported in its view that the declaration covers only such terms and conditions of employment prescribed by law as are indispensable for the national legal order of the Member States. (26) It must be examined in more detail whether the contested provisions meet that requirement.

2. The provisions of points (1), (2), (8) and (11) of Article 1(1) of the Law of 20 December 2002

– Requirement of a written contract of employment or corresponding document established pursuant to Directive 91/533

47. As regards the requirement of a written contract of employment or corresponding document established pursuant to Directive 91/533 provided for in point (1) of Article 1(1) of the Law of 20 December 2002, the Commission must be supported in its submission that, in principle, the host State is not responsible for monitoring compliance with the provisions of Directive 91/533.

48. Directive 91/533 serves to harmonise those provisions on the form of employment relationships which some Member States have adopted, having regard to the increase in the number of types of employment relationship, with a view to protecting employees against possible infringements of their rights and to create greater transparency in respect of employment relationships. (27) That includes the proof, referred to by the parties, of an employer's compliance with its obligation arising through the combined effect of Article 2(1) and Article 3(1) of Directive 91/533 to inform an employee in writing of the essential aspects of the contract or employment relationship and of the conditions of his posting abroad in accordance with Article 4(1) of Directive 91/533. An employer discharges its obligation of proof where it issues documents containing the necessary information and gives them to the employee before the latter departs. (28)

49. According to the final recital in the preamble to the directive 'Member States are to adopt the laws, regulations and legislative provisions necessary to comply with this Directive or are to ensure that both sides of industry set up the necessary provisions by agreement, with Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive'. As follows from that wording itself, the obligation of transposition incumbent on the Member States exceeds mere legislative activity and encompasses the implementation of those provisions, including monitoring of compliance. The same obligation is incumbent on Member States in the event of workers being posted and, in that regard, in accordance with Article 4(1) of Directive 91/533, measures must be taken to ensure that employees receive additional information in advance of their posting concerning the conditions thereof. If the State from which the posting is effected has already made use of its monitoring powers, having regard to the harmonisation pursued by Directive 91/533, it follows that no scope exists for any host State competence in that regard.

50. No such competence can be derived from Directive 91/533. Neither, can it be justified by reason of the fact that Luxembourg categorises observance of the abovementioned obligations on the provision of information as rules protecting public policy objectives. Such a requirement, as provided for by point (1) of Article 1(1) of the Law of 20 December 2002, cannot be included within the core Community terms and conditions of employment established by Article 3(1) of Directive 96/71. The legislative decision not to include the obligations to supply information required by Directive 91/533 in the list established by Article 3(1) of Directive 96/71 must be respected. (29)

51. Finally, the observations of the Luxembourg Government concerning the legislative procedure leading to the adoption of Directive 2006/123 must be rejected as irrelevant as regards examination of this complaint. The Luxembourg Law of 20 December 2002 at issue is connected neither in terms of content nor time with Directive 2006/123. Rather, it is solely concerned with the transposition of Directive 96/71.

– Automatic adjustment of pay in accordance with developments in the cost of living

52. With regard to the automatic adjustment of pay in accordance with developments in the cost of living established by point (2) of Article 1(1) of the Law of 20 December 2002, the Luxembourg Government argues that the provision aims to protect employees and contributes to the maintenance of good labour relations in Luxembourg. It contends that such automatic adjustment is implicitly covered by Article 3(1) of Directive 96/71.

53. The Commission's complaint, however, is not directed against the automatic nature of that mechanism but against the indisputable fact that Luxembourg law provides for a general adjustment of 'pay' which includes both real wages and minimum rates of pay. In its letter of 30 August 2004 the Luxembourg Government had already indicated that under Luxembourg law the minimum wage was also subject to the general adjustment mechanism. In the Commission's view, however, that does not conform to the requirements of Article 3(1)(c) of Directive 96/71 which refers simply to 'minimum rates of pay'.

54. The Commission is correct in its assertion that the wording of the Luxembourg legislation transposing Directive 96/71 differs from that of the Directive. In determining whether a provision of national law conflicts with Community law the interpretation placed on that provision by national courts must be taken into account. (30) However, the wording of point (2) of Article 1(1) of the Law of 20 December 2002 is neither ambiguous nor does it allow for an interpretation which is contrary to Community law. Inasmuch as the Law of 20 December 2002 must be interpreted according to objective criteria, that is to say, as meaning that a general adjustment of pay is effected in line with developments in the cost of living which also operates to the benefit of the minimum wage, point (2) of Article 1(1) of the Law of 20 December 2002 fulfils the Community law requirements of Article 3(1)(c) of Directive 96/71. To that extent, the Commission's argument must be rejected as unfounded.

– Compliance with the rules on part-time and fixed-term work

55. The requirement to comply with the rules on part-time and fixed-term work established by point (8) of Article 1(1) of the Law of 20 December 2002 cannot be assigned to any of the categories listed in Article 3(1) of Directive 96/71; rather it goes beyond the nucleus of terms and conditions of employment prescribed by Community law. Since the power established by Article 3(10) of Directive 96/71 constitutes the basis for that requirement, the latter must be examined in the light of the concept of public policy as provided for by Declaration No 10 which in content essentially reproduces the Court's case-law on Article 49 EC. (31)

56. It is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services. (32) According to that definition, in order to constitute a restriction on the freedom to provide services within the meaning of Article 49 EC it is sufficient that the Luxembourg rules on part-time and fixed-term work are stricter than those applying in the home State, thus rendering the provision of services in Luxembourg less advantageous to foreign undertakings.

57. Moreover, the Court has held that the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established. (33)

58. According to the Luxembourg Government, point (8) of Article 1(1) of the Law of 20 December 2002 aims to secure the equal treatment and remuneration of workers and accordingly pursues the objective – regarded as legitimate in Community law – of worker protection. It contends that this rule aims to protect worker rights that are already guaranteed in the Community legal order by Directives 97/81/EC (34) and 1999/70/EC. (35) Moreover, it merely transposes principles originating in the Community's public policy.

59. I cannot support that view. The fact that the Community legislature did not include in Article 3(1) of Directive 96/71 the matters governed by the said directives, that is to say, the regulation of part-time and fixed-term work, points to the conclusion that this area of European employment law specifically does not fall within the scope of the Community's public policy. Moreover, as the Luxembourg Government itself concedes, the rules at issue in that regard are already addressed by Directives 97/81 and 1999/70 and, therefore, must be implemented by all Member States. (36) Accordingly, the interests embodied therein are already protected by legislation to which the service provider is subject in the Member State in which he is established. As a result, the Luxembourg Government cannot rely on overriding reasons in the public interest to declare the national rules at issue to be public policy provisions.

– Compliance with collective labour agreements

60. As regards the reference made in point (11) of Article 1(1) of the Law of 20 December 2002 to collective labour agreements as 'mandatory provisions falling under national public policy', first of all the question arises as to the compatibility of that provision with Article 3(1) and (10) of Directive 96/71. The Commission has doubts as to the legality of the transposition and in essence alleges that Luxembourg – contrary to the terms of the power granted by Article 3(10) of Directive 96/71 – is seeking to elevate a category of instruments to mandatory provisions falling under national public policy irrespective of their legal nature or substantive content.

61. Thus, the Commission finds fault with two aspects of that provision which must be examined separately. First, I agree with the Commission that different meanings attach to the term 'collective labour agreements' as mentioned in the opening sentence of Article 1(1) of the Law of 20 December 2002 and in point (11) of that provision. Whereas in the first situation universally applicable collective agreements are at issue, point (11) makes a general reference to 'collective agreements'. However, the latter situation can only be taken to concern collective agreements not declared universally applicable. As such, however, given the unambiguous wording of the second indent of Article 3(1) of Directive 96/71, which refers only to 'collective agreements ... which have been declared universally applicable', they cannot fall within the Directive's scope, with the result that those collective agreements cannot be regarded as belonging to the nucleus of Community terms and conditions of employment. (37)

62. A different aspect to that question concerns the elevation of a particular category of instruments to the status of public policy provisions irrespective of their legal nature or material content. In order to be able to decide whether a particular rule established by collective agreement may be regarded as mandatory within the meaning of Declaration No 10, it is necessary in my view that the Member State concerned indicates precisely which rules established by collective agreement are at issue. (38) However, the general reference to 'collective labour agreements' under point (11) of Article 1(1) of the Law of 20 December 2002 exhibits the characteristics of a blanket rule in which a minimum degree of certainty and clarity is lacking. That clarity is absolutely necessary, since one cannot exclude the possibility of circumstances existing in which the application of collective agreements to posted workers is incompatible with the freedom to provide services. (39) Therefore, an examination on a case-by-case basis is always necessary to determine whether, when viewed objectively, the rule in question promotes the protection of posted workers and whether it confers a genuine benefit on the workers concerned which significantly augments their social protection. However, precisely that possibility of carrying out a detailed examination is denied to the Court in the light of the general reference to 'collective labour agreements'.

63. In procedural terms, in referring in its defence to the collective labour agreements enclosed with its letter of reply of 30 August 2004, (40) the Luxembourg Government has failed to adequately fulfil its obligation to defend itself in substance and in detail against the charges raised. As the Commission

correctly observes, the instruments concerned are in fact collective agreements declared universally applicable by Grand-Ducal Order within the meaning of the opening sentence of Article 1(1) and not other 'collective labour agreements' as are at issue here to which reference is made in point (11) of Article 1(1) of the Law of 20 December 2002.

64. Accordingly, point (11) of Article 1(1) of the Law of 20 December 2002 is not in conformity with Article 3(1) and (10) of Directive 96/71.

The second complaint

65. In its letter of formal notice the Commission first drew the attention of the Luxembourg Government to the fact that Article 3(1)(a) of Directive 96/71 obliges Member States to ensure that undertakings established in another Member State observe national requirements on maximum work periods and minimum rest periods. It pointed out that point (3) of Article 1(1) of the Law of 20 December 2002 limits the protection concerning minimum rest periods to the weekly rest period. However, the term 'minimum rest periods' includes not only the weekly rest period but also other rest periods such as, for example, the daily rest period or rest breaks as are provided for in Articles 3 and 4 of Directive 2003/88/EC. (41)

66. In its letter of reply of 30 August 2004 the Luxembourg Government admitted to the incomplete transposition of Directive 96/71. (42)

67. Thus, only at a date after expiry of the two-month period laid down in the Commission's reasoned opinion of 12 October 2005 did the Luxembourg Government fulfil its obligations. According to the Court's consistent case-law the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. (43) As the Luxembourg Government does not contest the fact that that transposition was late, on that ground alone this complaint is well founded.

The third complaint

68. The Commission's complaint concerning an unjustified restriction on the freedom to provide services resulting from the obligation imposed on undertakings established abroad, in accordance with Article 7(1) of the Law of 20 December 2002, 'prior to the 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' does not, however, concern the transposition of Directive 96/71 but relates directly to Article 49 EC.

69. As I have already stated, Article 49 EC requires not only the elimination of all discrimination against a person providing services established in another Member State on the ground of his nationality but also the abolition of any restriction. (44) According to consistent case-law, the application of the host Member State's national rules to providers of services is liable to prohibit, impede or render less attractive the provision of services and thus to be regarded as a restriction on the freedom to provide services to the extent that it involves expense and additional administrative and economic burdens. (45)

70. The rule established by Article 7(1) of the Law of 20 December 2002 aims to enable the Luxembourg labour inspectorate to monitor the identity of workers and the legality of their presence within the framework of a posting. It subjects undertakings established outside the territory of the Grand Duchy of Luxembourg to a mandatory prior administrative procedure which requires the production of documents concerning the social security, employment and residence status of the posted workers prior to the commencement of the work, resulting in a situation which implies at any rate for the undertakings concerned the existence of administrative formalities which are liable to render the posting of workers to Luxembourg less attractive than the situation would be on the national territory. In accordance with the broad definition developed by case-law, set out above, that circumstance alone suffices to justify the conclusion that the rule is, by its nature, restrictive. (46)

71. At the same time, the Court has recognised that Member States have the power to verify compliance with the national and Community provisions relating to the provision of services.

Likewise, it has accepted justification of monitoring measures necessary to verify compliance with requirements which are themselves warranted on grounds of public interest. (47) The Luxembourg Government justifies the rule established by Article 7(1) of the Law of 20 December 2002 both on the grounds of worker protection and on the need for monitoring in order to combat abuse and illegal transnational activities. According to case-law, both the social protection of workers and the combat of abuse are considered legitimate objectives. (48)

72. However, the Court has also held that such monitoring must comply with the limits imposed by Community law and must not render the freedom to provide services illusory. (49) In particular, it must be suitable for securing the attainment of the objective which it pursues; and it must not go beyond what is necessary in order to attain that objective. (50)

73. Above all, the Luxembourg rule is characterised by the legislative requirement on undertakings even 'prior to the commencement of the work' to provide the labour inspectorate with the requisite documents which would appear to imply the existence of a prior control aimed at detecting abuse, a measure which is in principle incompatible with Community law. The Luxembourg Government counters by indicating that the undertaking must comply with its obligation to provide information simply 'on request', a fact which it considers as softening the impact of the legal obligation. Accordingly, no obligation arises on the undertaking requiring it to provide information to the authorities of its own accord.

74. It seems to me, however, that there are grounds for concluding that the Luxembourg rule is indeed structured in a similar manner to a prior control measure aimed at detecting abuse. Article 7(1) of the Law of 20 December 2002 must be read in conjunction with Articles 13 to 17 of the Law of 4 April 1974 on the reorganisation of the Labour and Mines Inspectorate (51) ('Law of 4 April 1974'), which in the event of an undertaking failing to fulfil its obligation to provide information permits the labour inspectorate to order with immediate effect that the posted workers cease their activities in the territory of the Grand Duchy. The labour inspectorate may only permit work to be resumed once all necessary documents have been provided, (52) and in that connection, in accordance with Article 28 of the Law of 4 April 1974, a failure to observe that order is punishable with imprisonment and a fine. If, however, first a 'permit' is required to resume work and second non-compliance with the obligation to provide information is sanctioned by penal law measures, the rule of Article 7(1) of the Law of 20 December 2002 can only be interpreted as meaning that the provision of services of Luxembourg by way of deploying workers is prohibited unless authorised. (53)

75. The situation is aggravated by the fact that the provision's wording fails to meet the requirements of legal certainty and clarity. According to consistent case-law, Member States are required not only to bring their legislation into conformity with Community law but also to do so by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts. (54) That principle must apply a fortiori if national law imposes obligations on individuals and threatens sanctions in the event of non-compliance.

76. It must be observed that the ambiguous wording of the rule places the issue of a permit largely at the discretion of the administration and, in addition, unreasonably increases the risk that undertakings will find themselves subject to administrative or penal sanctions. Thus, according to the evidence submitted by the Commission to the Court, the labour inspectorate evidently places a strict interpretation on Article 7(1) of the Law of 20 December 2002 in requiring the submission in full of all documents prior to the provision of services, (55) such that – contrary to the arguments of the Luxembourg Government – provision of the documents on the day itself, shortly before works commence, does not suffice. Difficulties in the practical implementation of Article 7(1) of the Law of 20 December 2002 may also result from the fact that the obligation to provide information and, thus, the administrative procedure itself ensues, in principle, only following the receipt of a 'demand' from the labour inspectorate, with it remaining unclear in that regard what role the undertaking is expected to play in anticipation of that procedure and whether possibly it must itself trigger that 'demand'. Since in the absence of such a 'demand' an undertaking cannot in practice take advantage of the freedom to supply services without risking administrative or penal sanctions, that restriction operates as an

absolute prohibition which, given the possibility of having recourse to less-restrictive measures, cannot be regarded as necessary for the purposes of worker protection.

77. Finally, in this connection I consider it imperative to recall that, as regards the disproportionate character of an authorisation as a condition for taking up employment and the applicability of less-stringent measures, in *Commission* v *Luxembourg* (56) the Court recently held: 'A measure which would be just as effective whilst being less restrictive than the measure at issue here would be an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment. It would enable those authorities to monitor compliance with Luxembourg social welfare legislation during the deployment while at the same time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin.' In those circumstances it is more appropriate that the host Member State restricts its intervention to verifying the requisite information provided by the service provider on commencing activities in the host Member State and only has recourse to sanctions where this proves necessary. (57) In introducing a de facto condition of prior authorisation in Article 7(1) of the Law of 20 December 2002 the Luxembourg rule thus goes beyond what is regarded by the Court as proportionate.

78. It follows from the above that this rule constitutes prior monitoring for abuse which is incompatible with Article 49 EC. Accordingly, this complaint is also well founded.

The fourth complaint

79. As an additional administrative requirement liable to render the posting of workers more difficult for undertakings established in another Member State, the designation of an ad hoc agent resident in Luxembourg provided for by Article 8 of the Law of 20 December 2002 constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. (58) Therefore it must be considered whether the restrictions on the freedom to provide services arising from that national provision are justified by a public interest objective and, if so, whether they are necessary in order to pursue, effectively and by appropriate means, such an objective.

80. The Luxembourg Government relies on the objectives of worker protection, the combating of abuse and the need for effective monitoring. As I have already indicated, both the social protection of workers and the combating of abuse are recognised as legitimate objectives, (59) whilst the carrying out of monitoring in order to implement protective measures required by national law is considered compatible with Community law provided that such supervision is effected within the limits established by Community law. (60)

81. First, it must be observed that a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the EC Treaty whose object is to guarantee the freedom to provide services. (61)

82. Accordingly, in *Commission* v *Italy* (62) the Court held that the requirement that undertakings providing temporary labour which wish to supply manpower to customers established in Italy must have their registered office or a branch office on Italian territory is directly contrary to the freedom to provide services, in so far as it renders impossible, in that Member State, the supply of services by undertakings established in other Member States.

83. The Luxembourg Government essentially argues that nothing in Article 8 of the Law of 20 December 2002 makes any reference to the precise characteristics of the ad hoc agent at issue. There is no requirement that the latter should be a natural or legal person or that it should be a body which is remunerated. The only thing that matters is that the labour inspectorate is aware of the name of the person with whom the requisite documents have been lodged. In the construction industry, for example, an ad hoc agent for the purposes of that provision could be either the prime contractor, the foreman or a construction authority.

84. In response, it must be observed, however, that no support for such interpretation is to be found in Article 8 of the Law of 20 December 2002. That interpretation even contradicts the legislative provisions. Rather, it follows clearly from the provision's wording that the ad hoc agent in question must be 'resident' in Luxembourg, that is to say the 'centre of his activities' or his 'place of normal residence' must be in that State. As the Commission correctly observes, that requirement presupposes 'permanent residence' or at least a stay for a period exceeding that for which services are provided. It follows from that circumstance that the requirements of Article 8 of the Law of 20 December 2002 are not satisfied, for example, if the necessary documents are kept with one of the deployed workers.

85. In my view, that result is incompatible with the Court's case-law. In *Arblade and Others* (63) the Court held that an obligation to keep available and retain certain documents at the address of a natural person residing in the host Member State, who was to keep them as the agent or servant of the employer by whom he had been designated, even after the employer had ceased to employ workers in that State could only be regarded as lawful if the authorities in that State could not carry out their supervisory task effectively in the absence of such an obligation.

86. On the one hand, I agree with the Luxembourg Government that it is essential to carry out onsite monitoring in order to ensure compliance with national protective legislation. However, one may legitimately criticise its failure to adduce sufficient evidence or prove that the Luxembourg authorities could not perform their monitoring tasks without the involvement of an ad hoc agent resident in Luxembourg. For the purposes of justifying such an invasive restriction of the freedom to provide services as in the present case, it is insufficient to express unsubstantiated criticism or mere doubts concerning the efficiency of the organised system for cooperation and exchange of information between the Member States established by Article 4 of Directive 96/71. (64) The Grand Duchy of Luxembourg, like all other Member States, is required to participate in the said system for administrative assistance in order to monitor compliance with the terms and conditions of employment concerned. To that extent, the Luxembourg Government has failed in procedural terms to discharge its burden of proof.

87. Notwithstanding that conclusion, monitoring to ensure that the rules connected to the social protection of workers are respected can indeed be achieved with less-restrictive measures. It may be assumed, in principle, that for the purposes of fulfilling that monitoring task it suffices to designate one of the workers deployed, for example a supervisor, who can act as a link between the foreign undertaking and the labour inspectorate and, where necessary, keep the requisite documents available onsite or in an accessible and clearly identified place in the territory of the host Member State. (65) As a measure aimed at ensuring the social protection of workers that is less restrictive of the freedom to provide services, that would be compatible with the principle of proportionality.

88. I have reached the conclusion, therefore, that the requirements of Article 8 of the Law of 20 December 2002 are disproportionate and infringe Article 49 EC. Accordingly, the fourth complaint is also well founded.

VII – Costs

89. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Grand Duchy of Luxembourg has been essentially unsuccessful, it should be ordered to pay the costs.

VIII – Conclusion

90. In view of all the foregoing considerations, I propose that the Court should:

– hold that:

(1) by declaring points (1), (8) and (11) of Article 1(1) of the Law of 20 December 2002 to be mandatory provisions falling under national public policy;

(2) by failing fully to transpose Article 3(1)(a) of Directive 96/71 in point (3) of Article 1(1) of that Law;

(3) by setting out, in Article 7(1) of that Law, conditions which are not sufficiently clear to ensure legal certainty;

(4) by requiring, in Article 8 of that Law, that documents necessary for monitoring purposes be kept in Luxembourg by an ad hoc agent resident there,

the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3(1) and (10) of Directive 96/71, and Articles 49 EC and 50 EC;

– dismiss the remainder of the action as unfounded;

– order the Grand Duchy of Luxembourg to pay the costs.

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1 – Original language: German.

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2 – OJ 1997 L 18, p. 1.

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3 – Declaration No 10 was not published in the *Official Journal of the European Communities*. However, its content is reproduced in the **communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 (COM(2003)** 458 final, p. 13).

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4 – *Mémorial* A – No 154 of 31 December 2002, p. 3722.

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5 – Amended proposal for a directive of the European Parliament and of the Council on services in the internal market of 4 April 2006 (COM(2006) 160 final).

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6 – See recital 5.

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7 – See recital 6.

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8 – In recitals 7 to 11 in the preamble to Directive 96/71 reference is made to the relationship with the Rome Convention which, in Article 6, makes provision for individual employment contracts. According to that provision – whether as the applicable law of the contract or in constituting a restriction on the choice of law – '... the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country' (Article 6(2)(a) of the Rome Convention) is considered decisive. That provision is modified by Directive 96/71 to the extent that as regards the terms and conditions of employment listed in the Directive the law of the place of work is considered decisive unless the law of the employment contract determined in accordance with Article 6 of the Rome Convention provides for more favourable conditions. According to Jayme, E. and Kohler, C., 'Europäisches Kollisionsrecht 1997 – Vergemeinschaftung durch "Säulenwechsel"', *Praxis des internationalen Privat- und Verfahrensrechts*, Volume 17, No 6, 1997, p. 400, in the light of the express reference made in recital 10 thereto, the Posted Workers Directive may be treated as constituting specific expression of 'mandatory rules' within the meaning of Article 7 of the Rome Convention.

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9 – See on this point the Opinion of Advocate General Léger in Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, point 28. The area of the posting of workers has not yet been subjected to harmonisation. According to recital 86 in the preamble to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), the area is expressly excluded from that directive's scope. At the behest of the European Parliament and the Council, the Commission deleted its earlier draft proposal regarding the removal of administrative obstacles and

regarding obligations of Member States to cooperate regarding the posting of workers and the posting of third-country nationals. On that point see the amended proposal for a directive of the European Parliament and of the Council of 4 April 2006 (COM(2006) 160 final, p. 13).

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10 – Schmidt, M., *Das Arbeitsrecht der Europäischen Gemeinschaft*, Baden-Baden, 2001, pp. 254 and 259, takes the view that the Posted Workers Directive does not harmonise conditions of employment but simply limits freedom of choice as regards conflict-of-laws rules. Däubler, W., 'Die Entsende-Richtlinie und ihre Umsetzung in das deutsche Recht', *Europäische Zeitschrift für Wirtschaftsrecht*, 1997, p. 614, draws attention to the fact that Directive 96/71 is based primarily on Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now, after amendment, Article 55 EC). He notes that Article 66 of the EC Treaty makes reference to the possibilities for legislative development and restriction in the area of the freedom of establishment and provides for their application in the area of the freedom to provide services. According to Article 57(2) of the EC Treaty, the Council may issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States in order to make it easier to exercise a fundamental freedom (establishment or the provision of services). He argues, having regard to those objectives, that such a development has occurred. The Directive coordinates the employment law requirements which a provider of services must respect. Forgó, K., 'Aktuelles zur Entsenderichtlinie', *ecolex*, 1996, p. 818, argues that Directive 96/71 removes differences arising by reason of different conflict-of-laws rules. However, differences arising as a result of differing national employment law regimes are retained even after the entry into force of Directive 96/71 since the latter does not provide for harmonisation as to content. Borgmann, B., 'Kollisionsrechtliche Aspekte des Arbeitnehmer-Entsendegesetzes', *Praxis des internationalen Privat- und Verfahrensrechts*, 1996, p. 319, considers Directive 96/71 to be a measure coordinating the international mandatory rules in the area of employment law. In point 58 of his Opinion in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, Advocate General Mengozzi indicates that the purpose of Directive 96/71 is to coordinate the conflict-of-laws rules of the Member States in order to determine which national law should apply to the provision of cross-border services where workers are posted temporarily abroad within the Community, without harmonising either the substantive rules of the Member States as regards employment law and the terms and conditions of employment relating, in particular, to rates of pay, or the right to resort to collective action.

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11 – See the Opinion of Advocate General Geelhoed in Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, point 6.

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12 – See, in the same vein, point 28 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095 and points 144 to 163 of the Opinion in *Laval un Partneri*, cited in footnote 10.

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13 – Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27; Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 35; Case C-263/99 *Commission* v *Italy* [2001] ECR I-4195, paragraph 27; Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraph 38; Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 102; and Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6.

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14 – Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21.

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15 – During the negotiations in the Council, the United Kingdom, Ireland and Portugal, in particular, expressed their opposition to an open list, arguing that such a list contradicted the Directive's objective of providing for clarity and increasing legal certainty (Agence Europe, Volume 43, No 6449 of 27/28 March 1995)

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16 – The same view is taken by Fuchs, M. and Marhold, F., *Europäisches Arbeitsrecht*, 2nd edition, Vienna, 2006, p. 322. Borgmann, B., 'Kollisionsrechtliche Aspekte des Arbeitnehmer-Entsendegesetzes', cited in footnote 10, p. 316, takes the view that whilst Member States in 'strengthening' their international mandatory requirements can weaken the impact of unpopular competition from undertakings in States with low wage costs, the requirements of Community law must, however, be observed. Görres, S., *Grenzüberschreitende Arbeitnehmerentsendung in der EU*, Vienna and Graz, 2003, p. 122, takes the view that recourse to Article 3(10) of Directive 96/71 is premised on the condition that the Member States' terms and conditions of employment in question constitute public policy provisions not infringing the rules of the EC Treaty. Thus, the authors acknowledge that when recourse is had to Article 3(10) of Directive 96/71 certain conditions must be respected, necessarily including both the furtherment of freedom to provide services and the specific objectives pursued by the European legislature in adopting the Directive. According to Advocate General Mengozzi, in point 212 of his Opinion in *Laval un Partneri*, cited in footnote 10, the fact that domestic rules belong to the category of public policy provisions or mandatory rules does not – as is apparent from Article 3(10) of Directive 96/71 and the case-law on Article 49 EC – make them exempt from compliance with the provisions of the Treaty.

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17 – In connection with restrictions on the freedom to provide services and of establishment see point 143 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891. Georgiadis, N., *Derogation clauses: the protection of national interests in EC law*, Brussels, 2006, p. 72, indicates that all derogation clauses, in particular the public policy derogation, are subject to a narrow construction. According to Wichmann, J., *Dienstleistungsfreiheit und grenzüberschreitende Entsendung von Arbeitnehmern*, Frankfurt am Main, 1998, pp. 104 and 105, schematic considerations point against a broad interpretation. She argues that simply by virtue of their status as Treaty derogations the requirement follows that public policy exceptions must be interpreted narrowly. Reliance on public policy arguments accordingly presupposes that essential sovereign interests of the Member State are affected.

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18 – In that regard the Court has always emphasised that the public policy exception constitutes a derogation from the fundamental principle of freedom of movement, which, as is the case with all exceptions from fundamental Treaty principles, must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States. See Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 6; Case 36/75 *Rutili* [1975] ECR 1219, paragraph 27; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 23; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 64 and 65; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 45; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 34; and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383, paragraph 42.

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19 – Case C-296/95 *EMU Tabac* [1998] ECR I-1605, paragraph 30, and Case 53/81 *Levin* [1982] ECR 1035, paragraphs 10 to 12.

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20 – According to settled case-law, reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society (see *Rutili*, cited in footnote 18, paragraph 28; *Bouchereau*, cited in footnote 18, paragraph 35; *Orfanopoulos and Oliveri*, cited in footnote 18, paragraph 66; *Commission* v *Spain*, cited in footnote 18, paragraph 46; *Commission* v *Germany*, cited in footnote 18, paragraph 35; and *Commission* v *Netherlands*, cited in footnote 18, paragraph 43).

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21 – See Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 18 and 19.

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22 – It can be found in numerous Community law provisions, of which at the level of primary law, in particular, Articles 30 EC, 39(3) EC, 46 EC, 55 EC and 58(1)(b) EC have acquired significance as

'limitations on the fundamental freedoms' which under certain conditions permit restrictions on the free movement of goods, persons, services and capital guaranteed under primary law. In addition, the concept of public policy has effect in secondary law either as a derogation or as an interpretative and clarifying secondary law application (see on that point Schneider, H., *Die öffentliche Ordnung als Schranke der Grundfreiheiten im EG-Vertrag*, Baden-Baden, 1998, p. 53).

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23 – Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9; Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23; and Case C-368/96 *Generics (UK) and Others* [1998] ECR I-7967, paragraphs 25 to 28.

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24 – A refusal to accept the statement contained in Declaration No 10, emanating as it does from the Council in its institutional capacity and thus additionally from the Luxembourg Government, would be contrary to the legal principle 'venire contra factum proprium nemini licet', according to which a person is estopped from arguing contrary to his own conduct.

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25 – See, in particular, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 17, and Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 23, in which the Court held that in particular a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the Treaty whose object is to guarantee the freedom to provide services.

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26 – Wolfsgruber, C., *Die grenzüberschreitende Entsendung von Arbeitnehmern*, Vienna, 2001, p. 42, does not mention Declaration No 10. None the less, the author takes the view that the concept of public policy in Article 3(10) of Directive 96/71 must be narrowly construed on the basis of the Court's case-law on Article 46(1) EC. Accordingly, the terms and conditions of employment of the host State may be extended only on condition that 'a real and sufficiently serious risk to fundamental social interests exists'. Däubler, W., 'Die Entsende-Richtlinie und ihre Umsetzung in das deutsche Recht', cited in footnote 10, p. 615, points out that by no means does every term of a collective agreement applicable to domestic undertakings extend to service providers from other Member States. Rather, in his view, the Directive is concerned with minimum wages and minimum holiday entitlements, such that, for example, the higher rates of pay for skilled workers, customary wage supplements, occupational pensions, etc. are irrelevant. From those observations it may be concluded that although Directive 96/71 establishes a core set of provisions concerning minimum standards of protection, at the same time, however, it seeks as far as possible to avoid public policy restrictions on the freedom to provide services.

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27 – Directive 91/533 aims also to implement point 9 of the Community Charter of Fundamental Social Rights for Workers, according to which the conditions of employment of every worker of the European Community must be stipulated in laws, a collective agreement or a contract of employment, according to arrangements applying in each country.

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28 – Under Article 2(1) and Article 3(1) of Directive 91/533, an employer is obliged to inform an employee in writing of the essential aspects of the contract or employment relationship not later than two months after the commencement of employment. Article 2(2) sets out the minimum requirements concerning the information to be supplied. In addition, under Article 4(1) of Directive 91/533, in the case of employees who are required to work in a country or countries other than the Member State whose law and/or practice governs the contract or employment relationship, the written proof must include information on (i) the duration of the employment abroad, (ii) the currency to be used for the payment of remuneration, (iii) where appropriate, the benefits in cash or in kind attendant on the employment abroad and, where appropriate, the conditions governing the employee's repatriation; in these cases, too, such information on the currency to be used for the payment of remuneration and the benefits attendant on the employment abroad may be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective

agreements. Those documents must reach the employee's possession before his departure. On this issue, see Fuchs, M. and Marhold, F., *Europäisches Arbeitsrecht*, cited in footnote 16, p. 79 et seq.

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29 – On the legal relationship between Directive 96/71 and Directive 2006/123, see my observations in footnote 9.

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30 – Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, point 5-056, p. 162, indicate that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation placed on them by national courts. If a national provision is capable of different interpretations – one consistent with Community law and another not – it is incumbent on the Commission to prove that the national courts do not interpret the provision at issue in accordance with Community law. However, in the present case the wording of point (2) of Article 1(1) of the Law of 20 December 2002 is unambiguous and does not allow for other interpretations pointing to an infringement of Article 3(1)(c) of Directive 91/533.

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31 – See point 45.

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32 – Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25; Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 18; *Portugaia Construções*, cited in footnote 25, paragraph 16; and Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 30.

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33 – Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 31, and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 34.

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34 – Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC (OJ 1998 L 14, p. 9). The directive guarantees to workers affected by new forms of flexible working the same treatment as full-time workers and workers with open-ended contracts. Access to part-time work should be made easier; recommendations are to be made to employers suggesting how they can take account of workers' wishes as regards the structuring of flexible forms of work.

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35 – Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43). The directive contains minimum requirements with regard to fixed-term work in order to ensure the equal treatment of workers and to prevent abuse through the use of successive fixed-term employment contracts or relationships. It calls upon the Member States to provide for sanctions in the event of a failure to comply with the minimum requirements. Further, it provides for derogation clauses in order to limit the administrative burden on small and medium-sized enterprises which might result from the application of those new provisions.

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36 – The general cross-industry organisations, namely the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC) concluded on 6 June 1997 a framework agreement on part-time work and on 18 March 1999 a framework agreement on fixed-term work which were to be implemented by Directives 97/81 and 1999/70 respectively. As follows from recital 14 in the preamble to Directive 97/81 and from recital 15 in the preamble to Directive 1999/70, a directive within the meaning of Article 249 EC was considered to be the proper instrument for implementation since it binds the Member States as to the result to be achieved, whilst leaving them the choice of form and methods.

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37 – Without engaging in a precise legal analysis in the light of Directive 96/71, Däubler, W., 'Die Entsende-Richtlinie und ihre Umsetzung in das deutsche Recht', cited in footnote 10, p. 615, and Borgmann, B., 'Entsendung drittstaatsangehöriger Arbeitnehmer durch EU-Unternehmen nach Deutschland', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 1993, p. 122, take the view that not every term of a collective labour agreement applicable to domestic undertakings can be extended to service providers from other Member States. The latter author considers that the mandatory extension to foreign contracts of employment of the terms of collective labour agreements which as a matter of domestic law have not been declared universally applicable even constitutes an act of overt discrimination against foreign undertakings.

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38 – That conclusion follows, moreover, from the general obligation on Member States to implement a directive's provisions in a manner fully satisfying the requirements of clarity and certainty in the legal situations targeted by the directive (see Case 300/81 *Commission* v *Italy* [1983] ECR 449, paragraph 10, and Case 239/85 *Commission* v *Belgium* [1986] ECR 3645, paragraph 7).

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39 – That was the conclusion reached by the Court in *Portugaia Construções*, cited in footnote 25, paragraphs 28 and 29, regarding the application of national minimum wage provisions to service providers. Accordingly, it held that it is for the national authorities or courts to determine whether, when viewed objectively, a contested provision promotes the protection of posted workers and whether it confers a genuine benefit on the workers concerned which significantly augments their social protection. Thus the Court made it clear that national provisions governing terms and conditions of employment such as those relating to a minimum wage which are seemingly of a beneficial nature may not always work to the advantage of posted workers. In my view, the same principle must apply with regard to collective agreements. To the same effect see also Advocate General Mengozzi in point 237 of his Opinion in *Laval un Partneri*, cited in footnote 10, who makes reference to *Portugaia Construções*.

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40 – The instruments concerned are the 'Convention collective de travail pour le métier de plafonneur-façadier' (Grand-Ducal Order of 31 January 1996 – *Mémorial* A – No 14), the 'Convention collective de travail pour les métiers d'installateur sanitaire et d'installateur de chauffage et de climatisation' (Grand-Ducal Order of 23 September 1996, *Mémorial* A – No 72) and the 'Contrat collectif pour le bâtiment' (Grand-Ducal Order of 18 February 1997, *Mémorial* A – No 14).

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41 – Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

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42 – In that letter it announced the preparation of a draft law by which it was intended to insert in point (3) of Article 1(1) of the Law of 20 December 2002 a reference to the daily rest period and to rest breaks. According to Luxembourg's defence that was effected by Article 4 of the Law of 19 May 2006 on the transposition of Directives 2003/88 and 96/71 (Loi du 19 mai 2006 (1) transposant la directive 2003/88/CE du Parlement européen et du Conseil du 4 novembre 2003 concernant certains aspects de l'aménagement du temps de travail; (2) modifiant la loi modifiée du 7 juin 1937 ayant pour objet la réforme de la loi du 31 octobre 1919 portant règlement légal du louage de services des employés privés; (3) modifiant la loi modifiée du 9 décembre 1970 portant réduction et réglementation de la durée de travail des ouvriers occupés dans les secteurs public et privé de l'économie; (4) modifiant la loi modifiée du 17 juin 1994 concernant les services de santé au travail; (5) modifiant la loi du 20 décembre 2002 portant 1. transposition de la directive 96/71/CE du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de service; 2. réglementation du contrôle de l'application du droit du travail (*Mémorial* A – No 97 of 31 May 2006, p. 1806)).

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43 – Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraphs 27 and 28; Case C-29/01 *Commission* v *Spain* [2002] ECR I-2503, paragraph 11; Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26; Case C-119/00 *Commission* v *Luxembourg* [2001] ECR I-4795, paragraph 14; Case C-384/99 *Commission* v *Belgium* [2000] ECR I-10633, paragraph 16; Case C-60/96 *Commission* v *France*

[1997] ECR I-3827, paragraph 15; Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20; and Case C-302/95 *Commission* v *Italy* [1996] ECR I-6765, paragraph 13.

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44 – *Säger*, cited in footnote 32, paragraph 12; *Vander Elst*, cited in footnote 32, paragraph 14; *Guiot*, cited in footnote 32, paragraph 10; *Reisebüro Broede*, cited in footnote 32, paragraph 25; *Parodi*, cited in footnote 32, paragraph 18; *Portugaia Construções*, cited in footnote 25, paragraph 16 ; and *Commission* v *Germany*, cited in footnote 32, paragraph 30.

45– In *Arblade and Others*, cited in footnote 33, paragraph 50, the Court had to examine the compatibility with Community law of national rules which required an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he had already paid to the fund of the Member State in which he was established. The Court held that to constitute a restriction on the freedom to provide services since such an obligation gave rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that those undertakings were not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and could thus be deterred from providing services in the host Member State. See also *Finalarte and Others*, cited in footnote 33, paragraph 30, which in turn makes reference to *Mazzoleni and ISA*, (cited in footnote 25, paragraph 24. In the latter judgment the Court held that the application of the host Member State's national rules on minimum wages to service providers established in a frontier region of a Member State other than the host Member State may result in an additional, disproportionate administrative burden if the remuneration for employees posted to the host State merely on an hour-by-hour basis has to be the subject of separate calculation.

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46 – See *Finalarte and Others*, cited in footnote 33, paragraph 36, and Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 41, in which the Court held that the necessity to comply with administrative formalities was sufficient to raise the presumption of a restriction on the freedom to provide services. In his Opinion in Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, point 17, Advocate General Ruiz-Jarabo Colomer points out that suppliers of services who exercise their right to provide services in any of the Member States by posting staff there encounter various difficulties. One relates to the requirement to obtain an authorisation, the granting of which is not only discretionary but problematic, involving bureaucratic procedures which may be lengthy, complex or costly. Another difficulty relates to having to undergo checks over and above (or duplicating) those imposed by the Member State of establishment. These procedures often lead to the supplier withdrawing from supplying the service or having to put up with damaging delays. As regards these facts I consider that the Court should continue to uphold that line of case-law.

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47 – Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, paragraph 43; *Commission* v *Germany*, cited in footnote 32, paragraph 36; and *Arblade and Others*, cited in footnote 33, paragraph 38.

48– On the Court's case-law on the social protection of workers, see Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 10; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18; *Vander Elst*, cited in footnote 32, paragraph 25; *Guiot*, cited in footnote 32, paragraph 16; *Arblade and Others*, cited in footnote 33, paragraph 36; *Finalarte and Others*, cited in footnote 33, paragraphs 40 and 45; Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 35; *Commission* v *Austria*, cited in footnote 47, paragraph 47; and point 249 of the Opinion of Advocate General Mengozzi in *Laval un Partneri*, cited in footnote 10. On case-law as regards the combat of abuse, see *Commission* v *Austria*, cited in footnote 47, paragraph 56. That Community law will not protect cases of abuse and fraud follows, moreover, from Case C-206/94 *Paletta II* [1996] ECR I-2357, paragraph 28, in which the Court held that as a matter of Community law employers are not barred from adducing evidence to support, where appropriate, a finding by the national court of abuse or fraudulent conduct on the part of the worker concerned, in that, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of Council Regulation (EEC)

No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), he was not sick at all.

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49 – *Commission* v *Austria*, cited in footnote 47, paragraph 43, and *Rush Portuguesa*, cited in footnote 48, paragraph 17.

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50 – *Arblade and Others*, cited in footnote 33, paragraph 35,;*Mazzoleni and ISA*, cited in footnote 25, paragraph 26; and *Wolff & Müller*, cited in footnote 48, paragraph 34. Teyssié, B., *Droit européen du travail*, 2nd edition, Paris, 2003, pp. 158 and 159, takes the view that a requirement to comply with an administrative formality is only justified if it furthers the interests of the workers concerned. He argues that the legitimate justification concerning the social protection of workers may not operate as a pretext to introduce legislation restricting the freedom to provide services.

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51 – According to Article 11 of the Law of 20 December 2002, 'the Inspection du travail et des mines [Labour and Mines Inspectorate] and Administration des douanes et accises [Customs and Excise Authorities] shall each be responsible in their respective area for monitoring the application of the provisions of the present law'. The Law of 4 April 1974 on the reorganisation of the Labour and Mines Inspectorate (*Mémorial* A – No 27, p. 485) establishes the area of responsibility of the labour inspectorate.

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52 – See the copy of the provisionally enforceable order of the labour inspectorate dated 29 April 2004 served on a particular undertaking by which it prohibits the provision of services by non-registered workers ('ordonnance executoire par provision: cessation de prestations de travail détachées non-déclarées'), included in Annex A-5 to the Commission's application.

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53 – However, the legislature prohibits certain activities (or certain projects) not because they must be forbidden in general but because the authorities must examine in advance whether in an individual case they infringe certain substantive legal provisions. If that assessment proves positive and it follows that the conduct is in conformity with substantive law, the authorisation must be granted. From the outset, therefore, the prohibition applies subject to the reservation that permission is to be granted if the authorisation procedure does not reveal any legal grounds for refusal. Thus, in the case of a 'permit' one can equally refer to a 'prohibition qualified by a reservation of authorisation' (see on that point Maurer, H., *Allgemeines Verwaltungsrecht*, 15th edition, Munich, 2004, point 51, p. 218). The existence of such a prohibition unless authorisation is given also clearly confirms the restrictive nature of the Luxembourg rule established by Article 7(1) of the Law of 20 December 2002. As regards the deployment of workers from non-member States by a service provider established in the Community, the Court has already held that national legislation which makes the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative visa constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. See *Commission* v *Austria*, cited in footnote 47, paragraph 40; *Commission* v *Luxembourg*, cited in footnote 46, paragraph 24; and *Vander Elst*, cited in footnote 32, paragraph 15.

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54 – In the same vein, with regard to directives, see Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission* v *Luxembourg* [1995] ECR I-1589, paragraph 10. In addition, see Case C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraphs 22 to 25, and Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 20.

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55 – In the provisionally enforceable order of the labour inspectorate dated 29 April 2004 by which it prohibits the provision of services by non-registered workers ('ordonnance exécutoire par provision: cessation de prestations de travail détachées non-déclarées'), included as a copy in Annex A-5 to the Commission's application, the labour inspectorate draws attention to the fact that the documents relating the social security and employment law status of the posted workers must be submitted prior to the provision of

transnational services with the word ‘antérieurement’ written in capital letters, evidently to educate undertakings whose operations are putatively illegal.

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56 – Cited in footnote 46, paragraph 31.

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57 – In the same vein see also the Opinion of Advocate General Geelhoed in *Commission* v *Germany*, cited in footnote 11, point 28, as regards a German rule which subjected the deployment of third-country nationals employed by a service provider established in another Member State for the provision of services on German territory to a prior authorisation procedure. According to the Advocate General, prior authorisation measures are disproportionate, since undertakings which do not comply with national legislation on worker protection must bear the responsibility for a posting effected unlawfully and can always be held liable in that regard. Accordingly, monitoring in advance cannot be justified by the necessity of ensuring that the posting is effected lawfully.

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58 – This is implicitly admitted by the Luxembourg Government on page 5 of its reply to the Commission’s letter of formal notice. It acknowledges therein the particular constraints caused by the requirement to nominate an ad hoc agent resident in Luxembourg.

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59 – See point 71.

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60 – See point 72.

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61 – See *Säger*, cited in footnote 32, paragraph 13, and *Mazzoleni and ISA*, cited in footnote 25, paragraph 23.

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62 – Case C-279/00 [2002] ECR I-1425, paragraphs 17 and 18.

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63 – Cited in footnote 33, paragraph 76, and Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 54.

64– In *Arbladeand Others*, cited in footnote 33, paragraph 79, the Court held that ‘the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there’. In accordance with that provision Member States are required to establish bodies to facilitate close cooperation between the Member States as regards terms and conditions of employment. Inter alia, the national courts are thereby enabled to ascertain the terms of employment applicable at the place of work in other Member States. As bodies capable of fulfilling that role, liaison or other offices competent for administrative assistance can be mentioned in particular. The cooperation established by the Directive between the authorities responsible for monitoring the relevant terms and conditions of employment is of particular importance. That cooperation consists in responding to requests from the authorities of other Member States for information on (i) the transnational hiring-out of workers, (ii) manifest abuses, and (iii) possible cases of unlawful transnational activities. Member States are required to provide the mutual administrative assistance free of charge (see on that point Forgó, K., ‘Aktuelles zur Entsenderichtlinie’, cited in footnote 10, p. 817).

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65 – See *Arblade and Others*, cited in footnote 33, paragraphs 65 and 74, which concerned the social protection of workers in the construction industry.