Case C-319/06

Commission of the European Communities

v

Grand Duchy of Luxembourg

(Failure of a Member State to fulfil obligations – Posting of workers – Freedom to provide services – Directive 96/71/EC – Public policy provisions – Weekly rest days – Obligation to produce documents relating to a posting on demand by the national authorities – Obligation to designate an ad hoc agent residing in Luxembourg to retain all the documents necessary for monitoring purposes)

Summary of the Judgment

1. *Freedom to provide services – Posting of workers in the framework of the provision of services – Directive 96/71 – Terms and conditions of employment – Public policy provisions – Definition*

   (European Parliament and Council Directive 96/71, Art. 3(10))

2. *Freedom to provide services – Posting of workers in the framework of the provision of services – Directive 96/71 – Terms and conditions of employment – Public policy provisions*

   (European Parliament and Council Directive 96/71, Art. 3(10))

3. *Freedom to provide services – Posting of workers in the framework of the provision of services – Directive 96/71 – Terms and conditions of employment – Public policy provisions*

   (European Parliament and Council Directive 96/71, Art. 3(10))

4. *Freedom to provide services – Posting of workers in the framework of the provision of services – Directive 96/71 – Terms and conditions of employment – Public policy provisions – Provisions resulting from collective agreements declared to be universally applicable*

   (European Parliament and Council Directive 96/71, Art. 3(10))

5. *Actions for failure to fulfil obligations – Examination of the merits by the Court – Situation to be taken into consideration – Situation on expiry of the period laid down in the reasoned opinion*

   (Art. 226 EC)

6. *Freedom to provide services – Restrictions – Posting of workers in the framework of the provision of services – Monitored by the host Member State*

   (Art. 49 EC)

7. *Freedom to provide services – Restrictions – Posting of workers in the framework of the provision of services – Monitored by the host Member State*

   (Art. 49 EC)

1. The first subparagraph of Article 3(1) of Directive 96/71 concerning the posting of workers in the framework of the provisions of services provides that Member States are to ensure that, whatever the law applicable to the employment relationship, undertakings established in another Member State which post workers to their territory in the framework of a transnational provision of services, guarantee the posted workers the terms and conditions of employment,

covering the matters set out in that article, which are laid down in the Member State in which the work is carried out. For that purpose, Article 3(1) sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.

Nevertheless, the first indent of Article 3(10) of Directive 96/71 recognises that it is open to Member States, in compliance with the EC Treaty, to apply, in a non-discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to the first subparagraph of Article 3(1), in the case of public policy provisions.

In that connection, the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State. Therefore, the public policy exception is a derogation from the fundamental principle of freedom to provide services, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States.

In the context of Directive 96/71, the first indent of Article 3(10), constitutes a derogation from the principle that the matters with respect to which the host Member State may apply its legislation to those undertakings are set out in an exhaustive list in the first subparagraph of Article 3(1) thereof and must therefore be interpreted strictly. That provision does not exempt the Member States from complying with their obligations under the EC Treaty and, in particular, those relating to the freedom to provide services.

(see paras 25-31, 33)

2. A Member State which declares that a national law transposing Directive 96/71 which requires the undertakings concerned, first, to post only staff linked to the undertaking by a written contract of employment or another document deemed analogous thereto under Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship and, second, to comply with national rules on part-time and fixed-term work, to be mandatory provisions falling under national public policy, fails to fulfil its obligations under the first indent of Article 3(10) of Directive 96/71 concerning the posting of workers in the framework of the provision of services.

Such provisions have the effect of making undertakings which post workers to the host Member State subject to an obligation to which they are already subject in the Member State in which they are established. Moreover, the aim of Directive 96/71, which is to guarantee compliance with a nucleus of rules for the protection of workers, renders the existence of such an additional obligation all the more redundant since, having regard to the procedures involved, it is likely to dissuade undertakings established in another Member State from exercising their freedom to provide services.

Although Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by both sides of industry to any person who is employed, even temporarily, no matter in which Member State the employer is established, nevertheless such a possibility is subject to the condition that the workers concerned, who are temporarily working in the host Member State, do not already enjoy the same protection, or essentially comparable protection by virtue of obligations to which their employer is already subject in the Member State in which it is established.

In particular, 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.

(see paras 41-44, 60, operative part)

3. A Member State, which imposes on undertakings posting staff on its territory the requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living, in so far as it has not shown to the required legal standard that that national law is a public policy provision within the meaning of the directive, fails to fulfil its obligations under the first indent of Article 3(10) of Directive 96/71 concerning the posting of workers in the framework of the provisions of services.

That provision of Directive 96/71 gives the host Member State an opportunity to apply to undertakings posting workers to its territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) of Directive 96/71, provided that they are public policy provisions. That proviso in the first indent of Article 3(10) of Directive 96/71 constitutes an exception to the system put in place by that directive and a derogation from the fundamental principle of freedom to provide services on which the directive is based and must be interpreted strictly.

Thus, while the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated. Therefore, in order to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, a Member State is required to submit evidence to establish whether and to what extent the application to workers posted to its territory of the rule concerning automatic adjustment of rates of pay to the cost of living is capable of contributing to the achievement of that objective.

(see paras 49-52, 54-55, operative part)

4. A Member State which declares that measures resulting, in particular, from collective agreements which have been declared universally applicable constitute mandatory provisions falling under national public policy fails to fulfil its obligations under the first indent of Article 3(10) of Directive 96/71 concerning the posting of workers in the framework of the provision of services.

Such a national rule cannot constitute a public policy exception within the meaning of the first indent of Article 3(10) of Directive 96/71. First, there is no reason why provisions concerning collective agreements, namely provisions which encompass their drawing up and implementation, should per se and without more fall under the definition of public policy. Second, such a finding must be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either. Third, since the second indent of Article 3(10) of Directive 96/71 relates exclusively to the terms and conditions of employment laid down in collective agreements which have been declared universally applicable, a national law which expressly covers ordinary collective labour agreements cannot properly claim to reflect the discretion granted to Member States under that article.

(see paras 64-67, operative part)

5. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes.

(see para. 72)

6. A Member State which sets out in rules of national law establishing a prior notification procedure when workers are posted conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to the territory of that Member State fails to fulfil its obligations under Article 49 EC

The obligation for all undertakings to make available to the national authorities on demand and within as short a period as possible the basic information necessary for monitoring purposes is not without ambiguities which are likely to dissuade undertakings wishing to post workers to that Member State from exercising their freedom to provide services. On the one hand, since the extent of the rights and obligations of those undertakings is not clearly apparent from that provision and, on the other hand, since undertakings which have failed to comply with the obligations laid down in that provision incur not inconsiderable penalties, such a national law is, by its lack of clarity and the ambiguities that it contains, incompatible with Article 49EC.

(see paras 80-82, operative part)

7. A Member State, which requires undertakings whose registered office is outside its national territory and which post workers there to deposit, before the start of the posting, with an ad hoc agent residing in that State, the documents necessary for monitoring compliance with their obligations under national law and to leave them there for an indeterminate period after the provision of services has ceased, fails to fulfil its obligations under Article 49 EC.

As such requirements constitute a restriction on freedom to provide services they cannot be justified where effective monitoring of compliance with employment legislation may be achieved by less restrictive measures.

(see paras 90-95, operative part)

JUDGMENT OF THE COURT (First Chamber)

19 June 2008 (*)

(Failure of a Member State to fulfil obligations – Posting of workers – Freedom to provide services – Directive 96/71/EC – Public policy provisions – Weekly rest days – Obligation to produce documents relating to a posting on demand by the national authorities – Obligation to designate an ad hoc agent residing in Luxembourg to retain all the documents necessary for monitoring purposes)

In Case C-319/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 July 2006,

Commission of the European Communities, represented by J. Enegren and G. Rozet, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by C. Schiltz, acting as Agent,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to hold that:

– by declaring the provisions of points (1), (2), (8) and (11) of Article 1(1) of the Law of 20 December 2002 transposing 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 and the monitoring of the implementation of labour law (*Mémorial* A 2002, p. 3722) ('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/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1);

– by setting out, in Article 7(1) of the Law of 20 December 2002, conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to Luxembourg, and

– 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.

Legal background

Community law

2 Under the heading 'Terms and conditions of employment', Article 3 of Directive 96/71 states:

'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.'

3 When Directive 96/71 was adopted, Declaration No 10 on Article 3(10) of Directive 96/71 ('Declaration No 10') was recorded in the minutes of the Council of the European Union as follows:

'The Council and the Commission stated:

"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."'

Luxembourg legislation

4 Article 1 of the Law of 20 December 2002 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 lay-offs;

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'Etat 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.'

5 Article 2 of the Law of 20 December 2002 states:

'(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.’

6 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 habitually 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.’

7 Article 8 of the Law of 20 December 2002 states:

‘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.’

Pre-litigation procedure

8 By a letter of formal notice of 1 April 2004, the Commission indicated to the Luxembourg authorities that the Law of 20 December 2002 was likely to be incompatible with Community law. In particular that law was said to:

– require undertakings established in another Member State which posted workers to Luxembourg to comply with terms and conditions of employment going beyond the requirements of Article 3(1) and (10) of Directive 96/71;

– fail to ensure that posted workers are afforded any other rest period (daily rest period) entitlement apart from the weekly rest period;

– lack the necessary clarity to ensure legal certainty, by requiring undertakings posting workers to Luxembourg to make available to the Labour and Mines Inspectorate prior to the commencement of work on demand and within as short a period as possible the basic information necessary for monitoring purposes;

– restrict freedom to provide services by requiring undertakings whose registered office is outside the territory of the Grand Duchy of Luxembourg or which do not have a permanent establishment there to keep the documents necessary for monitoring purposes with an ad hoc agent resident in Luxembourg.

9 In its response of 30 August 2004, the Grand Duchy of Luxembourg stated that the terms and conditions of employment which are the subject of the first complaint raised in the letter of formal notice are ‘public policy provisions’ as provided for in the first indent of Article 3(10) of Directive 96/71.

10 The Grand Duchy of Luxembourg acknowledged that the second complaint in the letter of formal notice was well founded.

11 As regards the third and fourth complaints in the letter of formal notice, the Grand Duchy of Luxembourg stated, first, that Article 7 of the Law of 20 December 2002 did not require prior notification and, second, that the obligation to transmit to the Labour and Mines Inspectorate the name of the person keeping the documents required by the Law was a non-discriminatory requirement that was essential to enable that authority to carry out checks.

12 Since it was not satisfied by those answers, the Commission repeated its complaints in a reasoned opinion of 12 October 2005, calling on the Grand Duchy of Luxembourg to comply with its obligations within a period of two months of receipt of that opinion.

13 After requesting an additional period of six weeks, the Grand Duchy of Luxembourg did not consider it necessary to reply to the reasoned opinion.

14 Therefore, the Commission brought this action for failure to fulfil obligations pursuant to Article 226 EC.

The action

The first plea in law: incorrect transposition of Article 3(1) and (10) of Directive 96/71

Arguments of the parties

15 By its first complaint, the Commission claims that the Grand Duchy of Luxembourg has incorrectly transposed Article 3(1) and (10) of Directive 96/71.

16 More specifically, the Commission takes the view that, by wrongly describing the national provisions relating to the areas covered by the measures in question as mandatory provisions falling under national public policy and thereby requiring undertakings which post workers to its territory to comply

with them, the Grand Duchy of Luxembourg imposes obligations on those undertakings which go beyond those laid down by Directive 96/71. According to the Commission, the notion of public policy in Article 3(10) of Directive 96/71 cannot be unilaterally defined by each Member State, since the latter are not free to impose unilaterally all the mandatory provisions of their employment law on suppliers of services established in another Member State.

17 First, the obligation laid down in Article 1(1) of the Law of 20 December 2002 to post only staff linked to the undertaking by a written contract of employment or another document deemed analogous thereto under Directive 91/533 is such a mandatory obligation.

18 In that regard the Commission points out that in any event the monitoring of compliance with the provisions of Directive 91/533 is the responsibility of the authorities of the Member State in which the undertaking concerned is established and which has transposed that directive, not of the host Member State.

19 Second, as regards the automatic adjustment of rates of remuneration to the cost of living provided for in Article 1(2) of the Law of 20 December 2002, the Commission maintains that Luxembourg law conflicts with Directive 96/71, which provides that the host Member State is to regulate rates of pay only as regards minimum rates.

20 Third, as regards compliance with the rules on part-time and fixed-term work laid down by point 8 of Article 1(1) of the Law of 20 December 2002, the Commission submits that, under Directive 96/71, it is not for the host Member State to impose its rules in respect of part-time and fixed-term work on undertakings which post workers to its territory.

21 Fourth, as regards the obligation to comply with collective labour agreements, laid down in point 11 of Article 1(1) of the Law of 20 December 2002, the Commission submits that acts which fall within a category of acts cannot as such constitute mandatory provisions falling under national public policy irrespective of their substantive content.

22 The Grand Duchy of Luxembourg contends that the measures referred to in the Commission's first complaint all relate to mandatory provisions falling under national public policy within the meaning of the first indent of Article 3(10) of Directive 96/71. In that regard, it submits, first, that Declaration No 10 does not have any binding legal force and, second, that the definition of public policy provisions includes all provisions which, in the view of the host State, meet the imperative requirements of the public interest. Furthermore, the Grand Duchy of Luxembourg refers to the legislative procedure which led to the adoption of 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).

Findings of the Court

– Preliminary observations

23 First of all, in order to address the main argument put forward by the Grand Duchy of Luxembourg in its defence, it must be pointed out that, according to Article 3(1)(a) thereof, Directive 2006/123 is not intended to replace Directive 96/71 and the latter prevails over the former in the event of conflict. Therefore, the Grand Duchy of Luxembourg cannot base its arguments on the legislative procedure which led to the adoption of Directive 2006/123 in order to support its interpretation of a provision of Directive 96/71.

24 It is clear from recital 13 in the preamble to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there (Case C-341/05 *Laval un Partneri* [2007] ECR I-0000, paragraph 59).

25 Thus, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, undertakings established in another Member State which post workers to their territory in the framework of a transnational provision of services, guarantee the posted workers the terms and conditions of employment, covering the matters set out in that article, which are laid down in the Member State in which the work

is carried out (Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 18).

26 For that purpose, Article 3(1) sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.

27 Nevertheless, under the first indent of Article 3(10) of Directive 96/71 it is open to Member States, in compliance with the EC Treaty, to apply, in a non-discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to the first subparagraph of Article 3(1), in the case of public policy provisions.

28 As is clear from Article 1(1) of the Law of 20 December 2002, which states that the provisions concerning matters referred to in points 1 to 14 thereof are mandatory provisions falling under national public policy, the Grand Duchy of Luxembourg intended to rely on the first indent of Article 3(10) of Directive 96/71.

29 In that connection, it must be recalled that the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State (Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 30).

30 Therefore, contrary to the Grand Duchy of Luxembourg's submissions, the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States (see, regarding freedom of movement for persons, Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 45).

31 In the context of Directive 96/71, the first indent of Article 3(10), constitutes a derogation from the principle that the matters with respect to which the host Member State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of Article 3(1) thereof. The first indent of Article 3(10) must therefore be interpreted strictly.

32 Moreover, Declaration No 10 which, as the Advocate General rightly pointed out in point 45 of her Opinion, may be relied on in support of an interpretation of the first indent of Article 3(10) of Directive 96/71, states that the expression 'public policy provisions' is to 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.

33 In any event, Article 3(10) of Directive 96/71 provides that availing themselves of the option for which it provides does not exempt the Member States from complying with their obligations under the EC Treaty and, in particular, those relating to the freedom to provide services, the promotion of which is referred to in recital 5 of the preamble to the directive.

34 It is in the light of those considerations that the Court must examine the requirements set out in Article 1(1) of the Law of 20 December 2002 whose classification as mandatory provisions falling under national public policy is challenged by the Commission.

– The requirement of a written contract or document established pursuant to Directive 91/533, as provided for in Article 1(1) of the Law of 20 December 2002

35 As a preliminary point, it is to be noted that that requirement is not a matter mentioned in the list in the first subparagraph of Article 3(1) of Directive 96/71.

36 The Grand Duchy of Luxembourg submits, first, that the contested requirement is simply a reminder of the condition referred to in Articles 2 and 3 of Directive 91/533 and, second, that it is a matter of public policy in so far as its objective is to protect workers.

37 As stated in the second recital of the preamble to Directive 91/533, the need to subject employment relationships to formal requirements is essential in order better to protect employees against possible infringements of their rights and to create greater transparency on the labour market.

38 However, it is also clear from Article 9(1) of Directive 91/533 that the Member States are to adopt the laws, regulations and administrative provisions necessary to comply with that directive.

39 Consequently, all employers, including those which post workers abroad, are, as provided by Article 4(1) of Directive 91/533, subject, by virtue of the laws of the Member State in which they are established, to the obligations laid down by that directive.

40 It is evident that compliance with the requirement laid down in Article 1(1)(1) of the Law of 20 December 2002 is ensured by the Member State of origin of the posted workers.

41 Accordingly, the contested provision has the effect of making undertakings which post workers to Luxembourg subject to an obligation to which they are already subject in the Member State in which they are established. Moreover, the aim of Directive 96/71, which is to guarantee compliance with a nucleus of rules for the protection of workers, renders the existence of such an additional obligation all the more redundant since, having regard to the procedures involved, it is likely to dissuade undertakings established in another Member State from exercising their freedom to provide services.

42 The Court has consistently held that, although Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by both sides of industry to any person who is employed, even temporarily, no matter in which Member State the employer is established, nevertheless such a possibility is subject to the condition that the workers concerned, who are temporarily working in the host Member State, do not already enjoy the same protection, or essentially comparable protection by virtue of obligations to which their employer is already subject in the Member State in which it is established (see, to that effect, Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 29 and the case-law cited).

43 In particular, the Court has already 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 (see, *Arblade and Others*, paragraph 34, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarteand Others* [2001] ECR I-7831, paragraph 31).

44 That being the case as regards the protection of workers guaranteed by Directive 91/533 and relied on by the Grand Duchy of Luxembourg, it must be held that the requirement laid down in point 1 of Article 1(1) of the Law of 20 December 2002 does not comply with the first indent of Article 3(10) of Directive 96/71, in so far as it is not applied in compliance with the Treaty.

– The requirement relating to the automatic adjustment of rates of remuneration to the cost of living provided for in Article 1(1)(2) of the Law of 20 December 2002

45 It is clear from the Commission's application that the latter does not challenge the fact that minimum wages are indexed to the cost of living, a requirement which, as the Grand Duchy of Luxembourg points out, is unquestionably covered by point (c) of the first subparagraph of Article 3(1) of Directive 96/71, but the fact that that indexation concerns all wages, including those which do not fall within the minimum wage category.

46 The Grand Duchy of Luxembourg submits, however, that point (c) of the first subparagraph of Article 3(1) of Directive 96/71 authorises the host Member State by implication to impose its system for determining all wages on undertakings which post workers to its territory.

47 In that connection, it must be pointed out that the Community legislature intended, by means of point (c) of the first subparagraph of Article 3(1) of Directive 96/71, to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay. It follows that the

requirement in the Law of 20 December 2002 concerning the automatic adjustment of rates of pay other than the minimum wage to the cost of living does not fall within the matters referred to in the first subparagraph of Article 3(1) of Directive 96/71.

48 The Grand Duchy of Luxembourg submits, however, that point 2 of Article 1(1) of the Law of 20 December 2002 is aimed at ensuring good labour relations in Luxembourg and that, on that basis, it constitutes a public policy imperative within the meaning of the first indent of Article 3(10) of Directive 96/71, by protecting workers from the effects of inflation.

49 In that connection, it must be recalled that that provision of Directive 96/71 gives the host Member State an opportunity to apply to undertakings posting workers to its territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) of Directive 96/71, provided that they are public policy provisions. That proviso in the first indent of Article 3(10) of Directive 96/71 constitutes an exception to the system put in place by that directive and a derogation from the fundamental principle of freedom to provide services on which the directive is based and must be interpreted strictly.

50 Thus the Court has already had occasion to observe that, while the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions (see, to that effect, Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 30). It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17).

51 It has to be remembered that the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (see, to that effect, Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, paragraph 36, and the case-law cited).

52 Therefore, in order to enable the Court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the application to workers posted to Luxembourg of the rule concerning automatic adjustment of rates of pay to the cost of living is capable of contributing to the achievement of that objective.

53 However, in this case the Grand Duchy of Luxembourg merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations, without adducing any evidence to enable the necessity for and proportionality of the measures adopted to be evaluated.

54 Accordingly, the Grand Duchy of Luxembourg has not shown to the required legal standard that point 2 of Article 1(1) of the Law of 20 December 2002 falls under public policy provisions within the meaning of the first indent of Article 3(10) of Directive 96/71.

55 Therefore, that Member State cannot rely on the public policy exception referred to in the first indent of Article 3(10) of Directive 96/71 in order to apply to undertakings posting staff on its territory the requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living.

– The requirement relating to the rules on part-time and fixed-term work laid down in point 8 of Article 1(1) of the Law of 20 December 2002

56 The Grand Duchy of Luxembourg submits that such a provision seeks to ensure the protection of workers by guaranteeing the principle of equal treatment and pay as between full and part-time

workers, laid down in Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) and 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).

57 The requirement referred to above concerns a matter which is not mentioned in the list in the first subparagraph of Article 3(1) of Directive 96/71.

58 It is not disputed that the obligations arising from point 8 of Article 1(1) of the Law of 20 December 2002, having regard to the accompanying constraints, are likely to hinder the exercise of freedom to provide services by undertakings wishing to post workers to Luxembourg.

59 In that connection it is clear that, pursuant to Articles 2(1) of Directives 97/81 and 1999/70, the Member States were to implement the laws, regulations and administrative provisions necessary to comply with those directives.

60 Therefore, as compliance with the requirement laid down by the contested national provision is monitored in the Member State in which the undertaking wishing to post workers to Luxembourg is established, the Grand Duchy of Luxembourg cannot rely on the public policy exception in the first indent of Article 3(10) of Directive 96/71 in order to justify the national measure in question, for the same reasons as were set out in paragraphs 41 to 43 of this judgment.

61 It follows that point 8 of Article 1(1) of the Law of 20 December 2002 does not comply with the first indent of Article 3(10) of Directive 96/71.

– The requirement relating to imperative provisions of national law in respect of collective agreements in point 11 of Article 1(1) of the Law of 20 December 2002

62 The first subparagraph of Article 3(1) of Directive 96/71 defines the instruments by which the terms and conditions of employment of the host Member State are laid down covering the matters referred to in points (a) to (g) thereof and which are guaranteed to posted workers. The second indent of that provision refers in particular to collective agreements which have been declared universally applicable.

63 Likewise, Article 1(1) of the Law of 20 December 2002 states that measures resulting, in particular, from collective agreements which have been declared universally applicable concerning the matters referred to in points 1 to 14 thereof constitute mandatory provisions falling under national public policy. Point 11 mentions provisions concerning collective agreements.

64 Such a provision cannot, however, constitute a public policy exception within the meaning of the first indent of Article 3(10) of Directive 96/71.

65 First, there is no reason why provisions concerning collective agreements, namely provisions which encompass their drawing up and implementation, should *per se* and without more fall under the definition of public policy.

66 Second, such a finding must be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either.

67 Third, the Grand Duchy of Luxembourg cannot argue that point 11 of Article 1(1) of the Law of 20 December 2002 ultimately reflects the discretion granted to Member States under the second indent of Article 3(10) of Directive 96/71. Article 3(10) relates exclusively to the terms and conditions of employment laid down in collective agreements which have been declared universally applicable. That is not the case with respect to point 11 of Article 1(1) which expressly refers, in contrast with the introduction to of Article 1, to mere collective labour agreements.

68 Accordingly, point 11 of Article 1(1) of the Law of 20 December 2002 is not in compliance with the first indent of Article 3(10) of Directive 96/71.

69 Consequently, it follows from the foregoing that the Commission's first complaint is well founded.

The second complaint: incomplete transposition of Article 3(1)(a) of Directive 96/71 relating to compliance with maximum work periods and minimum rest periods

Arguments of the parties

70 By its second complaint, the Commission criticises the Grand Duchy of Luxembourg for incomplete transposition of point (a) of the first subparagraph of Article 3(1) of Directive 96/71 relating to compliance with maximum work periods and minimum rest periods.

71 The Grand Duchy of Luxembourg has acknowledged that this complaint is well founded and has stated that it has adopted Article 4 of the Law of 19 May 2006 amending the Law of 20 December 2002 (*Mémorial* A 2006, p. 1806) in order to bring its national legislation into line with the relevant Community provisions.

Findings of the Court

72 It must be recalled that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, in particular, Case C-168/03 *Commission* v *Spain* [2004] ECR I-8227, paragraph 24; Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32; and Case C-354/06 *Commission* v *Luxembourg* [2007] ECR I-0000, paragraph 7).

73 In this case it is not disputed that when the period prescribed in the reasoned opinion expired the Grand Duchy of Luxembourg had not adopted the measures necessary to ensure that point (a) of the first subparagraph of Article 3(1) had been fully transposed in its national law.

74 Therefore, the Commission's second complaint is well founded.

The third complaint: infringement of Article 49 EC on account of the lack of clarity of the monitoring arrangements laid down in Article 7(1) of the Law of 20 December 2002

Arguments of the parties

75 By its third complaint, the Commission claims that, on account of its lack of clarity, Article 7(1) of the Law of 20 December 2002 is likely to give rise to legal uncertainty for undertakings wishing to post workers to Luxembourg. Thus, the obligation for all undertakings to make available to the Labour and Mines Inspectorate on demand and within as short a period as possible the basic information necessary for monitoring purposes amounts, in the case of a posting, to a prior notification procedure incompatible with Article 49 EC. However, if that should not be the case, the text of the contested provision should nevertheless be amended in order to remove any legal ambiguity.

76 The Grand Duchy of Luxembourg takes the view that the text of Article 7(1) of the Law of 20 December 2002 is sufficiently clear and that, in any event, it does not impose any prior notification requirement. In that connection, it takes the view that the need to make available the information necessary for monitoring purposes 'prior to the commencement of the work' means that that information may be communicated on the day on which the work commences.

Findings of the Court

77 First it must be noted that, since the Law of 20 December 2002 does not provide for any other communication of information between an undertaking which posts workers and the Labour and Mines Inspectorate, it is difficult to understand how the latter can request information from that undertaking before the commencement of the work, in so far as it cannot be aware of the presence of that undertaking in Luxembourg unless the latter has previously announced its arrival in some way. Therefore, as the Advocate General notes in point 76 of her Opinion, the question arises as to the role accorded to an undertaking wishing to post workers, necessarily prior to any request for

information from the Labour and Mines Inspectorate, and which, in any event, is not defined by the Law of 20 December 2002.

78 On that basis, the interpretation of the expression 'prior to the commencement of the work' in Article 7(1) of that law, adopted by the Grand Duchy of Luxembourg, cannot be relevant. It is clear that such an expression means not only that the information must be provided on the actual day on which the work commences, but that it would also cover a somewhat longer period preceding that date.

79 Second, as the Advocate General noted, in point 74 of her Opinion, it follows from the provisions of the Law of 4 April 1974 on the Reorganisation of the Labour and Mines Inspectorate (*Mémorial* A 1974, p. 486), to which reference is made in Article 9(2) of the Law of 20 December 2002 in respect of the definition of the monitoring powers of that authority, and, in particular from Articles 13 to 17 of the Law of 4 April 1974, that the Labour and Mines Inspectorate may order the immediate cessation of the posted worker's activities if his employer does not comply with an order addressed to the employer to provide information. Furthermore, Article 28 of that law provides that failure to comply with that obligation may give rise to criminal proceedings against the undertaking concerned.

80 Having regard to those factors, it must be acknowledged that the prior notification procedure to be followed by an undertaking wishing to post workers to Luxembourg territory is not without ambiguities.

81 The ambiguities which characterise Article 7(1) of the Law of 20 December 2002 are likely to dissuade undertakings wishing to post workers to Luxembourg from exercising their freedom to provide services. On the one hand, the extent of the rights and obligations of those undertakings is not clearly apparent from that provision. On the other hand, undertakings which have failed to comply with the obligations laid down in that provision incur not inconsiderable penalties.

82 Accordingly, since Article 7(1) of the Law of 20 December 2002 is incompatible with Article 49 EC on account of its lack of clarity and the ambiguities that it contains, the Commission's third complaint is well founded.

The fourth complaint: infringement of Article 49 EC by reason of the requirement that the undertakings designate an ad hoc agent residing in Luxembourg to retain the documents necessary for monitoring by the competent national authorities

Arguments of the parties

83 By its fourth complaint, the Commission takes the view that, by requiring undertakings whose registered office is outside Luxembourg territory and which post workers there to deposit, before the start of the posting, with an ad hoc agent residing in Luxembourg, the documents necessary for monitoring compliance with their obligations under the Law of 20 December 2002 and to leave them there for an indeterminate period after the provision of services has ceased, Article 8 of that Law constitutes a restriction on freedom to provide services. The system of cooperation and exchange of information provided for in Article 4 of Directive 96/71 makes such an obligation superfluous.

84 The Grand Duchy of Luxembourg states, first of all, that the cooperation mechanism to which the Commission refers does not enable the competent administrative authorities to carry out ordinary checks with the necessary effectiveness. Next, it contends that the contested national provision does not require any specific legal form with respect to the role of agent. Lastly, apart from the deposit of the documents necessary for monitoring with the agent for a period following the posting, the documents do not have to be lodged until the day on when the provision of services concerned begins.

Findings of the Court

85 It is not disputed that the obligation provided for in Article 8 of the Law of 20 December 2002 involves an additional administrative and financial burden for undertakings established in another Member State, so that the latter are not on an equal footing, from the point of view of competition, with employers established in the host Member State and they may be dissuaded from providing services in the latter Member State.

86 First, the contested provision requires that the agent with whom the documents are lodged reside in Luxembourg.

87 Second, that provision lays down an obligation to retain the documents relating inter alia to the information referred to in Article 7 of the Law of 20 December 2002, without, however, defining the period over which those documents must be retained or specifying whether that obligation concerns only the period after the service is provided or whether it also concerns a period prior to its commencement.

88 In order to justify such a restriction on freedom to provide services, the Grand Duchy of Luxembourg cites the need to ensure effective monitoring by the Labour and Mines Inspectorate of compliance with employment legislation.

89 In that connection, the Court has held that the effective protection of workers may require that certain documents are kept at the place where the service is provided, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks (see, to that effect, *Arblade and Others*, paragraph 61).

90 However, the Court added, in paragraph 76 of *Arblade and Others*, that where there is an obligation to keep available and retain certain documents at the address of a natural person residing in the host Member State who holds them as the agent or representative of the employer by whom he has been designated, even after the employer has ceased to employ workers in that State, it is not sufficient, for the purposes of justifying such a restriction on the freedom to provide services, that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task. It must also be shown that those authorities cannot carry out their supervisory task effectively unless the undertaking has, in that Member State, an agent or representative designated to retain the documents in question. In that connection, the Court has held that a requirement that a natural person domiciled in the territory of a host Member State should retain documents cannot be justified (see, *Arblade and Others*, paragraph 77).

91 In this case, the Grand Duchy of Luxembourg does not submit any specific evidence in support of the argument that only the retention of the documents concerned by an agent residing in Luxembourg enables the authorities to carry out the checks for which they are responsible. In any event, a worker present in the place where the services were provided could be designated to ensure that documents necessary for monitoring purposes were made available to the competent national authorities, which would be a measure less restrictive of freedom to provide services and just as effective as the contested obligation.

92 For the rest, the Court noted, in paragraph 79 of *Arblade and Others*, that the organised system for cooperation and exchanges of information between Member States provided for in Article 4 of Directive 96/71 renders superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.

93 Consequently, the Grand Duchy of Luxembourg cannot require undertakings which post workers to do what is necessary to retain such documents on Luxembourg territory when the provision of services comes to an end.

94 Nor can such documents be required to be retained by an agent residing in Luxembourg in so far as, since the undertaking concerned is physically present on Luxembourg territory when the services are provided, the documents in question may be held by a posted worker.

95 Lastly, it must be pointed out that, although Article 8(2) of the Law of 20 December 2002 does not expressly provide that documents necessary for monitoring purposes must be retained in Luxembourg before the commencement of work, that provision states that the identity of the agent must be communicated to the competent authorities prior to the employment activities envisaged at the latest. Therefore, the interpretation put forward by the Grand Duchy of Luxembourg, according to which the documents do not have to be available until the date on which the work commences, has no basis in the provision in question. In any event, such an obligation to retain such documents prior to

the commencement of work would constitute an obstacle to freedom to provide services which the Grand Duchy of Luxembourg would have to justify by arguments other than mere doubts as to the effectiveness of the organised system of cooperation or exchanges of information between the Member States provided for in Article 4 of Directive 96/71.

96 It is clear from the foregoing that, since Article 8 of the Law of 20 December 2002 is incompatible with Article 49 EC, the action must be upheld in its entirety.

97 Accordingly, it must be held that:

– 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;

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

– by setting out, in Article 7(1) of that Law of 20 December 2002, conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to Luxembourg; and

– 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) of Directive 96/71, read in conjunction with Article 10 thereof, and Articles 49 EC and 50 EC.

Costs

98 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked that for in the successful party's pleadings. Since the Commission has asked that the Grand Duchy of Luxembourg be ordered to pay the costs and the latter has been unsuccessful, the Grand Duchy of Luxembourg must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Declares that,

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

– by failing fully to transpose Article 3(1)(a) 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;

– by setting out, in Article 7(1) of that Law of 20 December 2002, conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to Luxembourg; and

– **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) of Directive 96/71, read in conjunction with Article 10 thereof, and Articles 49 EC and 50 EC.

2. Orders the Grand Duchy of Luxembourg to pay the costs.

[Signatures]

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* Language of the case: French.