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SOCIAL VALUES IN THE EUROPEAN UNION: ARE THEY BECOMING MORE IMPORTANT AFTER THE LISBON TREATY?

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Some Comments on C-515/08 Santos Palhota and Others

On 7 October 2010 the ECJ delivered a [judgment](#) that was built around the issues discussed in the very well-known posting of workers cases of [Laval](#) and [Rüffert](#) and [Commission v Luxembourg](#).

The facts of the case tell the story of a Portuguese company Termiso Limitada that posted workers from Portugal to Belgium for work at the shipyard in Antwerp. According to Belgian law, Termiso Limitada failed to produce certain social documents aimed at protection of workers' rights: to draw up individual account in respect of the posted employees, to pay the statutory minimum wage and additional overtime work payments. The Portuguese company challenged the validity of this national law on the basis of Articles 56 and 57 TFEU on free movement of services.

The Court had to decide on two specific sets of national rules: the one that required Termiso Limitada to send a prior declaration of

posting (without which posting is impossible) and the second one that required the company to keep certain social or labour documents available for inspection by Belgian authorities.

Advocate General Cruz Villalón in para 94 of his [Opinion](#) (delivered on 5 May 2010) proposed the Court to rule as follows:

(1) Articles 56 and 57 TFEU must be interpreted as meaning that they preclude national legislation which makes the posting of workers and the actual beginning of the provision of services conditional on certification of receipt and approval of the prior declaration within five working days from the date on which it was received by the Inspectorate.

(2) Articles 56 and 57 TFEU must be interpreted as meaning that they do not preclude national legislation which requires the production of certain documents of the State of establishment (in the instant case, the Belgian individual account and pay slip) which are equivalent to the documents that must be drawn up in the State of destination.

Advocate General rightly pointed out that this case 'brings to light once again the inherent tension between the construction of the internal market and the protection of social values' (para 38). Cruz Villalón stated that the rules laid down in the Posting of Workers Directive ([Directive 96/71](#)) 'coexist with an additional but essential set of rules in order to give them effect' (para 42). Having discussed the legislation in question, he went on to criticise the reasoning that the ECJ made based on the provisions of the Posting of Workers Directive in *Laval* and *Rüffert* and *Commission v Luxembourg*. Instead, AG suggested that the Court in this case should take a constitutional interpretation approach, based on the Treaty provisions (Article 56 TFEU) that occurred in *Arblade and Others*, as opposed to the Posting of Workers Directive that was interpreted in *Laval* (para 46).

The innovative suggestion made by the AG was that 'since 1 December 2009, when the Treaty of Lisbon entered into force, it has

been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms' (para 51). To this end, he pointed to Article 9 TFEU, Article 3(3) TEU and Article 31 of the Charter of Fundamental Rights. Thus 'a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly' (para 53). In this way, 'to the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation'.

In other words, Advocate General proposed that new changes in European constitutional law allowed certain restrictions on free movement of services (social protection of workers in this case) to be given the same importance as the fundamental freedoms (i.e. free movement in services). This means that social goals should no longer have to be considered as narrow limitations to free movement of services, but are to be given the same standing and importance as fundamental freedoms.

The ECJ followed Advocate General Cruz Villalón's suggestions in para 94 of the Opinion. However, the judgment did not address any of the above concerns related to the social changes introduced by the Lisbon Treaty. The Court applied the breach-justification-proportionality approach. Thus it held that both 'obligations constitute a restriction on the freedom to provide services' (para 44), which could be justified by the objective of the social protection of workers. The ECJ went on to state that 'a registration and notification procedure, by virtue of which ... the declaration in question assumes the nature of an administrative authorisation procedure, goes beyond what is necessary in order to ensure that posted workers are protected' (para 52); whereas 'Articles 56 TFEU and 57 TFEU national

legislation requiring an employer, established in another Member State and posting workers to the territory of the first Member State, to keep available to the national authorities of the latter, during the posting, copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period' (para 61).

What could be the reasons that the ECJ decided not to incorporate AG General Cruz Villalón's reasoning of 'new social era' (paras 51-53) in European law? Could it be the fact that the new [Posted Workers Directive](#) is on the way? Maybe the ECJ did not want to address the question of importance of social values at the moment because then it would be doing the legislator's job?

Whatever the motives behind the ECJ's argumentation, it seems that Cruz Villalón's call for a more balanced 'rights v freedoms' approach is valid and very timely. I trust it will find support not only in academia, but in the future opinions of other Advocates General.

Note: this blog post was first published on 2 December 2010 on ['Europe on the Strand' blog](#):