Accounting and Management Information Systems
Vol. 8, No. 4, pp. 622 – 639, 2009

TERRITORIALITY OR PORTABILITY IN CASE OF LABOUR LAW?

Raluca DIMITRIU[1]
The Bucharest Academy of Economic Studies, Romania

ABSTRACT

The variety of Labour Regulations is not only respected as a fact of the European construction itself, but it is also encouraged by various legal instruments, under the circumstances of elimination of any possibility of disadvantage of some workers with regards to other workers.
Essentially, the labour law is territorially applicable, a territoriality which can be eliminated by the parties' will only to the extent this determines more rights for the employee. The labour law portability can be accepted only in case it would not lead to discrimination of the employee carrying out his/her activity in another country.
As regards the relation between diversity and discrimination in labour relations, the European Union pays a crucial part, in the sense that it protects the former and it eliminates the latter.
In the last few years, the New Member states, including Romania, saw major evolutions in their labour market flexibility and income security.
This work is intended to investigate the relation between territoriality and portability in the European Labour Law, as well as the identification of the field in which the worker can carry out his/her activity in the territory of another Member State, yet maintaining his/her Law system.

Law, Labour contract, European Union, discrimination

[1] *Correspondence address:* Raluca Dimitriu, Faculty of Accounting and Management Information Systems, Bucharest Academy of Economic Studies, Piaţa Romană nr. 6, Bucharest, Romania, Tel. +40 21.319.19.00, E-mail: raluca_dimitriu@yahoo.com

INTRODUCTION

Although the domestic legislation of the Member States of the European Union in most of the branches of law is closely similar, the differences from one State to another as regards the labour relation regulations are still obvious. As a matter of fact, the European Union itself seems not to have as an objective the similitude of labour law in the Member States, letting each system the freedom of self-regulating the labour collective and individual relations. The relatively reduced number of Directives and Regulations passed in the field of the labour law proves a background in which the freedom of domestic regulation is larger than in other law fields and the European Community legislator's intervention is rather discrete.

Under these circumstances of maintaining the diversity, one of the politics' purposes promoted by the European Union in the field of labour contracts is non-discrimination. The juridical differences from one Member State to another will not be used for the purpose of discriminating a worker coming from a Member State compared to his/her colleagues coming from another Member State. Furthermore, the regulation of the most varied labour contracts in which work can be carried out at present will not determine the discrimination of workers who carry out their activity based on an atypical employment contract compared to those who work based on a typical employment contract.

1. CONSEQUENCES OF THE "ROME I" REGULATION

As regards this diversity from one State to another concerning the regulation of the labour contract, the (EC) Regulation no. 593/2008 of the European Parliament and Council, from June 17th 2008 on the law applicable to contractual obligations, seems to be extremely important not only for the setting of the law applicable to civil or commercial relations, but also for the labour contracts. (In literature and jurisprudence the references to this regulation are made under the heading "Rome I", while the (EC) Regulation no. 864/2007 on the law applicable to non-contractual obligations is called "Rome II").

Indeed, if the labour law from the Member States had a homogeneous character, it would not be extremely important if to a labour contract is applied the employee or the employer law. But, since each Member State has its own policy as regards the manpower, the latter being materialized by a package of legislative measures, once the protection offered to employees by each Member State is different – the fate of the labour contract itself depends on the establishment of the law applicable to it.

The "Rome I" Regulation is applied to the contractual obligations, in case there is a conflict of laws. This refers to the contracts concluded after December 17th 2009, date on which the "Rome I" Regulation comes into force. The "Rome I"

Regulation replaces the Convention of Rome of June 19th 1980 on the law applicable to contractual obligations. Romania had ratified the Convention of Rome from 1980 at the same time with the EU Adhesion Treaty.

At present, the law applicable to Individual Employment Contracts is established by the article 8 of the "Rome I" Regulation. According to this text:

> "(1) An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
> (2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
> (3) Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
> (4) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply".

Hereunder, we will try to put forth the consequences of the above-quoted regulation. Simplifying, we can assert there are two possibilities:

a) the parties did not choose the applicable law. In this case, *the law objectively applicable* is established to be, in turn:

- the law of the country the activity is carried out in;
- the employer law;
- the law of the country the employment contract is closely connected to;

b) the parties have chosen the applicable law. This is *the law subjectively applicable*. The law subjectively applicable can never be more disadvantageous for the employee than the law objectively applicable.

In other words, the "Rome I" Regulation aims to eliminate the possibility of applying a more disadvantageous legal regime to the employee coming from another State, compared to the regime he/she would have had if he/she had come from the State where he/she carries out a temporary activity. Let's give an example: a worker from the Member State "A" carries out the activity for an employer established in the Member State "B". The law objectively applicable is

the law "B". Let us suppose that the law "A" is more protective for the employee than the law "B". In this case, the parties could choose as the law subjectively applicable the law "A", eliminating thus the law objectively applicable. If, on the contrary, the "A" is less protective than law "B", it will not be chosen by the parties as a law subjectively applicable any more.

The law objectively applicable comprises the minimum rights that are to be acknowledged to the employee. Any conventional derogation can be made to the advantage of the employee only.

Essentially, the labour law is territorially applicable, a territoriality which can be eliminated by the parties' will only to the extent this determines more rights for the employee. The labour law portability can be accepted only in case it would not lead to discrimination of the employee carrying out his/her activity in another country.

Than, which would be the solution if the employee normally carries out his/her activity in the territory of a State and temporarily in the territory of another State? The article 8, paragraph (2), 2nd thesis provides as follows: the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

Thus, if the employee is temporarily sent to work in another country, his/her own labour legislation is to be applied. The law objectively applicable will not be the law of the place the employee carries out his/her activity, nor the temporary employer law, but the law of the normal activity, the initial contract law, usually meaning the employee law. For instance, the delegation of the employee or his/her sending to another country to temporarily work does not determine the modification of the legal regime applied to the initial employment contract. Here we have another breach in the labour law territoriality, as although the work is carried out in the territory of one State, the law objectively applicable is the law of another State.

As a consequence, as regards the E.U. norms, the labour law courts of each state, including Romania, must be prepared to judge not only according to the Romanian law, but also according to the law of another Member State, as a law objectively applicable or subjectively applicable the legal contract under discussion.

2. NON-DISCRIMINATION OF WORKERS

The E.C. norms on the establishment of the applicable law are based on the very strict conception of the European Union as regards the interdiction of discrimination. An even shallow examination of the E.C. regulation can easily prove it.

Besides the "horizontal" diversity of regulations in the field of labour law, from one country to another, in the contemporary labour law we have also a "vertical" diversity, inside the same law system, among various contractual forms of work. It is about the atypical employment contracts, as the contract concluded on determined period of time, the temporary employment contract, the part-time employment contract, etc, as well as the special modalities of work carrying out (telework, night work, work in turns, etc.). Sometimes, the work is carried out both in an atypical contractual form, as well as in another State. In these circumstances, the E.C. regulations constantly try to eliminate the possible discriminatory manifestations, on both sides of diversity.

Regarding the **posted workers**, they are applied the European Parliament and Council Directive 96/71/EC of December 16th 1996 on the posting of workers in the framework of the provision of services, transposed in Romania by Law no. 344 of July 19th 2006 on the assignment of employees inside the transnational services.

It was notice that this doctrine had a specific sense for the expression "posting" [detasare], compared to the meaning of the same in the Romanian law (Popescu, 2008: 441).

Indeed, in the Romanian law the usual meaning of the posting notion supposes the suspension of the employment contract with the initial employer, which sent the employee to work in another company – the beneficiary of services supply – and the cession of the employment contract temporarily to the same company. Thus, according to the Article 45 of the Labour Code, by temporarily transfer one means the decision of the employer to temporarily change the working place of his/her employee, to another employer, for the purpose of carrying out some works for the latter's benefit. As per Article 52, letter e) of the Labour Code, the employment contract can be suspended by employer's decision, among other, during his/her transfer.

On the contrary, according to the Directive, the concept of "posting" encompasses alternatively (article 1, paragraph 3):

(a) to post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) to post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a

Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

Thus, the posted workers continue their working relation with the employers giving the assignment and not with the company beneficiary of the services. By this, the term of "posting" used by the Law no. 344/2006 can create confusions.

As per Article 3 of the Directive:

> "The Member States make the assurance that, irrespective of the law applicable to employment contracts, the companies warrant to the workers posted in their territory working and employment conditions concerning the following aspects established in the Member State in the territory of which the works are carried out:
> ✓ by means of documents having the value of law and administrative documents and/or
> ✓ by collective conventions or arbitral judgments of general applications to the extent they refer to:
> (a) the maximum work periods and the minimum rest periods;
> (b) the minimum paid annual leaves period;
> (c) the minimum salary, including the payment of extra hours; this paragraph does not apply to the pension complementary systems;
> (d) the conditions of workers assignment, especially by the part-time employment contract companies;
> (e) security, health and hygiene at the working place;
> (f) protection measures applicable to the working and employment conditions of the pregnant women or who recently gave birth, of children and youths;
> (g) parity of treatment between men and women, as well other provisions concerning the non-discrimination".

Here we have nucleus of imperative norms of minimum protection which must be complied with in the State where the activity is carried out by the employer who assigns the employees, thus eliminating the possibility of any discrimination. As a consequence, any interpretation of the Directive must be made under this meaning, as the Court of Justice of the European Communities had the opportunity to show.

As the **temporary workers** are concerned, employed during the mission of temporary work in a user company located in the territory of another country, is applicable the article 5, paragraph (1) of the Directive 2008/104/EC of November 19th 2008 on the work by temporary work agent: "The work and employment basic conditions applicable to temporary workers are, during the temporary work mission with a user company, at least those that would apply to workers in case they had been directly recruited directly by the relative user company in order to have the same position".

This means that, even if the law objectively applicable is the initial law, meaning the law of the employment contract concluded with the temporary work agency, it will not determine for the temporary workers a work regime inferior to those of their colleagues directly recruited by the user.

As regards the **workers employed on determined period of time**, the Directive 1999/70/EC of the Council from June 28th 1999 on the standard agreement concerning the determined period work, concluded between the CES, UNICEF and CEEP provides in the clause 4, paragraph 1: "As regards the employment conditions, the workers employed on a determined period of time are not treated in a less favorable manner that the workers having a undetermined period of time contract, on the ground they have a determined period of time contract, save for the case the discriminatory treatment is justified by objective reasons".

The text does not make an express reference to the hypothesis in which the employee concludes an employment contract on determined period in another country, because the legal regime applicable in this case is similar to that applicable to the employment contract concluded on undetermined period in the territory of another country. The law objectively applicable will be the law of the place the work is carried out.

As per Article 4 from the Standard Agreement on telework S/2002/206.01.02 concluded in Brussels in 2002 between the social partners, the **teleworkers** benefit from the same rights and they have the same obligations as the other employees of the employer.

Similar regulations are those concerning the **part-time employees**, the Directive 97/81/EC of December 15th 1997 on the standard agreement regarding the part-time work, concluded among the UCIPE, CEIP and CES, provides in clause 4: "In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds."

As a conclusion, the E.C. law contains many regulations concerning the prohibition of discrimination, maintaining the diversity. Yet sometimes these norms could be interpreted against the meaning they are legally known by, as an expression of what our doctrine calls "abuse of law". The Court of Justice of the European Communities constantly rejected such interpretations, as the cases of Laval, Viking, Rüffert or Luxembourg. The case of Laval is mentioned below, as a significant example for the modality of application the norms of interdiction of discrimination between the workers who normally carry out their activity in the territory of one State and the workers posted in the territory of the relative State.

3. THE LAVAL CASE

The Directive 96/71/EC on posting of workers in the framework of the provision of services somehow anticipated the way of thinking that was to be the base of the provisions of the Article 8 of the "Rome I" Regulation. The worker could not be deprived of, by choosing the law subjectively applicable, the benefit of the minimal applicable norms at his/her working place.

As regards the modality of transposing into the domestic law of this directive, before the Court of Justice of the European Communities, one of the most important preliminary questions in the history of this body was asked, at least as regards the labour law. Known as "The Laval Case", the C-341/05 Case launched huge wave of debates with social and political implications, aiming at the connection between the so-called "old Member States" and "new Member States" of the European Union.

The purpose of the Article 3 of the Directive 96/71/EC (quoted above) is to protect the worker posted in another country from the possibility of being discriminated by the employer in that country applying a less favourable legal regime than those which applies to the other workers. In other words, the position of posted worker from the State A in the State B does not have to determine the application for the posted worker of a less favourable legal regime than that the workers currently carrying out their activity in the State B benefit from.

The Laval Case was born in the wake of using this regulation – emphasizing on *protective regulation* for the posted worker – against his/her interests.

As the case itself comprises many elements that we will not be able to reproduce them entirely, we are going to present a synthesis of the Laval Case, mentioning that our description has many simplifications lacks in all details of the case.

B. is a trade union organization from Sweden for the workers in the field of construction. Approximately 87% of the workers in the field of construction are part of this organization.

A collective convention was concluded between the trade union organization B, as central organization which represented the workers in the field of construction, on one side, and the S.B. (the central organization of the employers from the field of construction) on the other side. According to this collective convention, the "safety salary" was of 109 SEK (approximately 12 Euros) per hour for the second half of the year 2004.

Laval is a Latvian company whose headquarters is in Riga. Between May and December 2004, this company posted in Sweden approximately 35 workers to work on the sites of the Baltic company, a Sweden company whose capital was possessed by Laval 100%, especially for the building of a school in Vaxholm.

Laval had signed collective conventions with the Latvian trade union of the workers in the field of construction in Latvia.

The Swedish trade union organization B required to the Laval company, on one side, to adhere to the collective convention from the field of construction as regards the site in Vaxholm and on the other side to warrant that the workers posted receive a salary of 145 SEK (approximately 16 Euro, meaning over the "safety" salary).

"The adhesion" to the collective convention is required by the trade union because Sweden does not know the system of the general applicability of collective labour contracts to all the employees from the level they were concluded. The collective labour contracts are applicable only to employees that are members of the trade union which negotiated the relative employment contract. Actually, there is no minimum salary imposed by law or by any generally applicable labour contract.

In other words, although the workers posted were part of a collective convention applicable in their country of origin, Latvia, and their salary respected the minimum level imposed by this country, the trade union based in the country they were detached claimed the respecting of a superior level of the minimum salary, that is the salary negotiated with the Employer's Association representative in the field of construction in Sweden. As stated above, such a collective contract is not, according to the Swedish law, automatically applicable to all the employees and the employers which carry out activities in the relative field, and the opposability of the collective convention is determined by an express adhesion procedure to its provisions.

The requirement of the trade union B was rejected by the Baltic Swedish company which continued to give to the employees posted from the Laval Latvian company salaries according to the provisions of the collective contract applicable in the country of origin. As by means of negotiation they came to no result, the trade union B submitted a notification to the Baltic company, by which it announced a collective action was going to be initiated.

A blocking of the site in Vaxholm started on November 2nd 2004. This blocking consisted especially in hindering the supply of merchandise on the site, in initiating strike pickets and in prohibiting the entrance on the site of the Latvian workers, as well as of vehicles. The Laval Company (the Latvian employee of the posted employees) required the help of the Police Forces which informed it that, since the collective action was legal according to the national law, they were not authorized to intervene nor to eliminate the physical obstacles which prevented the entrance on the site.

At Christmas, the Latvian workers sent by the Laval Company came back in Latvia and never came back on the site again.

In January 2005, other trade union organizations announced solidarity actions meaning the boycotting of all sites that Laval had in Sweden, so that this company was no longer able to exercise its activities. In February 2005 the city of Vaxholm required the cancelation of the contract concluded with the Baltic company and, on March 2005, this went bankrupt.

Referred with compensation claims by the Baltic company, the Swedish Company formulated a preliminary question to the Court of Justice of the European Communities: "Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC … for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?"

The reasoning is as follows: the employees can initiate collective actions for the protection of their own interests. For instance, they can claim higher salaries, reacting by means of such actions in case of the employer's refusal. But can the employees react in front of the employer's refusal to grant superior rights, as high salaries, to some third parties?

Far from being a form of solidarity with the posted workers, the trade union aimed, by above-mentioned protest actions, at their elimination (which was also achieved), a questionable lawfulness objective. Thus, between the employer and the posted worker interferes a third party, a trade union which does not represent the interests of the workers of the same employer, but of other workers in the field, competing for the positions of the posted workers. This trade union claims that the employer grants superior rights to posted workers. In fact, the trade unions intend that the use of posted workers become burdensome for the employer so as this employer prefers using the local manpower. The preliminary question regards the compatibility between such behaviour and the EC norms.

From the beginning, the Swedish trade unions questioned the admissibility of the application concerning the preliminary decision pronunciation, claiming that the Laval Company, whose activity would be the temporary placing of staff from Latvia to companies which exercise their activity on the Swedish market, in fact tries to elude all the obligations resulting from the legislation and from the Swedish regulation on the collective conventions and tries, by invoking the provisions of the Treaty on Services, as well as the Directive 96/71, unjustifiably availing itself of the facilities given by the EC law. The Court rejected this point of view, thinking that the preliminary decision pronunciation application is admissible.

Further on, the Court started from the premise that the EC law does not object to the Member States extending the applicability of their legislation or of the collective conventions concluded by the social partners, regarding the minimum salaries, regarding any person who carry out a remunerated work, even having a temporary character, in their territory, irrespective of what the settling State of the employer is. From the Directive 96/71 results that the Member State legislations must be coordinated so as a nucleus of imperative norms of minimum protection is provided and which should be complied with in the host State by the employers who assign workers in this country. Nonetheless, the application of such norms "must be so to guarantee the objective aimed at, that is the protection of workers who were posted and who work in the territory of the host country and not to exceed what is necessary to reach this goal".

On the other hand, the trade union B showed that the right to initiate collective actions during the negotiation with an employer is not part of the field of application of the Article 49 of the European Community. The EC is not competent to regulate this right.

But the Court rejected also this point of view. The fact that the EC law does not apply neither for the right to strike, nor for the right to lock-out, is not of a nature to initiate a collective action as that under discussion in the main case from the field of freedom to supply services.

As for the possibility to take a decision as regards the right to strike, the Court considered:

- it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).
- Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of

Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

- Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.
- In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods or freedom to provide services.
- As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.
- It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.
- It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.
- It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect.
- Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.
- In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which

undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

- The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.
- The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.
- In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty
- Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.
- It must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.
- However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be

justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

- Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means.
- However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.
- In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

This view of the Court was to determine detailed doctrine analyses, as the Laval case was thought to be translated by: **The freedom of services movement versus the right to strike**. There have been voices (especially from the trade union field) which considered that, by its decision, the Court decides in favour of services freedom of movement, to the prejudice of right to strike, as it considered the collective actions initiated by the other workers against its decision to the illegitimate.

On the other side, the trade union B showed that the restrictions of services freedom of movement are justified since they are necessary to guarantee the protection of a fundamental right recognized by the European Community law and they have as objective the workers protection which could be an imperative reason of general importance. The right to carry out a collective action which has as purpose the protection of workers in the host State against a possible social dumping practice can represent a imperative reason of general importance, according to the Court jurisprudence, of a nature to mainly justify a restriction concerning one of the fundamental freedoms guaranteed by the treaty, as the services freedom of services. The trade union B insisted on the fact that the goal wanted by the initial blocking against Laval represented the workers protection.

The Court also rejected this defence. Mainly, a blocking carried out by the trade union organization from the host Member State, which aims at guaranteeing to the posted workers during a cross-border service supplies working and employment conditions established at a certain level, it is part of the workers protection objective. Nonetheless, as regards the specific obligations connected to the adhesion to the collective convention in the field of constructions, which the trade union organizations try to impose to companies based in other Members by a collective action as the one under discussion, the obstacle that the latter supposes could not be justified according to such an objective.

Finally, the Court decided: Article 49 EC and Article 3 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 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

CONCLUSIONS

The labour law norms regulate the relation between the employee, taken individually, respectively a group of employees and the employer, relations based on the individual contract, respectively the collective employment contract. The interests of these parties are not similar but if theses interests have common elements, the employees and the employer can reach a consensus, or on the contrary, if these become divergent the two parties can reach a conflict.

The possibility of working in any Member State of the European Union complicates the background of the labour law. The workers do not find themselves in divergent or convergent relations only with the employer, but also with the other workers, belonging to the same State or to some other Member States. The person's freedom of movement and the freedom of service establishment determine the workers not to be skilled to carry out the work only in the territory of a certain Member State, but also in the territory of any other Member State, and when the number of the position is limited and the unemployment grows, they are in competition with any other European worker. If the employee posted is subject to his/her own law in the State where he/she works temporarily and this law contains salary standards and work conditions inferior to those imposed by the law of the State where he/she works temporarily, his/her employing becomes more attractive for the economic agent than employing workers who currently carry out their activity in that country territory.

This situation is not without repercussion regarding the European trade union confederations. The Laval Case, as the solutions given by the Court of Justice of the European Communities concerning cases as Viking, Rüffert or Luxembourg provoked their virulent reactions, especially on the protection of workers from the old Member States. The Court was accused of supporting the "social dumping" enabling thus the access on the labour market of workers from the new Member States, according to their own laws, which impose inferior minimum working conditions and salaries. Thus the unemployment centre of gravity would go towards West as here the employing is more costly. Among the trade union confederations which protested we could mention ETUC (European Trade Union Confederation), CGT (Confédération Générale du Travail), ITF (International Transport Workers Federation) etc. On the contrary, the Trade Union Confederations based in new Member States of the European Union did not have any reaction, meaning they did not support the Court solutions, except some trade unions from the Baltic counties.

The unemployment rate, which kept on increasing from the publication of solution for the Laval case up to the present due to the world crisis, became an extremely important factor in choosing a certain solution as the positions did not have a sole legal character, but also a political one. The conflict that can arise does not concern thus only the two traditional actors, the employer and the employees, but also the workers among themselves, the persons looking for a job and those who already carry out an employment contract, those temporarily employed and those employed on determined period of time, those subject to a certain law and those subject to some other law, or even those coming from various Member States of the European Union.

The analysis made here concerns only a small part of the problem regarding the working activity in the territory of other Member States than that where the employee currently works. The labour law is traditionally the right to protect the

weak one, the person more exposed economically, and from the above-mentioned issues results that the contemporary EC law maintains this vision not only when it concerns the relation between the employer and the employee, but also among the employees belonging to different Member States.

At European level there is a small concern for the actual regulation modality of some contractual relations in the internal law of each State, but there is concern for the elimination of legal regime conflicts among those who work for the same employer, based on some various contracts. As a consequence the concept of "comparable employee" appeared, that can be also found in the Romanian law. Since there is an important variety of the types of contracts concluded, since the employment contracts tend to become even more flexible, transforming in "niche legal relations" negotiated and applicable according to the interests of a certain employer and of a certain employee, under the conditions of the various legal regimes consecrated legally or by collective employment agreements in each country, the elimination of the discriminations that such a diversity could generate represents a very actual stake in the EC law. The implementation of the flexicurity concept – this new connection between the labour law and the social security law – contains the danger of the discrimination of employees who carry out their activity based on some contractual relations.

By respecting and encouraging the diversity, the EC law norms always aim at eliminating any discrimination possibility. Furthermore, besides enunciating such an objective, the European Union bodies interpret these norms so that these do not lead to disadvantaging just those whose protection is wanted. When, as concerns the Laval case, some European trade union confederations claim the right of workers to strike was violated, their protest does not concern the axis of the employee-employer ratio of forces, but they fight for promoting the interests of its own workers to the detriment of other EC workers interests.
On the other side, the Laval case proved that, although there is not a EC competence in the field of strike and of the minimum salaries, the EC law eventually influences also these fields. The court of Justice of the European Communities could not avoid the direct reference to the right to strike and the appreciation regarding the lack of legitimacy of the collective actions for the Laval case. In fact, the labour law is a unitary action out of which it is difficult to delimitate a sequence which definitively escape the EC institutions competence.

As regards the effects of the Laval case in the Romanian society, they determined fewer consequences than in other law systems. As far as we are concerned, we believe that the Romanian trade unions should double their efforts to be taken into account both internally and abroad. They should have firm points of view, not necessarily consistent with those expressed by the important European Confederations, meaning to agree with the points of view expressed by the court of Justice of the European Communities in cases as Laval and to protect the interests of workers they represent not only as concerns their employers in the territory of

Romania, but also as concerns the employers they work temporarily for, or even against the workers in the host countries where they are posted. A opening of the trade union activity is necessary, especially under the condition of the world crisis, which should enable an actual representation of the Romanian employees taking into account the services settling and the movement freedom.

The traditional relation, sometimes of conflict, sometimes of agreement, between the employer and the employees is, at the level of the country and the European Union, doubled by a new type of relation, sometimes characterized by agreement and sometimes by conflicts: among the workers belonging to different Member States. These compete to get positions that during this economic crisis are limited and even fewer. We believe this might be a meditation theme also for the political factors as well as for the trade unions as the objective of the European trade union solidarity seems to be more distant than ever.

Different, but not discriminatory, enabling the Member States a regulation autonomy, but protectively interfering for those economically exposed, promoting the flexibility, as well as the security during work, the EC labour law is constantly changing in searching for answers.

REFERENCES

Banu, M. (2008) "Regarding the relation between the collective action of trade unions and the exercise of a fundamental freedom from EC Treaty, including by posting workers", Notices on decisions of the Court of Justice of the European Communities in cases C 438/05, Viking and C-341/05, Laval [Despre raportul dintre actiunea colectiva a sindicatelor, pe de o parte si exercitarea unei libertati fundamentale din Tratatul CE, inclusiv prin detasarea de lucratori, pe de alta parte. Observatii pe marginea hotararilor CJCE in cauzele C 438/05, Viking si C – 341/05, Laval], *Revista Romana de Drept Comunitar*, no. 4: 130-170

Dimitriu, R. (2009) "Responsibilities of the Origin State in the Protection of Migrant Workers. The Case of Romania", *Cahiers de l'Urmis*, no. 12, http://urmis.revues.org

Dimitriu, R., Vartolomei, B. & Vidat, A. (2009) "Collective bargain and protection of migrant workers" [Negocierea colectivă şi protecţia lucrătorilor migranţi în cadrul Uniunii Europene], *Revista Română de Dreptul Muncii*, no. 5: 24 – 35

Popescu, A. (2008) *International and European Labour Law* [Dreptul International si European al Muncii], Bucharest: Ed. CH Beck

Ştefănescu, I.T. (2008) „The globalisation's impact on labour law and on social secuity law" [Impactul globalizării asupra dreptului muncii şi a dreptului securităţii sociale – perspectiva europeană], *Dreptul*, no. 4: 68 – 87

www.lavalvikingruffert.eu/default.aspx