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Inland Water Transport workers and the Posting of Workers Directive

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Abstract

Inland Water Transport (IWT) workers within the EU represent a workforce of about 50,000, most of whom work across borders on a regular basis. The national labour law applicable to them is hard to determine under the current EU legal framework. In particular, the question of whether, and if so, when, IWT workers should be viewed as posted workers, within the meaning of the Posting of Workers Directive (PWD), remains unclear. This article aims to shed some light on the matter. It suggests that determining the national labour law applicable to them under the Rome I Regulation should be the priority. This would suppose that the meaning of the 'habitual place of work' be clarified for IWT workers. In order to do so, we claim that the usual pattern of operation in IWT should be taken into account. IWT is a river-based, rather than a country-based, activity. For this reason, we suggest a two-step process in determining the habitual place of work: first designate the river where IWT workers carry out their activity, then determine the law of the riparian State that is objectively applicable to their contract of employment. In our view, such an approach would suffice to fix most social dumping practices presently ongoing in IWT. It would also bring clarity and security to both workers and transport undertakings, without generating disproportionate additional administrative burdens for Member States or transport undertakings. The PWD would then marginally apply to IWT workers, covering cases that depart from the usual IWT patterns of operation, when it brings real benefits to IWT workers.

Keywords

Labour law, transport workers, inland water transport, EU law, social dumping, posting of workers

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Introduction

The free movement of workers within the EU presently comes with a labour law framework that is both complex and riddled with gaps and uncertainties. EU law does not harmonise the national labour laws of Member States but rather posits minimum standards and common choice of law rules for the determination of the applicable national labour law. Every worker within the EU remains governed by the national labour laws of a specific Member State. Given the current differences in labour standards across the EU Member States, undertakings may be tempted to choose the national labour laws that lower their social costs, leading to so-called social dumping practices. The term, although largely used, is not defined under EU law.[1] As this article focuses on labour law considerations, the term will here only refer to unfair competitive advantages gained by playing with the differentials in labour costs (wages, working time, annual leave) among EU Member States, to the detriment of workers.[2]

IWT workers are not spared by the phenomenon. According to a 2019 report, wages within the EU for the same activity on board an inland vessel may vary from EUR600 to EUR3000.[3] To take advantage of the labour cost differentials, the most commonly reported practice consists in hiring out workers, from an employer located in a low-labour cost country, to a user undertaking established in a country with higher social standards. Techniques to that end include recourse to placement agencies, subsidiaries, time charters,[4] or a combination of the three. The personnel recruited

1. On 18 August 2016, the European Parliament proposed a definition circumscribing social dumping to unlawful practices. It defined social dumping as '*a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and lead to violations of workers' rights and exploitation of workers'* (Report on social dumping in the European Union, 2015/2255 (INI), 18 August 2016). In this article, we opt for a definition that also encompasses social dumping practices that are legal and actually induced by a legal framework that is not fit for purpose. In our view, these practices should be addressed as a matter of priority, through a revision of the current legal framework.
2. The definition we are proposing echoes the terms used in recital 5 of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services: 'promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers'.
3. CCNR, *Thematic Report, the European Inland Navigation Sector Labour Market*, February 2021 (CCNR Labour Market Report 2021); https://www.ccr-zkr.org/files/documents/om/om20_IV_en.pdf, p. 6: 'According to official figures, the average monthly gross wage in the water transport sector in the Czech Republic was 872 Euro in 2017, thereby 16% lower than the average wage level in the Czech transport sector and 23% lower than the average wage level in the whole Czech economy. In the Hungarian IWT sector, the average monthly earnings for IWT workers amounted to 602 Euro, which was about 29% below the average wage level in the entire Hungarian economy. In Serbian IWT, the wage of IWT workers was 616 Euro in 2019. Compared to the wage level in western Europe, wages in eastern Europe are very low: the monthly gross median income for full-time IWW workers under the social security regime in Germany was 2,780 Euro in IWW freight transport in 2017 and 2,917 Euro in IWW passenger transport.

   Even if one takes into account the possibility that actual wages might be higher than the wages as stated in the official figures, it can be assumed that there is a significant wage gap between central and eastern Europe on the one hand, and western Europe on the other hand. This is confirmed by statistical data on the level of personnel costs per employee per country in the EU.

   According to Eurostat figures, the seven countries with the lowest personnel costs per employee in IWT in the EU are (in ascending order regarding the cost level): Bulgaria, Serbia, Croatia, Romania, Czech Republic, Hungary, Poland. Personnel costs per employee in German IWW freight transport are around three to five times higher than in these countries.'
4. A time charter is a contract whereby a vessel owner or operator rents a fully equipped vessel to another undertaking for a limited period of time. As in the maritime sector, these contracts are commonly used in IWT. For instance, river cruise vessels are often rented to a tour operator for the season through a time charter.

are typically low-skilled workers (boatmen in freight transport, cabin crew in river cruise shipping) who are either non-EU citizens (from Ukraine, Serbia, Indonesia, the Philippines, etc.) or Central and Eastern European nationals (from Hungary, Croatia, Bulgaria or Romania). These practices are common in many other sectors using low-skilled workers, where they have been widely described and commented on.[5] The freedom to provide services is the EU principle that makes such practices possible.[6]

Other methods encountered in IWT consist in relocating the headquarters of the undertaking or reflagging the vessel in a low-cost country (Malta and Cyprus being the most favoured locations).[7] Freedom of establishment is the EU principle that makes such practices possible.

The EU regularly takes initiatives to improve its legal framework in an endeavour to prevent social dumping practices. The recent efforts to upgrade the Posting of Workers Directive is one of its latest endeavours to that end. Directive 96/71/EC 'concerning the posting of workers in the framework of the provision of services', adopted in December 1996, was supplemented in 2014 by a Directive on its enforcement (the Enforcement Directive)[8], and further amended in 2018 (the Reform Directive).[9] We will refer to this whole package as 'the PWD'.

5. See, for instance, the analysis provided in the Study commissioned by the European Parliament's Policy Department for economic and scientific policy, 'Posting of Workers' Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07; https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU%282016%29579001_EN.pdf (2016 Parliament Study on the Posting of Workers' Directive). The study distinguishes two major models of posting: one mainly driven by labour costs and one driven by shortage of highly-skilled workers. The first model is largely used in transport: 'a specialisation of lower wage countries in the provision of labour-intensive services to higher wage countries can be observed, particularly in sectors such as construction or transport' (p. 17). The model typically involves employment agencies, especially in the building and construction sectors as well as in the transport, shipbuilding, hotel and restaurant, and other service sectors (p. 40). See also J. Cremers, 'Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping', ETUI Policy Brief No. 5/2014, Brussels, or De Wispelaere, F., De Smedt, L. and Pacolet, J – HIVA- KU Leuven (2019). *Posting of workers– Report on A1 Portable Documents issued in 2018*, European Commission, p. 9 & p. 25–26, available at: https:// www.mobilelabour.eu/ wp- content/ uploads/ 2020/ 02/ PD- A1- report- Referenceyear-2018.pdf. See also P. van Nuffel and S. Afanasjeva 'The Revised Posting of Worker's Directive: curbing or ensuring free movement of workers?' *in* N. Cambien, D. Kochenov, E. Muir (eds), *European Citizenship under Stress; Social Justice, Brexit and other Challenges,* Nijhoff Studies in European Union Law, vol. 16, 2020, p. 274: 'In several sectors, Member States face an increasing number of workers being posted from Central or Eastern Europe Member States with generally lower wage levels'. For an analysis of the phenomenon in air transport, see Ricardo Energy & Environment, 'Study on Employment and Working Conditions of Aircrews in the EU Internal Aviation Market' (the 2019 Ricardo Report), Study Contract no. DG MOVE/E1/ 2017-556, January 2019. https://op.europa.eu/fr/publication-detail/-/publication/97abb7bb-54f3-11e9-a8ed-01aa75ed71a1.
6. As an additional complexity, placement agencies providing IWT personnel are at times manning agencies located in third countries. These agencies are primarily involved in the provision of seafarers (the British Virgin Islands, the Cayman Islands, the Philippines, Indonesia, etc.). The practice is indeed common in the maritime sector where it is authorised in all EU Member States. Some member countries extend their authorisation beyond seafarers, thereby allowing their use for the provision of IWT workers as well.
7. ILO Working paper n° 297, 'Living and Working Conditions in Inland Navigation in Europe' (2013 ILO Report), Dec. 2013, n° 2.7, pp. 12–13.
8. Directive 2014/67/UE of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (the IMI Regulation). This Directive had to be transposed into domestic law by 18 June 2016.
9. Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71 concerning the posting of workers in the framework of the provision of services. This directive had to be transposed into domestic law by 30 July 2020.

These well-intentioned initiatives solve some problems but also generate new ones. They even add to the current complexity for transport workers who regularly perform their professional activities in several EU Member States. IWT workers are among them, but because IWT is of little economic significance at EU level (counting for about 6% of the total share of goods transported)[10] and IWT workers represent a tiny workforce of fewer than 50,000 persons,[11] the complex legal framework that governs their social conditions is rarely analysed. This article tries to shed some light on one aspect of their largely ignored situation: whether, and if so, when, IWT workers should be viewed as posted workers within the meaning of the PWD.

1. IWT workers can be posted workers under the PWD

Pursuant to Article 2 (1) PWD, a '"posted worker" means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.

The PWD distinguishes three categories of posting (Art. 1(3)):

(a) when the employer sends his/her worker abroad to carry out a mission; or
(b) when the employer sends the worker to an establishment or an undertaking owned by the group in the territory of another Member State (intra-group posting); or
(c) when the worker is hired out by a temporary employment undertaking or placement agency to a user undertaking located abroad (indirect recruitment)

It is not disputed that transport workers fall within the scope of the PWD in case of intra-group posting or when indirectly recruited (hypotheses (b) and (c)). Whether international transport workers systematically fall under hypothesis (a), on the other hand, has led to divergent views.

1.1. From the exclusion of transport services to a general application of the PWD

Transport as a service was initially excluded from the scope of application of the PWD. Indeed, the PWD is based on Art. 57 (2) TEC[12] (now Art. 64 TFEU) and Art 56 TFEU,[13] which do not cover the provision of transport services. This is specified in Art. 58 (1) TFEU[14] and was initially re-emphasised by the CJEU: 'free movement of services in the transport sector is governed not by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58 (1) TFEU, according to which "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport".'[15]

10. European Commission Statistical Pocket Book, 'EU Transport in Figures', 2021, p. 36.
11. Based on the 2018 figures, IWT has about 48,266 workers, of whom 53% work in passenger transport (21,581 workers for 4,000 undertakings) and 47% work in freight transport (23,291 workers for 5,600 undertakings). See the *Eurostat Structural Business Statistics* quoted in the CCNR *Market Observation Report* for *2020*, p. 115). See also CCNR, Labour Market Report 2021, p. 43.
12. Directive 96/71/EC, recital 1.
13. Reform Directive, recital 2.
14. Previously Art. 51 TEC.
15. Judgment of 13 July 1989, *Lambregts Transportbedrijf v Belgian State*, C-4/88, ECLI:EU:C:1989:320, paragraph 9; judgment of 22 December 2010, *Yellow Cab Verkehrsbetrie*b, C-338/09, EU:C:2010:814, paragraph 29; Judgment of 19 December 2019, *Dobersberger,* C-16/18, ECLI:EU:C:2019:1110, paragraph 24.

Regarding international transport workers, the exclusion was further supported by the understanding that posted workers were meant to 'fill temporary shortfalls in the labour supply in certain sectors'[16] and therefore did not cover those regularly working on the territory of several countries.[17] This understanding still prevails in social security. Regulation (EC) No. 883/2004 on the co-ordination of social security systems limits the notion of posting to workers temporarily performing their activity in one foreign Member State.[18] Workers involved in international transport are not posted workers for social security purposes.

In the field of labour law, this understanding has evolved since the recent upgrading of the PWD. In a 2019 case (*Dobersberger*), the EU Court of Justice (CJEU) first found that the PWD is applicable to workers involved in services such as 'on-board services, cleaning services or the provision of food and drink on trains', because they are incidental and not inherently linked to the service of transport.[19] As such, they are not covered by the TFEU provisions relating to transport, but by the TFEU provisions relating to the provision of services in general.[20] In a later case in 2020 (*FNV*), the Court went a step further and found that Art. 1(3)(a) PWD applies to road transport workers.[21] To reach its conclusion, the Court not only referred to EU rules specific to road transport,[22] in which case its finding could have been limited to road transport workers. It also put forward arguments of a more general nature, which are equally valid for other transport modes. It first quoted the Enforcement Directive, which asserts its applicability to 'mobile workers in the transport sector'.[23] It further pointed out that the PWD explicitly excludes merchant navy seagoing personnel from its scope of application[24] and inferred therefrom that the PWD applies to all services not

16. See COM (2007) 304 final, 'Posting of workers in the framework of the provision of services: maximizing its benefits and potential while guaranteeing the protection of workers', p. 3; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0304&from=de.
17. See for instance *The Inspection Activity within posting of workers in the road transport: a guide for control authorities*, TRANSPO Project (Road Transport Sector and Posting of Workers, Call for Proposal VP/2010/011), considering that the application of Directive 96/71/EC to any single contract of transnational transport for the part of the journey that takes place in the territory of a Member State other than that of establishment was "unsustainable in terms of effectiveness and enforcement" (p. 19).
18. Posted workers are subject to the social security legislation of the country designated pursuant to Art. 12 of Regulation (EC) No.883/2004, whereas workers who habitually work in two or more Member States are subject to the social security legislation of the country designated pursuant to Art.13 of the Regulation.
19. Judgment of 19 December 2019, *Dobersberger,* C-16/18, ECLI:EU:C:2019:1110, paragraph 26.
20. These services 'fall within the scope of Articles 56 to 62 TFEU relating to services, with the exception of Article 58 (1) TFEU […and] may, as such, be covered by Directive 96/71, which was adopted on the basis of Article 57(2) and Article 66 EC, relating to services' (paragraph 27).
21. Judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (*FNV*), C-815/18, ECLI:EU:C:2020:976, paragraph 41.
22. The application of Art. 1(3)(a) to road transport workers was first asserted for those involved in cabotage operations. See Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market, Recital 17: 'the provisions of Directive 96/71 apply to transport undertakings performing a cabotage operation'. It was then recognised in more general terms. See Directive 2020/1057, recital 7: "The provisions on the posting of workers, in Directive [96/71/EC] […], apply to the road transport sector'. See also the Reform Directive, recital 15: 'Because of the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport also reinforcing the combating of fraud and abuse'.
23. *FNV*, paragraph 35. Article 9(1)(b) of the Enforcement Directive lists administrative requirements and control measures to ensure effective monitoring of compliance with the obligations set out, inter alia, in Directive 96/71. Among the measures listed, measures specifically aimed at 'mobile workers in the transport sector' can be found.
24. Directive 96/71/EC, Art. 1(2).

explicitly excluded from its scope:[25] 'the directive applies, as a rule, to any transnational provision of services involving the posting of workers, irrespective of the economic sector to which that provision of services relates, including, therefore, in the road transport sector'.[26]

From this, we can conclude that Art. 1(3)(a) PWD is, in principle, applicable to international transport workers, including IWT workers.

1.2. The requirement of a 'sufficient connection' for international transport workers

The extent to which the PWD applies to international transport workers, however, remains unclear.

As a preliminary remark, one should first emphasise that international transport workers are subject to the PWD only when they are effectively involved in the provision of a transnational service. The worker's activity must be related to the execution of a contract of service concluded between his or her employer located in country A and a client located in country B:[27] 'the categories of workers sent to another Member State, but still providing services in favour of their employer situated in their home country, remain excluded from the notion of posting under the Posting of Worker's Directive. In such an eventuality, indeed, the cross-border element required by the EU free movement rules is missing, since no service is provided to any recipient located in another Member State. This is the case, in particular, […] of tour operators'.[28] For instance, employees of a river cruise tour operator or IWT workers involved in the carriage of goods for their employer's own requirements would not qualify as posted workers.[29]

25. *FNV*, paragraph 38.
26. *FNV,* paragraph 33.
27. See *The Inspection Activity within posting of workers in the road transport: a guide for control authorities*, TRANSPO Project (Road Transport Sector and Posting of Workers, Call for Proposal VP/2010/011), p. 16–19: all the national experts involved in the TRANSPO project agreed that in the case of transnational transport from country A to country B, where the contract of carriage is concluded between two entities established in the same country and there is no contractual relationship between carrier and recipient, 'Directive 96/71 does not apply', as 'this type of transnational transport (from Country A to Country B) is not a "transnational provision of services" falling in the cases of art. 1.3. of the Directive'. It was then considered that transnational transport operations would qualify as a transnational provision of services if the contract of carriage was concluded between a provider of goods located in country A and a carrier located in country B, regardless of whether the transport operation *per se* was purely national or transnational. This understanding departs from the definition of posting in social security legislation, where there is no need for the worker to be involved in the provision of a transnational service.
28. M. Bottero, *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, Kluwer Law International, 2020, pp. 41–42.
29. Addendum to the minutes of the 1948th Council meeting held in Brussels on 24 September 1996, Council document No 10048/96 SOC 264 CODEC 550, statement No 3: 'Article 1(3)(a) of the [Posting of Workers] Directive presupposes the transnational provision of services by an undertaking on its own account and under its direction, under a contract concluded between the undertaking providing the services and the party for whom the services are intended and posting as a part of such provision of services.

    Accordingly, where the aforementioned conditions are not met, *workers who are normally employed in the territory of two or more Member States and who form part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water do not fall within the scope of Article 1(3)(a)'*.[Emphasis added] Quotation referred to in EU COMMISSION, Commission Staff Working Document: Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Brussels, 4 April 2006, SEC(2006) 439,12, and in the Opinion of the Advocate General Szpunar, *Dobersberger* case, C-16/18, ECLI:EU:C:2019:638, paragraph 5. See also G. Busschaert and P. Pecinovsky, 'The application of the EU posting rules to aircrew', EU project Research Report for a Support for social dialogue in the Civil Aviation Sector, Brussels, 2019 (the *Aviation research report)*, § 240: 'if

Even when involved in the transnational provision of a service, international transport workers are not always subject to the PWD. Following the adoption of the Enforcement Directive, some countries (particularly France,[30] Germany[31] and Austria[32]) decided to systematically apply part of their labour laws to all international transport workers operating on their territory. This practice was supported by trade unions,[33] but the European Commission launched an infringement procedure against these countries,[34] claiming that a systematic application of the PWD to international transport workers would constitute a disproportionate restriction of the EU internal market.[35] The CJEU confirmed the Commission's understanding in the *Dobersberger* case: the PWD only applies to international transport workers who have a 'sufficient connection' with the host country.[36]

Two reasons explain this limitation. First, the common choice of law rule for a contract of employment is enshrined in Art. 8 of the Rome I Regulation,[37] which in essence designates the law of the country 'in which or, failing that, from which the employee habitually carries out his work in performance of the contract' (usually referred to as the habitual place of work or the home country).[38] EU law posits the same choice of law and jurisdiction for all social aspects of the worker's condition.[39] The underlying policy objective is to ensure that all aspects of the

there is just the air carrier as an employer who is flying its aircrew to other locations, without any link to other parties or to establishments of the company or undertakings owned by the group in the territory of a Member State, the Directive is simply not applicable. Most standard flights will therefore not fall under the scope of the posting rules'.

30. Statute n° 2015-990 of 6 August 2015 (*loi pour la croissance, l'activité et l'égalité des chances économiques*, known as '*loi Macron*'), followed by a series of ordinances entered into force on 1 July 2016.
31. The Minimum Wage Act of 11 August 2014 (MiLoG) provides that an employer established abroad must submit a 'written notification in German to the customs authority', including an assurance that the worker's remuneration is 'of no less than the amount of the German minimum wage during the period of posting on the German territory'. http://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html#p0026. This obligation covers the passenger transport sector, and the haulage, transport and associated logistics sectors (see Act to Combat Undeclared Work and Unlawful Employment of 23 July 2004, Art. 2a).
32. See the Austrian Act to Combat Wage and Social Dumping of 13/06/2016 (*Lohn- und Sozialdumping-Bekämpfungsgesetz*) to the road transport sector (now amended, see § 1(1)). See https://www.ris.bka.gv.at/eli/bgbl/I/2016/44 for the original version and https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555 for the current version.
33. See the position of the European Transport Federation (ETF) on the infringement procedures launched by the European Commission: 'European Commission uses infringement procedures to sanction transposition of laws which, if in place, would eradicate illegal practices and social dumping in the road transport sector', 1 July 2016.
34. On 19 May 2015, pursuant to art. 258 TFEU, against Germany; on 16 June 2016 against France; on 27 April 2017 against Austria.
35. See, for instance, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1053.
36. *Dobersberger*, paragraph 31, *FNV*, paragraph 45.
37. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
38. According to Art. 8(1), the national law applicable to the contract of employment is freely chosen by the parties. However, the work relationship being inherently unequal, the protection afforded to the worker by this choice of law may not be lower than that afforded by the 'provisions that cannot be derogated from by agreement under the law' of the habitual country of work. Art. 8(2) provides that, in the absence of choice of law made 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'. In practice, the 'provisions that cannot be derogated from by agreement under the law' form the main part of the labour laws in most EU countries, so that the choice left to the parties remains largely theoretical.
39. Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussel I *bis*) and Regulation (EC) No. 884/2004 on the coordination of social security systems.

worker's social conditions are governed by one and the same national law. The protection granted to the worker may indeed lose its coherence if it is fragmented into different legal systems: 'workers are not only governed by individual contracts, they are also part of a local labour force which, in search for as much social coherence as possible, should be governed by the same rules'.[40] Workers are *a priori* better protected when all social aspects concerning their situation are governed by one and the same legal system. This is why posting normally has no bearing on the determination of the labour law applicable: Art. 8 Rome I provides that 'the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'. The PWD departs from this policy objective since it subjects posted workers to two sets of national labour laws, namely, the terms and conditions of employment of the host State in the domains listed under Art. 3 PWD ('core labour rights'), and the law of the home country determined pursuant to the Rome I Regulation.

The PWD is further viewed as a restriction on the freedom to provide services granted to undertakings under the EU constitutive Treaties: 'the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens'.[41] The application of the PWD certainly comes with an increase in administrative burdens for undertakings. The application of two sets of national labour law rules is in itself a source of complication. Furthermore, the host State can subject undertakings to a series of administrative requirements and control measures, including the obligation to submit, for each posted worker and prior to the posting, a declaration containing assurances that the worker concerned is granted at least the core labour rights of the host State,[42] the designation of a person in charge of liaising with the host State's competent authorities,[43] or making available copies of employment contracts and/or other social documents during and/or after the posting, in the original language and/or translated version.[44] These formalities must be repeated, often in slightly different forms, in all countries crossed during the transport operation. Finally, undertakings must inform posted workers of their additional rights under the PWD.[45] All

40. E. Pataut, 'Rome 1 and Rome 2' in Edoardo Ales, Mark Bell, Olaf Deinert, Sophie Robin-Olivier (dir.), *International and European Labour Law – A Commentary*, pp. 664–676, https://halshs.archives-ouvertes.fr/halshs-02268857/document.
41. Judgment of 25 October 2001, *Portugaia Construção Lda,* C-70/98 (Joined Cases C-49/98, C-50/98, C-52/98, C-53/98, C-54/98, C-68/98, C-69/98, C-70/98, C-71/98), ECLI:EU:C:2001:564, paragraph 18 and case-law cited.
42. Directive 2014/67/EU, Art. 9(1)(a). It is one of the most popular measures imposed by Member States (see the Aviation Research Report, § 127).
43. Directive 2014/67/EU, Art. 9(1)(e).
44. Directive 2014/67/EU, Art. 9(1)(c).
45. Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union, Art. 7: '1. Member States shall ensure that, where a worker is required to work in a Member State or third country other than the Member State in which he or she habitually works, the employer shall provide the documents referred to in Article 5(1) before the worker's departure and the documents shall include at least the following additional information:

(a) the country or countries in which the work abroad is to be performed and its anticipated duration;

(b) the currency to be used for the payment of remuneration;

(c) where applicable, the benefits in cash or kind relating to the work assignments;

(d) information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.

2. Member States shall ensure that a posted worker covered by Directive 96/71/EC shall in addition be notified of:

(a) the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State;

this certainly is a hindrance for undertakings, especially when they are small SMEs, as it is overwhelmingly the case in IWT.

That is why the CJEU has circumscribed the possibility for host Member States to impose their own rules on workers involved in the provision of a transnational service. According to the CJEU, the application of the host State's provisions is only justified if:

- it pursues a legitimate objective,[46] as is the protection of workers[47] or the prevention of unfair competition on the part of the posting undertakings;[48]
- this objective is not already similarly protected by the objectively applicable law[49] designated pursuant to Art. 8 Rome I, so that the application of the host State's rules actually confers "a genuine benefit to the workers concerned"';[50] and
- the restriction resulting therefrom is proportionate to the objective. To keep it proportionate, the host Member State should balance 'the administrative and economic burdens that the rules impose on providers of services against the increased protection of workers' granted by the application of the host State's rules.[51]

Hence the PWD is never sufficient to determine the labour laws applicable to the worker. The objectively applicable law under the Rome I Regulation always needs to be determined as a matter of priority. Furthermore, because the PWD both derogates from the policy objective of one single national system governing the social conditions of the worker and infringes upon the freedom to provide services, its application is necessarily limited in scope and duration. The

(b) where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging;

(c) the link to the single official national website developed by the host Member State pursuant to Article 5(2) of Directive 2014/67/EU of the European Parliament and of the Council.

3. The information referred to in point (b) of paragraph 1 and point (a) of paragraph 2 may, where appropriate, be given in the form of a reference to specific provisions of laws, regulations and administrative or statutory acts or collective agreements governing that information.

4. Unless Member States provide otherwise, paragraphs 1 and 2 shall not apply if the duration of each work period outside the Member State in which the worker habitually works is four consecutive weeks or less.'

46. Judgment of 25 October 2001, *Finalarte Sociedade de Construção Civil Ld*ª, C 49/98, ECLI:EU:C:2001:564, paragraph 49.
47. Judgment of 17 December 1981, *Webb,* C-279/80, ECLI:EU:C:1981:314, paragraph 19.
48. Judgment of 12 October 2004, *Wolff & Muller*, C-60/03, ECLI:EU:C:2004:610, paragraph 41.
49. Judgment of 28 March 1996, *Guiot*, C-272/94, ECLI:EU:C:1996:147, paragraphs 16–17 ; Judgment of 23 November 1999, *Arblade*, C-369/96 (Joined cases C-369/96 and C-376/96), ECLI:EU:C:1999:575, paragraph 51 ; see also M. Bottero, *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, Kluwer Law International, 2020, p. 57 and P. Davis, 'The Posting of Workers Directive and the ECC Treaty', (2002) 31 *Industrial Law Journal*, 298, pp. 303–304.
50. Judgment of 23 November 1999, *Arblade*, C-369/96 (Joined cases C-369/96 and C-376/96), ECLI:EU:C:1999:575, paragraphs 52- 54: obligations imposed by the host Member State are only justified if they 'confer on workers an advantage capable of providing them with real additional protection which they would not otherwise enjoy' (§ 54). See also Judgment of 25 October 2001, *Finalarte Sociedade de Construção Civil Ld*ª, C 49/98, ECLI:EU:C:2001:564, paragraph 53; Judgment of 25 October 2001, *Portugaia Construçõe Lda,* C-70/98 (Joined Cases C-49/98, C-50/98, C-52/98, C-53/98, C-54/98, C-68/98, C-69/98, C-70/98, C-71/98), ECLI:EU:C:2001:564, paragraph 42.
51. Judgment of 25 October 2001, *Finalarte Sociedade de Construção Civil Ld*ª, C 49/98, ECLI:EU:C:2001:564, paragraph 50.

requirement of a sufficient connection aims to circumscribe the realm of the PWD to what is strictly necessary.

2. The limitations of the PWD

2.1. Limitation in scope: The interplay with the Rome I Regulation

As previously stated, the common choice of law rule for a contract of employment is enshrined in Art. 8 Rome I, and the PWD does not change this. The law of the habitual place of work prevails, including when the worker 'is temporarily employed in another country' (the host country).[52] Rome I only entitles Member States to apply their 'overriding mandatory provisions' to 'any situation falling within their scope, irrespective of the law otherwise applicable to the contract'.[53] Overriding mandatory provisions (also referred to as public policy provisions) are defined as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests'.[54]

The PWD fits into this architecture by listing the host country's 'overriding mandatory rules' applicable in case of posting in its Art. 3(1):[55] 'Directive 96/71/EC on the posting of workers establishes certain overriding mandatory rules in the area of employment contracts. National rules which implement these overriding provisions in the country where the worker is posted may take precedence over the rules of the law of the country where the work is habitually carried out, particularly when such national rules are more favourable to the employee.'[56]

The PWD nevertheless departs from the underlying rationale of the Rome I Regulation in two ways.

First, the PWD limits the Member States' margin of appreciation in delineating the scope of their overriding mandatory rules. The latter are normally freely determined by each Member State, even if, as previously stated, the CJEU has already set some limits. Art. 3(1) PWD goes a step further by listing all the overriding mandatory rules that the host State may impose on posted workers. Although Art. 3(10) allows Member States to impose other overriding mandatory rules which do not fall within the scope of Art 3(1),[57] the CJEU has interpreted this clause restrictively,[58] so

52. Art. 8 (2), 2nd sentence. See also recital 36 of the Rome I Regulation: 'As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad'.
53. Art. 9 Rome I.
54. Art. 9 Rome I.
55. Judgment of 19 June 2008, *Commission v. Luxembourg*, C-319/06, ECLI:EU:C:2008:350, paragraph 29 ; See also M. Bottero, *op. cit.* pp. 63–64 : 'The PWD designates, in its Art. 3(1), "the host country's elements of employment law applicable to posted workers, regardless of the otherwise applicable law, as 'overriding mandatory provisions' […] in case of posting, a number of host country provisions apply to the employment relationship as overriding mandatory rules under Art. 9 of the Rome I Regulation and the PWD basically regulates their (minimum and maximum) degree of application";' C. Barnard, *EU Employment Law,* Oxford, 2012, p. 231–232. See also Study commissioned by the European Parliament's Policy Department for economic and scientific policy, 'Posting of Workers' Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07; www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU%282016%29579001_EN.pdf, p. 22, or the Aviation Research Report, § 62.
56. Practice Guide on Jurisdiction and Applicable Law in International Disputes between the Employee and the Employer, 2016, p. 18; https://op.europa.eu/en/publication-detail/-/publication/41547fa8-20a8-11e6-86d0-01aa75ed71a1.
57. M. Bottero, *op cit.* p. 63.
58. Since it constitutes a derogation to the fundamental principle of the freedom to provide services. Judgment of 18 December 2007, *Laval un Partneri Ltd*, C-341/05, ECLI:EU:C:2007:809, esp. paragraphs 80–81; Judgment of 19 June 2008, *Commission v. Luxembourg*, C-319/06, ECLI:EU:C:2008:350. See analysis in Study commissioned by

that 'Member States cannot unilaterally rely on […] Art. 3(10) to impose additional requirements on posted workers over and above those laid down by Art. 3(1) PWD, except in truly exceptional circumstances'.[59] The overriding mandatory rules considered under Art. 3 PWD include remuneration,[60] working times, the age of retirement and annual leave.

Secondly, whilst the application of the host State's overriding mandatory rules is a mere possibility under Art. 9 Rome I, it is an obligation under the PWD: host States must ensure compliance with their public policy provisions falling within the scope of Art. 3(1) PWD, regardless of whether it brings an actual benefit for the worker.[61] The host State's core labour rights listed under Art. 3(1) can therefore be viewed as minimum rights that must systematically be respected by employers and controlled by host States.[62]

These minimum rights in turn do not prevent 'the application of terms and conditions of employment which are more favourable to workers',[63] provided that these are either agreed upon by the contracting parties or originate from the objectively applicable labour law under the Rome I Regulation.[64] As C. Barnard puts it, 'a German service provider could continue to apply German labour law rules to its workers posted to Poland'.[65] The 'could' may actually have to be read as a 'should': the posted worker remains governed by the objectively applicable labour law rules designated pursuant to Art. 8 Rome I. If the public policy provisions of the home country are more favourable than those of the host country, the PWD should not result in a downgrading of the protection granted to the worker.[66] The systematic application of the host State's core

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the European Parliament's Policy Department for Economic and Scientific Policy, 'Posting of Workers Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07, p. 23; see also S. Hennion, M. Le Barbier, M. Del Sol, J-P. Lhernould, *Droit social européen et international*, Thémis PUF, 2017 (3rd ed.), n° 244, p. 297.

59. C. Barnard, *op. cit.* p. 232.
60. The term 'remuneration' encompasses 'all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable' (Art. 1(2)(a) of the Reform Directive, amending Art. 3 of Dir. 96/71).
61. Art. 3(1): 'Member States shall ensure, *irrespective of which law applies to the employment relationship,* [Emphasis added] that undertakings […] guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment […] which are laid down in the Member State where the work is carried out'. Study commissioned by the European Parliament's Policy Department for Economic and Scientific Policy, 'Posting of Workers Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07, p. 23: 'Member States must apply them [core of terms and conditions of employment] to workers posted within their territory'. M. Bottero, *op. cit.* p. 63: 'with the Preamble recitals 7–11 of the PWD, the optional character of the exception provided for by Art. 9 of the Rome I Regulation is made *de facto* obligatory by the Directive itself'. See also S. Hennion, M. Le Barbier, M. Del Sol, J-P. Lhernould, *Droit social européen et international*, Thémis PUF, 2017 (3rd ed.), n° 230, pp. 285–286 and n° 242, 245, p. 297.
62. S. Hennion, M. Le Barbier, M. Del Sol, J-P. Lhernould, *Droit social européen et international*, Thémis PUF, 2017 (3rd ed.), n° 245, p. 297; C. Barnard, *op. cit.* p. 218–220.
63. Art 3(7): 'Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers'. See also recital 17: 'the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers'.
64. Judgment of 3 April 2008, *Rüffert,* C-346/06, ECLI:EU:C:2008:189; Judgment of 18 December 2007, *Laval un Partneri Ltd*, C-341/05, ECLI:EU:C:2007:809, paragraph 81. For a clear and thorough analysis of the interplay between the Rome Regulation and the PWD, see C. Barnard, *op.cit.* p. 224–235. See also Study commissioned by the European Parliament's Policy Department for Economic and Scientific policy, 'Posting of Workers Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07, p. 31.
65. C. Barnard, *op. cit.* p. 224.
66. EU Commission's Practice Guide on Jurisdiction and Applicable Law in International Disputes between the Employee and the Employer, 2016, p. 18: The PWD 'offers additional protection to the employee who can invoke the law of the

labour rights under the PWD should be understood as a way of facilitating the controls by the host State during the time of posting.[67]

2.2. Limitation in duration

According to Art. 2(1) PWD, posting supposes that workers exercise their activities in the host Member State for a 'limited period'. The term is vague and has led to abusive recourse to posting under hypotheses (b) and (c) of Art. 1(3) PWD.

For example, cabin crew members recruited by an undertaking established in Malta and sent to work in France would be governed by the Maltese labour laws and the overriding mandatory rules of the French labour law if considered posted workers. They would be governed by the full spectrum of the French labour law and be better protected as a result, if not considered posted workers.[68]

Whilst intended to protect workers, the rules on posting can thus easily be used to circumvent the application of a more protective national labour law that should normally apply. As described in the introduction, this is in fact one of the most common social dumping scenarios in the transport sector, including in IWT.

To prevent such situations, the Enforcement and Reform Directives have clarified what is meant by 'limited period'.

The Enforcement Directive identifies 'genuine' posting by means of two conditions:

1. The undertaking posting the worker(s) must 'genuinely perform substantial activities, other than purely internal management and/or administrative activities, in the Member State of establishment'.
2. The worker must normally work in another country than the host country and is supposed to 'return to or is expected to resume working in the Member State from which he or she is

host Member State *if it is more favourable to the employee than the law of his/her habitual place of work'* [Emphasis added].

67. EU Commission's Practical Guide on Posting, 2019, Nr. 3.4, p. 22: 'In order to apply the Posting of Workers Directives, two sets of rules may need to be taken into account:

    1. the rules of the host Member State which determine the required "remuneration", including, as the case may be, the rules set out in collective agreements made universally applicable or that otherwise apply;

    2. the rules of the home Member State determining the remuneration paid to the worker, including the law, any applicable collective agreement and the individual employment contract.

    The employer must ensure that the amount paid to the posted worker is at least equivalent to the remuneration required under the rules of the host Member State'.

    See also the EU Commission's Practical Guide employer-employee, 2016, p. 18: The PWD 'offers additional protection to the employee who can invoke the law of the host Member State *if it is more favourable to the employee than the law of his/her habitual place of work'*. [Emphasis added] https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1/language-en.

68. This scenario echoes the situation considered in the Judgment of 14 September 2017, *Nogueira & others v Crewlink Ireland Ltd*, joined cases C-168/16 and C-169/16, ECLI:EU:C:2017:688. In these cases, air cabin crew were hired by Crewlink, a company established in Ireland and seconded to Ryanair to work from the Belgian airport in Charleroi. Their employment contracts included a choice of law and a choice of jurisdiction clause for Irish law and Irish courts. The CJEU nevertheless found that Belgium was the home country as opposed to the host country. Consequently, the Belgian judge was found competent to handle the case, and the workers were subject to the full spectrum of Belgian labour law, instead of just the Belgian core labour rights. See Aviation Research Report, § 278.

> posted after completion of the work or the provision of services for which he or she was posted'.[69] There is no posting if the worker has not previously performed activities in the home country and does not return to the home country after being posted.[70]

The Reform Directive in turn clarifies that the limited period cannot exceed 12 months. If longer, the host State automatically becomes the habitual place of work under the Rome I Regulation, leading to the application of the full spectrum of the host State's labour law.[71] The Reform Directive further clarifies the interplay between the PWD and the Temporary Agency Work Directive (TAWD):[72] the TAWD systematically applies to workers sent by a temporary work agency (TWA) to a user undertaking located abroad.[73] Workers posted under hypothesis (c) of Art. 1(3) PWD not only benefit from the core labour rights of the host country but must also be granted the same 'basic working and employment conditions' as workers directly recruited by the user undertaking.[74] The 'basic working and employment conditions'[75] is a wider concept than the 'terms and conditions of employment' listed under Art. 3(1) PWD. It notably encompasses provisions laid down by any kind of collective agreement, including company level agreements.[76] The host State may even choose to go further and apply the full range of its terms and conditions applicable to locally recruited temporary agency workers.[77] In this case, 'posted agency workers will enjoy all the rules of the host

69. Art. 4(3)(d). See also the Rome I Regulation, recital 36: 'work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad'.
70. Directive 2014/67/UE, Art. 4(2) and 4(3) give an indicative list of criteria for Member States to control whether these conditions are met. See also recital 8: 'the constituent factual elements characterizing the temporary nature inherent to the notion of posting, and the condition that the employer is genuinely established in the Member State from which the posting takes place, need to be examined by the competent authority of the host Member State and, where necessary, in close cooperation with the Member State of establishment". Regulations 883/2004 and 987/2009 on the coordination of social security systems use similar criteria, albeit with the important nuance that posted workers do not need to have worked in the home country prior to being posted nor are they expected to resume working in the home country after the posting. Posting within the meaning of the EU legislation on social security covers those who are "recruited with a view to being posted to another Member State'. See Regulation 987/2009, Art. 14(1).
71. S. Hennion, M. Le Barbier, M. Del Sol, J-P. Lhernould, *Droit social européen et international*, Thémis PUF, 2017 (3rd ed.), p. 291, n° 235.
72. Directive 2008/104/EC of 19 November 2008 on temporary agency work.
73. PWD, Art. 3(1.b.): 'Member States shall provide that the undertakings referred to in point (c) of Article 1(3) guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out'.
74. TAWD, Art. 5.
75. TAWD, Art. 2(f): '"basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
    (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
    (ii) pay'.
76. Study commissioned by the European Parliament's Policy Department for Economic and Scientific Policy, 'Posting of Workers Directive – current situation and challenges' June 2016, IP/A/EMPL/2016-07, p. 25.
77. PWD, Art. 3(9): 'Member States may require undertakings as referred to in Article 1(1) to guarantee workers referred to in point (c) of Article 1(3), in addition to the terms and conditions of employment referred to in paragraph 1b of this Article, other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out'.

Member State'.[78] This understanding reinforces the trend initiated by the CJEU towards a specific, more protective, regime for workers posted under hypothesis (c) of Art 1(3) PWD, where the movement of workers in the host country is the very purpose of the supply of service.[79]

In parallel to this specific regime, the core labour rights of another host Member State may actually apply by virtue of Art. 1(3)(a) PWD. The Reform Directive indeed makes it clear that a situation can simultaneously fall under hypothesis (c) and hypothesis (a) of Art. 1(3) PWD: 'Where a worker who has been hired out by a temporary employment undertaking or placement agency to a user undertaking as referred to in point (c) is to carry out work in the framework of the transnational provision of services within the meaning of point (a), (b) or (c) by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or placement agency, or for the user undertaking, the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or placement agency with which the worker is in an employment relationship. The temporary employment undertaking or placement agency shall be considered to be an undertaking as referred to in paragraph 1 and shall fully comply with the relevant provisions of this Directive and Directive 2014/67/EU of the European Parliament and of the Council.'[80]

For example, a boatman is recruited by a Czech placement agency, then hired out to an IWT undertaking established in the Netherlands. The boatman will be considered a posted worker in the Netherlands by virtue of Art. 1(3)(c) PWD if:

- the Czech agency genuinely performs substantial activities in the Czech Republic;
- the boatman normally works in the Czech Republic; and
- the boatman has a sufficient connection with the Netherlands.

If so, the boatman should not only benefit from the level of protection of the host State in the areas listed in Art. 3 of the PWD. He or she should also benefit from 'the basic terms and conditions of employment' as provided by Article 5 TAWD, which are broader in scope than the 'terms and conditions of employment' listed under Art. 3(1) PWD.

If the user undertaking further sends the boatman to work on the Rhine, the Czech placement agency may have to subject the boatman to the German, French, and/or Swiss core labour rights, by virtue of Art. 1(3)(a) PWD, if the boatman is found to have a 'sufficient connection' with these countries.

2.3. The meaning of a 'sufficient connection' for international transport workers

Though legitimate, the new requirement of a sufficient connection triggers new complications and uncertainties: How should this factual assessment be made, and by whom?

78. C. Barnard, *op. cit.* p. 219.

79. Judgment of 17 December 1981, *Webb,* C-279/80, ECLI:EU:C:1981:314, paragraphs 17–19: the provision of manpower as a transnational service may be subject to a system of licensing; Judgment of 10 February 2011, *Vicoplus*, C-307 to 309/09, ECLI:EU:C:2011:64, paragraphs 30, 33, 45 and 51: host countries may subject third-country nationals posted under hypothesis (c) of Art. 1(3) PWD to the obtaining of a work permit. Judgment of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405, paragraph 33 and the case law cited.

80. Reform Directive, Art. 1(1)(c)(ii), incorporated into Art. 1(3)(c) PWD.

The CJEU first provided guidelines in the *Dobersberger* and *FNV* Cases. The Court first emphasised that the test of a sufficient connection applies to all international transport workers, regardless of whether they are indirectly recruited, relocated through intragroup posting, or directly recruited.[81] This confirms our previous analysis that international transport workers could end up being posted workers in several countries at the same point in time, therewith further complicating the reading of the labour laws applicable to them.

To evaluate the degree of connection with the host State, the Court takes account of the nature of the activities performed in the host country and the proportion represented by those activities within the entire service provision.[82]

Transport operations always involve loading or unloading operations, but their nature and characteristics are specific to each mode of transport, notably because the conditions laid down by EU law to access the market vary with each mode of transport. For this reason, the requirement of a sufficient connection needs to be assessed and evaluated against the specific features of each mode of transport. This has been done for road and air transport workers.

2.3.1. Road transport workers

Road transport is a highly mobile and reactive business, where routes can easily change. It is mostly carried out by micro to small undertakings that are relatively easy to set up.[83] Access to the market is open to holders of a community licence, delivered under strict conditions of establishment.[84] Under these conditions, EU undertakings have unlimited access to transit and cross-border road transport within the EU,[85] whereas their access to cabotage[86] is strictly limited to operations of a short duration upon return from an international transport operation.[87]

81. Judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (*FNV*), C-815/18, ECLI:EU:C:2020:976, paragraphs 56-57 on intragroup posting (Art. 1(3)(b)) : 'The existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers does not, as such, determine the degree of connection with the territory of a Member State to which the worker concerned is sent and, therefore, does not determine whether the connection between that worker's performance of his or her work and that territory is sufficient in order to establish whether there has been a posting under Directive 96/71' (§ 56). It is not, as such, 'relevant in order to determine whether there has been a posting of workers' (§ 57). Likewise, on Art. 1(3)(c) posting, the Court indicates that 'the fact that a driver working in international road transport, who has been hired out by an undertaking established in one Member State to an undertaking established in another Member State, receives the instructions related to his or her tasks, starts or finishes them at the place of business of that second undertaking, is not sufficient in itself to consider that that driver has been "posted" to the territory of that other Member State, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors' (§ 50).
82. *FNV*, paragraphs 46–48.
83. Regulation 1071/2009, Art. 4(2)(c), even specifies that a transport manager cannot manage more than four undertakings, with a combined maximum total fleet of 50 vehicles.
84. Regulation 1071/2009 posits four conditions for obtaining the professional occupation licence, one of which is the requirement to 'have an effective and stable establishment in a member state' (Art. 3(1)).
85. Since 1 March 2004.
86. In road transport, cabotage operations are defined as the provision of services by hauliers within a Member State in which they are not established, and should not be prohibited as long as they are not carried out in a way that creates a permanent or continuous activity within that Member State. See Regulation 1072/2009, recital 15.
87. Regulation 1072/2009, Art. 8(2) authorises up to three cabotage operations following international carriage from another Member State or from a third country to the host Member State. The last unloading in the course of a cabotage operation before leaving the host Member State shall take place within seven days from the last unloading in the host Member State in the course of the incoming international carriage.

Road transport accounts for about 70% of inland freight within the EU[88] and is therefore key to the EU economy. This probably explains why a Directive specifically devoted to the application of Art. 1(3) (a) PWD to road transport workers was adopted in 2020 (the Road Transport Directive).[89]

According to the Road Transport Directive, applicable since 2 February 2022, the PWD does not apply to drivers involved in:

- bilateral transport operations from/to the Member State of establishment including up to one cabotage operation on the way, as long as it occurs in a country different from the country of destination;
- transit; and
- a road transport operation which is one leg of a multimodal, combined transport operation.

The PWD does apply to drivers involved in:
- cabotage, as defined in Regulations 1072/2009 and 1073/2009;[90] and
- bilateral transport operations not from/to the Member State of establishment.

2.3.2. Air transport workers

Air transport is a global business primarily regulated by the Convention of Chicago. Air transport is obviously not as reactive as road transport and air transport companies are necessarily big firms with high levels of capital. Both cabotage and cross-border air transport operations within the EU are fully open to EU undertakings[91] holding an operating licence.[92]

No specific Directive has been adopted for air transport workers, but a 2019 research report funded by the European Commission[93] (the Aviation Research Report) provides guidelines on the applicability of the PWD to air transport workers. The report proposes solutions that are similar to those of the Road Transport Directive regarding workers engaged in transit and bilateral transport operations: workers involved in flights from or to the home base, with either one or several flights in between, should not be considered as posted workers, because the fast variation of

88. *Collection and Analysis of Data on the Structure of the Road Haulage Sector in the European Union,* 3 February 2014, p. 20.
89. Directive 2020/1057 of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012. This Directive was adopted in response to a statement made in the Reform Directive. See Directive 2018/957, recital 15: 'Because of the highly mobile nature of work in international road transport, the implementation of [the PWD] in that sector raises particular legal questions and difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport also reinforcing the combating of fraud and abuse'.
90. See fn 86.
91. Regulation 2408/92, entered in force on 1 January 1993. The opening of cabotage occurred progressively through three 'packages' until completion of an EU single market on 1 January 1993.
92. See Regulation 1008/2008, esp. Art. 4. The operating licence is delivered under strict conditions of establishment for the air transport undertaking.
93. G. Busschaert and P. Pecinovsky, 'The application of the EU posting rules to aircrew", EU project Research Report for a "Support for social dialogue' in the Civil Aviation Sector, Brussels, 2019. Research report funded by the Commission and requested in the context of the call for proposals VP/2018/001 (support for Social Dialogue) for a project submitted by three social partner organisations in the EU Sectoral Social Dialogue Committee on Civil Aviation under the grant agreement VS/2019/0030.

applicable core labour rules would hardly be feasible and would be of little benefit to the worker.[94] The report notes that this hypothesis covers 'most aircrew which operate on standard flights'.[95]

The Aviation Research Report conversely departs from the choice made for road transport workers regarding cabotage operations: it does not recommend application of the PWD to air transport workers involved in cabotage. As mentioned before, there are no time limits on access to cabotage in air transport for undertakings established within the EU. The line between continuous and occasional cabotage is therefore impossible to draw, not to mention the difficulty enforcing it. It would further lead to a constant change in the law applicable to air transport workers, a situation that could be more detrimental than beneficial to workers. For this reason, the report proposes another criterion to assess the applicability of the PWD, namely, whether the worker is temporarily sent to a secondary base[96] that is not the home base wherefrom he or she habitually works.[97] Such temporary posting usually occurs through a wet lease, intragroup mobility, or indirect recruitment by a placement agency. In other words, the PWD would essentially apply to air transport workers falling within hypotheses (b) and (c) of Art. 3 (1) PWD, bringing us back to where we initially came from.

2.3.3. Some preliminary conclusions for IWT workers

Some preliminary conclusions of relevance for IWT transport workers may be drawn from the road and air transport examples.

1. The PWD is not applicable to transport workers involved in transit operations.
2. The PWD is not applicable to transport workers involved in a transport operation that is a leg of a multimodal, combined transport operation.
3. The regulation of cabotage in the access to the market rules plays an important role in assessing the applicability of the PWD. The PWD is applicable to transport workers involved in cabotage operations when, as in road transport, access thereto is authorised on a clearly defined occasional basis; it is inapplicable to transport workers involved in cabotage operations when, as in air transport, access thereto is unrestricted for EU undertakings.
4. The Member State of establishment for road transport and the home base for air transport, respectively, play an important role in assessing whether the transport worker involved in an international transport operation has a sufficient connection with the host State. The Member State of establishment in road transport and the home base in air transport are

94. G. Busschaert & P. Pecinovsky, *op. cit.* §§ 249–260. This finding confirms the analysis made in the 2019 Ricardo Report, *op. cit.* fn. 5, p. 133 and endorsed by the Commission in its 'Aviation Strategy for Europe: Maintaining and promoting high social standards', COM (2019) 120 final, Brussels, 1 March 2019.
95. G. Busschaert & P. Pecinovsky, *op. cit.* § 249.
96. 'Unlike the home base, the secondary base is not a legal concept. The secondary base is the identifiable location from where the aircrew is de facto working from for a limited period of time during the posting […]. The concept of secondary base is linked to the aircrew worker and not to the air carrier. Therefore, it should not be confused with operational bases, secondary establishments or secondary hubs of air carriers, which should be distinguished from their main hubs'. G. Busschaert & P. Pecinovsky, *op. cit.* § 225.
97. G. Busschaert & P. Pecinovsky, *op. cit.* §§ 262–280. This proposal is in line with the 2019 Ricardo Report and the European Commission Communication on the 'Aviation Strategy for Europe: Maintaining and promoting high social standards', COM (2019) 120 final, 1 March 2019. However, it predates the *Dobersberger* case, which could have an impact on the findings.

both defined in detail under EU law, in an attempt to assert a genuine link between the establishment/home base and the home Member State.

The first two points appear to be easily transposable to IWT workers: States crossed during transit or multimodal operations may not apply the PWD to the IWT workers involved therein. Conversely, the findings made in respect of road and air transport on both cabotage and bilateral operations are not immediately transposable to IWT workers because the IWT access to the market rules do not clearly define cabotage at EU level nor do they set out any criteria to ensure the existence of a genuine link between the Member State of establishment and the IWT undertaking.

3. The case of IWT workers

3.1. Nature and characteristics of IWT

IWT is an activity that is both inherently transnational (74.4% of freight transport is cross-border)[98] and geographically circumscribed to 13 EU Member States[99] and a few neighbouring third countries.[100] Most of Europe's 37,000 km of waterways are concentrated in the north-western part of the continent,[101] and inland navigation primarily operates on corridors linking a seaport to a hinterland, with a high concentration of the activity in the lower part of the rivers.[102] Because of these characteristics, two rather distinct IWT markets coexist within the EU. The Rhine market covers the overall north-western network and is located on the territory of six countries: Germany, the Netherlands, Switzerland, Belgium, France, and Luxembourg (often referred to as the Rhine countries). The Danube market covers the ten Danube riparian countries, from Germany to the sea ports of Constanta, Galati and Braila in Romania. Based on statistics for 2020,[103] the IWT freight market within the EU has been observed as follows:

1. 78.6% of IWT freight takes place on the territory of the six Rhine countries, with almost 70% being located in the Netherlands and Germany.[104]
2. 19.1% of IWT freight takes place on the territory of the 10 Danube countries, with almost 15% being located in Romania and Bulgaria.[105]
3. All the other countries taken together represent 0.3% of IWT freight within the EU.[106]

98. CCNR, *Inland Navigation in Europe, Market Observation, Annual Report 2021 (Market Observation Annual Report 2021)*, p. 24.
99. 13 EU Member States are interconnected by inland waterways: the Netherlands, Germany, Belgium, Luxembourg, France, Austria, Poland, the Czech Republic, Slovakia, Hungary, Croatia, Romania and Bulgaria.
100. Switzerland on the Rhine; Serbia, Moldova and Ukraine on the Danube; Bosnia and Herzegovina on the Sava (a Danube tributary).
101. The European Court of Justice recognised that IWT around the Rhine is 'of special importance within the whole network of international transport', Opinion of the Court of 26 April 1977, 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', 1/76, ECLI:EU:C:1977:63, p. 754.
102. UNECE, TRANS-SC3-138e (1996), 'White Paper on Trends and development of inland navigation and its infrastructure', § 28: 'For both the Rhine and the Danube, countries lying near the mouth of the river possess about a half of the carrying capacity of the river fleet'. https://unece.org/DAM/trans/doc/finaldocs/sc3/TRANS-SC3-138e.pdf.
103. *Market Observation Annual Report 2021*, p. 24 (total counted as EU-27 plus Switzerland and Serbia).
104. *Market Observation Annual Report 2021*, p. 22.
105. *Market Observation Annual Report 2021*, p. 22.
106. *Market Observation Annual Report 2021*, p. 26.

Despite the ongoing harmonisation of the legal framework at the EU level, the economic reality of IWT remains largely river-based.

Workers in cargo shipping

IWT workers in cargo shipping tend to habitually work in one river market or the other. The undertakings, business practices, types of vessels used, and nautical experience required still differ on both river markets. This, in addition to the distance, makes it unlikely that IWT cargo workers will habitually work on both river markets simultaneously.

On the Rhine market, workers constantly cross borders because cabotage has been open to vessels without any time limits since the 19th century.[107] On the Danube market, transport operations are more concentrated on transit and international transport operations. Access to cabotage remains temporarily limited and is economically less significant given the industrial configuration in the region.[108] Consequently, IWT workers on the Danube do not work on cabotage and cross-border operations as a matter of course, as Rhine workers do.

Workers in passenger shipping

Two kinds of passenger transport can be distinguished in IWT.

- The river cruise industry employs about 14,000 workers,[109] of which about 12,000 work in accommodation and hospitality related activity ('horeca personnel') and about 2,000 are nautical personnel.[110]
- Daily excursion and local commuting inland shipping employs around 8,000 workers.

The nautical personnel usually work under a permanent contract of employment. The horeca personnel usually work under a seasonal contract and tend to work on the same vessel throughout the season.

Vessels used for daily excursions or local commuting always operate in the same river market and rarely cross borders.[111] When the commuting involves the picking up and setting down of passengers, this usually occurs within the borders of the same Member State.

River cruise vessels conversely mostly operate across borders, usually on the same route throughout the season. As the cruisers stay on board from the beginning to the end of the trip, with no getting off and on the vessel during the cruise, these trips do not involve any

107. On the Rhine by virtue of the Act of Mainz of 1831, replaced in 1868 by the Act of Mannheim. The Treaty of London of 18 April 1839 and the Treaty of 5 November 1842 implementing the treaty of separation between Belgium and the Netherlands have extended the Rhine concept of freedom of navigation to all waterways crossing the border between the two countries.

108. Transport on the Danube is primarily a traffic of transit and international transport (UNECE, TRANS-SC3-138e (1996), 'White Paper on Trends and development of inland navigation and its infrastructure', §13; Market Observation Annual Report 2020-II, p. 28). Typically, traffic on the Danube consists of steel products being shipped upstream from overseas and agricultural products being shipped downstream from the middle and upper Danube.

109. *Market Observation Annual Report 2017*, p. 122.

110. CCNR Labour Market Report 2021, *op.cit.* fn. 3, p. 19.

111. The five countries with the largest day trip fleets in Europe are Germany, the Netherlands, France, Italy and Switzerland.

cabotage operations. According to the available statistics, 75% of the river cruise vessels operate on the Rhine, Rhine-Main canal and the Danube[112] and 20%, operating in France (Seine, Rhône), and in Portugal (Douro).[113] River cruise vessels operating on the Danube offer two major types of cruise.[114] The most common Danube cruise is a five- to eight-day journey from Passau to Vienna, Bratislava or Budapest.[115] Longer cruises of 14 to 16 days are also offered, going from Amsterdam or Passau down the Danube Delta.[116] Few vessels operate solely on the Danube.

3.2. The habitual place of work under the Rome I Regulation

Under Art. 8 Rome I, the law objectively applicable to the contract of employment is the 'law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' ('habitual place of work' or home country).[117] Applied to international transport workers,[118] this points to the State 'in which […] is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated'. The 'places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks' are also taken into consideration.[119]

When the habitual place of work cannot be ascertained despite these specifications, the 'place of business through which the employee was engaged' (i.e., the country where the employer is

112. 405 river cruise vessels were operating within the EU in 2021. 300 out of these 405 were navigating on the Rhine, Rhine-Main canal, and Danube. *Hader, A. (2022) The River Cruise Fleet Handbook,* quoted in *Market Observation Annual Report 2022*, p. 118.
113. *Market Observation Annual Report 2017,* p. 116.
114. *Market Observation Annual Report 2017,* p.122.
115. With 565,000 passengers in 2016.
116. 87,000 passengers were counted in 2016.
117. Art. 8(2) Rome I.
118. CJEU, Judgment of 15 March 2011, *Koelzsch*, C-29/10, ECLI:EU:C:2011:151. The meaning of the 'habitual place of work' was first interpreted by the CJEU in the context of Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussel I *bis*), which provides in its Art. 21(b)(i) that 'an employer domiciled a Member State may be sued in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so'. In the Judgment of 9 January 1997, *Petrus Wilhelmus Rutten v. Cross Medical Ltd.,* C-383/95, ECLI:EU:C:1997:7, paragraph 23, the Court held that the place where or from where the employee habitually carries out his work refers to the place where the worker 'has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer'. See also Judgment of 13 July 1993, *Mulox IBC,* C-125/92, ECLI:EU:C:1993:306, paragraphs 20, 26, where the Court defined the habitual place of work as the place 'where or from which the employee principally discharges his obligations towards his employer'.
119. *Koelzsch* Case, *op. cit.* paragraph 49. Similar criteria were listed in the case law interpreting the concept of habitual place of work for air transport workers in the context of the application of the Brussel I *bis* Regulation. See CJEU, Judgment of 14 September 2017, *Nogueira & others v Crewlink Ireland Ltd*, joined cases C-168/16 and C-169/16, ECLI:EU:C:2017:688, which defined the place from which the worker carries out his transport-related tasks as

– the place where he returns after his tasks, receives instructions concerning his tasks and organizes his work,
– the place where his work tools are to be found,
– the place where the aircraft aboard which the work is habitually performed is stationed, and
– the place where the 'home base' is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

established) is the next option listed in Rome I to determine the objectively applicable law.[120] The European Court, however, tends systematically to reject this option, for being too dependent on the sole will of the employer and therefore unlikely to meet the objective of guaranteeing adequate protection for the employee.[121] When the habitual place of work cannot be ascertained, the Court tends to apply Art. 8(4), which points to the national law of the country with which 'it appears from the circumstances as a whole that the contract is more closely connected'.[122] This determination, however, can only be made by a judge on a case-by-case basis.[123]

Whilst the law of the State of the employer as the objectively applicable law should remain an exceptional occurrence, this is actually the common choice of labour law rule in IWT, as no IWT-specific interpretation of Art. 8 Rome I has ever been provided and IWT employers fail to designate one Member State as the 'habitual place of work'. This, in our view, should be the first concern when dealing with social dumping in IWT.

For example, a boatman is recruited by an employer established in Malta to work on the Rhine market. In the course of his or her duties, the worker travels on the waterways of the six Rhine countries. As a result, the employer is unable to designate a State 'in which or, failing that, from which the employee habitually carries out his work', and concludes that the objectively applicable labour law is the law of Malta, where the employer is established.

3.2.1. A proposed two-step process for determining the habitual place of work for IWT workers

In order to avoid the situation described in the example above, general guidelines should be drawn up to determine the habitual place of work for IWT workers. While it is often difficult to designate one specific State where the IWT worker habitually works, the usual patterns of IWT operations previously described show that it is relatively easy to designate the river where he or she habitually works. Determining the habitual place of work in a two-step process, starting with the determination of the river, followed by the riparian State with which the contract of employment has the closest connection, would conversely guarantee that the labour law of a riparian country is designated as the objectively applicable law.

For example, a cabin crew is hired by an employer established in Cyprus to work on the Rhine for the whole season. Absent the intervention of a judge, the employer may legitimately claim that no country can be designated as the habitual place of work, leaving the law of Cyprus as the only choice for the objectively applicable law. If the habitual place of work is determined in a two-step process, starting with the river, then the labour law objectively applicable to the contract would have to be the law of one of the riparian countries.

120. Art. 8(3) Rome I.

121. *Koelzsch* Case, *op. cit.* paragraphs 32, 40, 41, 43; Judgment of 15 December 2011, *Jan Voogsgeerd v. Navimer* SA, C-384/10, ECLI:EU:C:2011:842; Judgment of 13 July 1993, *Mulox IBC,* C-125/92, ECLI:EU:C:1993:306; Judgment of 9 January 1997, *Petrus Wilhelmus Rutten v. Cross Medical Ltd.,* C-383/95, ECLI:EU:C:1997:7, paragraph 22.

122. Aviation Research Report, *op. cit.* § 235. See also CJEU, Judgment of 27 February 2002, *Weber*, C-37/00, EU:C:2002:122.

123. CJEU, Judgment of 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, C-64/12, ECLI:EU:C:2013:551, paragraph 41: 'among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.'

This solution would be particularly useful on rivers where both international transport and cabotage are fully open, as is the case on the Rhine. As in air transport, trying to work out the time spent in each riparian country would generate a lot of paperwork with little benefit to the workers.

It is admittedly less useful on the Danube market, where access to cabotage is both legally limited in time and marginally used in practice. Furthermore, the determination of the river would still leave the choice between 10 countries, seven of which are EU Member States. Patterns of operation on the Danube could, however, be further distinguished. One could note, for instance, that IWT operations respectively on the lower Danube (the so-called maritime Danube) and the middle and upper Danube remain rather distinct, and that Danube IWT workers tend to work habitually on either one or the other.

In a two-step process starting with the determination of the river as the habitual place of work, there would be no labour cost benefits for undertakings to relocate in low-cost countries such as Poland, the Czech Republic, Cyprus or Malta. The river-based system would also facilitate control of posting situations under hypothesis (c) of Art. 1(3) PWD, which, as we have seen, constitutes the most common social dumping scenario in IWT. In line with the aforementioned criteria, the placement agency providing IWT workers abroad should also provide IWT workers to local undertakings for a significant proportion of its turnover. In addition, the posted IWT workers should normally work in the placement agency's state of establishment and return thereto after the posting. None of these conditions are likely to be met if the home country is not one of the 13 EU Member States with interconnected waterways.[124]

3.2.2. The obligation to notify the habitual place of work

Pursuant to Principle No. 7 of the European Pillar of Social Rights[125] and Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union,[126] the workers must be informed in writing[127] of their habitual place of work.[128] Where a worker is required to work in a Member State or a third country other than his or her habitual place of work, he or she should be further informed in writing of where he or she is being sent to work and for how long.[129]

These information requirements could also be interpreted in the light of the two-step process previously described. A worker regularly working on the Rhine market should not be deemed to have changed his or her habitual place of work if he or she works more in the Netherlands one year and

124. Unless the personnel on board also work on board seagoing vessels registered in that country.
125. 'Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship'.
126. Directive (EU) 2019/1152, Art. 4:

'1. Member States shall ensure that employers are required to inform workers of the essential aspects of the employment relationship.

2. The information referred to in §1 shall include *at least* […]:

b) the place of work; where there is no fixed place of work, the principle that the worker is employed at various places or free to determine his or her place of work, and the registered place of business or, where appropriate, the domicile of the employer'.

127. Directive (EU) 2019/1152, Art. 3.
128. Directive (EU) 2019/1152, Art. 4.
129. Directive (EU) 2019/1152, Art. 7.

more in Germany another year, while working for the same employer. Such fluctuations are inherent in IWT work and should not add to the administrative burden when it does not improve the situation of the worker. In contrast, a change in river market should be considered as a change in working place, giving rise to a requirement to provide written information, according to Directive (EU) 2019/1152.

The information should also be made accessible to the enforcement authorities. In a two-step, river-based system, the enforcement authorities could have access to two pieces of information. First, a vessel-specific document would indicate the vessel's habitual place of operation, described with reference to a river market. Secondly, a worker-specific document would indicate the worker's habitual place of work with reference to a river market, and the objectively applicable labour law with reference to a country.

If the worker's habitual river of work differs from the vessel's habitual place of operation and if the labour law objectively applicable to his or her situation is the labour law of a non-riparian country, then authorities carrying out inspections on board could immediately conclude that the worker is subject to the national core labour rights. The river-based approach suggested would thus also help in the application of the PWD, whilst limiting the administrative burden that usually comes with it.

3.3. The 'sufficient connection' in IWT

As previously mentioned, bilateral operations to or from the Member State of establishment/home base are not considered sufficiently connected to the host State for application of the PWD. This criterion, however, is not immediately transposable to IWT because the EU rules setting forth the conditions to access the IWT market do not guarantee the existence of a genuine link between the undertaking and its State of establishment. The two-step, river-based approach, could provide a useful alternative.

(1) The PWD would not apply to bilateral operations within the same river market

For example: An IWT undertaking is established in the Netherlands. The worker habitually works on board a vessel that habitually operates on the Rhine. Based on the two-step process proposed, the worker should be governed by the labour laws of a Rhine country. When the worker is involved in a bilateral transport operation on the Rhine, e.g., between Germany and Switzerland, the PWD should not apply.

(2) The PWD would apply to workers involved in transport operations outside their habitual river of work

For example: An IWT undertaking is established in the Netherlands. The worker habitually works on board a vessel that habitually operates on the Rhine. When the worker is involved in a transport operation beyond the Rhine market, e.g., between Passau and Budapest, the PWD should apply.

(3) On an international river where cabotage is open and is not subject to any time restrictions, the PWD would not apply to workers involved in cabotage operations on the river

For example: An IWT undertaking is established in Malta. The worker habitually works on board a vessel that normally operates on the Rhine. Based on the two-step process proposed, the worker should be governed by the labour law of a Rhine country. When the worker is involved in a

cabotage operation on the Rhine, e.g., on the German part of the Rhine, the PWD should not apply. Conversely, when the worker is involved in a cabotage operation beyond the Rhine market, e.g., between Magdeburg and Berlin, the PWD should apply.

(4) On an international river where cabotage is open for a strictly defined limited duration, the PWD would apply when the worker is involved in a cabotage operation in the same river market

For example: An IWT undertaking is established in Malta. The worker habitually works on board a vessel that habitually operates on the lower Danube. Based on the two-step process proposed, the worker should be governed by the labour law of Bulgaria or Romania. When the worker is involved in a cabotage operation on the Danube, e.g., in Hungary, the PWD should apply.

Conclusion

As things currently stand, the application of the PWD to IWT workers is too complex to effectively prevent social dumping practices in the sector, and posting actually remains the method most commonly used by IWT undertakings to lower their social costs. It is also worth emphasizing that workers, to the greatest extent possible, should be governed by the national labour law and social security legislation of one and the same country in order to be better protected. The application of the PWD departs from this policy objective. For these reasons, the first priority, in order to ensure a social playing field in the IWT sector, is to clarify the notion of 'habitual place of work' within the meaning of Art. 8 Rome I. Guidelines clarifying the circumstances under which the PWD applies to IWT workers would then be needed as a second priority. As for road and air transport, the usual patterns of operations in this specific transport sector must be taken into account in order to clarify these notions. As a matter of course, cross-border IWT mostly occurs in two separate markets, organised respectively around the Rhine and the Danube. IWT workers rarely habitually work on both markets simultaneously.

In view of this, we suggest using a two-step process to determine the habitual place of work for IWT workers: first determine the river, then designate a riparian state of the river market concerned. This solution would be particularly appropriate on the Rhine market, where cabotage is unlimited and workers constantly cross borders.

If the habitual place of work is designated with some certainty, the situations where the PWD should apply to IWT workers would remain limited, without any detrimental effect on the level of protection granted to IWT workers. Based on our analysis,

the PWD would not apply to IWT workers involved in:

- transit operations;
- bilateral transport operations within the river market where they habitually work;
- a transport operation which is a leg of a multimodal, combined transport operation; and
- cabotage operations on the river market where they habitually work, when access to cabotage on this river market is open without time limitations.

On the other hand, the PWD would apply to IWT workers who are involved in the transnational provision of a service and, in this context, are:

- sent on a temporary assignment outside their habitual river market (e.g., a boatman habitually working on the Rhine temporarily sent to work on the Danube);

- involved in cabotage operations on river markets where access thereto is time limited;

A river-based appreciation of the 'habitual place of work' would be, in our view, an accessible way of addressing the currently most serious social dumping practices in IWT[130] without generating excessive administrative burdens for the IWT undertakings. It would further facilitate the application of the PWD to IWT workers, therewith building a legal framework capable of ensuring a social level playing field in the IWT sector.

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130. See the Aviation Research Report, where a similar statement is made, § 229: 'Art. 8 of the Rome I Regulation will look at the habitual place of work to determine the applicable employment law, which can also function as an effective tool against social dumping'.