



# Posting drivers in the EU road transport sector

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**Abstract** It is unclear which minimum wages should be applied to cross-border posted lorry drivers in road transport. The most important EU instrument that deals with this topic is the Posting of Workers Directive (PWD). The PWD was however mainly adopted to regulate this matter in the construction sector, which is also clearly showed in the specific scope rules that determine the scope of application of this directive. This makes for a difficult application of the PWD to the atypical and highly mobile transport sector and leads to many questions. These questions can be divided into two major questions: 1. Is the PWD applicable to cross-border postings in the road transport sector? 2. If so, which specific postings are covered by the scope of the PWD? The EU legislator finally found an agreement to generally assume that the PWD is applicable; however, the question remains which specific posting situations subsequently fall under the scope of the PWD. In this article, the assumption of the EU legislator regarding the first question is taken as a starting point and the remaining second question will be assessed which posting situations are covered by the scope of the PWD. Answering this question will determine which minimum wages apply to these postings.

**Keywords** Private international law · Cross · Border application of minimum wages · Posting · Cross · Border labour law · Road transport law · Social competition

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## 1 Introduction

Posting drivers in the EU road transport sector is a difficult topic and is currently in the spotlight of the EU legislator. An important question in this context is which minimum wages (should) apply to the highly mobile cross-border working activities of lorry drivers. This question is triggered in particular by the current state of today's EU road market space and the fierce social competition in that area. According to many reports the internationalisation and liberalisation process of the road transport market in the '90 s 'has not been accompanied by an adequate parallel process of social harmonisation in employment conditions.'<sup>1</sup> Subsequently, the EU enlargements of 2004, 2007 and 2013 exacerbated the social variances between Member States to a new level, resulting in an increase in wage differentials from 1:3 to 1:15.<sup>2</sup> The combination of these facts has finally developed into an unfair playing field, causing competition based not only on productivity, efficiency and quality but also, or even rather, on social costs.

The central legal instrument in the EU social competition context is the Posting of Workers Directive (hereafter: PWD). This directive determines which and when minimum wages should be applied in cross-border labour flows within the EU.<sup>3</sup> The overall goal is to safeguard the freedom of services and at the same time minimise social competition by balancing the various interests that are at stake in cross-border labour flows. In recital 5 of the PWD these interests are identified as the freedom of services, fair competition and labour protection.<sup>4</sup>

Whereas the PWD was designed in the 90's mainly for the construction sector, this instrument also applies to the road transport sector. This has recently been confirmed

<sup>1</sup>E.g. Ex-post evaluation of social legislation in road transport and its enforcement, MOVE/D3/2014-256, 2016, p. 185. The European Commission now explicitly recognises this in various official documents: e.g. COM (2017), 278.

<sup>2</sup>Briefing Employment and Social affairs, The revision of the PWD, PE 607.346 October 2017, p. 1.

<sup>3</sup>Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* 1997, L 18/1. In this context, the Rome I-Regulation is important as well. Art. 8 and 9 Rome I determine the applicable labour law in general. Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6. The PWD however overrides Rome I regarding the in the PWD specified labour conditions, such as the minimum wages, of the country to where a driver is temporarily posted, if these conditions are more favourable to the driver (art. 3 section 1 jo section 7 PWD). Given the scope and subject of this contribution, Rome I will not be discussed.

<sup>4</sup>The legal basis of the PWD is solely the freedom of services. However, in time the goal of minimising social competition has been stressed more and more. Clear examples of this are the enactment of the Directive 2014/67 of the European Parliament and of the Council 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 1024/2012 on administrative cooperation through the Internal Market Information System, *OJ* 2014, L 159/11 ('Enforcement Directive') and Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, *OJ* 2018, L 173/16 ('Revision Directive'). These legal instruments enhance and correct the application of the PWD considerably and mainly on the basis of social considerations. Note that the Revision Directive is not yet applicable to the road transport sector; only when a sector specific rule has been adopted that clarifies the current uncertainty of the application of the PWD to road transport, the Revision Directive becomes applicable. See article 3 section 3 jo recital 15 Revision Directive.

by the EU legislator in the framework of the adoption of the Revision Directive regarding the PWD.<sup>5</sup> It was stated that, until the moment the Revision Directive will apply to road transport, ‘there is a clear understanding by the three institutions and the Member States that the rules of the PWD shall apply.’<sup>6</sup>

However, the question still remains as to exactly which labour activities the PWD applies. The specific, rather to labour in the construction sector tailored, ‘scope rules’ of the PWD prove to be very tricky in their application to labour in the atypical road transport sector and raises questions that are unsolved to this very day. An example that illustrates this is the fact that since 2015 various Member States, such as Germany, France, Austria, Luxembourg and Italy, have taken matters into their own hands by unilaterally enacting minimum wage acts for lorry drivers.<sup>7</sup>

This situation, and particularly the fragmentation of the internal road transport market that has occurred as a consequence of the unilateral minimum wages acts, has propelled the European Commission into action. First, in 2016 and later in 2017 the Commission launched infraction procedures versus Germany, France and Austria.<sup>8</sup> Second, on 31 May 2017 the Commission proposed to adopt a specific posting rule for road transport.<sup>9</sup> The state of affairs of the subsequent legislative procedure tells us that, against all odds, it might be possible that an agreement will be reached on this posting rule.

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<sup>5</sup>See the previous footnote.

<sup>6</sup>Explanatory Memo to the members of the European Parliament on the revision of the Posting of Workers Directive, 1 March 2018, p. 4: ‘The new elements of this Directive will apply to the transport sector once the sector specific legislation (currently under negotiation) enters into force. Until that moment, there is a clear understanding by the three institutions and the Member States that the rules of the 1996 Posting Directive shall apply. This was called into question by a number of Member States in the past.’ (freely accessible online). The Court of Justice EU however ruled on 19 December 2019 that the PWD is not applicable to transport activities in trains. See ECLI:EU:C:2019:1110. The main reasoning is that the legal base of the PWD is the freedom of services and transport is not regulated by the freedom of services but by special Title VI TFEU (Art. 58 section 1 TFEU). This could mean that the PWD would not be applicable to transport activities by road as well. In that case the assessment whether minimum wages can be applied to lorry drivers should be done on the basis of the mandatory rules of Article 9 Rome I-Regulation. It remains to be seen whether the CJEU confirms this in the context of road transport, given the broad and general understanding that the PWD should in principle apply to road transport. As will be shortly discussed in this contribution, currently a case about the applicability of the PWD on road transport is pending, which gives the CJEU an opportunity to create clarity on the matter (HR 14 December 2018, ECLI:NL:HR:2018:2322; HR 23 November 2018, ECLI:NL:HR:2018:2174).

<sup>7</sup>The European Commission expects more Member States to follow if no clarification would be provided. See Commission staff working document impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) 165/2014 as regards positioning by means of tachographs and Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, SWD (2017), 186 1/2, p. 5.

<sup>8</sup>See for the infraction procedures versus Germany and France, initiated on 16 June 2016: [http://europa.eu/rapid/pressrelease\\_IP-16-2101\\_en.htm](http://europa.eu/rapid/pressrelease_IP-16-2101_en.htm). See for the infraction procedure versus Austria, initiated on 27 April 2017: [http://europa.eu/rapid/press-release\\_IP-17-1053\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1053_en.htm).

<sup>9</sup>Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, COM (2017), 278.

Meanwhile, this legislative procedure will to a certain extent be intersected by jurisprudence, since the Dutch Supreme Court (Hoge Raad) has on 14 December 2018 tried to obtain some clarification on the matter as well, by referring seven preliminary questions to the Court of Justice EU regarding the application of the PWD to the road transport sector.<sup>10</sup>

In this contribution I will focus on the current uncertainty regarding the application of the PWD to the road transport sector. The main question is: which posting situations in road transport are covered by the scope of the PWD? Answering this question will determine which minimum wages apply to these postings.

I will divide this contribution into four parts. Firstly, I will outline various types of posting in EU road transport to establish a deeper understanding of this atypical sector. Secondly, I will discuss the various bottlenecks that occur when the PWD is applied to these types of posting. Thirdly, I will analyse the posting rule as is currently negotiated in the legislative procedure and assess whether this will provide more clarity in the future. Fourthly, I will provide some concluding remarks.

## 2 Types of posting in the EU road transport sector

### 2.1 Labour in road transport = posting

Labour in road transport often characterises as a certain type of posting. After all, work is being carried out on the road, outside the employer's establishment, and the work is often done 'temporarily' in the frame of a specific transport operation. Subsequently, a large variety of types of posting exist in the road transport sector.

### 2.2 Posting type I

In some types of posting, drivers remain under the direct authority of their original employer and provide their services to companies that want to have their goods transported. I will call this posting type I. Think in this context of bilateral, crosstrade and cabotage transport operations.

A *bilateral transport operation* is transport carried out by a vehicle that is registered in country A and plies the route between country A and B or vice versa. For example: a Polish transport company carries vodka from Poland to Germany.

A *crosstrade operation* is transport carried out by a vehicle that is registered in country A and plies the route between country B and C. For example: a Hungarian transport company carries German sausages between Germany and the Netherlands.

Finally, a *cabotage operation* is transport carried out by a vehicle that is registered in country A and plies the route between several venues within country B.<sup>11</sup> For example: a Rumanian transport company carries cargo between Trier and Berlin.

<sup>10</sup>HR 14 December 2018, ECLI:NL:HR:2018:2322; HR 23 November 2018, ECLI:NL:HR:2018:2174.

<sup>11</sup>This type of transport is limited to three cabotage operations after an international transport operation. See art. 8 Regulation 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the internal road haulage market, *OJ* 2009, L 300/72 ('Regulation 1072/2009'). These limits are currently under heated discussion in the legislative revision procedure of the road transport rules.

All these transport operations can be combined with so-called *transit transport*. This means the mere crossing of a country without loading or unloading goods. For example: a Polish transport company carries out a bilateral transport operation between Poland and Belgium and crosses Germany without loading or unloading any goods in Germany. The transport operation on German jurisdiction characterises as transit transport.

In the EU road transport sector these various transport operations are often combined. Sometimes the consecutive combination of these operations can lead to a rather ‘nomadic’ transport model, in which lorry drivers are sent to provide cross-trade and/or cabotage operations in various states, without returning to their ‘home’ base for considerably long periods of time. According to studies, in these models lorry drivers often come from EU13 Member States and work in EU15 Member states, sometimes even for months.<sup>12</sup>

### 2.3 Posting type II

Another considerably different type of posting in the EU road transport sector can be found in situations in which transport companies post their drivers to other transport companies, including the transfer of authority, to work directly under the authority of the hirer and to the benefit of their subsequent transport operations. I will call this posting type II.<sup>13</sup>

Think in this context of a situation in which a Bulgarian transport company temporarily posts Bulgarian drivers to a Dutch transport company, where and from where

<sup>12</sup>European Parliament, Road Transport Hauliers in the EU: Social and Working Conditions, PE 602.000, October 2017; European Parliament, Employment conditions in the international road haulage sector, PE 542.205, April 2015.

<sup>13</sup>This posting type II can occur in combination with the so-called ‘letterbox’ companies. An example of a letterbox company is the establishment of a bogus company in a low wage Member State with literally nothing more than having a letterbox there, purely to be able to apply the lower wages of this country, whereas the lorry drivers are ‘posted’ to high wage Member States to mainly work (from) there. This is prohibited by article 5 Regulation 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC, OJ 2009, L 300/51 (‘Regulation 1071/2009’). The PWD does not apply to these situations: see article 4 Enforcement Directive. In classical letterbox cases, the Rome I-Regulation will point to the applicable labour law of the habitual workplace of these lorry drivers and in any case will not lead to the application of the labour law of the letterbox company. After all, important factors for Rome I to connect a case to a country are the place of work, the station of the lorry driver and where the lorry driver receives instructions (art. 8 section 2 Rome I). See for the application of article 8 Rome I to a lorry driver: CJEU 11 March 2011, C-29/10, ECLI:EU:C:2011:151, ‘Koelzsch’. Also important are factors which social security system is applicable to the lorry driver and where the lorry driver has to pay income taxes (art. 8 section 4 Rome I). See CJEU 12 September 2013, C-64/12, ECLI:EU:C:2013:55, ‘Schlecker’. These fields of law generally take the factual working situation into account and the establishment of a letterbox alone would generally not trigger the application of the social security system of that country or create competence for that country to levy income taxes. Less important is the factor of place of establishment (art. 8 section 3 Rome I), of which one can wonder if a letterbox establishment would even meet the criteria of ‘establishment’. See CJEU 15 December 2011, C-384/10, ECLI:EU:C:2011:842, ‘Voogsgeerd’.

these drivers will be working throughout the EU. This type of posting often occurs in the Netherlands.

## 2.4 Common denominator of the types of posting

Unlike the classical type of posting in the construction sector, all these types of posting in the road transport sector can be characterised by very short working activities on a territory, namely the sole loading and unloading of cargo. Another typical feature of these activities is the fact that lorry drivers almost mutually extend various territories, leading to many relevant consecutive territories within the framework of one single transport operation.

## 3 The application of the PWD to posting types in EU road transport

### 3.1 Introductory remarks – five bottlenecks

In case these types of posting lead to social competition, the PWD is the only relevant instrument to balance the various interests at hand: there are indeed no special rules in this context for road transport.<sup>14</sup> This makes the PWD vitally important for this sector. However, as has been pointed out in the introduction of this contribution, there are many difficult questions when this general instrument is applied to labour in the atypical road transport sector.

This clearly showed in the Open Public Consultation of the European Commission, held in 2016–2017 in the framework of the proposed posting rule for road transport:

‘The Open Public Consultation shows that 70% of all respondents (...) regard the posting provisions as not adapted to the specificities of the highly mobile road transport sector (...). In the same vein the lack of clarity of application of PWD in transport was regarded as a major problem by 91% of both institutional and individual EU-13 respondents and by 65% of EU-15 respondents. The SME Panel Review brought similar results with 70% of respondents regarding the posting provisions not to be fit for the sector’.<sup>15</sup>

In my PhD I have identified at least five bottlenecks regarding the application of the PWD to posting types in road transport that raise unanswered questions to this day.<sup>16</sup> These are:

<sup>14</sup>Except from the niche-specific Regulation 1214/2011 of the European Parliament and of the Council of 16 November 2011 on the professional cross-border transport of euro cash by road between euro-area Member States, *OJ* 2011, L 316/1. This regulation determines when and how the PWD applies to cross-border transport of euro cash.

<sup>15</sup>Impact assessment, SWD (2017), 186 1/2, p. 16 (see for the full reference of this document reference no. 8).

<sup>16</sup>See also *van Hoek, A. and Houwerzijl, M.* [1], p. 419–451; *van Hoek, A. and Houwerzijl, M.* [2], p. 16.

1. The definition 'to the territory of a Member State' (art. 1 section 1 PWD)
2. The requirement of a service contract (art. 1 section 3 subsection a PWD)
3. The definition of 'posting' (art. 1 section 3 PWD)
4. The definition 'for a limited period' (art. 2 section 1 PWD)
5. The requirement of a normal workplace somewhere else (art. 2 section 1 PWD).

### 3.2 Bottlenecks explained

The first bottleneck concerns the definition 'to the territory', which basically requires that only postings that have been done 'to the territory' of a state fall under the scope of the PWD. Given the atypical postings in the road transport sector in which working activities of lorry drivers mutually extend many territories, this immediately triggers the question whether the PWD requires with this definition that drivers should be posted to the territory of *one* specific Member State or if it is allowed that there are more consecutive territories on which work is carried out.

And subsequently, in the case there can be more consecutive territories, another question immediately arises: when exactly will there be a sufficient connection with one or more of these territories to justify the application of some of their labour conditions pursuant the PWD?

The bottleneck of the requirement of a service contact can lead to uncertainty in the context of road transport when such a contract is absent, yet the lorry driver is closely connected with a specific territory. Think of a situation that a lorry driver from a Polish transport company is posted to a base in the Netherlands for five months, without the presence of any official establishment or even branch of this employer there. The lorry driver subsequently works in and from the Netherlands. The presence of a service contract that triggers the application of several elements of Dutch labour law would in that case depend on the coincidence that there is a company located in the Netherlands for whom transport services are provided, which, in the highly liberalised transport sector, does not have to be the case. Does the absence of a service contract mean that the PWD cannot be applicable on this case?

The third bottleneck of the definition of 'posting' triggers questions when it is applied to the atypical working activities in road transport. In a study, carried out for the European Commission, some national implementation acts of the PWD have been detected that do not recognise the highly mobile working activities of lorry drivers as 'posting' in the sense of the PWD. Illustrative is the Portuguese implementation act that stipulates that lorry drivers that 'transport people or goods from Portugal to another State and vice-versa are not considered to work abroad and therefore they are not posted workers'.<sup>17</sup>

The bottleneck of the definition 'for a limited period' is one of the most pervasive ones. Typically, working activities in the road transport sector are very temporary. This raises the question whether these very short working activities are covered by this definition or if there is some kind of threshold before being able to apply the labour conditions pursuant the PWD. After all, an immediate application of the PWD

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<sup>17</sup>van Hoek, A. and Houwerzijl, M. [2], p. 52, 57 and 70.

to cases that have weak links with the temporary working territory, or do not cause social competition issues, could lead to ‘over application’ of the PWD and subsequently to the hindering of the freedom of services.

The fifth and last bottleneck concerns the requirement of a normal workplace somewhere else and leads to the question whether this requirement directly should be applied to the road transport sector. After all, it could be very difficult to determine in this highly mobile sector where such workplace could be located, if such place can even be located at all.<sup>18</sup> Think of the in the first part of this contribution discussed ‘nomadic’ transport model in which lorry drivers from EU-13 Member States are consecutively posted to various EU-15 Member States, without staying at one of these states longer than some days.<sup>19</sup> Where would be the ‘normal workplace’ in these situations?

### 3.3 Conclusion and the upcoming Court of Justice EU ruling

The Court of Justice EU has never had the opportunity to shine its light on these matters, so until this very moment uncertainty remains. It goes without saying that this is deeply concerning: the various bottlenecks can affect all the aforementioned types of posting and as a result it remains very challenging to determine the applicable labour conditions for posted lorry drivers.

This means in practice that social competition in road transport cannot be properly dealt with, since the only relevant instrument in that regard can be blocked in its application. In combination with the in the introduction of this contribution discussed market conditions of the sector, these ingredients make for a very poisonous cocktail in the EU road transport market.

However, more clarity is soon expected regarding the first bottleneck on the definition ‘to the territory’. On 14 December 2018 the Dutch Supreme Court has referred seven preliminary questions to the Court of Justice EU about the applicability of the PWD to highly mobile lorry drivers.<sup>20</sup>

This specific case concerns the in the first part of this contribution discussed posting type II, in which in this case Hungarian drivers were posted from the Hungarian transport company to a Dutch transport company, including the transfer of authority. The drivers subsequently worked in and from the Netherlands throughout the EU, yet got paid considerably lower Hungarian wages. In this context the Dutch Supreme Court asked whether the definition ‘to the territory’ blocks the applicability of the PWD to this posting type and, if it does not, when exactly a sufficient link between a driver and a territory can be established.

These referred questions thus certainly hit the bullseye for this difficult topic and the answer of the Court of Justice EU can solve an important piece of the puzzle. The other bottlenecks remain open for debate however, which makes the legislative procedure very important.

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<sup>18</sup>van Overbeeke, F. [3].

<sup>19</sup>This transport model might be limited in future road transport legislation. In the revision process of the transport legislation, the European Commission clearly condemned these kind of models and subsequently proposed to adopt a so-called ‘return-to-base’-rule. This rule would stipulate lorry drivers to return to their home base after at least two weeks.

<sup>20</sup>HR 14 December 2018, ECLI:NL:HR:2018:2322, ‘FNV/Van den Bosch’.



## 4 The EU legislative procedure regarding a posting rule for road transport

### 4.1 The proposed posting rule of the Commission and background

On 31 May 2017 the European Commission launched a proposal to adopt a posting rule for lorry drivers: minimum wages and holiday pay should not be applied to working activities that take three days or less per month on a territory, and vice versa, they should be applied when these activities exceed three days.

It could be said that any legislative action from the EU towards the creation of a posting rule for road transport has been postponed to the very last moment; on the one hand an untenable fragmentation of the internal transport market occurred, caused by the various since 2015 unilaterally enacted minimum wage acts with different rules on when to apply minimum wages; and on the other hand it became clear that no agreement would be reached about the application of the Revision directive of the PWD (with its enhanced definition of minimum wages and substantive limitations to posting) on the sector if the pervasive uncertainty of the PWD itself would not be fixed first by sector specific rules. These developments basically tipped the scale and ‘forced’ the European Commission to come with solutions.

However, given the fact that these developments occurred relatively recent, there was no time for thorough research on what such specific posting rule should be looking like: the evaluation process of the EU transport regulation already had been started in 2014, initially not even taking the PWD into account as an official object for study and evaluation. This clearly affected the drafting of the posting rule: ‘caught’ in a proposal that actually mainly concerns amendments to the substantive interpretation on working time, just one single posting rule of the three days threshold was proposed.<sup>21</sup> Nothing else was proposed and thus no attention at all was given to the previously discussed bottlenecks.

### 4.2 The currently negotiated posting rule

Given the lack of thorough research and the drafting of the proposal, it is not surprising that the by the Commission proposed rule has led to a storm of criticism at both

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<sup>21</sup>Very illustrative is that the first impact assessment that accompanies the proposal of the Commission was rejected by the Regulatory Scrutiny Board. The Board stated i.a.: ‘The report does not describe the policy context clearly and does not take into account relevant parallel processes such as the 2016 Posting of Workers Directive proposal, the ongoing social dialogues and pending ECJ cases’. And: ‘The challenges and objectives that this initiative addresses are unclear, incomplete, and do not fully match the findings of the evaluation. (...) ‘The baseline is based on unclear assumptions and does not take sufficient account of relevant ongoing processes, market trends and potential future technology developments’. See Commission staff working document impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) 165/2014 as regards positioning by means of tachographs and Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, SWD (2017), 186 2/2, p. 2–3. Some weeks later a revised impact assessment was submitted, which did get approval. It could however be questioned whether it is possible to meet the severe criticism of the Board in this short amount of time.

the EU Council and the European Parliament. Both institutions therefore suggested a considerably different posting rule, mainly based on qualitative criteria instead of the purely quantitative criteria of the Commission. In June 2019, the Commission however has stated in a letter to approve this approach. Notwithstanding the fact that it could be said that both approaches differ like day and night, the Commission argues that the both approaches are based on ‘the same criteria of a closer connection’ and therefore that it will not campaign against the new approach in the trilogue. This means that if a posting rule would be adopted in this legislative procedure, this rule would be based on the qualitative approach. In what follows, I will therefore only pay attention to this new approach.

The Council was the first to reach internal agreement about the proposal of a posting rule. Whereas the Council, in some of the first official Council documents, still focusses on the proposal of the Commission and opts for several substantive amendments to extend the threshold (e.g. for international operations from three days to seven days), on 28 November 2018 the Council turns around and made the following statement:

‘The Presidency proposes to abandon the concept of a grace period and to focus on the nature of the operation instead. If an operation is organised in such a way that the link of the driver’s work with the Member State of establishment remains intact, the driver should be excluded from posting rules. This approach also avoids the difficult identification of the preferable number of days or hours.’<sup>22</sup>

Thus the Council clearly opts for excluding bilateral transport operations of the scope of the PWD. Additionally, transit operations and several operations that are combined with bilateral transport are proposed to be excluded as well. All other types of operations should fall, according to the Council, under the scope of the PWD.

The European Parliament finally reached an agreement on 4 April 2019. The proposed amendments of the Parliament broadly meet the amendments of the Council: bilateral and transit operations should be excluded from the scope of the PWD, whereas other international operations and cabotage fall under the scope of the PWD.

Both institutions however differ on the amount of flexibility given to the exceptions on certain transport operations that are combined with bilateral operations. Whereas the Council opts for the exclusion of ‘two-two’ operations from the PWD (being two on the journey to the country of destination and two on the journey back to the country of establishment), the Parliament only accepts the exclusion of ‘one-two’ operations from the PWD (being one on the journey to the country of destination and two on the journey back to the country of establishment).<sup>23</sup> The amendments of the Council and the Parliament are thus based on the same qualitative approach, yet different consequences have been drawn to this approach.

Meanwhile, the trilogue has commenced at the end of 2019, and currently it seems that both institutions have reached a compromise regarding this aspect. The rule on

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<sup>22</sup>Council of the EU 28 November 2018, 14802/18, p. 6.

<sup>23</sup>European Parliament, Enforcement requirements and specific rules for posting drivers in the road transport sector \*\*\*I, P8\_TA-PROV(2019)0339.

combined transport operations with bilateral transport is currently formulated as follows:

‘The driver performing a bilateral transport operation in addition thereto performs one activity of loading and/or unloading in the Member States or third countries that the driver crosses, provided that the driver does not load goods and unloads them in the same Member State. Where a bilateral transport operation starting from the Member State of establishment during which no additional activity was performed is followed by a bilateral transport operation to the Member State of establishment, the exception shall apply for up to two additional activities of loading and/or unloading, under the conditions set out above.’<sup>24</sup>

### 4.3 Conclusion

One may say that it is quite remarkable that the institutions have gotten so far in reaching an agreement on this file. The substantive design of the exceptions regarding operations that are combined with bilateral operations was one of the most ‘tricky’ aspects to tackle in the trilogue, and yet already a compromise seems to be reached. This leads to good prospects of successfully adopting a posting rule in road transport.

The legislative ‘metamorphosis’ that was suggested by the Council and the Parliament clearly creates more certainty to the application of the PWD to types of posting in road transport. Many of the in section II discussed bottlenecks would run obsolete. Regarding some transport operations the scope rules of the PWD are directly being neutralised. E.g. under the currently proposed definitions cabotage operations fall directly under the scope of the PWD, without having to pay attention to the scope rules of the PWD, whereas bilateral and transit operations are being excluded. Only crosstrade operations are left to the scope rules of the PWD to decide whether the PWD is applicable; many bottlenecks of these scope rules however do not play a role regarding this specific transport operation.

However, exactly how manageable the enforcement of the proposed posting rule would be remains to be seen. Given the fact that on the one hand this rule would distinguish between various transport operations, whereas on the other hand many transport operations are mutually combined, it must be quite challenging for enforcement officers to assess which transport operations exactly are taking place in a specific case and which of those are excluded from, or included under, the scope of the PWD.

## 5 Concluding remarks

The application of the PWD to labour in road transport operations is currently far from clear and is subject to at least five bottlenecks. This makes it very challenging to determine the applicable minimum wages to lorry drivers. Enhanced clarity is to be expected soon however. The EU legislator seems to have reached a compromise on a posting rule: a green light for bilateral transport operations, some operations that are combined with bilateral transport and transit operations; a red light for cabotage and other international operations, such as crosstrade.

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<sup>24</sup>Council of the EU, Working document of 12 November 2019, 2017/0121, 7894/19, p. 97–98.

Whereas the proposed amendments of the Council and Parliament create more certainty, it could be questioned however whether this is also positive from a social point of view: apparently social competition will be permitted, and in fact will be officially legalised, in certain transport operations that are going to be excluded from the scope of the PWD. This means that social competition will be still occurring in EU's playing field, with all its economic and social consequences. Interesting in this context is the fact that the importance of the freedom of services also seems to get more underlined in the trilogue. E.g. a sentence was added to a recital, on which both Council and Parliament have reached an agreement, that states: 'It would constitute a disproportionate restriction to the freedom to provide cross-border road transport services if the posting rules, and thereby the terms and conditions of employment guaranteed in the host Member State, would apply to such bilateral operations.'<sup>25</sup>

The enforcement of the PWD to the road transport sector is expected to level up considerably; notwithstanding the practical challenges faced by enforcement officers. After all, on the one hand the Commission has proposed to include the breach of the PWD to the list of 'social infringements' that can cause a transport company to lose its transport licence. On the other hand the European Labour Authority has been created; while this authority is rather toothless currently, in the future this pilot project can be expected to being gradually rolled out to level up enforcement in member states.

Considering this, it becomes more and more important for transport companies to assess, and subsequently to apply, the applicable minimum wages to their lorry drivers when they are being posted abroad. Due to many factors that have been discussed in this article, this will remain a complex task. In this context it is relevant to point to the legal services of the The Hague based 'Internationaal Juridisch Instituut' (International Institute for International and Foreign Law).<sup>26</sup> For over a hundred years, and on a neutral basis, this Institute provides legal assistance to legal practitioners, such as judges and lawyers, regarding difficult questions of applicable law; it is undoubtedly the place to go when uncertainty exists about the applicable labour law to lorry drivers.

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<sup>25</sup>Council of the EU, Working document of 12 November 2019, 2017/0121, 7894/19, p. 37.

<sup>26</sup>[www.iji.nl](http://www.iji.nl). As pointed out in footnote 1, I am working at this institute as a legal counsel.