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In Search of the Notion of "Posted Worker": Some Clarifications from the Court of Justice Starting from the International Transport Sector

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Abstract. The essay deals with the relationship between the European directives on the transnational posting and the European rules on the international transport of goods by road, examining the judgment of the Court of Justice of 1 December 2020, C-815/2018. The profiles related to the applicable collective bargaining, the inclusion of transport in the field of application of the European directives on posting are discussed and, in addition, the concrete elements to apply the protections of transnational posting to international road hauliers are highlighted.

Keywords: international transport; transnational posting, collective bargaining.

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1. INTRODUCTION

In a judgment of December 2020 (*Federatie Nederlandse Vakbeweging c. Van den Bosch Transporten BV*), the European Court of Justice dealt with the link between the international road haulage and the transnational posting of workers to Member States[1].

[1] After the judgment in question, European lawmaker has reformed this matter with stringent rules with the so-called Mobility Package I, which includes regulations no. 1054, 1055 and 1056 and directive no. 1057, all dated July 15, 2020. For a comment before the final texts *see* Frosecchi (2020, p. 562).

This paper analyses the content of this judgment and highlights its critical points. Before doing so, however, it is useful to make some preliminary considerations.

First of all, it is necessary to consider that European companies can choose the country where to establish themselves based on the lowest economic and regulatory treatment provided for their labour relationships[2]. Moreover, in the good transport sector the recruitment of the transporters based on their state of origin is easier. Their work does not require specific skills and/or qualifications – except those necessary to drive[3] – and they can be selected on basis of the State in which the company decides to establish itself in order to apply the most favourable law[4].

In this sector, the transport may take place only *temporarily* in a Member State other than the one whose law is applied to the employment relationship of the haulier. In this situation, it is necessary to assess whether the case may be qualified as a transnational posting (*see*: Lazzeroni, 2017, p. 50).

The judgment examines, in particular, the correct definition of the criteria on the basis of which the posting of a haulier to another Member State, for the purpose of loading and/or unloading goods, is subject to the employment rules of Directives 96/71 and 14/67.

As it will be highlighted, this investigation is complicated by the fact that it is necessary to recognize whether the presence of the worker in the host State is so relevant as to allow the application of the posting rules, without infringing the freedom to provide services of the carrier sending the haulier abroad.

2. ANALYSIS OF THE FACTS OF THE CASE

In order to analyse the facts of the case it is necessary to refer to the, albeit scarce, information contained in the decision. The three questions on the application of Directive 96/71 proposed by the Dutch Supreme Court to the European Court of Justice concerned the dispute between the Dutch trade union Federatie Nederlandse Vakbeweging ('FNV') and three companies owned by the same person and located in different Member States: Van den Bosch Transporten (Netherlands), Van den Bosch Transporte (Germany) and Silo Tank (Hungary).

The FNV's application to the Dutch court concerned the contract for the transport of goods, entered into by the union with the employer Vereniging Goederenvervoer Nederland - to which the Dutch company had adhered. In this application the union had requested, on the basis of the rules on transnational posting, to bind the other two companies of the group to respect the agreement, since they had employed their workers in international transport, to and from the Netherlands, using the presence in the Dutch territory of the third sister company.

The action was aimed at imposing to German and Hungarian companies the application of a specific rule of the mentioned collective agreement, namely Article 44. According to this provision, the foreign subcontractor shall grant to workers employed on Dutch territory the minimum working conditions laid down by collective bargaining "where this is provided for in Directive 96/71" (see the reference to Article 44 of the collective agreement in point 14 of the decision).

The FNV's right to sue was clearly justified by its interest in asserting what had been negotiated collectively. However, this claim presupposed that the international transport operations carried out by the foreign companies were attributed to hypotheses of transnational posting.

The factual assumptions on which the judgment was, therefore, based were as follows. A) The German and Hungarian haulers were employed, respectively, by the German and Hungarian companies. B) The workers were

[2] On the problem of social and wage dumping see, among others: Izzi (2019); Loffredo (2019, p. 239).
[3] On dumping in the transport sector *see* Lazzeroni (2017, p. 38).
[4] On the problems of transnational work in the logistic sector see the essays of: Allamprese (2018), Borelli (2018), Frosecchi (2018).

drivers of international transports and they were employed within the framework of rental contracts between their respective employer companies and Dutch sister company. C) The journeys made began and ended in Erp, a town in the Netherlands, but a large part of the journeys were outside Dutch territory. Consequently, (d) part of the transport took place entirely in the Netherlands by means of cabotage transport. E) The haulers employed had not enjoyed the minimum conditions of the FNV collective agreement.

3. THE COMPETENCE FOR EXTENDING THE EFFECTS OF COLLECTIVE BARGAINING TO POSTED WORKERS

A profile of collective bargaining applicable to posted workers that it has never been touched by European jurisprudence, but on which scholars have always agreed, is the first preliminary question on which to reflect[5]. The referring court has asked the Court whether the general effectiveness of collective agreements, also applicable to posted workers in the fields of Article 3 of Directive 96/71, must be declared through an internal mechanism of the Member States or whether are sufficient, for this purpose, the indications of art. 3, paragraph 8. In addition, he has asked whether the system for obtaining the general effectiveness of collective agreements indicated in Article 3, paragraph 8, could be understood as an *autonomous* expression of European law.

It should be pointed out that the question does not concern the subsidiary criteria of the second indent of Article 3(8), which the directive allows being applied in the absence of a "system for declaring collective agreements to be of general application" in the legislation of the host state. These criteria – which after Directive 2018/957 operate as instruments of "completion" and not only if such a system is completely lacking[6] – are an option deemed to be in compliance with the *directive in a subordinate manner*. The issue posed by the referring court, on the other hand, is whether the definition of the main rule of Article 3(8), first indent, on the declaration of the general applicability of collective bargaining, is a matter for national or European law.

This question is relevant to the case because the collective agreement concluded by the FNV union and applied by the Dutch company - where the drivers were employed - is not declared to be of general applicability according to the system provided for in the Netherlands. However, this does not necessarily mean that it does not comply with Article 3(8)(1) of the directive, since Article 44 is identical to a provision of the generally applicable collective agreement for the goods transport sector.

Distinguishing between the two hypotheses, if the competence to determine this system was "European", it would be sufficient for the national court to verify the existence of the conditions of the first indent of Article 3(8), - i.e. the compliance with this agreement by the companies in the geographical area and the category concerned –, in order to establish the applicability of the FNV agreement. This would make it possible to disregard the use of the mechanism abstractly envisaged by the Member State to ensure compliance with these conditions.

In the opposite case, where the competence was 'national', it would also be necessary to ensure that the FNV's contract is adopted in accordance with the system specifically provided by the State to guarantee the general effectiveness of contracts. It would follow that the FNV contract does not comply with the directive because, although it provides identical conditions to those of the general-effect contract, it does not comply with the mechanism established by the Dutch legislature to achieve this requirement.

The Court's answer is in the paragraphs 69 and 70 of the decision, where the two different reasons why the system for declaring collective agreements to be generally applicable must be adopted at the *national level* are indicated.

[5] On the problems related to collective bargaining and to posting see, among others, Orlandini (2013, p. 70).
[6] On this aspect, *see* Cordella (2020, p. 64-65).

Despite this conclusion, the reason why the FNV contract was judged not applicable to foreign haulers is not linked with the requirement of general effectiveness.

Examining the two grounds in detail, the first one is in paragraph 69 of the judgment, which refers to the reasoning proposed by the Advocate General in paragraph 129 of his Opinion (2020).

Advocate General Bobek pointed out that the declaration by which a collective agreement becomes generally applicable also requires to define a mechanism to ensure that the same contracts are first negotiated and then concluded. In this sense, accepting the thesis that the competence to determine such system is "European", at that level should also be established the modalities of negotiation of collective agreements: it is known that none of this is realized in the current structure of European law, where - the Advocate General adds - the competence to regulate collective agreements is referred to national rules and this, therefore, ends up invalidating the thesis.

In addition to this first important point, at paragraph 70 of the decision the Court adds another, equally agreeable, based on the literal content of the directive's provisions. The presence, in Article 3 (8), second indent, of Directive 96/71, of "alternative" mechanisms for declaring the general effectiveness of contracts confirms the national competence. In particular, it is pointed out that if the features of the system of declaration of effectiveness were autonomously defined at the European level - without any intervention at national level - it would not be possible to give any valid meaning to the provision cited above, which provides for subsidiary criteria applicable precisely when no such system is established – at the national level, mind you. Also for this reason, according to the Court, the intention of the European lawmaker, in setting up the system of Article 3(8), first indent, is to leave the determination to the single Member States.

Nonetheless, the above arguments did not lead to the conclusion that the FNV contract was incompatible with the directive, but rather supported its applicability to posted workers. In fact, the Court held that it complied in any case with the first indent of Article 3(8), since its content is identical to the contract of general application and, moreover, because the Dutch lawmaker has expressly established that adherence to the former (contract) exempts companies from the application of the latter.

From this point of view, it is clear the European judge's intention to focus on the "substantial" - the presence in the FNV contract of provisions *identical* to those of the contract of general application - and not on the formal aspect - the lack of the requirement of general applicability, according to the system defined by the national lawmaker.

4. THE APPLICATION OF THE RULES ON TRANSNATIONAL POSTING TO TRANSPORT

Turning now to the two questions for a preliminary ruling which are more specifically related to international road transport, the referring court first asks whether the European rules on transnational posting are applicable to this sector.

The question is not fresh and has its roots in the reasons why, especially the countries of Central and Eastern Europe, have argued the inapplicability of such discipline (*see:* Lhernould 2019, p. 255; Overbeeke, 2016, pp. 114, 119-120; Even & Zwanenburg, 2017, p. 157).

This orientation is supported by the fact that the posting rules are based on Art. 56 TfEU and not on the rules on the free movement of transport services of Arts. 90-100 TfEU - as reiterated, recently, in the Dobersberger case (*see*: Judgement of the Court, 2019, paras 24-25)[7].

[7] See also the conclusions of Advocate General Szpunar (2019, pt. 33), who stresses that transport companies cannot invoke the direct effectiveness of the freedom to provide services before national courts.

However, there are also practical reasons for the exclusion of the posting rules, as pointed out by Advocate General Bobek in his conclusions to the case (paras. 75 et seq.): the inclusion of transport in the scope of transnational posting - it was pointed out - entails the need to ensure different working conditions depending on the State in which the haulier operates. The "mobile" nature - naturally linked to the execution of a transport operation - makes this sector difficult to reconcile with the concept of "posted worker". In fact, the latter requires both that the activity carried out in the sending Member State is "habitual" and that the "temporary" duration of the service in the territory of the host State has a consistency, in terms of quality and quantity, that can be materially perceived.

The subject should be treated by differentiating the results of the reflection according to the concrete hypotheses in which an international transport takes place - as will be done below, in relation to the second question for a preliminary ruling on the subject of transport. In any case, the Court expressed a favourable opinion on the abstract applicability of transnational posting to transport, on the assumption that Directive 96/71 does not provide for explicit exclusions for this sector - unlike what it expressly states for merchant navy crews (art. 1, par. 2).

This conclusion is supported by reference to the many similar indications given by the European lawmaker[8], but above all by the clarifications on the purpose of Directive 96/71. The Court pointed out that the lawmaker intends to promote a services market in which there is fair competition between companies and adequate protections for workers, for any "provision of services"; for transport, then - it continued -, it is necessary to distinguish measures intended to implement a "common policy" under Art. 91 TfEU (see point 39, where Regulation 1072/2009 on common rules for access to the road haulage market is cited as an example) and those relating, instead, only to transport that carries out a transnational provision of services.

5. THE CRUCIAL QUESTION OF THE JUDGMENT: WHEN IS THE LINK WITH THE HOST STATE SUCH AS TO LEAD TO THE WORKER BEING DEEMED "POSTED"?

The case presents other problems related to the application of the posting rules to the goods transport sector.

The referring court had also asked - by question 2(a) - the correct interpretation of Article 2(1) of Directive 96/71 - according to which the worker is posted "to the territory of a Member State other than that in which he habitually carries out the work" - such as when foreign drivers transit through the foreign territory and there receive instructions for the transport of goods, but cover a large part of the journey outside the State of posting - in this case the Netherlands.

The Court continued the orientation taken in the Dobersberger case, in which it said that, in order to establish a hypothesis of posting, there must be "a sufficient link" with the territory of the State where the worker is posted. In the Dobersberger case, the workers had not only been placed at the disposal of and followed the instructions of their employer, but they had also been employed for transport operations in which most of the working time was performed in the territory of their country of habitual execution of the activities (*see*: Judgement of the Court, 2019, par. 33): it was not complicated – in short – to reach the conclusion that the legal requirement of a sufficient link with the host State was not met in order to qualify the workers as posted.

This time the use of the criterion of "sufficient link" has led to more complications, and the Court has taken a position only partly agreed by the Advocate General.

[8] See paragraph 35, which cites Article 9(1)(b) of Directive 14/67 on the administrative obligations of undertakings employing "mobile workers in the transport sector" and recital 7 of Directive 2020/1057, which presupposes the applicability of the provisions of Directive 96/71 to the road transport sector.

In his opinion, Advocate Bobek explained how to verify the existence of a "sufficient link" with the host state in the case of international road transport. He emphasized the need for a case-by-case verification based on a variety of elements but also pointed out that there may be well defined situations at the extremes of the range of possibilities. These include situations in which the employer makes available a driver with whom he has a contract of employment to a recipient of services located in another Member State in order to carry out national or international transport operations on a temporary basis[9]. This hypothesis – from the perspective of the Advocate General - constitutes a typical case of transnational posting. In such case, in fact, the sending of the haulier at the service recipient, where he will receive instructions and load the vehicles in order to carry out the transport operations to and from such premises, requires that the haulier be transferred to the host State to be assigned to the local base of operations until the end of each transport operation.

In the Court's view, however, the above-mentioned factual elements alone do not justify a transnational posting. Paragraphs 50 and 53 of the decision refer to the factual conditions on which Mr. Bobek based his position in favour of applying the posting rules, namely (a) the posting by the employer of one of his drivers to an undertaking established in another Member State and (b) the receipt by the driver of instructions concerning the missions, the beginning and the end of the missions at the headquarters of the second undertaking. However, the European judge did not consider this sufficient, requiring "other factors" in order to determine the existence of "a sufficient link" with the territory of another Member State.

It is on this profile that the analysis of the decision becomes complicated, since it is difficult to understand what the judges mean by the reference to the "other factors".

The point on which to reflect is the 51. The first part of this point excludes that the factual elements mentioned are sufficient to configure a posting. In the second part, thus, the further features for conducting the investigation are formulated, albeit briefly. The sufficient link with the different Member State - it is stated - must be ascertained on the basis of an overall assessment that takes into account: *a*) the nature of the activities carried out by the worker; *b*) the intensity of the link of the activities with the territory of each Member State in which the worker operates; *c*) the importance of these activities in the overall transport service.

The verification of this last indicator does not create any difficulty in the case examined. The drivers used for the transport of goods are not employed in accessory activities (e.g. on-board services, such as catering staff on trains, examined in the Dobersberger judgment), but they are employed in the principal activity in the overall transport service.

The verification of the other two elements is more complex and it merits an analytical treatment.

With the first reference the judges state that the posting inquiry must distinguish the "sedentary" work, i.e. to be carried out in the same place, from "mobile" work, which, by its nature, is intended to be performed in different places. Consequently, the Court stresses the need to apply the posting discipline to road haulage without rigidly superimposing the factual elements commonly used for other types of activity. In other words, it is requested that the presence on the territory of a different State - as a typical element of transnational posting - is not due to mere geographical conditions, which have nothing to do with the final service to be rendered - imagine the transit through Italy of the Croatian haulier who has to reach France.

There are more considerations regarding the second indicator. It refers to the degree of intensity of the activities with the territory of each State in which the worker is called upon to work. This profile is only apparently embodied by the previous one, since it requires to consider between the different countries in which the transnational transport service has been carried out - excluding territories only crossed for geographical reasons -, the one that is the "prevalent" destination of the goods transported. In this way, the analysis introduces a "comparison" of the intensity

[9] Point 100 of the conclusions.

of the link between the two or more States in which the transport is carried out, which serves to resolve the most complex cases - such as that of the judgment - in which only certain elements of the investigation reveal a prevailing connection with a State.

In the case of the judgment, for example, even though the awarding of missions and the beginning and the end of them evidenced a connection to the Netherlands, the transports could have had a closer connection to the state in which the unloading of the goods had to be carried out. This would have been especially confirmed if, before returning to the Netherlands, the haulier had been called to perform further loading or unloading (in a different or) in the same state where the first unloading had taken place.

These aspects have not been clarified by the referring court and this uncertainty has led the Court to extend the elements on which to assess the existence of a hypothesis of posting, beyond the criteria already indicated by the Advocate General in point 100 of his conclusions.

The convergence on a single territory (in this case the Netherlands) of the elements relating to the place where the drivers received their transport instructions and to the beginning and end of their journeys - convergence assumed by the Advocate General as a factor capable, in the abstract, of constituting a typical hypothesis of posting -, according to the European court does not exclude the verification of the intensity of the link between the activities carried out and the other Member States concerned by the transport. The Court has thus required that the investigation compares the degree of intensity of the link between the international transport and each of the States involved in the operation. On the basis of this investigation, it is possible to ascertain the foreign State in which the service has been *prevalently* performed.

Finally, it must be pointed out that the global assessment of all material elements of the case, proposed by the European judge, could have revealed the existence of more than one Member State in which the haulier has actually operated - a hypothesis which, as mentioned above, would have required a precise investigation of the country in which the haulier has carried out the *prevalent* activity.

At the same time, however, such an assessment could also have led to the conclusion that there was no "different" country within the meaning of Article 2, paragraph 1, of Directive 96/71. This is the case of the bilateral international transport, that Directive 2020/1057, para. 3, Art. 1 excludes from the discipline of transnational posting, in which the driver has reached the foreign territory in order to load (or unload) the goods and then transported them to the State *where he habitually carries out his work*.

6. INTRA-GROUP POSTING AND CABOTAGE

This last question for a preliminary ruling is also made up of two other questions - referred to in the judgment as points (b) and (c) of reference number two - which are of a subsidiary meaning in the context of the decision but which nevertheless contain details to highlight. In the first point, the referring court asks whether the existence of a corporate group is a relevant element in the assessment of the existence of a posting.

In truth, the question is meaningful only if one reflects on the fact that setting up a company in a foreign country can be a means of entering the market of that country with one's own workers but, at the same time, of continuing to benefit from the (more favourable) regulation of employment contracts provided for by the law of one's own country of establishment. For this reason, the referring court wondered whether the above-mentioned case - which, as is well known, falls within the scope of Directive 96/71 pursuant to Article 1(3)(b) - justified in itself the application of the more protective rules on posting.

Accepting the Advocate General's suggestion, the Court made it clear that the link between the companies involved in the transnational provision of services is not in itself sufficient to consider these rules applicable. In order to constitute a case of posting, it is not only necessary to verify that one of the three conditions of Article 1(3)

of the directive exists, but also that, pursuant to Article 2(1), the worker is posted to a State other than the one in which he habitually provides the service.

On this point, we can only agree with the response of the European judge. It can be added, in systematic terms, that in order to identify a posting it is necessary, first of all, to consider the factors common to all hypotheses, including art. 2, par. 1 - in addition to the *temporary* nature of the work, the *existence of an employment contract* with the posting company and, at least for the hypotheses of lett. a) and c), of art. 1, par. 3, *a commercial contract* between the recipient of the services and the posting company - and, only in the presence of these prerequisites, verify the existence of the conditions of one of the hypotheses of art. 1, par. 3[10].

As regards, instead, the last question for a preliminary ruling, it is asked to clarify the relationship between the transport of goods by road, which is a case of "cabotage", and the application of the discipline of transnational posting. The referring court, in particular, asks whether cabotage constitutes posting even when the performance of the activity in the host State by the haulier requires his presence in that State *for a very limited period*.

In this regard, it should be pointed out that the definition of cabotage contained in art. 8, EU regulation 1072/2009 places maximum limits on the applicability of this case. The worker may, in fact, carry out, on a temporary basis, the carriage of goods for third parties, in a Member State other than that in which he is normally employed, for 7 days and as long as he does not carry out more than 3 national transport operations in the extra-national State after the international transport operation carried out towards that State. This regulation satisfies the interest of transport companies in increasing the so-called "load factor" of heavy goods vehicles by encouraging a reduction in unladen journeys, but also makes it possible to prevent foreign hauliers from being employed continuously in the host State.

The question of the referring court, on the other hand, focuses on other cases in which the haulier engages in cabotage for a very limited period of time in the foreign country - such as when he loads and unloads in the foreign country on the same day and then leaves for the country of origin.

The Court's position is based on the inclusion of cabotage activities in the scope of application of posting, which is already expressly provided for by Regulation 1072/2009 (see recital 17, referred to in paragraph 59 of the judgment). However, it notes that also in this case the European court applied the criterion referred to for international transport, namely the verification on a sufficient link between the work activities carried out and the host State.

It is true that recital 17 of the regulation is explicit in reserving the application of Directive 96/71 to companies carrying out cabotage transport - a rule confirmed by the recent Directive 2020/1057, in art. 1, par. 7. Nevertheless, both the use of the criterion of the "sufficient link" and the reference in paragraph 63 of the Decision to the applicability of the posting rules to cabotage only "in principle" and not "in any case" – as, instead, the referring court had asked to know (see in particular paragraph 29(2)(c)) – suggest an intention to allow national courts a margin of manoeuvre in their interpretation of the specific case.

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[10] On this point reference may be made to Cordella (2020, p. 8).

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