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How to interpret the Posting of Workers Directive in the cross-border road transport sector? Dutch Supreme Court asks the ECJ for guidance (NL)

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Summary

In this transnational road transport case, the Dutch Supreme Court had to elaborate on the ECJ *Koelzsch* and *Schlecker* cases and asks for guidance from the ECJ on the applicability and interpretation of the Posting of Workers Directive.

Facts

The Dutch limited liability company Van den Bosch B.V. ('VdB') is active in the road transport sector. Two of its sister companies are situated in Germany and Hungary: Van den Bosch Transporte Gmbh and Silo-Tank Kft, respectively. VdB is party to the collective labour agreement on the transport of goods in the Netherlands ('CLA Goederenvervoer'). On the employees' side, CLA Goederenvervoer was signed by the Dutch trade union FNV. The CLA Goederenvervoer has not been declared generally binding.

The CLA Goederenvervoer contains a so-called charter provision:

1. The employer must stipulate in subcontracting agreements, executed in or from the employer's company located in the Netherlands, entered into with independent contractors who act as employers, that their employees are granted the same basic working and employment conditions as contained in CLA Goederenvervoer, if this results from the Posted Workers Directive ('PWD'), even if the law of a country other than the Netherlands is chosen.
2. The employer must inform the employees referred to in paragraph 1 of this article about the basic working and employment conditions that apply to them.
3. Paragraphs 1 and 2 of this article do not apply if the workers referred to in paragraph 1 of this article fall directly within the scope of CLA Goederenvervoer, because in such a case the entire collective agreement applies to them in any event.

This provision is an exact copy of the same provision laid down in another collective labour agreement that has been declared generally applicable, which means that every employer in this business in the country must observe it. The current CLA Goederenvervoer was exempted from the collective labour agreement declared generally applicable. A same type of stipulation applies to the hiring of drivers from companies outside the Netherlands.

VdB entered into an agreement with its sister companies and they were consequently responsible for the transport of goods from VdB, essentially, under a charter agreement. The sister companies use their own drivers. German or Hungarian law applied to the employment agreements of the drivers. The drivers received instructions from VdB and VdB paid their wages, though these were subsequently recharged to the sister companies and social security and tax were paid in the countries of the sister companies. Net expense allowances were paid in Euros. The employees from the Hungarian company, Silo-Tank, stated that they performed their work in, or at least 'from', the establishment of VdB in the Netherlands. The tachograph and on-board computers were registered in the name of VdB. The employees had an email address and obtained a certificate in the Netherlands from VdB's Academy. VdB used the same branding as Silo-Tank.

First proceedings: the Dutch trade union FNV – v – VdB

The FNV demanded application of the core employment conditions deriving from the CLA Goederenvervoer to the employment agreements of the foreign employees working under charter agreements and brought an action against both VdB and its sister companies. VdB refused to apply these conditions, arguing

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that the PWD did not apply to this situation and that therefore the charter provision did not apply either. VdB explained that many Dutch companies have acquired or established Eastern European companies in countries such as Poland, Hungary and the Baltic states and that this is having an impact on road transport throughout the EU. If VdB were to apply Dutch employment conditions to its dealings with its sister company, it could not make a profit and would not be able to retain the work. It felt that these kinds of issues are something that will need to be remedied on an EU level.

Second proceedings: the employees of Silo-Tank – v – VdB and Silo-Tank

In the second case – running in parallel with the first – the employees initiated proceedings against both VdB and Silo Tank. They stated that they were in fact employed by VdB, rather than by Silo-Tank, but in any event, their employment terms were subject to the laws of the Netherlands. The employees argued that the contract with Silo-Tank was a sham. A third company, situated in the Netherlands, Company Services B.V., gave the employees their instructions and performed planning and administrative activities. The employees had to ask for permission to take leave in the Netherlands. Newsletters were sent to them from the Netherlands. The tank passes of the drivers were registered in the name of VdB. The sister companies rented their equipment from a Dutch company. After taking legal proceedings, the employees were dismissesd by Silo-Tank. They claimed against VdB that their termination was void and also claimed for payment of wages. They then did the same against Silo-Tank in Hungary.

VdB and Silo-Tank challenged the claims. They stated that VdB had acquired Silo-Tank in order to be able to transport goods using cheaper Hungarian drivers, as is permitted in the EU under free market rules. They said the arrangement was not a sham, as Silo-Tank was a genuinely independent legal entity, employing 60 people. Silo-Tank entered into employment agreements with the employees concerned. The termination of the employment agreements is the subject of litigation in Hungary, and should not be pursued in the Netherlands. There is no employment relationship between the employees and VdB. The fact that the on-board computers were registered in the name of VdB was because VdB owns the licence for the entire group, the group has one training facility and that happens to be in the Netherlands, and the fact that the entire group uses the same branding is perfectly logical. These factors do not indicate that the employment agreements are with VdB. Although VdB did give instructions to the employees when performing their charter activities, this was logical, and insufficient to indicate employment agreements were in place. Further, the employment agreements between the employees and Silo-Tank are subject to Hungarian law. Dutch law simply does not apply: neither on the basis of the Rome I Regulation nor through the PWD. According to VdB and Silo-Tank, the employees did not habitually perform their work in or from the Netherlands.

Prior legal proceedings[1]

First proceedings: the Dutch trade union FNV – v – VdB c.s.

According to the District Court the activities as performed by the sister companies fall within the definition of transnational secondment.[2] VdB subcontracted to these sister companies. Article 1 paragraph 3 sub a of the PWD applies. Furthermore, the situation as referred to in sub b may apply as well. VdB's statement that the PWD solely applies should the foreign driver perform their work exclusively or in the majority within the borders of the Netherlands is false and is therefore rejected.

The District Court furthermore assessed whether there was a genuine secondment, applying the Enforcement Directive 2014/67/EU. It concluded that the sister companies perform substantial activities. Whether or not the work is performed on a temporary basis should be assessed on a case-by-case basis applied to each individual employee. That is, however, not relevant to this case. If the work is performed on a permanent basis in the Netherlands, Dutch law – including the core employment conditions of the collective labour agreement – applies on the basis of the Rome I Regulation. If the work is performed on a temporary basis, the core employment conditions of the collective labour agreement apply on the basis of the implementation law of the PWD. In both instances at least the core employment conditions deriving from the CLA Goederenvervoer should be applied.

The Court of Appeal took another view.[3] Firstly, referring to the Rüffert case (C-346/06), it held that the charter provision may be in violation of the EU principle of freedom to provide services as that provision is not part of a collective labour agreement that is generally applicable. However, the Court of Appeal observed that said provision was an exact copy of the same provision laid down in a collective labour agreement that has been declared generally applicable. The current CLA Goederenvervoer was exempted from the collective labour agreement declared generally applicable. Both agreements were therefore intertwined creating the same level playing field. Article 3 paragraph 8 of the PWD ought in such a situation to be interpreted in such manner that it also applies to the CLA Goederenvervoer at hand. That meant that there was no violation of the EU principle of freedom to provide services.

1. Taken from EELC 2017/36. For the commentary of this case, see: Z. Even and A. Zwanenburg, 'In an international road transport case the Dutch Appellate Court held that working from a given place is not relevant when applying the Posted Workers Directive', EELC 2017/36.
2. District Court 's-Hertogenbosch 8 January 2015 (*FNV Bondgenoten – v – Van Den Bosch Transporten B.V.*), ECLI:NL:RBOBR:2015:19.
3. Court of Appeal 's Hertogenbosch 2 May 2017 (*Van Den Bosch Transporten B.V. c.s. – v – FNV*), ECLI:NL:GHSHE:2017:1873.

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The next question is whether the PWD applied. The Court of Appeal held that the current situation could fall within the ambit of Article 1 paragraph 3 sub a of the PWD. VdB, however, disputed that the PWD could apply in a situation in which the work is not performed *in* the Netherlands, but rather *from* the Netherlands. Although that last criterion may apply when establishing the applicable law under the Rome I Regulation, is does not apply to the PWD. The Court of Appeal followed that point of view. Articles 1.1 and 1.3 of the PWD stipulate that the posting needs to take place 'to the territory of a Member State', not *from* the territory of a Member State. The same applies to Article 2 of the PWD, where it clarifies that a 'posted worker' carries out their work in the territory of a Member State other than the State in which they normally work, as opposed to *from* another Member State. The same wording can be found in the opinion of Advocate General Wahl in the case C-396/13. The PWD therefore does not apply to the underlying situations. A broad interpretation of the PWD, that would not only include working in another Member State but also working from another Member State, wouldn't do justice to the aim of the PWD, which wants to serve the principle of freedom of services and wants to protect the internal market of the Member State involved. Which Member State should be protected when 'working from' would apply? The country of the party who instructed the company performing the charter agreement? Or the country in which most time is spent driving? Or the country in which the freight is barged and unloaded? Moreover, the original proposal of the Commission of the PWD referred to Com 91, 230 def 346 providing services in another Member State, and deemed it unnecessary to add a list of exceptions. The combination of Article 1 and 2 of the Directive already made it clear that the Directive does not apply to, inter alia, international road transport.

Second proceedings: the employees of Silo-Tank – v – VdB and Silo-Tank

According to the District Court, there is not a choice-of-law clause in the contract.[4] The applicable law should therefore be determined by Article 6 of the Rome Convention/Article 8 Rome I Regulation. This is typically the country in or from which the employees perform their work. It is, however, subject to debate which country that is. Employees need to prove that they perform their work habitually in or from the Netherlands. Meanwhile, the District Court noted that that part of the wage claim of the employees is based on the CLA Goederenvervoer which, according to the District Court (which turned out to be an error), is generally binding. The District Court ruled that the hard core employment terms of the CLA Goederenvervoer apply anyway due to the PWD. Therefore, regardless whether Dutch law applies in full or not, these terms must be abided by. With regard to the applicability of the PWD, the same line as to reasoning as mentioned above was applied. The litigating parties were allowed to respond to the question exactly which stipulations from the CLA Goederenvervoer are to be considered as such hard core terms.

Again, the Court of Appeal took a different approach.[5] It ruled that the employment agreements did not contain a choice-of-law clause. It acknowledged that the ECJ has ruled in the *Koelzsch* case (C-29/10) that in international road transport the employee is considered to habitually work in the country in which the place is situated (i) from which the employee carries out his transport tasks, (ii) receives instructions concerning his tasks and organises his work, and (iii) where his work tools are situated. The Court of Appeal did not, incidentally, explicitly mention the criterion of the ECJ that it must also determine the place where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of their tasks. According to the Court of Appeal, the employees habitually work in or from Hungary, and their employment agreements are in any event more closely connected to that country. The Court of Appeal held in that regard:

i. Silo-Tank is situated in Hungary;
ii. it also performs work that is unrelated to VdB;
iii. the employees have employment agreements with Silo-Tank;
iv. the employees are domiciled in Hungary, pay their taxes and are insured under social security law in that country;
v. the employees regularly returned to Hungary after their transports;
vi. the employees received pay as of the moment they left Hungary; and
vii. the transport works only partially (both in mileage and in time) take place in the Netherlands.

In these circumstances the mere fact that the transport started in the Netherlands and ended there, and the employees received instructions form VdB in the Netherlands, was insufficient to lead to the conclusion that the Netherlands is the country of habitual work. This means according to the Court of Appeal that Dutch law does not apply on the basis of the Rome Convention/Rome I Regulation.

In line with its aforementioned reasoning, the Court of Appeal also held that the PWD does not apply to the underlying situation. That means that the claims of the employees are denied.

4. District Court 's-Hertogenbosch 8 January 2015 (*employees – v – Van den Bosch Transporten B.V.*), ECLI:NL:RBOBR:2015:18

5. Appellate Court 's-Hertogenbosch 2 May 2017 (*Silo-Tank – v – 10 Hungarian employees)*, ECLI:NL:GHSHE:2017:1874.

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Dutch Supreme Court

First proceedings: the Dutch trade union FNV – v – VdB c.s.[6]

The Dutch Supreme Court was asked whether the Hungarian truck drivers were covered by the PWD if they are brought to the Netherlands to carry out international transport services from Dutch territory. The Supreme Court asked the Court of Justice of the European Union to provide further guidance on the precise scope of the PWD.[7] Firstly, it asked whether the PWD also applies to international truck drivers who perform their work in more than one country. In particular, it asked for clarification on how to interpret Article. 1(1) and Article 1(3) of the PWD in conjunction with Article 2(1) of the PWD with regard to the situation of an international truck driver sent by their Hungarian employer to carry out work from the Netherlands. The Supreme Court asked if special meaning should be attached to the specific mode of posting (in this case: intra-concern) or the specific mode of transport (such as cabotage). Another question posed to the ECJ concerned the interpretation of the notion 'collective agreements which have been declared universally applicable' in Article 3(1) and Article 3(8) of the PWD. The referring Dutch Supreme Court wondered whether (or to what extent) national law definitions are decisive, or whether an autonomous EU interpretation on the basis of the PWD prevails. Finally, the question was posed whether it is in breach of Article 56 of the TFEU on the freedom to provide cross-border services within the EU, if a service provider would be contractually bound to apply the terms of a collective labour agreement which is not generally binding (see the 'Charter' provision in Artle 73 of the Dutch road transport collective labour agreement).

Second proceedings: the employees of Silo-Tank – v – VdB and Silo-Tank[8]

The employees of Silo-Tank argued that the Court of Appeal did not – or at least not correctly – take into account the circumstances in line with the case law of the European Court of Justice when deciding on (i) the habitual place of work and (ii) the 'closer connected country'. The Dutch Supreme Court agreed with the employees and referred the case back to the Court of Appeal, that has to take into account the following.

According to Article 8(2) of Rome I, the employment contract is governed in principle by the law of the country in which or, failing that, from which the employee habitually carries out their work in performance of the contract – i.e. the habitual place of work. Under Article 8(4) of Rome I this pre-established connecting factor – habitual place of work– may be set aside where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of that other country shall apply.

In the *Koelzsch* case the ECJ made clear that even in the case of a truck driver working in international transport the national court should still try to establish whether, based on the circumstances as a whole, a country can be identified where or from which the work is actually performed.[9] When ascertaining the place of work in the case of international transport (including international road transport), the national court must take account of all the factors which characterise the activity of the employee. These are, in particular, the place:

- from which the employee carries out his transport tasks;
- where the employee receives instructions concerning their tasks and organises their work; and,
- where their work tools are situated.

Additionally, the court must determine:

- 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 their tasks.

The Dutch Supreme Court clarified that this list of circumstances is not limited. The court should take into account 'all the factors which characterise the activity of the employee'. However, great importance should be given to the elements that – according to the ECJ – *in particular* should be considered. In any case, these elements should be taken into account. The Court of Appeal had failed to do so, according to the Dutch Supreme Court, even though it took into account some of the elements that should be considered according to the ECJ. Moreover, the Court of Appeal failed to consider whether the elements that were put forward by the employees are 'factors which characterise the activity of the employee' and to include this in its judgment.

Whether the contract is more closely connected to another country (Article 8(4)) than the country where the work is habitually performed should appear from the circumstances as a whole. The ECJ in *Schlecker* ruled that among the significant factors suggestive of a close connection with a country are, in particular, the country in which the employee pays taxes on their income and where they are 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.[10]

The Dutch Supreme Court stated that, when a national court sets aside the pre-established connecting factor of the habitual place of work country, it should explain its motivations for that. From this motivation, it should

6. Dutch Supreme Court 23 November 2018 (*FNV – v – Van Den Bosch Transporten B.V. c.s*), ECLI:NL:HR:2018:2174.
7. Case C-815/18.
8. Dutch Supreme Court 23 November 2018 (*10 Hungarian employees – v – Silo-Tank*), ECLI:NL:HR:2018:2165.
9. See ECJ 15 March 2011, Case C-29/10, *Koelzsch*, ECLI:EU:C:2011:151, paras. 47-49.
10. See ECJ 12 September 2013, Case C-64/12, *Schlecker/Boedeker,* ECLI:EU:C:2013:551, paras. 40-41.

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follow that it appears from the circumstances as a whole that the contract is more closely connected to the other country.

When the Court of Appeal ruled that the Hungarian employment agreements (are in any event) more closely connected to Hungary (Article 8(4)), it took into account the same circumstances as it did when concluding that Hungary was the habitual place of work (Article 8(2)). Even though the Court of Appeal did mention some of the circumstances that should be taken into account according to the ECJ – such as the country where the employees are covered by a social security scheme and where they pay their taxes – it did not consider that the employees received their wages from VdB, that they had a VdB fuel pass and they had to report sick at VdB. These elements are parameters relating to salary determination and other working conditions within the meaning of *Schlecker*.

The case is referred back to the Court of Appeal that should reconsider and rule on whether Hungary or the Netherlands is the habitual place of work (Article 8(2)) and whether it should apply the 'closer connected country' escape clause form (Article 8(4)). Only in case the Rome I Convention does not point to the Netherlands, the Court of Appeal should decide whether the employees might be protected by the Posting of Workers Directive. In that case, the Court of Appeal should stay the proceedings until the ECJ provides further guidance on the preliminary question in the first proceedings.

Commentary

In the Netherlands, ample case-law on transnational transport and the law applicable to the drivers is in place. It remains difficult to determine that applicable law. The different cases have led to different outcomes:

- The Court of Appeal Den Bosch held that the Dutch international transport company Mooy B.V. needed to ensure that the Polish group company, which services were retained by Mooy B.V., applied the Dutch law to the employment agreements entered into between that Polish group company and the employees concerned. Although it was allowed to set up a group company in Poland in order to be able to compete on wages, the Dutch law applied to the employment agreements of the Polish employees due to the fact that these employees habitually worked from the Netherlands. Strangely enough the Court of Appeal ruled that the applicability of Dutch law also resulted in the applicability of the Dutch implementation act of the PWD.[11]
- The Court of Appeal Arnhem-Leeuwarden had to rule on the applicability of the charter clause to international transport company Vos. The trade union argued that Vos's employees in the service of its Romanian and Lithuanian group companies, from which Vos retained the services, should fall under the Dutch transport collective labour agreement. The Court of Appeal, however, ruled that there was insufficient evidence presented in the proceedings that the contract concluded with these group companies was executed in or from the Netherlands or that the PWD and its Enforcement Directive should be applied to the case. The trade union, in the view of the Court of Appeal, had not provided sufficient evidence that the foreign subsidiaries were not operating independently from the Dutch office, so that the allegation of posting had not been sufficiently substantiated.[12]
- The Court of Appeal Den Bosch had to rule on the applicability of the charter provision as well in a case involving international transport company Farm Trans. The trade union argued that Farm Trans retained the services of its Polish group company, which resulted in the applicability of the basic working and employment conditions of this transport collective labour agreement. As Farm Trans did not dispute the statements of the trade union, the Court of Appeal ruled in favour of the trade union.[13] This also meant that according to the Court the PWD applied.
- The Court of Appeal Arnhem-Leeuwarden also ruled on the applicability of the charter provision, in a case where the Dutch international transport company Brinkman Trans Holland worked that closely together with its group companies in Poland and Moldova, that, according to the Court, it could be concluded that their employees were assigned to the Dutch territory. The charter provision applied. The fact that most of the transport in reality takes place outside the Netherlands does not affect that conclusion.[14]

It is, given the above, important that the ECJ shed further light on the interpretation of the PWD in relation to the transnational transport sector.

In the meantime, that sector has been excluded from the applicability of the amended PWD (2018/957). Paragraph 15 of the recitals clearly stipulates: "*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.*" Further clarification of the position of this sector will therefore have to be provided by the mobility package.

The legal challenges of social and legal aspects for cross-border road transport workers have in recent years been the focus of an Erasmus+ project called SENSE.[15] The

11. Gerechtshof Den Bosch, 28 May 2013, ECLI:NL:GHSHE:2013:CA1457.
12. Gerechtshof Arnhem-Leeuwarden, 17 May 2016, ECLI:NL:GHARL:2016:3792.
13. Gerechtshof Den Bosch, 24 May 2016, ECLI:NL:GHSHE:2016:2011.
14. Gerechtshof Arnhem-Leeuwarden, 31 July 2018, ECLI:NL:GHARL:2018:6962.
15. http://www.project-sense.eu/.

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project, funded by the European Commission, was launched in early 2017. Five universities (Erasmus University Rotterdam, University of Antwerp, Tilburg University, University of Luxembourg and University of Gdańsk) of four EU Member States (Poland, the Netherlands, Belgium and Luxembourg) are involved. The project aims to contribute to solving problems in the field of EU transnational road transportation by providing adequate understanding of the legal setting, both at national level and at EU and comparative level.
On 14 May 2019, a selected number of top notch students from each country was given the opportunity to join a conference on the topic of transnational road transport in Luxembourg. The students tried to find 'best practice solutions' and discussed this case in a moot court setting. They were also asked to give input on the underlying case. The comments from other jurisdictions below contain critical remarks, best practices and recommendations from these students.

Comments from other jurisdictions

Poland (Aneta Nadolska and Mateusz Barczewski, University of Gdańsk): The issue of posting of workers within the international road transport sector is particularly acute in Poland, as this area has been explicitly excluded from the coverage of a Polish act implementing the PWD. The facts of the case seem to exhibit a certain connection of the Hungarian employees with their home state, thus by virtue of the Rome I Regulation the Hungarian law would be likely deemed applicable and the position of the Dutch Court of Appeal in the second proceedings could be justified. In Poland, there is strong reliance on the freedom to provide services within the internal market and it determines the approach to such cases. Nonetheless, courts have not had an opportunity to elaborate on the topic in too many instances.

Belgium (Lucas van Geel, University of Antwerp): The case at hand is as interesting as it is pertinent, since Belgian courts regularly face similar situations.
In casu, Dutch courts are facing difficulties in determining the applicable law to the dispute and the scope of the PWD. Belgium has also had similar experiences and realised the consequences of discrepancies in interpreting and determining the applicable law.
Consequently, Belgium has adopted guidelines, setting out a list of criteria to determine the applicable law.[16] These guidelines intend to increase legal certainty and create a level playing field for all the actors involved in the transnational road transport sector. This list adds to the criteria set out in *Koelzsch*; such as the place where the transport is predominantly carried out, where the goods are unloaded, where the employee has to check in before starting work and the place where the employee returns after work. I believe that the application of these additional criteria to the case at hand would have had a meaningful impact. That is, these criteria are specifically tailored to the particularities of international road transport.
Moreover, Belgium has adopted the LIMOSA system, which intends to fight unfair competition and social fraud through the mandatory submission of information, suitable for determining the applicable law.[17]
However, international transport is specifically exempted from this obligation. In my opinion, which is supported by several key Belgian stakeholders, this exemption should be lifted as to include international transport.
Regarding the problems related to the posting of workers, Belgian courts have taken a different approach to their Dutch counterparts. That is, in order to combat unfair competition and cases of social fraud, the undertakings' legal structure is often scrutinised in light of the *fraus omnia corrumpit* principle. Furthermore, there is a particular focus on exposing illegal cases of posting by defining the undertaking involved as a letterbox company. In such instances, the labour relationship is requalified as a Belgian one if there is an authority relationship between the Belgian branch of the undertaking and the employee. In doing so, I believe that this is a remarkably efficient approach to combatting illegal cases of posting, which often result in unfair competition or social fraud.

Belgium (Dorien Willemsen, University of Antwerp): The judgment of the Dutch Supreme Court succinctly clarifies the application of Article 8 of the Rome I Regulation. What it especially clearly explains is the relationship between Article 8(2) and Article 8(4) that is not so evident in the Belgian case law as it is often unclear if the Belgian judge applied Article 8(2) or Article 8(4). Generally, the reasoning of the Belgian courts usually starts from the criteria stemming from the *Koelzsch* & *Voogsgeerd* cases to establish the habitual place of work. In fact, the Belgian courts tend to focus particularly on the relationship of authority between the driver and their employer and the place from where the driver receives their instructions. After describing several facts and elaborating on other main issues of similar cases, the courts often conclude their reasoning by simply saying that considering all circumstances together, the Belgian law is applicable, often without mentioning or indicating a legal basis for such an outcome.[18] Despite this common practice, some courts do indicate in a rather clear manner when they use the escape clause in Article 8(4) of the Rome I Regulation.[19] However, the distinction

16. Available at: http://www.siod.belgie.be/sites/default/files/content/download/files/guidelines_transport_24_04_17_nl.pdf (last accessed on 11 January 2019)
17. Available at: https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html.
18. Criminal Court Bruges, 10 May 2017, S/85/15 BG.69.98.1226-16 1121.
19. Court of Appeal Ghent, 3 December 2015, 2014/PGG/61 2014/VJ12/53.

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and the relationship between Article 8(2) and Article 8(4) has, in my opinion, never been more clearly illustrated than by the Dutch Supreme Court in this landmark judgment, so it can be seen as a valid source of inspiration for the Belgian practitioners and the judiciary.

The Netherlands (Nikki Snels, Corné van der Wiel, Anne Hoogendoorn and Morwarid Hashemi, Tilburg University and Erasmus University Rotterdam): This decision illustrates the complexities surrounding the question of the applicability of the Posting of Workers Directive (PWD) in transnational road transport. The PWD protects posted workers to a certain extent, but with respect to transnational road transport its scope remains unclear. In the Netherlands, due to implementation, the PWD only applies when there appears to be a situation of genuine posting. More and more Dutch transport companies use drivers from low(er) wage Member States to perform activities in or from The Netherlands. Therefore, the guidance of the CJEU in the pending case regarding the question whether the phrase 'to the territory of a Member State' of Articles 1.1 and 1.3 of the PWD should also include posting *from* the territory of a Member State is of vital importance for (Dutch) cases of international road transport.
Even though there are arguments that advocate for a strict interpretation of the PWD, we believe there are more important arguments to interpret the PWD broadly. In our opinion, the protection of truck drivers should be prioritized. A strict interpretation of the PWD nullifies this protection, since the truck drivers fall outside the ambit of the PWD. Truck drivers already form a rather vulnerable group of workers and a strict interpretation of the PWD enables employers to exploit this vulnerability. Essentially, the PWD is meant to guarantee a minimum protection for posted workers. It would make no sense to exclude this group of workers due to for example technical arguments regarding the design and system of the PWD. A broad interpretation also corresponds with the interpretation of Article 8(2) of Rome I by the CJEU in the *Koelzsch* case. It is up to the CJEU to clarify this issue.

Luxembourg (Ottavio Covolo, Maria Rodriguez; Florence Denise Jacqué; Nicole Kahn; Jessica Cafferkey, University of Luxembourg): Regarding the proceedings of the Silo-Tank employees, the Supreme Court ruled that the District Court failed to explain its disregard of the 'habitual place of work' and other factors mentioned by the ECJ.
This ruling may be criticized on the ground that the district judge, whilst not having mentioned all the possible connecting factors, arguably fulfilled its *Simmenthal*[20] mandate and applied the tools given by the Rome I Regulation in a manner consistent with its scope and goal. Such level of strictness in the application of European law, in contrast to the judge's discretion in applying the law, is unnecessary. First, the reasoning behind the disregard of the habitual place of work factor is evidently a consequence of the fact that the activity of cabotage in question does not have such a place. Second, in *Ryanair*, the ECJ held that the equivalent 'home base' factor is not decisive,[21] and can therefore be absent from the District Court's reasoning. Third, the factors mentioned by the District Court show that the Court appreciated the circumstances and did not stop at considering formal elements only; an evolution in the judicial approach seen also in Luxembourg.[22]
For comparison, the *Luxleaks* case law of Luxembourg's courts ended with judges strictly following the methodology of the ECHR in reaction to the lower courts' reluctance to recognize the defendants' whistle-blower defence.[23] In this case, the judges did not show reluctance in recognizing the social 'rights'[24] and the ruling of the Supreme Court will create more frustration than legal certainty.
The District Court could utilize the *CILFIT* case law of the ECJ to justify its interpretation of the Rome I Regulation,[25] as it is clear that the national judge enjoys a discretion in utilizing the alternative factors of Article 8.

Subject: Private international law, Posting of workers

Parties: Van Den Bosch Transporten B.V. c.s. – v – FNV and Silo-Tank – v – 10 Hungarian employees

Court: *Hoge Raad* (Dutch Supreme Court)

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