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CHAPTER 11

WHERE DO EU MOBILE WORKERS BELONG, ACCORDING TO ROME I AND THE (E)PWD?

Aukje VAN HOEK and Mijke HOUWERZIJL

1. INTRODUCTION

In this chapter we critically analyse criteria and concepts used by the EU legislator and the Court of Justice (CJ) in order to establish the place(s) where mobile EU workers ‘belong’ in relation to their labour law entitlements.¹ In this context the term ‘belonging’ refers to the fact that the mobile worker is included in the group that is covered by a given national system of labour law – either fully or partially. They are beneficiaries thereof and bound by it. Because of the private law character of the employment contract between employer and employee, the rules of private international law (PIL) play a central role in deciding which law applies to a given labour relationship with transnational elements. Nowadays, the law applicable to an employment contract is determined in all EU Member States by the PIL rules contained in Article 8 and 9 of the Rome I Regulation.²

¹ This contribution draws on a combination of earlier work, in particular: A.A.H. VAN HOEK, ‘Private international law: an appropriate means to regulate transnational employment in the European Union?’ (2014) 3 *Erasmus Law Review*, 157–169; M.S. HOUWERZIJL, ‘“Regime shopping” across (blurring) boundaries’, in S. EVJU (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance* (Oslo: Institut for privatrett, Skriftserie 196, 2014) 95–130 and A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘“Posting” and “posted workers” – The need for clear definitions of two key concepts of the Posting of Workers Directive’, in C. BARNARD, M. GEHRING and I. SOLANKE (eds.), *Cambridge Yearbook of European Legal Studies* (Oxford: Hart Publishing, 2012), 419–451.

² Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177/6 (hereinafter referred to as ‘Rome I’). For the UK, see Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (notified under document number C(2008) 8554) OJ 2009 L 10/22). Denmark is party to the Rome Convention of 1980, OJ 1998, C 27/34 (consolidated version). It should be noted though, that in the UK and the Scandinavian countries the law applying to the contract may have only a limited relevance for the actual protection of the worker. This

Additionally, the Posting of Workers Directive³ (PWD) is of relevance in the specific situation of cross-border posting of workers. We will examine these legal instruments and their interpretation by the CJ from the perspective of ‘belonging’: why do the conflicts rules attribute a situation to the law of country A rather than country B? What underlying system of ordering is at work here? As will be shown, both in (the interpretation of) the relevant provisions of Rome I and in the PWD, several lines of ordering are visible, informed by the specific goals of labour law. These ordering lines may carry with them different types of ‘belonging’, attributing workers to legal systems on the basis of the territory and/or the branch of industry in which the work is performed, or the organisational framework of the employing company.

Our analysis is based on the assumption that both Rome I and the (E)PWD⁴ may be seen as tools to strike a balance between the types of ‘belonging’ involved, in situations where this is necessary because they do not lead to the same applicable law. Striking the most suitable balance is not a ‘static’ exercise but rather an ongoing game where different weight may be given to the distinct lines of ordering depending on the specific circumstances of the individual case. The ‘right’ balance may also change over time in order to adapt to new political compromises and/or developments in society. In respect of the latter, it may be questioned whether in transnational employment relationships, based on the ‘search of cheap labour’ across the EU, the rules of Rome I and the (E)PWD still succeed in their aim to designate (together) the most suitable place(s) of belonging – and hence applicable labour law(s). The new European Commission led by Juncker seems to give a negative answer to this topical question, as regards the PWD, since a ‘targeted review’ of this Directive is part of its political priorities.⁵ This then raises the question which adjustments could or should be made in order to restore the balance? We will reflect on this issue

is due to the special status of statutory protection in the UK and of collective agreements in the Scandinavian countries. See for the UK: U. GRUŠIĆ, *The European Private International Law of Employment* (Cambridge: CUP, 2015) 13 and 179 *et seq.*; U. GRUŠIĆ, ‘The Territorial Scope of Employment Legislation and Choice of Law’ (2012) 75 *Modern Law Review*, 722–751; L. MERRETT, *Employment Contracts in Private International Law* (Oxford: OUP, 2011), 242 *et seq.*; and L. MERRETT, ‘The Extra-Territorial Reach of Employment Legislation’ (2010) 4 *Industrial Law Journal*, 355–381.

³ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1 (hereinafter referred to as ‘PWD’).

⁴ ‘EPWD’ refers to Directive 67/2014/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ 2014 L 159/11.

⁵ Jean-Claude Juncker, ‘Political guidelines for the next European Commission’, available at http://ec.europa.eu/priorities/docs/pg_en.pdf, p. 12. See also www.scienceguide.nl/201409/juncker-instructs-his-team.aspx (last accessed on 31 January 2016). Apparently, Employment Commissioner Marianne Thyssen (initially) refused to match Jean-Claude Juncker’s promise to review the posted workers directive. See www.eurolabour.org.uk/employment-commissioner-marianne-thyssen-posted-workers-directive-review (last accessed on 31 January 2016).

towards the end of our chapter, taking into account the emerging discussion in academic literature about (the need for) ‘transnational solidarity’ based on European citizenship versus traditional notions of ‘working-class solidarity’, institutionalised in systems of national labour law.

We will start with a brief explanation of the ordering lines and ‘types of belonging’ that may underpin the formulation and interpretation of choice of law rules (section 2), followed by an overview of the relevant legal instruments for determining the applicable labour law in the EU context of free movement (section 3). Here, we also give our understanding of the interaction between Rome I and the PWD. Then, we turn to the (implications of the) relevant connecting factors enshrined in these legal instruments. We will look in particular to the way these factors operate in different situations of cross-border labour mobility within the EU (sections 4–8). Where apt, this will include discussing the goals behind the legal rules such as worker protection, legal certainty, ‘*Gleichlauf*’, furthering fair competition and enhancing the free provision of services. Matters of compliance and enforcement will be touched upon in sections 8–9. Section 10 concludes.

2. LINES OF ORDERING AND TYPES OF ‘BELONGING’

In the Rome I Regulation the individual contract of employment is treated as a weaker party contract. The choice of law rules of the Savignian system on which the Rome I Regulation is based aim to ‘bring home’ the international contract to the legal system in which it belongs.⁶ But the special rules for contracts of employment contained in Article 8 thereof also aim to offer adequate protection to the individual worker. They do so *inter alia* by protecting the worker against a choice of law imposed by the employer (see below). However, it is not self-evident that the individual labour relationship with cross-border elements should be treated – purely – as a contract.⁷ In many EU Member States, labour law is and was to a large extent public order legislation. Its purpose is largely regulatory

⁶ See for example U. GRUŠIĆ, *The European Private International Law of Employment* (Cambridge: CUP, 2015), 54: ‘in other words, the protection of employees in private international law is primarily about finding and protecting the labour law system of the country or countries to which the employee ‘belongs’, in whose labour market(s) he or she participates.’

⁷ I. Szaszy declared private international law to be unfit to deal with labour law. In the Netherlands, Koopmans was of a similar opinion. See T. KOOPMANS, *De internationaalrechtelijke aspecten van de arbeidsovereenkomst* (Baarn: Hollandia BV, 1966) and I. SZASZY, *International Labour Law. A comparative survey of the conflict rules affecting labour legislation and regulation* (Leyden: A.W. Sijthoff, 1968). This was however, fiercely opposed by Gamillschegg, one of the great spokesmen in favour of the contractual approach to employment: see F. GAMILLSCHEGG, *Internationales Arbeitsrecht (Arbeitsverweisungsrecht)*,

– it ‘polices’ the contract.⁸ An important aspect of this regulatory function is that mandatory labour protection restricts competition based on differences in labour conditions, both between (groups of) workers amongst themselves and between employers, in their role of providers of goods and services. In the transnational context the term ‘social dumping’ may refer to both types of competition.⁹ The regulatory goal of many labour law rules influences the scope of application thereof, often leading to territorial application. This territoriality is most often linked to the place of work, but can also be based on competition rationales – the decisive factor in that case being whether the contract affects competition between workers on the labour market or between providers of (goods and) services on the national markets. From another perspective the regulatory element of employment law can be seen as relating to the internal functioning of the undertaking. The worker becomes part of an organisation in which specific rules apply. Within this perspective, being embedded in the organisational structure of the undertaking, the ‘*Eingliederung*’, becomes the prominent characteristic of the employment contract and the location of the undertaking the relevant connecting factor.

These two lines of ordering, (1a) based on labour market competition, (1b) competition between providers of goods and services¹⁰ and (2) based on organisational framework of the undertaking, are mirrored in the law and

Beiträge zum ausländischen und internationalen Privatrecht nr 27 (Berlin – Tübingen: Max-Planck-Institut für ausländisches und internationales Privatrecht, 1959).

⁸ The French term for such overriding mandatory provision with a territorial character is ‘*lois de police*’. See *inter alia* P. MAYER and V. HEUZÉ, *Droit International Privé* (Issy-les-Moulineaux: LGDJ, 2014) 99 and R. CALLESEN, ‘*Eingriffsnormen und Ordre public-Vorbehalt im Internationalen Arbeitsrecht – Ein deutsch-französischer Vergleich*’, Dissertation in internationaler Doppelbetreuung zur Erlangung des Dr. iur. Vorgelegt und öffentlich verteidigt am 13/12/2013 in Nanterre. See more in general on the regulatory function of private law in the EU *inter alia* H.W. MICKLITZ, *Social Justice and Access Justice in Private Law*’ (2011) 2 *European University Institute Working Papers*. On the regulatory function of the choice of law rules in this area, see *inter alia* U. GRUŠIĆ, *The European Private International Law of Employment* (Cambridge: University Press, 2015), 9, who refers to collective, public and systemic interests taking their place besides the interests of the parties to the contract.

⁹ See on the term ‘social dumping’ e.g. L.E. BERNTSEN, *Breaking the law? Varieties of social dumping in a pan-European labour market. Market expansion and social dumping in Europe* (London: Routledge, 2015); C. BARNARD, ‘Fifty Years of Avoiding Social Dumping? The EU’s Economic and not so Economic Constitution’, in M. DOUGAN and S. CURRIE (eds.), *50 Years of the European Treaties. Looking Back and Thinking Forward* (London: Hart Publishing, 2009); C. JOERGES and F. RÖDL, ‘Informal Politics, Formalised Law and the Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’ (2009) 15 *European Law Journal*.

¹⁰ Within countries the line of ordering under 1a explains the system of extension of collective labour agreements; in the transnational context it is the rationale behind the equal treatment requisite in Article 157 TFEU (see judgment Case C-43/75, *Defrenne*, EU:C:1976:56) and Article 45 TFEU (see judgment in Case C-167/73, *Commission v France*, EU:C:1974:35). The main example of the line of ordering under 1b is the regulation of ‘posting in *strictu sensu*’ – see judgments Case C-113/89, *Rush Portuguesa*, EU:C:1990:142; and Case C-43/93, *Vander Elst*, EU:C:1994:310. Both distinct sublines have in common their aim to (partially) prevent

practice of collective negotiations where collective labour agreements may organise the entire labour force within a given territory, specific professions, specific sectors of the economy or a specific undertaking/company. Each of these may carry with them different types of ‘belonging’. Finally, if labour law is taken as part of the fabric of the social welfare state, belonging may take on yet another meaning – (3) ‘belonging’ being determined by inclusion in the system of taxes and social security premiums. This interaction is very relevant in systems, as in most EU Member States, in which (collective) labour law protection and the social security and tax system form an inseparable whole. For instance, dismissal law protection and unemployment benefit schemes are often closely aligned. The same is true for rules on disability pensions and employer’s liability for accidents at work.

So, in relation to the rationale behind PIL rules of bringing home the individual contract (while taking into account the weaker position of the individual worker), we distinguish three lines of ordering (informed by the specific goals of labour law), which may impact on the choice of connecting factors, which in turn determine applicable law. In (the interpretation of) the relevant provisions of Rome I and the PWD these different lines of ordering are visible, as will be shown below.

3. OVERVIEW OF THE RELEVANT LEGAL INSTRUMENTS AND THEIR INTERACTION

In the European Union, labour mobility and migration is part of the internal market. Both migration of workers and temporary posting of workers in the context of the cross-border provision of services are protected under the Treaty on the Functioning of the EU (TFEU). If EU nationals qualify as employees, they may move to another Member State for work by using their right enshrined in Article 45 TFEU. Employers based in the EU who post their employees to another Member State, may rely on Article 56 TFEU.

The right to free movement within the EU implies that administrative controls on (labour) migration are abolished. In contrast to situations of migration from third countries, rules of (national or European) migration law are not applicable to intra-EU situations of (labour) mobility and migration. As a result, free movement rights also remove the ‘protective function’ of migration law, for instance rules (existing in several countries) which may impose (as a minimum) the application of host state labour law as a condition for acquiring a work permit. Such rules are meant to prevent exploitation of migrant workers in low-skilled (and low-paid) jobs. In place of the protective function

competition on labour costs (also) in order to protect workers, by prescribing the territorial application of labour law (*lex loci laboris*).

of migration law, the free movement rules (and secondary EU law based on the freedoms) stipulate (partial) equal treatment between (migrant/posted) workers and domestic workers. However, the equal treatment rights which are granted to the workers exists only in interaction with and can in practice be limited by rules of private international law (PIL, also called ‘conflict of laws’) and the free movement rights of the employer in his role as service provider.

Article 8 of the Rome I Regulation harmonises the conflict rules in Europe on the law applicable to individual contracts of employment. In principle, parties are free to choose the law applicable to their employment contract. But Article 8(1) Rome I limits the effect of a choice of law since such a choice by the parties cannot deprive the employee of the protection afforded to him by mandatory provisions of the law applicable in absence of this choice (the ‘objectively applicable law’). According to the majority opinion in literature, this means that the law chosen by the parties applies to the contract in full, except when mandatory rules of the otherwise applicable law would provide the worker better protection.¹¹ Hence, the employee will always be protected by the law which offers the better protection; if the employer and employee agree on better employment conditions than enshrined in the law applicable in the absence of choice, Article 8(1) Rome I prioritises the chosen law. But, if the parties agree on worse employment conditions than enshrined in the objectively applicable law, the latter law prevails. This ‘*favor* principle’ is meant to prevent the employer from abusing his superior bargaining position.

Since the objectively applicable law acts as a ‘floor’, a minimum standard of protection, it is always relevant to ascertain the latter law, which can be done following the choice of law rules in Article 8(2)-8(4) Rome I. According to Article 8(2) Rome I, the employment contracts is governed in principle by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract – i.e. the habitual place of work. The country where the work is habitually carried out shall not be deemed

¹¹ Opinion of Advocate General TRSTENJAK in Case C-384/10, *Voogsgeerd*, EU:C:2011:564, para. 48 and Opinion of Advocate General WAHL in Case C-64/12, *Schlecker*, EU:C:2013:241, para. 24; O. DEINERT, *Internationales Arbeitsrecht* (Tübingen: Mohr Siebeck, 2013), 96, 102 and 128; L. MERRETT, *Employment Contracts in Private International Law* (Oxford: OUP, 2011), 215; P. MANKOWSKI and O. KNÖFEL, ‘On The Road Again oder: Wo arbeitet ein Fernfahrer? – Neues vom europäischen Internationalen Arbeitsvertragsrecht’ (2011) 4 *Europäische Zeitschrift für Arbeitsrecht*, 524 and P. WINKLER VON MOHRENFELS, ‘Zur objektiven Anknüpfung des Arbeitsvertragsstatuts im internationalen Seearbeitsrecht: gewöhnlicher Arbeitsort, Flagge und einstellende Niederlassung (Rechtssache Voogsgeerd)’ (2012) *Europäische Zeitschrift für Arbeitsrecht*, 371. The opposing view would grant a choice of law in a contract of employment only substantive effect – comparable to the effect of a choice of law in non-international contracts under Article 3(3). See *inter alia* L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht* (Kluwer: Deventer, 2012), 175. This would mean that the chosen law only applies in as far as it does not deviate from mandatory provisions of the otherwise applicable law. The CJ has not taken up a clear position on this issue yet, see Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 35; and Case C-384/10, *Voogsgeerd*, EU:C:2011:842, para. 28.

to have changed if he is temporarily employed (posted) in another country. By referring to the *habitual* place of work, rather than the *actual* place of work, this provision stabilises the law applying to the employment contract: during a temporary posting, the law of the home state remains applicable. Article 8(3) Rome I contains an alternative reference rule in case the country where the work is habitually carried out cannot be identified. In that case the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. Under Article 8(4) Rome I both pre-established connecting factors – habitual place of work and engaging place of business – 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.

However, Article 9(2) Rome I allows courts to apply domestic ‘overriding mandatory’ provisions (law of the forum), regardless of the (objectively) applicable law.¹² According to Article 9(1): ‘Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.’ Many labour law rules have an overriding mandatory character, though the Member States traditionally draw the line between *lex causae*¹³ rules and overriding mandatory provisions differently.¹⁴ As a result,

¹² Moreover, Article 9(3) Rome I allows the courts to give effect to overriding mandatory provisions of the country of performance, in so far as those overriding mandatory provisions render the performance of the contract unlawful. This provision is not considered in this chapter. However, it may be relevant in specific cases of transnational employment: on February 25, 2015, the German Federal Labour Court referred three questions relating to the interpretation of Article 9 and Article 28 Rome I Regulation to the CJ. In the context of a wage claim made by a Greek national who is employed by the Greek State at a Greek primary school in Germany, the German Federal Labour Court faced the problem whether to apply the Greek Saving Laws No 3833/2010 and 3845/2010 Laws as overriding mandatory provisions although the employment contract is governed by German law. See for a first analysis L. GÜNTHER, blog 25 April 2015, available at <http://conflictoflaws.net/2015/german-federal-labour-court-on-foreign-mandatory-rules-and-the-principle-of-cooperation-among-eu-member-states> (last accessed on 31 January 2016).

¹³ *Lex causae* is the law or laws chosen by a forum court from among the relevant legal systems to arrive at its judgment.

¹⁴ For a description of the different models of workers’ protection in the EU Member States, see A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union’ (2011) and ‘Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union’ (2012) *Reports to the European Commission under contract VT/2009/0541 and contract VC/2011/0096*, available at <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016). Also see A.A.H. VAN HOEK, ‘Private international law: an appropriate means to regulate transnational employment in the European Union?’ (2014) 3 *Erasmus Law Review*, 157–169. For a comparison between France and Germany with regard to overriding mandatory

Article 9 Rome I facilitates labour law systems which rely (sometimes heavily) on overriding mandatory law.

The PWD, aiming to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU with the need to ensure a climate of fair competition and respect for the rights of workers (preamble, paragraph 5), uses in essence the same technique to achieve these aims. In Article 3, the PWD identifies which national mandatory rules of the host state must apply to posted workers. In this manner a hard core of clearly defined terms and conditions of work and employment for minimum protection of workers (laid down in Article 3(1)(a)-(g)) is established, that must be complied with by the service provider in the host Member State. According to the Preamble of the PWD (Recitals 7–11), the Directive thus makes the optional character of (now) Article 9 Rome I obligatory, by defining those subjects of employment law in which the national mandatory rules must be seen as 'overriding mandatory provisions'. Hence, the rules on mandatory protection laid down in the PWD can be understood to form an application of Article 9 Rome I.

In our view, the PWD can and should not be read in isolation from Article 8 Rome I. Indeed, from the perspective of the host state, the PWD fills in the 'gap'¹⁵ that Article 8 Rome I would create for the territorial application of labour law. As is well known, 'the Directive, which was drafted in 1991, was partially intended to allay the fears of policymakers in high-wage economies that their markets would be flooded by increasing numbers of lower paid workers.'¹⁶ Accordingly, Article 3(1) PWD states that: 'Member States shall ensure that, *whatever the law applicable to the employment relationship*, the undertakings referred to in Article 1(1) PWD guarantee workers posted to their territory the terms and conditions of employment covering the following matters...' (emphasis added). Thus, it is made clear that the law applying to the employment contract is regulated by PIL rules (currently Article 8 Rome I Regulation), but the PWD superimposes – if necessary – the minimum protection of the law of the host state upon the protection already offered under the law applying to the contract by virtue of Article 8 Rome I.

provisions, see R. CALLSEN, 'Eingriffsnormen und Ordre public-Vorbehalt im Internationalen Arbeitsrecht – Ein deutsch-französischer Vergleich', Dissertation in internationaler Doppelbetreuung zur Erlangung des Dr. iur. Vorgelegt und öffentlich verteidigt am 13/12/2013 in Nanterre.

¹⁵ As pointed out above in section 3, Art 8(2) stipulates that the country where the work is habitually carried out shall not be deemed to have changed if a worker is temporarily employed (posted) in another country. See also below section 7.

¹⁶ A. KENNETT and S. NESBITT, 'The consequences of employing a mobile workforce – a patchwork of protections' (2000) 12 *International Company and Commercial Law Review*, 400. For the first draft of the PWD, see European Commission, 'Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services' COM(1991)230 final – SYN 346. See also M.S. HOUWERZIJL and F.J.L. PENNING, 'Double Charges in Case of Posting of Employees: The Guiot Judgment and its Effects in the Construction Sector' (1999) 1 *The European Journal of Social Security*, 102.

An indication for the complementary character of the PWD in relation to Article 8 Rome I may also be found in Article 3(7) PWD. Article 3(7) first sentence PWD allows the *application* of better protection to posted workers than the minimum provided for by the Directive.¹⁷ In the *Laval* and *Rüffert* judgments the CJ made it clear that this provision only refers to the more favourable terms and conditions of employment which those workers already enjoy pursuant to the law or collective agreements in the Member State of origin, or agreed voluntarily by the employer. Based on the legislative history of the PWD we support that reading.¹⁸

Some authors, however, seem to infer a home country control rule from said case-law, which would submit the posted worker to the laws of the country of establishment of his employer and disallow the application of more favourable provisions contained in the law applicable by virtue of Article 8 Rome I.¹⁹ Admittedly, the reference to the ‘country of origin’ or ‘home country’ in the court’s case-law may cause confusion if the Member State where the employee is recruited or where he will habitually perform his work is not the same as the Member State where the employer is established. However, in our view ‘country of origin’ or ‘home country’ should be read to refer to the country whose law is

¹⁷ Recital 17 of the PWD also refers to *application* of more favourable terms and conditions to posted workers. For the embodiment of the ‘favor principle’ in pre-PWD case-law: see M.S. HOUWERZIJL and F.J.L. PENNING, ‘Double Charges in Case of Posting of Employees: The Guiot Judgment and its Effects in the Construction Sector’ (1999) 1 *European Journal of Social Security*, 102.

¹⁸ See Case C-341/05, *Laval*, EU:C:2007:809, paras. 79–81, 120; and Case C-346/06, *Rüffert*, EU:C:2008:189, paras. 32–34. Compare M.S. HOUWERZIJL, *De Detacheringsrichtlijn: over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Deventer: Kluwer, 2005), 161. See, more in detail, also S. EVJU, ‘Posting Past and Present The Posting of Workers Directive – Genesis and Current Contrasts’ (2009) *Formula WP* 8, 32: ‘Initially it was clear from the wording of the proposed provision that it referred only to more favourable terms and conditions in a workers home state (under the law applicable to the contract of employment) (D 2, Parliament, COM-93 – ctr WG 11 – Council 1994h). There is no indication that the change of wording was intended to fundamentally depart from this. On the contrary, the subsequent concern was how to compare and the Statement in the Council Minutes on pay comparison (231/96) must be understood to presuppose that it is more favourable terms in the State of “the law applicable” that should be the yardstick.’

¹⁹ See e.g. F. VAN OVERBEEKE, ‘Over de interactie tussen het IPR en de bepalingen inzake het vrij verkeer, toegespitst op internationale arbeidsovereenkomsten’ (2013) *Rechtskundig Weekblad*, 648 and M. FORNASIER and M. TORGA, ‘The Posting of Workers: The perspective of the Sending state – The Judgment of the Civil Chamber of the Estonian Supreme Court of 16 January 2013 No 3–2–1–179–12’ (2013) 3 *Europäische Zeitschrift für Arbeitsrecht (EuZA)*, 364. Those authors draw a parallel between this situation and that of the eDate decision of Case C-509/09, *eDate Advertising and Others*, EU:C:2011:685 and Case C-161/10, *Martinez and Martinez*, EU:C:2010:656. However, we would submit there are crucial differences between the eDate scenario and the situation of discussed here. See in more detail (with references): A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘“Posting” and “posted workers” – The need for clear definitions of two key concepts of the Posting of Workers Directive’, in C. BARNARD, M. GEHRING and I. SOLANKE (eds.), *Cambridge Yearbook of European Legal Studies* (Oxford: Hart Publishing, 2012), 419–451.

objectively applicable in light of Article 8 Rome I. This will most often be the country in which the work is normally or habitually performed, rather than the country of establishment of the employer.²⁰ Support for this reading may also be found in Article 4(1) of Directive 91/533 which, under the heading ‘expatriate employees’, gives rules on information requirements in situations where the employee is required to work in one or more countries other than *the Member State whose law and/or practice governs the contract or employment relationship abroad* (emphasis added).²¹

In this section we sketched the relevant legal instruments and gave our understanding as to the interaction between the Rome I Regulation and the PWD. However, up until recently the CJ had no competence to interpret the existing choice of law instruments.²² This enabled Member States to develop and/or maintain different interpretations of both the interaction between Article 8 and Article 9 of the Rome I Regulation and the interaction between the Rome I Regulation and the PWD. In the recently adopted EPWD, Article 4 makes reference to the Rome I Regulation with regard to the issue of applicable law.²³ The exact implications of this latter position for the interpretation of Article 8 and 9 Rome I Regulation are yet unclear, though.

²⁰ Compare A.A.H. VAN HOEK and M.S. HOUWERZIJL, “Posting” and “posted workers” – The need for clear definitions of two key concepts of the Posting of Workers Directive’, in C. BARNARD, M. GEHRING and I. SOLANKE (eds.), *Cambridge Yearbook of European Legal Studies* (Oxford: Hart Publishing, 2012), 441–443. Employment conditions are specifically excluded from the coordinated field in the Services directive: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36, Article 3(1)(a), 3(2) and recital 14.

²¹ Directive 91/533 was adopted a few months after the first draft was presented by the Commission for what has become the PWD. See COM(91)230 def., 1. August 1990, Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services. The interrelationship between Directive 91/533 and the PWD (Directive 96/71) was emphasised during the implementation process of the latter Directive. In the transposal stage, the Commission expressed its belief that compliance with the requirements laid down in Directive 91/533 (in particular Articles 2 and 4) should facilitate the implementation of the PWD and in particular the process of comparing the home state’s and host state’s provisions on minimum wages and paid holidays. See *Report Working Party on the transposal of the Directive concerning the posting of workers*, Brussels: European Commission, Employment & Social Affairs, 1999, 13. Also in case-law, the linkage between the two Directives has been at issue. See joined cases C-369/96 to C-376/96, *Arblade*, EU:C:1999:575, paras. 61, 65, 67–68, 70, and Case C-319/06, *Commission v Luxembourg*, EU:C:2008:350, paras. 39–41.

²² The competence to interpret the predecessor of the Rome I Regulation, the Rome Convention, was established in a separate protocol which entered into force on 1 August 2004 (see Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 30). The Rome I Regulation only applies to contracts concluded as from 17 December 2009: Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177.

²³ The Commission proposal, COM(2012)131 final, specifies in recital 6 that the PWD ‘should not prejudice the application of the law which, under Article 8 of the Rome I Regulation, applies to individual employment contracts’. Interim solutions may be to call upon the Member State to jointly establish the applicable law to the contract, or introduce an assumption that in cases of ‘non-genuine posting’, the host state is the state in which the work

4. WHERE DO I BELONG? THE COUNTRY WHERE I HABITUALLY WORK?

Article 8(2) Rome I uses the habitual place of work as its primary connecting factor. Therefore, it is key to know how to interpret the concept ‘habitual place of work’. In the absence of case-law on the interpretation of the Rome I Regulation, similar concepts and criteria in the Brussels I Regulation on jurisdiction²⁴ and the Rome Convention, the treaty which preceded the Rome I Regulation, may be of relevance. In its case-law the CJ has stressed the continuity between the different instruments as well as the cross-referential character of concepts used therein.²⁵ Hence, the interpretation of the concept ‘habitual place of work’ in the Rome Convention is also relevant for the interpretation of the same concept in the Rome I Regulation. In the same vein, the interpretation given in the context of the rules on jurisdiction is also relevant in the context of applicable law.²⁶

So, how did the concept ‘habitual place of work’ evolve over time? In 1982 the CJ EU identified the contract of employment as a ‘weaker party contract’ meriting special protective PIL rules.²⁷ In a subsequent case the court specified that ‘contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts – even those for the provision of services – by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory

is habitually performed under Rome I: see for example the Draft report, amendments tabled in committee PE500.574, nos. 90 and 119, procedure file 2012/0061/COD).

²⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), OJ 2001, L 12/1, Article 19, currently replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2012 L 351/1 (Brussels I recast), Article 21.

²⁵ For an early reference, with regard to the continuity between the old case-law and the new text of Article 5(1) of the Brussels Convention, see Case C-383/95, *Rutten*, EU:C:1997:7, para. 21. For a cross-reference between the Brussels I and Rome I Regulations, see Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 33.

²⁶ See more extensively on this point V. PARISOT, ‘Vers une coherence verticale des textes communautaires en droit du travail? Réflexion autour des arrêts Heiko Koelzsch et Jan Voogsgeerd de la Cour de justice’ (2012) 139 *Journal de Droit International*, 597–645; A.A.H. VAN HOEK, ‘Heiko Koelzsch tegen Groothertogdom Luxemburg’ (2011) 60 *Ars Aequi*, 652 and the case note on the joined Cases C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, EU:C:2010:740 from A.A.H. VAN HOEK in (2012) 8 *European Review of Contract Law*, 93–107 with references. On the issue of the interpretation method, see also E. PATAUT, ‘Case note to Voogsgeerd’ (2012) 101 *Revue Critique de Droit International Privé* 3, 658 with references to French literature.

²⁷ Case C-133/81, *Ivenel*, EU:C:1982:199.

rules and collective agreements.²⁸ Hence, in the court's reasoning we find the different types of ordering described above. In due course, the focus in the case-law on jurisdiction shifted however, from developing a bilateral²⁹ rule aimed at *Gleichlauf* – giving jurisdiction to a court which could apply its own system of labour law including the locally applicable collective agreements³⁰ – to the establishment of a unilateral rule offering the employee easy access to a nearby court.³¹ To reach the desired protective result,³² the 'habitual place of work' was interpreted in a factual manner, referring to the actual performance of the contract rather than the contractual arrangements.³³ Moreover, the CJ expanded the concept to also include cases in which the worker performed activities in more than one country. According to the case-law as it currently stands the habitual place of work does not only refer to the place *in which* the work is habitually performed, but also to the place *from which* the employee principally discharges his obligations towards his employer.³⁴

In case of a sales representative working in different countries, the national court should try to determine in which place the employee has established the effective centre of his working activities.³⁵ When the employee carries out a large part of his work in the country in which he has established his office, that country is deemed to be the country *in or from which* the work is habitually performed. However, if a worker is sent to different locations to perform one and the same activity (cooking on oil rigs on the continental shelf for example), no such effective centre of working activities can be determined, nor can any qualitative criterion be used to determine the 'essential' part of the performance. In that case, the relevant criterion for establishing an employee's habitual place

²⁸ Case C-266/85, *Shenavai*, EU:C:1987:11.

²⁹ Available to both employee and employer.

³⁰ See Case C-133/81, *Ivenel*, EU:C:1982:199, paras. 12–15; Case C-266/85, *Shenavai*, EU:C:1987:11, para. 16; Case C-32/88, *Six Constructions Ltd*, EU:C:1989:68, para. 10; and Case C-125/92, *Mulox IBC Ltd*, EU:C:1993:306, para. 15.

³¹ Open for the employee only. See Case C-125/92, *Mulox IBC Ltd*, EU:C:1993:306, para. 19; and Case C-37/00, *Weber*, EU:C:2002:122, para. 40. It is interesting to note that these changes did not deter the CJ from referring to the old case-law for the interpretation of the current text.

³² On the protective character of the interpretation given to the rules on jurisdiction, see V. PARISOT, 'Vers une coherence verticale des textes communautaires en droit du travail? Réflexion autour des arrêts Heiko Koelzsch et Jan Voogsgeerd de la Cour de justice' (2012) 139 *Journal de Droit International*, 620. For a critical analysis thereof, see U. GRUŠIĆ, 'Jurisdiction in employment matters under the Brussels I Regulation: a reassessment' (2012) 61 *International and Comparative Law Quarterly*, 91–126.

³³ See for example Case C-37/00, *Weber*, EU:C:2002:122, para. 58 and A. WINTERLING, *Die Entscheidungszuständigkeit in Arbeitssachen im europäischen Zivilverfahrensrecht* (Frankfurt: Peter Lang, 2006) 61–62.

³⁴ See Case C-125/92, *Mulox IBC Ltd*, EU:C:1993:306, paras. 20 and 26. Compare Case C-437/00, *Pugliese*, EU:C:2003:219, para. 19 which refers to the place where or from which the employee in fact performed the essential part of his duties towards his employer. Neither the text of the Brussels Convention (as changed by the convention of 1989) nor the text of the Brussels I Regulation contain a reference to the place *from which* the work is habitually performed.

³⁵ See Case C-383/95, *Rutten*, EU:C:1997:7, para. 23.

of work is the place where he spends most of his working time engaged on his employer's business.³⁶ In principle the whole duration of the contract should be taken into account, unless there is a clear intention on the side of both parties to change the place of work, in which case only the most recent place of work will be relevant.³⁷

In the *Koelzsch* and *Voogsgeerd* cases the CJ made clear that even in the case of a truck driver working in international transport (*Koelzsch*) or a sailor working on a seagoing vessel (*Voogsgeerd*) the national court should 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.³⁸ These cases were rendered in the context of the application of Article 6 of the Rome Convention, identifying the law applying to the employment contract. The CJ justifies this broad interpretation of the primary connecting factor by referring to the protective character of this provision. Hence, the provision: 'must be understood as guaranteeing the applicability of the law of the State in which [the employee] carries out his working activities [...]. It is [there] that the employee performs his economic and social duties and [...], it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.'³⁹

When ascertaining the place of work in case of international transport (including international shipping), the national courts 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, receives instructions concerning his tasks and organises his work, and the place where his 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 his tasks.⁴⁰

The habitual place of work is clearly not a connecting factor that is easily applied to so-called 'peripatetic employees'.⁴¹ In the *Koelzsch* case, the Advocate

³⁶ See Case C-37/00, *Weber*, EU:C:2002:122, para. 50.

³⁷ See Case C-37/00, *Weber*, EU:C:2002:122, paras. 52–54.

³⁸ See Case C-29/10, *Koelzsch*, EU:C:2011:151, paras. 47–49.

³⁹ See Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 42.

⁴⁰ See Case C-29/10, *Koelzsch*, EU:C:2011:151, paras. 48–49; and Case C-384/10, *Voogsgeerd*, EU:C:2011:842, paras. 38–39.

⁴¹ 'Peripatetic' employees (such as airline pilots, international management consultants, sales staff and so on) are in Great Britain distinguished as a category, next to 'expatriate' employees. For instance see L. MERRETT. 'The Extra-Territorial Reach of Employment Legislation' (2010) 4 *Industrial Law Journal*, 367. Interestingly, Advocate General Bot uses the term in his Opinion of 11 June 2015 in the case *Tyco* (Opinion of Advocate General Bot in Case C-266/14, EU:C:2015:391, paras. 32 and 36) where he considers that 'peripatetic workers may be defined as being workers who are not assigned a fixed or habitual place of work. Such workers are therefore required to work at different premises every day.'

General refers to the need to study the duty roster (*Körselsrapport*) in order to assess the exact time and place of work for each individual employee. This does not only cause problems of proof, but may also lead to a more individualised protection of the workers involved. What might get lost in the process is the collective element of the employment relationship. The case-law discussed here contains several examples in which both the organisational framework of the employer and the system of collective agreements seem to point to a law other than that of the factual place of work. This raises the question of priority between the connecting factors; which of these connecting factors should prevail?

5. WHERE DO I BELONG? THE COUNTRY OF ENGAGEMENT?

In the *Koelzsch* and *Voogsgeerd* cases, the CJ stressed the priority of the habitual place of work over the place of establishment of the employer. This was innovative, as in many countries the employment contract of transport workers was deemed to be governed by the law of the place of establishment of their employer. This private international law rule was sometimes reinforced by the rules on admission to the sector by way of transport licensing.⁴² However, in the two cases put before the CJ, the ‘flag’ of the company plays no role whatsoever. The court emphasises that the reference to the engaging place of business in the Rome Convention is strictly secondary.⁴³ Only when it is not possible to identify the country in or from which the work is habitually performed, recourse may be had to the second connecting factor, the engaging place of business.⁴⁴

The identification of the habitual place of work in the *Koelzsch* and *Voogsgeerd* cases is left to the national courts. But in both cases it is clear from the facts that there was no relevant link between the actual performance of the contract by the employee and the country of establishment of the employer. The German truck-driver *Koelzsch* operated from Germany, the Dutch sailor

⁴² It is also interesting to note that in the *Voogsgeerd* case no mention is made of the flag(s) of the ships on which *Voogsgeerd* performed his work. Admittedly, the flag was not brought forward as a relevant connecting factor by any of the parties to the procedure. Neither was the connection to the habitual place of work, though. See on this issue P. WINKLER VON MOHRENFELS, ‘Zur objektiven Anknüpfung des Arbeitsvertragsstatuts im internationalen Seearbeitsrecht: gewöhnlicher Arbeitsort, Flagge und einstellende Niederlassung (Rechtssache *Voogsgeerd*)’ (2012) *Europäische Zeitschrift für Arbeitsrecht*, 373–377; U. GRUŠIĆ, ‘Should the connecting factor of the ‘engaging place of business be abolished in private international law?’ (2013) 62 *International and Comparative Law Quarterly*, 180–181 and A.A.H. VAN HOEK, ‘Het toepasselijk recht op arbeidsovereenkomsten in de zeevaart – Een commentaar op HvJ EU 15 december 2011, zaak C-384/10, *Voogsgeerd/Navimer*’ (2014) 7 *Nederlands Tijdschrift voor Europees Recht*, 245–251.

⁴³ See Case C-29/10, *Koelzsch*, EU:C:2011:151, paras. 48–49; and Case C-384/10, *Voogsgeerd*, EU:C:2011:842, paras. 34–35.

⁴⁴ See Case C-384/10, *Voogsgeerd*, EU:C:2011:842, paras. 32–35.

Voogsgeerd from Antwerp (BE); both were employed by a Luxembourg company. By focusing on the effective performance of the contract of employment as the connecting factor (which means priority of the habitual place of work over the place of establishment of the employer), the CJ prevents that a place with no real and relevant connection to the actual performance of the work is designated as the objectively applicable law. In the context of the ‘search of cheap labour’, i.e. the application of the law of the country with the lowest labour standards, this approach of the CJ seems to counter the negative effects the employers’ freedom of establishment and freedom to provide services may have on the protection of the employee. Cheap airlines are a case in point, but transport by road also gives rise to ‘flags of convenience’. Moreover, by specifically denying any priority for the place of establishment of the employer, the court implicitly rejects the existence of a home country control rule with regard to contracts of employment.⁴⁵ Hence, from the first ordering perspective of preventing labour market competition (social dumping – see section 2 above), this line may be welcomed.

However, from the organisation of the business, designated as the second ordering perspective, the assessment is less positive. Due to the purely secondary relevance of the engaging place of business, it is no longer evident that all workers employed by a single transport company are covered by the same law.⁴⁶ In transport by road even a common base from which a group of workers (a ‘crew’) is employed, might be missing. The fact that the law applying to the employment contract (and hence employment conditions) has to be established on an individual basis, might seriously hamper the possibility for the workers to protect their interests by way of collective negotiations. But the individual character of the assessment may also make other, administrative and collective, modes of protection and enforcement more problematic.⁴⁷

⁴⁵ In line with the fierce resistance against the first proposal for what now is Directive 2006/123 (the Services Directive), but in contrast with the effect of the ruling of the CJ in Case C-438/05, *Viking*, EU:C:2007:772.

See more extensively on this issue (with references): A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘Loonconcurrentie als motor van de interne markt? Een tweeluik – Deel 1: De arresten Viking, Laval en Rueffert, verdragsaspecten’ (2008) 14 *Nederlands tijdschrift voor Europees Recht*, 190–205.

⁴⁶ See L. MERRETT, *Employment Contracts in Private International Law* (Oxford: OUP, 2011), 176 – describes the importance attached under English common law to the application of one and the same law to all workers employed by a single employer in a single location. This was deemed to be a matter of equality. Also the right to choose the applicable law to the individual contract is assessed critically against this need for equal treatment (at 214). The importance of a single law applying to the entire workforce of an undertaking is also mentioned specifically by P. MANKOWSKI and O. KNÖFEL, ‘On The Road Again oder: Wo arbeitet ein Fernfahrer? – Neues vom europäischen Internationalen Arbeitsvertragsrecht’ (2011) 4 *Europäische Zeitschrift für Arbeitsrecht*, 525.

⁴⁷ See for a more detailed discussion on the relevance of public law and collective methods of protection: A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European

It is interesting to compare the situation in the transport sector to the facts in the cases decided under the Brussels Convention and Regulation. In the *Mulox* case, as in fact in *Ivenel* and *Rutten/Cross*, the worker was a sales representative having his base in a country other than the country of establishment of the employer. In the *Rutten* case it is clear from the facts of the case that the employee operated from his home base, rather than from an office employing several workers. Hence, this 'field worker' largely operated outside of any physical organisation. Also in these judgments the choice for the home base as the relevant connecting factor dislodges the employment contract from the organisational framework of the employer. Something similar is also happening in the *Weber* case. This case concerned a cook in the offshore industry. In that case, no centre of employment or base is deemed to be present as the worker is sent to perform the same type of work in different locations. This description covers a variety of employment situations and in particular the construction worker or the temporary agency workers/~~interim~~. In those cases the CJ focuses on the amount of time spent in a particular country. The organisational framework in which the employment contract finds its bedding seems to be largely irrelevant.

However, one should be careful not to jump to conclusions. In the case-law of the CJ, the place of work is deemed to be the primary connecting factor, with the place of engagement only filling a very subsidiary/~~ancillary~~ role. On closer inspection, the habitual place of work is a legal construct which includes elements of *Eingliederung* – embeddedness in an organisational framework. In the transport cases, in determining the habitual place of work, the CJ attached weight to the place where the worker receives instructions concerning his tasks and organises his work, as well as to the place where his work tools are situated. These criteria refer – at least in part – to the organisational structure of the employer. In the *Koelzsch* case there seems to have been some kind of collective presence in Germany (the country from which the work was performed) as the workers had established a works council there. In the *Voogsgeerd* case the worker reported to an office in Antwerp, where he received administrative briefings, as well as instructions for the performance of his work. So it could be argued that the CJ effectively conflated the organisational framework and the actual place of performance into a single connecting factor: the 'place where or from which the work is habitually performed'.

Taking into account the very broad interpretation of the 'habitual place of work' in Article 8(2) Rome I, it may seem as if there are hardly any situations that

Union' (2011), 21, *Report to the European Commission under contract VT/2009/0541*, available at <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016). See on the impact of collective labour law on the choice of law position taken by individual authors, A.A.H. VAN HOEK, *Mobiliteit van werknemers* (Den Haag: Sdu, 2000), 226–227.

will be covered by Article 8(3) Rome I – referring to the place of engagement.⁴⁸ Nevertheless, the Court did clarify this concept in the *Voogsgeerd* judgment. As the elements related to the performance of the contract are already taken into account in determining the habitual place of work, the assessment of the place of engagement has a more formal character and focuses on the recruitment procedure: ‘the courts should take into consideration not those matters relating to the performance of the work but only those relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavour to determine the real location of that place of business.’ Accordingly, this connecting factor does not establish a relevant link to the performance and the life line of the employment contract but is fixed at the very beginning thereof. The connecting factor serves to provide legal certainty in a case in which the primary connecting factor is not able to provide a clear link to any particular jurisdiction.⁴⁹ It’s – in a sense – a home for the homeless.

6. WHERE DO I BELONG? A COUNTRY TO WHICH I AM MORE CLOSELY CONNECTED?

The possibility to use the ‘escape clause’, currently regulated in Article 8(4) Rome I, was the object of the most recent preliminary question regarding the law applying to individual employment contracts which was answered in the *Schlecker* case.⁵⁰

The *Schlecker* case concerned a conflict between a German employee (Ms Boedeker) and her German employer (the Schlecker company), caused by the decision of the employer to terminate employment in the Netherlands and re-instate the employee in a different position in Germany. For the last twelve years (of a total of twenty-seven years of service) the employee had been employed as manager of the Dutch division of the employer, supervising its 300 local branches. There was no contestation as to the fact that the Netherlands was (had become) the habitual place of work.⁵¹ Ms Boedeker lodged a complaint in a Dutch court against her employer’s unilateral decision to change her place of work. She relied on the application of Dutch law, which in this case offered her better

⁴⁸ However, the provision may remain of or regain relevance for the emerging group of ‘hypermobile’ workers.

⁴⁹ See Case C-384/10, *Voogsgeerd*, EU:C:2011:842, para. 47. Furthermore, schematic interpretation of Article 6(2)(b) requires the – subsidiary – factor laid down in that provision to be applied when it is impossible to situate the employment relationship in a Member State. Consequently, only a strict interpretation of that subsidiary factor can guarantee the complete foreseeability of the law applicable to the contract of employment.

⁵⁰ Case C-64/12, *Schlecker*, EU:C:2013:551.

⁵¹ Case C-64/12, *Schlecker*, EU:C:2013:551, para. 27.

protection than German law. However, her employer Schlecker claimed that the contract was more closely related to Germany. Elements referring to Germany where *inter alia* the common nationality and place of domicile of both parties, the language and original currency of the contract, reference to provisions of German law in the contract and the fact that the employee was covered by German tax law, social security and additional pension schemes. Could the court in this case ignore the connection based on the place of work in favour of German law?

In the Dutch case which led to the preliminary question, Advocate General Strikwerda had stressed the protective character of using the habitual place of work as the primary connecting factor. Due to this specific character the Advocate General concluded that the escape clause based on a closer connection should be used sparingly when in competition with the habitual place of work.⁵² In contrast, the Dutch government argued that applying the law of the habitual country of work, 'even where the circumstances as a whole point to another legal system would have the effect of rendering meaningless' the escape clause.⁵³

In its judgment the CJ sides with the Dutch government. The habitual place of work does take priority over the engaging place of business, based on the protective character of the first connecting factor. No such hierarchy exists, however, with regard to the escape clause referring to the closest connection. Though the national court must first determine the applicable law by reference to the pre-established connecting factors, the national court may disregard these connecting factors and apply the law of another country, 'even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country', where it is apparent from the circumstances as a whole that the employment contract is more closely connected with that country.⁵⁴ Hence, both connecting factors are put on the same footing in this regard.

Furthermore, the CJ stresses that the closer connection test cannot be performed by simply counting connecting factors: not all connecting factors carry the same weight. According to the CJ 'among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.'⁵⁵ The content of the relevant laws is not decisive in this matter.

⁵² For a similar position, see L. MERRETT, *Employment Contracts in Private International Law* (Oxford: OUP, 2011), 206 and 209. For the original judgment, see HR 3 februari 2012, ECLI:NL:HR:2012:BS8791, NJ 2012/90.

⁵³ Case C-64/12, *Schlecker*, EU:C:2013:551, para. 21.

⁵⁴ Case C-64/12, *Schlecker*, EU:C:2013:551, paras. 42, 35–36.

⁵⁵ Case C-64/12, *Schlecker*, EU:C:2013:551, para. 41.

The *Schlecker* case brought to the fore that different agents may hold quite divergent views on the concept of ‘adequate protection’. In the *Koelzsch* and *Voogsgeerd* cases, the CJ stressed that the rules on applicable law should submit the contract of employment to the law of the state in which the employee performs his economic and social duties because it is in this country that the business and political environment affects employment activities. In jurisprudence this mechanism, in which certain weaker parties are protected by applying the law of their social and economic environment, is referred to as the ‘protection principle’ or ‘functional allocation’. This terminology is common in Dutch private international law,⁵⁶ which may explain the position of the Dutch Advocate General Strikwerda in the *Schlecker* case. In Dutch legal writing, the reference to the *locus laboris* in Article 8(2) Rome I Regulation is seen as the embodiment of the protective character of the choice-of-law rule. Accordingly, a deviation from the *locus laboris* rule in cases in which the social and economic environment of the employment can be clearly established, can be deemed to counteract the protective function of the rule.⁵⁷

In his opinion before the CJ, Advocate General Wahl takes a totally different view on the protective character of Article 8 Rome I. According to Wahl, protection is given mainly by limiting the freedom of the parties to choose the applicable law.⁵⁸ If any protection is to be had from the choice of law rules that apply in absence of such a choice, it consists of a strict adherence to the proximity rule.⁵⁹ In this view, the employee is protected by applying the law that is most familiar to her. In the case of Ms Boedeker (the employee in the *Schlecker* case) this would be the law of her country of origin and domicile, rather than her country of work. Advocate General Wahl even argues that the protection of the employee is served by an extensive interpretation of the escape clause, because in that case the search for the closest connection is given precedence over legal certainty and predictability.

By giving a broad interpretation of the possibility to deviate from the law of the habitual place of work in favour of another law, the CJ seems – to a certain extent – to undo the effect of the decisions in *Koelzsch* and *Voogsgeerd*. The escape rule of Article 8(4) undermines the general applicability of the law of the habitual place of work and hence the territorial application of labour law.⁶⁰

⁵⁶ See in particular TH. M. DE BOER, ‘The Purpose of Uniform Choice of Law Rules: The Rome II Regulation’ (2009) 56 *Netherlands International Law Review*, 298 and 316 and TH. M. DE BOER, ‘The EEC Contracts Convention and the Dutch courts: a methodological perspective’ (1990) 54 *Rabels Zeitschrift*, 25–62.

⁵⁷ This seems to be the French position as well, see O. DEINERT, *Internationales Arbeitsrecht* (Tübingen: Mohr Siebeck, 2013), 156.

⁵⁸ Opinion of Advocate General WAHL in Case C-64/12, *Schlecker*, EU:C:2013:241, para. 25.

⁵⁹ Opinion of Advocate General WAHL in Case C-64/12, *Schlecker*, EU:C:2013:241, para. 26. However, he illustrates his point with reference to typical expat situations, such as posting to third countries with lower levels of protection.

⁶⁰ See on this opinion *inter alia* U. GRUŠIĆ, *The European Private International Law of Employment* (Cambridge: CUP, 2015), 26, who distinguishes the individualistic view on

Based on the criteria which are deemed to be relevant in establishing a closer connection, this other law will usually be the law of common origin.⁶¹ In the context of the internal market, the rule established by the CJ in the *Schlecker* case may, if interpreted extensively, be quite similar to a home country control rule. Moreover, the importance attached to tax and social security shifts the attention to the rules applying to these fields of law. This furthers the alignment between applicable labour law and social security law, in line with the third line of ordering (see section 2 above). However, as Cornelissen points out in his contribution to this book, it may also open the door for possibilities to (mis)use ‘*Schlecker*’, especially in relation to a broad use of Article 16 of the Regulation 883/04 on coordination of social security within the EU.⁶²

In this regard, we should not overlook that there are elements in *Schlecker* which may temper a very (or, from the perspective of preventing the undermining of the *lex-loci-laboris* principle, too) extensive interpretation of the escape clause.

Firstly, it is possible that the subject of the conflict, being the unilateral alteration of the employment contract by the employer, played a decisive role in the importance attached to the country of closer connection. While stating that the referring court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant, the CJ adds – in line with the point of views of the Commission and the Advocate General (para. 66 of his Opinion) – that the referring court cannot *automatically conclude* to disregard the habitual place of work *solely* because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country.⁶³

Secondly, also in the Conclusion of AG Wahl, there are elements which allow for a less extensive reading of *Schlecker*. In para. 38 he seems to adhere to the point of view that ‘the rules laid down in the Rome Convention are intended, in the first place, to prevent the creation, to the detriment of employees, of situations comparable to ‘law shopping’ (before adding that they must not lead either to the creation, in favour of the worker, of an unlimited choice as regards

employment contracts which would underlie the position taken by Advocate General WAHL from a more systemic perspective which also takes into account the interest of the host state.

⁶¹ So in cases in which employer and employee do have a common origin. Cases of ‘irregular posting’ may not demonstrate this fact pattern. See A.A.H. VAN HOEK and M.S. HOUWERZIJL, ‘Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union’ (2011), 75, *Report to the European Commission under contract VT/2009/0541*, available at <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016).

⁶² See Regulation 883/2004, OJ 2004, L 166/1, Article 11(3)(a), 12(1) and 16(1). According to Article 16 ‘two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities, may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons’. See on this issue the chapter of R. CORNELISSEN in this volume.

⁶³ See Case C-64/12, *Schlecker*, EU:C:2013:551, para. 40.

the substantive provisions which he may regard as applicable and thus to the creation of significant uncertainty in determining the applicable law). And where he agrees with the Dutch government that, ‘the prevailing principle in matters relating to affiliation to a social security scheme is, save in the specific case of the posting of the employee, that of *lex loci laboris*, which implies that an employee is subject to the social security scheme of the State in which he habitually works’, and that ‘by avoiding that rule, as the relevant basic legislation permits, the parties concerned sought to shift the centre of gravity of their relationship to another country’, he also adds that, ‘always with a view to providing adequate protection to the party regarded as economically and socially weaker, *it is appropriate to examine whether the connection to the social protection schemes was made by mutual agreement of the parties or whether it was imposed on the employee*’ (para. 68; emphasis added). This remark might perhaps reassure Cornelissen a bit.⁶⁴

Although it is too early to predict how extensive the CJ will interpret Article 8(4) Rome I in future cases, it is beyond dispute that with *Schlecker*, the tax law and social security schemes applicable to the employee, ~~has~~ regained importance. As said, the weight attached to these factors in *Schlecker* do point to prioritising a different kind of belonging – not the labour market on which the employee performed her work was deemed to be decisive, but the social structure in which she was embedded through the system of social charges (the third line of ordering). Hence, the importance attached to tax and social security shifts the attention to the rules applying to these fields of law. Often, when an employment dispute reaches the courts, the relationship has been terminated. Since many court cases concern the rules of dismissals it might make sense to connect this specific element of employment law to the system of social security applicable to the worker concerned. This may impact on the way the courts handle the issue of applicable law. It can be questioned however, whether the same rationale is also valid for wages, working time, safety at work and all those other rules which influence the day to day performance of the contract. Do other types of belonging retain (or regain) relevance there? Inspiration may perhaps be drawn from the choices made with regard to cross-border posting of workers.

7. WHERE DO I BELONG WHILE POSTED ABROAD?

If one reads the case-law on the posting of workers in the context of the free provision of services from a lens of searching the applicable law to the contract between the parties involved, it seems as if the underlying assumption is that

⁶⁴ See also the judgment in Case C-115/11, *Format*, EU:C:2012:606, where the Court emphasises the factual situation above the party intentions.

posted workers (always) ordinarily work in the country of establishment of their employer and therefore will be covered by the law of their (employer's) home state ('the country of origin').⁶⁵ However, the CJ never had to decide yet on the applicable law to the contract of a posted worker and this may explain why it never paid attention to the underlying contractual position of the parties. Until now, the case-law has focused on establishing whether the application of host state law during the period of posting would (disproportionally) infringe the free provision of services. In this respect, as is common ground, the posting of workers in the context of the free provision of services opposes the interests of host state employers and workers to the interests of the company performing the cross-border service (and – according to some⁶⁶ – even the interests of the posted workers themselves). But it also pitches the interests of high cost host states against those of low cost sending states.⁶⁷ This makes the topic highly controversial.⁶⁸

By establishing a 'hard core' of minimum protection by mandatory law in the host state for posted workers, the PWD⁶⁹ tries to balance the interests involved. As is well known, this balance shifted towards the aim to further the provision of services, when the CJ interpreted the PWD in the notorious 'Laval-quartet' as to also limit the application of host state labour law to the areas mentioned in the Directive, unless the rule to be applied is considered to be part of public policy.⁷⁰ In other words: the PWD contains not only a minimum but also

⁶⁵ Some authors infer a home country control rule from this case-law, see above section 3, footnote 19. For our, different, view see also section 3.

⁶⁶ Often their employers, i.e. the service providers. For the first time this argument was put forward in Case C-49/98, *Finalarte and others*, EU:C:2001:564. More recently, this (presumed) point of view of the workers from the new member states is defended in literature by *inter alia* D. LECZYKIEWICZ, 'Conceptualizing conflict between the economic and social in EU law after Viking and Laval', in M. FREEDLAND and J. PRASSL (eds.), *EU law in the Member States: Viking, Laval and beyond* (Oxford: Hart Publishing, 2015) and D. KUKOVEC, 'Hierarchies as law' (2014) 21 *Columbia Journal of International Law*, 142. An illuminating description of the different perspectives on justice contained in the different viewpoints is given by A. SOMEK, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal*, 711–726.

⁶⁷ See M. FORNASIER and M. TORGA, 'The Posting of Workers: The perspective of the Sending state – The Judgment of the Civil Chamber of the Estonian Supreme Court of 16 January 2013 No 3–2–1–179–12' (2013) 3 *Europäische Zeitschrift für Arbeitsrecht (EuZA)*, 358 and D. LECZYKIEWICZ, 'Conceptualizing conflict between the economic and social in EU law after Viking and Laval', in M. FREEDLAND and J. PRASSL (eds.), *EU law in the Member States: Viking, Laval and beyond* (Oxford: Hart Publishing, 2015).

⁶⁸ The controversial character may also be deduced from the large number of amendments (833) which were submitted for the draft report on the enforcement directive of the committee on employment of the EP (procedure file 2012/0061/COD). A similar lively discussion took place in the legislative procedure for the Services directive. In the final version, employment conditions were specifically excluded from the home country control rule embedded therein: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36, Article 3(1)(a), 3(2) and recital 14.

⁶⁹ Adopted in 1996, well before the accession to the EU of the post-communist countries.

⁷⁰ The PWD also has an influence on the way the minimum level of protection should be established – e.g. by law or generally applicable collective agreement. Moreover, two

a maximum rule on application of host state law in the context of intra-EU provision of services. In the context of our quest to relevant concepts and criteria for ‘belonging’, it is of crucial interest to establish the rationale behind the delimitation of the package of host state law which must and may be guaranteed to the posted worker.

According to the Explanatory Memorandum: ‘The national differences as to the material content of working conditions *and the criteria inspiring the conflict of law rules* may lead to situations where posted workers are applied lower wages and other working conditions than those in force in the place where the work is temporarily carried out’ (emphasis added). ‘This situation would certainly affect fair competition between undertakings and equality of treatment between foreign and national undertakings; it would from the social point of view be completely unacceptable.’⁷¹ Consequently, Article 3(1) of the PWD includes in the hard nucleus of protection maximum work periods and minimum rest periods, minimum paid annual holidays and minimum rates of pay. These elements each have a distinct function in the overall protection of workers. However, they are closely correlated when considered from the perspective of fair competition. Especially when wages are calculated at the monthly or weekly rate, it is crucial to know how many hours a week/month the worker **actually performs work in order to qualify** for full pay. Likewise, holidays constitute direct wage costs and hence determine the actual cost per hour worked.⁷² So, beyond doubt, the inclusion of minimum rates of pay, working time and paid holidays in the subjects regulated by the host country was seen as important to prevent unfair competition (our first line of ordering). Although health and safety rules were not addressed in the Explanatory Memorandum,⁷³ the character of these rules makes it difficult to opt for a non-territorial application.⁷⁴

However, regarding minimum wages and paid holidays *unconditional* application of host state law would infringe the free provision of services and the

provisions allow for additional protection in case of employment through temporary work agencies.

⁷¹ COM(91)230 final, 11, under point 12. The last sentence seems to refer to the need to ‘protect the workers concerned from practices which may develop within the international framework of an Increasing use of external work and employment resources’, mentioned under point 19, fourth indent. See also tables 1–4 (pp. 5–8) which show ‘considerable disparities and divergences’ between the Member States regarding these subject matters.

⁷² Compare Case C-165/98, *Mazzoleni and ISA*, EU:C:2001:162, para. 39: ‘Second, in order to ensure that the protection enjoyed by employees in the Member State of establishment is equivalent, they must, in particular, take account of factors related to the *amount of remuneration and the work-period to which it relates*, as well as the level of social security contributions and the impact of taxation’ (emphasis added).

⁷³ Nor the other items in the list included in Article 3(1), such as protection to specific (vulnerable) groups of workers, equal treatment m/f and provisions relating to conditions for hiring out of workers, in particular the supply of workers by temporary agencies.

⁷⁴ Often the national rules do not apply to work performed outside the territory. The rules are enforced by public law bodies and may carry criminal sanctions in case of breach.

freedom of contract too much. Hence, if the applicable law to the employment contract offers equivalent or even better protection, there is no need to set aside the normal rule of conflict enshrined in Article 8 Rome I. This seems to be the rationale behind Article 3(7) PWD (first sentence)⁷⁵ which is also supported by the early pre-PWD case-law of the CJ on avoiding ‘double burdens’ for service providers in relation to their posted workers.⁷⁶

Nevertheless, it is easier to pay lip-service to the favour-principle, than to operationalise it. For instance, how to interpret the minimum rates of pay in the host state and how to compare this with the level of wage actually paid by the service provider to his posted workers? While there is some case-law on the latter issue,⁷⁷ the first issue remained unclear for a long time. In this respect, the last sentence of Article 3(1) stipulates that the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the host state. Does this mean that Member States are entirely free in the way they define ‘minimum rates of pay’?⁷⁸ Can the host state impose only a single (statutory or collectively agreed) minimum wage (flat rate)⁷⁹ or rather a set of rules determining the minimum rate of pay in the individual case (wage structure/job ladder)? The CJ confirmed the latter interpretation in his judgment in the Finnish preliminary reference case *Sähköalojen ammattiliitto*.⁸⁰ Notably, the CJ specifically points out that ‘the minimum wage calculated by reference to the relevant collective agreements cannot be a matter of choice for an employer who posts employees with the sole aim of offering lower labour costs than those of local workers.’⁸¹

⁷⁵ Elaborated upon in section 3 above, see footnotes 18 and 19.

⁷⁶ See M.S. HOUWERZIJL and F.J.L. PENNING, ‘Double Charges in Case of Posting of Employees: The Guiot Judgment and its Effects in the Construction Sector’ (1999) 1 *The European Journal of Social Security*, 91–112 and R. GIESING, ‘Posting: Social protection of workers versus fundamental freedoms?’ (2003) 40 *CML Rev*, 155.

⁷⁷ Case C-341/02, *Commission v Germany*, EU:C:2005:220. Confirmed in Case C-522/12, *Isbir*, EU:C:2013:711.

⁷⁸ Apart from the guidance provided in Article 3(1)(c) regarding overtime charges (which are explicitly deemed to form part of the ‘minimum rates of pay’ to be applied to posted workers) and contributions to supplementary pension schemes (which are specifically excluded from the minimum rates of pay).

⁷⁹ For a long time, this seems to have been the prevailing opinion in Germany, which was codified in the German implementation Act of the PWD (AEntG) prior to its amendment in 2009. See more in detail about the German situation M. KULLMANN, *Enforcement of Labour Law in Cross-Border Situations. A Legal study of the EU’s Influence on the Dutch, German, and Swedish Enforcement systems* (PhD thesis) (Deventer: Kluwer 2015), 80.

⁸⁰ Case C-396/13, *Sähköalojen ammattiliitto*, EU:C:2015:86, para. 43. Also, the Court clarified that host state rules may determine whether the calculation of the minimum wage must be carried out on an hourly or a piecework basis (para. 40) and that holiday pay constitutes part of the minimum wage (paras. 66–69).

⁸¹ Case C-396/13, *Sähköalojen ammattiliitto*, EU:C:2015:86, para. 41. The Court also seems to slightly restate the purpose of the PWD as well as the objective of a nucleus of mandatory rules for minimum protection guaranteed to posted workers. See paras. 28–30, emphasising the double aim of preventing unfair competition and ensuring the social protecting of the workers concerned.

Moreover, in this judgment the CJ gave a broad interpretation of the freedom for host states to include in the minimum rates of pay specific allowances such as a daily allowance intended to ensure the social protection of workers ‘making up for the disadvantages’ of the posting ‘as a result of the workers being removed from their usual environment’, and a compensation for daily travelling time.⁸² Regarding the coverage of the cost of accommodation (as obliged in the Finnish collective agreement) and meal vouchers (in accordance with the contract of employment between service provider and posted worker) the CJ ruled that these should be regarded as compensation for expenses in line with Article 3(7) (second sentence), which does not permit such expenditure to be taken into account in the calculation of their minimum wage. Consequently, the service provider cannot take these costs into account when comparing the actual wage paid with the prescribed level of minimum rates of pay in the host country. Hence, if other host Member States would follow the example set by the Finnish collective agreement (on the conditions explicated by the CJ in *Sähköalojen ammattiliitto*), the status of the posted worker may (in some respects) eventually approximate the expat contract, which is (also) characterised by the special arrangements made to compensate for the expatriation of the worker, such as travel arrangements, housing facilities and expat allowances.⁸³

But what about the other side of the coin? When and why may the law applicable to the employment contract continue to be adhered to in the case of cross-border posting? As explained in the Explanatory Memorandum to the first draft of the PWD, the designation and application of the mandatory rules to be observed by foreign service providers in the host state, had to be compatible with the temporary nature of the performance of work in the host country and consistent with the PWD’s stated aims and objectives. Against that background, it was decided that ‘mandatory rules concerning the form, suspension, alteration and termination of the contract of employment and workers’ rights on information, consultation and participation are not dealt with’.⁸⁴

Hence, the selection of said subject-matters which were kept outside the ‘hard core’ of Article 3(1) PWD, seems to be based either on considerations concerning the organisation of the work (second line of ordering), such as employee co-determination rights, or on considerations relating to the continuation of

⁸² Case C-396/13, *Sähköalojen ammattiliitto*, EU:C:2015:86, paras. 48–52, 54–56.

⁸³ See on this issue *inter alia* C.M.E.P. VAN LENT, *Internationale intra-concernmobilität* (Deventer: Kluwer, 2000), 16.

⁸⁴ COM(91)230 final, p. 15, under point 25, third indent and p. 13 under point 19, third indent. It is interesting to note that in a study on international contracts of employment written by T KOOPMANS in 1966, the author already advocated a similar solution in case the place of work and the place of establishment were located in different countries. He would submit both working time and safety and health issues to the law of the actual place of work, whereas both organisational issues and contractual matters would be regulated by the law of the place of establishment of the employer: T. KOOPMANS, *De internationaalrechtelijke aspecten van de arbeidsovereenkomst* (Baarn: Hollandia BV, 1966).

the employment relationship, such as in the case of dismissal law (third line of ordering). Indeed, in genuine cases of (short term) posting an overriding interest to apply host states' dismissal law is absent, since the labour market of the host country may be regarded as not-involved in such situations. In case of dismissal, a genuine posted worker (with a habitual country of work) will usually fall back on the labour market in the home country. Likewise, the host state has no (or only a limited interest) in regulating the co-determination rights within the foreign company. From the perspective of internal market law, giving effect to mandatory host country rules on dismissal and co-determination rights may be seen as a violation of the free movement of services and of the freedom of contract, not justified by overriding interests of a public policy nature. Phrased in terms of 'belonging': neither the long-term effects of the contract nor the elements related to the organisation of the employer have close links with the country in which the work is temporarily employed.

Above, we examined the (temporary) dual belonging of (genuine) posted workers to host and 'home' country, depending on the subject matter of their labour law entitlements, as defined in Article 3(1) PWD. From the lens of 'belonging', the employment relationship of a (genuine) posted worker touches upon all different lines of ordering. Regarding wages, working time, safety at work and other (minimum) labour standards which influence the day to day performance of the contract, the 'belonging' of the posted workers is clearly determined in light of the first ordering line distinguished in section 2: prevention of social dumping. Here, preference is given to the actual place of work instead of the habitual one. The other types of belonging retain relevance in relation to organisational and contractual matters deemed to be more closely related to the continuing relationship between employer and posted worker.⁸⁵ So, for these subject matters including dismissal law, the posted worker continues to 'belong' to the labour market on which he habitually works. However, this preference of the habitual over the actual place of work is by definition 'finite': the precondition is that the posting should remain an exceptional circumstance of *limited duration* within a contract habitually performed in another country. Therefore, the PWD only covers workers who fulfil the definition of posted worker in Article 2 PWD. And it is to this we now turn.

8. WHEN DO I QUALIFY AS BEING POSTED ABROAD?

In order to avoid stretching the scope of application of the PWD (in interaction with the Rome I Regulation) to non-genuine situations of posting, the concepts of 'posting' and 'posted worker' are crucial.

⁸⁵ According to the Explanatory Memorandum, this concerns 'the bulk of labour law' COM(91)230 final, p. 13, under point 19, third indent.

With regard to the concept of ‘posting’, the PWD covers different types of posting which are described in Article 1 PWD and include service contracts in the context of subcontracting, intra-company transfers and temporary agency work. For the three situations of posting covered by the PWD, Article 1(3) states that there must be a link to a cross-border service provision that is temporary in nature. The requirement has two related aspects:

- The posting should be connected to provision (by the posted worker) of a cross-border service in the meaning of Article 56 of the TFEU (as defined in Article 1(1) of the PWD).
- In two of the three situations of posting there seems to be required a service contract between the employer and a recipient established or active in the country where the service is performed. This requirement is mentioned in Article 1(3)(a) and (c), but does not seem to be a prerequisite in case of intra-company postings (Article 1(3)(b) PWD).

In respect of the latter aspect, it is important to note that the provision of services is not the sole context in which posting (secondment) might take place. A worker may also be posted/seconded in the framework of a project for the account of his own employer. Here we may think of the activities of film crews, employees who are sent abroad on business trips, to attend seminars or perform harvesting activities.⁸⁶ As a result, instead of coming within the scope of the PWD, this group of seconded workers will be covered by Article 45 TFEU in interaction with Article 8 (and 9) of Rome I.

Apart from the fact that the PWD does not cover all cross-border postings, it should be noted that it doesn’t contain a full coordination of cross-border services either.⁸⁷ Moreover, it does not even fully coordinate all employment in this context. For example, it would seem from the facts of the cases *Voogsgeerd* and *Koelzsch*, that neither Mr Voogsgeerd nor Mr Koelzsch were posted workers in the meaning of the PWD – even though their employer was a cross-border service provider.⁸⁸ Hence, the status of the employing company – as cross-border service provider – can and should be separated from the status of the worker – posted, migrant or otherwise.⁸⁹

With regard to the concept of ‘posted worker’, in Article 2(1), the PWD defines the posted worker as a worker ‘who, for a limited period, carries out

⁸⁶ Article 4 Directive 91/533 seems to encompass both groups of posting. This is also true for the concept of posting.

⁸⁷ The coordination of cross-border services is regulated (*inter alia*) by the Services Directive 2006/123. Labour law is specifically excluded from the fields coordinated by this directive; see preamble paragraphs 14 and 86–87 and Article 1(6) of Directive 2006/123.

⁸⁸ See for these facts section 5 above.

⁸⁹ Compare in the context of the transitional period and migration law: Joined Cases C-307/09, 308/09 and C-309/09, *Vicoplus and others*, EU:C:2011:64.

his work in the territory of a Member State other than the State in which he *normally* works' (emphasis added). This phrasing closely resembles Article 8(2) of the Rome I Regulation, although the PWD uses the word 'normally', whereas the Rome I Regulation refers to a 'habitual' country of work. For a long time, it was unclear whether there is a difference in meaning between the two concepts; whereas the Rome I Regulation seems to focus on the habitual place of work *under the contract*, the concept of the PWD may also be applied when the work in the country of origin is performed for more than one employer. Thus, a purely literal reading of Article 2(1) PWD would fit with the posting rule with regard to social security: here, previous insurance in the country of origin is required, not necessarily previous engagement with the posting undertaking.⁹⁰ However, a contextual interpretation would be more in line with the aims of the PWD.

The difference between the two possible interpretations is important in the situation that workers are hired solely for the purpose of posting. In that case there will be no habitual place of work in the country of origin, at least not under the contract. So, according to the contextual interpretation of Article 2(1) PWD, such a situation would not qualify as a genuine posting within the meaning of the PWD.⁹¹ We are in favour of this contextual approach, since, as explained above in section 3, in our view the PWD can and should not be read in isolation from Article 8 Rome I. After the implementation of the Enforcement Directive (due 18 June 2016), this issue may be solved: Article 4(3)(c) of the EPWD makes an explicit link between the concept of posting in the PWD and the 'habitual country of work' under the Rome I Regulation.⁹²

A controversial issue ~~not~~ solved nor clarified yet by the EPWD, is the interpretation of what is 'temporary' in Article 8 Rome I and the interpretation of 'a limited period' in Article 2(1) PWD. Some indications of the temporary/limited period of posting are included in recital 36 of the preamble of the Rome I Regulation,⁹³ which reads: 'As regards individual employment contracts, work carried out in another country should be regarded as temporary if the

⁹⁰ See Article 12 Regulation (EC) 883/2004 as amended by Regulation (EC) 988/2009 and implemented by Regulation (EC) 987/2009, which came into force from 1.5.2010.

⁹¹ This approach was taken in a recent Dutch case (Rechtbank Midden Nederland 22 juli 2015, ECLI:NL:RBMNE:2015:5393) between Portuguese and English subsidiaries of the notorious Atlantco Rimec group on the one hand and the Dutch parties to the collective labour agreement in the construction industry on the other hand. The 'posted' workers involved were, according to their employment contracts, explicitly and solely hired for a specific construction project in the Netherlands. Therefore, according to the Dutch court, their 'habitual' country of work under the contract was the Netherlands. As a consequence, Dutch law was deemed to be objectively applicable to the employment contracts of the workers pursuant to Article 8(2) Rome I.

⁹² Albeit only as an indicative factor in the overall assessment of whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works.

⁹³ In the Commission Proposal COM(2005)650 final the specifications were contained in the relevant Article itself, rather than in the preamble.

employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.’ The second sentence actually expands the notion of posting. It can be traced to a proposal of the Groupe Européenne de Droit International Privé⁹⁴ and caters for expatriate employees who, for reasons of immigration, might enter into a contract with an establishment in the country of posting while maintaining their contractual link with the original employer in the home country. In contrast, the first sentence is meant to narrow down the concept. It again highlights the importance of economic activity in the country of origin (a place of work to return to), but does not contain any specific limits as to time and/or purpose of the posting.⁹⁵

When approaching the temporary nature of the posting from an internal market perspective, it is remarkable that neither case-law nor legislation based on Article 56 TFEU gives a practicable definition of ‘temporary’. In *Rush Portuguesa* the CJ stated that a service provider ‘may move with its own work-force which it brings from its own Member State for the duration of the work in question’.⁹⁶ Hence, the temporary character of posting seems to be linked to the duration of the service abroad. So far, in this general case-law on services *no limitation in time* to the temporariness of a service provision has been accepted.⁹⁷ As stated in *Gebhard*, the temporary nature of the activities has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity.⁹⁸ In *Schnitzer*,⁹⁹ application of these criteria made the CJ conclude that Article 56 TFEU includes services such as construction projects involving large building works which are provided over an extended period, up to several years. On the other hand, the CJ held in *Trojani* that an activity carried out on a permanent basis or without any foreseeable limit

⁹⁴ The proposal was strongly supported by *inter alia* the German Max Planck institute in their comment on the Green Paper: Max Planck Institute for Foreign Private and Private International Law, ‘Comments on the European Commission’s Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to the contractual obligations into a Community instrument and its modernization’ (2003), 37, 65. See: http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf (last accessed on 31 January 2016).

⁹⁵ EuroISPA (European Internet Services Providers Association) Position Paper ‘Green Paper on the Conversion of the Rome Convention into a Community Instrument: COM (2002) 654’ (2003), 36–37, available at http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/euroispa_en.pdf (last accessed on 31 January 2016).

⁹⁶ Case C-113/89, *Rush Portuguesa*, EU:C:1990:142, paras. 17 and 19.

⁹⁷ Case C-514/03, *Commission v Spain*, EU:C:2006:63, para. 22.

⁹⁸ Case C-55/94, *Gebhard*, EU:C:1995:411, para. 27; and Case C-131/01, *Commission v Italy*, EU:C:2003:96, para. 22.

⁹⁹ Case C-215/01, *Schnitzer*, EU:C:2003:662, para. 30.

would not be considered a service within the meaning of Article 56 TFEU.¹⁰⁰ Also, it was ruled that a construction company exclusively focused on a different country than that of establishment cannot be considered a service provider ~~by the CJ~~.¹⁰¹ Notably, the distinction between Article 56 and Article 49 is in reality difficult to operationalise. In the words of AG Léger in his Opinion to *Gebhard*: ‘On the strictly legal level, this distinction is a tricky one, in so far as it is the upshot of a combination of criteria, closely depends on the factual circumstances in question and has never been precisely and systematically defined.’

So, both from an internal market perspective and from a PIL perspective the notion of temporariness is unclear and impractical. This also impacts on the distinction between situations falling within the scope of Article 45 TFEU *vis-à-vis* situations falling within Article 56 TFEU on the other hand, since the temporary nature of posting is often referred to as a key difference with the position of migrant workers, suggesting that the latter group is employed on a more continuous basis in the receiving state. But is that really and necessarily the case? As convincingly shown in the contribution to this book by Verschuereen, this is not automatically true, on the contrary.¹⁰² Nowadays many migrant and frontier workers are employed on fixed-term contracts. In case-law, it is established that also part-time workers, on-call workers and trainees qualify as workers within the meaning of Article 45 TFEU, as long as their work is of an economic nature and is not (too) marginal or ancillary. In light of that case-law, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU. For instance, someone who only worked on a temporary basis for two and a half months on the territory of another Member State than his state of origin, should be regarded as a worker within the meaning of Article 45 TFEU on condition that his activities are not purely marginal and ancillary. Clearly, what was once referred to as ‘permanent’ movement of migrant workers nowadays includes many cross-border movements with very much a temporary (fixed-term) nature.¹⁰³

¹⁰⁰ As shown by the very wording of Article 57 TFEU, in contradistinction to the permanent nature of the activity carried out by an economic operator who is established in a Member State (observation of AG Léger, Opinion of Advocate General LÉGER in Case C-55/94, *Gebhard*, EU:C:1995:194, para. 32).

¹⁰¹ This clearly follows from the judgment in Case C-404/98, *Plum*, EU:C:2000:607, situated in the context of what is now Regulation 883/2004.

¹⁰² See on the blurry nature of the concept of ‘worker’ in Article 45 TFEU, chapter of H. VERSCHUEREN in this volume. Also, M.S. HOUWERZIJL, “‘Regime shopping’ across (blurring) boundaries”, in S. EVJU (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance* (Oslo: Institut for privatrett, Skriftserie 196, 2014).

¹⁰³ Case C-413/01, *Ninni-Orasche*, EU:C:2003:600, paras. 25 and 32. See also Case C-169/03, *Wallentin*, EU:C:2004:203 and Case C-109/04, *Kranemann*, EU:C:2005:187 regarding trainees one of whom only worked abroad several weeks, as discussed by H. VERSCHUEREN, ‘Cross-border workers in the European internal market: Trojan horses for Member States’ labour and social security law?’ (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations*, 176.

At first sight, a more distinctive criterion in demarcating Article 45 mobility from Article 56 mobility may be found in the notion of ‘labour market access’. In the case *Rush Portuguesa*, the CJ made a distinction between migrant workers, who enter the labour market of the host state, and posted workers, who generally do not. The employer of a posted worker makes use of the free movement of services. The worker doesn’t need to avail himself of the free movement of workers, because ~~he does~~, according to the CJ, not seek access to the labour market of the host Member State, but will instead ~~immediately~~ return to the state where he normally works once the service ~~is~~ carried out. This passive movement (namely because the employer assigns him to) may be illustrated by the fact that the posted worker has concluded an employment contract with his employer governed by the law of the habitual country of work. Another indicator of passive movement, often used in the context of PIL, is the provision or reimbursement of travel, board and lodging costs by the employer.¹⁰⁴ Notably, in its recent judgment *Sähköalojen ammattiliitto*,¹⁰⁵ the CJ brought the status of the posted worker (in this respect) closer to the traditional expatriate employee, by ruling that such special arrangements should be regarded as compensation for expenses in line with Article 3(7) (second sentence) PWD.

The distinction based on labour market access is crucial in case the worker doesn’t enjoy free movement himself, e.g. because he is covered by a transitional regime.¹⁰⁶ But the distinction between Article 45 mobility and Article 56 mobility also has an impact on the labour law protection of the workers involved. The PWD intends to provide a significant but not a full level of host state protection for posted workers, who may be vulnerable given their situation (temporary employment in a foreign country, difficulty in obtaining proper representation, lack of knowledge of local laws, institutions and language). As Kilpatrick observes:¹⁰⁷ ‘Socially, it is not difficult to imagine that long-stretches of life in a (typically more expensive) host-state on a minimum skeleton of host-state labour standards can seem exploitative to posted workers and host-state inhabitants alike.’

The differences in labour costs attached to both ‘avenues’ for worker mobility seem to be used more and more strategically by firms (as a business model) in

¹⁰⁴ This indicator is made explicit in Article 4(2)(d) of the EPWD. See in more detail A.A.H. VAN HOEK and M.S. HOUWERZIJL, “Posting” and “posted workers” – The need for clear definitions of two key concepts of the Posting of Workers Directive’, in C. BARNARD, M. GEHRING and I. SOLANKE (eds.), *Cambridge Yearbook of European Legal Studies* (Oxford: Hart Publishing, 2012).

¹⁰⁵ See above footnote 80, elaborated upon in section 7.

¹⁰⁶ This may be different when the worker is sent abroad by a temporary work agency: see Joined Cases C-307/09, 308/09 and C-309/09, *Vicoplus and others*, EU:C:2011:64. For third-country nationals working and residing legally in a Member State the distinction makes it possible to post them to another Member State. See Case C-43/93, *Vander Elst*, EU:C:1994:310, recently confirmed in Case C-91/13, *Essent Energie Productie*, EU:C:2013:711.

¹⁰⁷ C. KILPATRICK, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’, *LSE Legal Studies Working Paper* No. 16/2009, 27.

order to gain this ‘comparative advantage’. Labour law is but one of the points to be taken into consideration; social security and tax law being at least as important. Intermediaries in other Member States are used with the sole purpose of turning (temporary or seasonal) migration into posting. When, for example, a TWA recruits Polish workers for jobs in Sweden, the actual circumstances may not change according to whether the TWA is Polish or Swedish, but the legal situation does. Therefore, blurring regulatory concepts and criteria also generate opportunities for non-compliance, resulting in violation of labour law and other (fundamental) rights of migrant workers.¹⁰⁸

9. WHERE DO I BELONG WHEN I DO NOT (WANT TO) KNOW MY LEGAL STATUS?

The distinction between Article 45 and Article 56 mobility, stemming from *Rush Portuguesa*, is often poorly understood. In the popular press there is (almost) no awareness of the fact that there are different migration modalities, let alone that these are governed by different legal regimes.¹⁰⁹ This may be explained by the fact that all these modalities seem to lead to very similar actual work patterns and problems, such as underpayment, excessive deduction of costs for lodging and travel, violations of health and safety and working time regulation.

Contentious cases in the media often relate to situations which may not be deemed to be ‘proper’ posting because the worker does not normally work in another state than the host state, because the employer is not genuinely established in another state or because an employment relationship between employer and worker is missing. Some cases relate to letter box companies opened only for the purpose of posting. The worker might actually be made to work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. The absence of genuine activities in the country of origin may be combined with repeated postings, in which the ‘posted’ worker is working in a specific Member State on an (almost) permanent basis. Other cases describe situations of rotational posting in which the worker is posted consecutively to different Member States or, with an unpaid leave in-between, to the same Member State again and again.

~~Anecdotic~~ evidence from media is now confirmed and elaborated upon by research on the ground. Studies of (e.g.) Wagner and Berntsen based on

¹⁰⁸ See more in detail M.S. HOUWERZIJL, “Regime shopping” across (blurring) boundaries’, in S. EVJU (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance* (Oslo: Institut for privatrett, Skriftserie 196, 2014).

¹⁰⁹ See section 3 and Annexes I/II of our comparative studies commissioned by the European Commission, on the legal aspects of the posting of workers in the framework of the provision of services in the European Union 2011/12, available at: <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016).

interviews with workers situated at the building sites of the European Central Bank in Germany and the 'Eemshaven' in the Netherlands, as well as in workplaces in the meat sector and the supermarket distribution centres, clearly show that the workers concerned most often do not know their legal status.¹¹⁰

Hence, there is (reason for) clear concern about abuses of the freedoms granted by the EU internal market. Posting regulations are misused systematically and do create competition on wage levels in host state labour markets.¹¹¹ Especially in the area of provision of manpower, the problem of combating illegal activities is encountered. However, these forms of abuse are not specific to posting (nor for provision of manpower). The illegal temporary work agencies may be established both in the country of recruitment (leading to posting) or in the county of work (leading to migration). Several reported cases of abuse concerned migrant workers or even (bogus) self-employed.¹¹² These cases involve social dumping in its purest form – with no respect for either the protective system of the country of origin or that of the host country.

For trade unions and enforcement authorities it is difficult to trace and combat the situations mentioned above; the fluidity in the cross-border context with firms often disappearing across borders or going bankrupt, complicate their efforts to enforce (and execute) local labour standards. Moreover, the employer-arranged migration context leads to isolation of migrants, as they often have limited knowledge of host state law and institutional structures. They are also segregated spatially and socially from their host surroundings because of the

¹¹⁰ L.E. BERNTSEN, *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015) and I. WAGNER, *Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015). They conducted micro-level research (based on interviews) regarding migrant/posted workers strategies and union strategies at two big building sites, in the supermarkets branch and in the meat sector in the Netherlands and Germany. See also, for the UK: C. BARNARD and A. LUDLOW, 'Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals,' presented as a working paper at the LLRN conference 25–27 June 2015 in Amsterdam.

¹¹¹ In the Netherlands, for instance, some Dutch truck drivers were given the choice of either accepting a reduction in their pay and other employment conditions, or accept pay rolling constructions via Cyprus, under threat of dismissal. See J. CREMERS, 'Schijnconstructies in het internationale wegtransport', *Zeggenschap* 2014, 25(1), 32–34.

¹¹² See A.A.H. VAN HOEK and M.S. HOUWERZIJL, 'Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2011) and 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2012) *Reports to the European Commission under contract VT/2009/0541 and contract VC/2011/0096*, available at: <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016). More recently, the European Agency on Fundamental Rights (FRA) called for 'zero tolerance for severe forms of labour exploitation', in its report on *Severe Labour Exploitation: Workers Moving within or into the European Union, States' Obligations and Victims' Rights* (Brussels: 2015).

way they are housed near the place of work. And if trade unions and host state institutions succeed in reaching the workers, they experience enormous practical difficulties in establishing exactly which conditions (should) apply to a specific individual employment relationship, because the rules are so complicated in cross-border situations.¹¹³

A different, more ambiguous, situation arises when the employment conditions do conform (more or less) to the standards of the home state but not to those of the host. As becomes apparent from several empirical studies, in such cases the workers may not have an incentive to claim the extra rights awarded to them under the law of the host state. They seem to be happy with the job opportunity and do not want to put that in danger by claiming host state entitlements.¹¹⁴ As Berntsen puts it: 'the commodified employment context tends to disempower migrants, at the same time it enables them to live better lives than they would if they opted not to participate in this European market context'.¹¹⁵

The harm of their passive attitude in claiming their rights is (felt to be) done to third parties, and – more abstractly – to the social structure of the host state, rather than to one of the parties to the individual contract. In extreme cases the workers will even operate in cohort with the employer to evade the law of the host state.¹¹⁶ From our perspective on 'belonging', these persistent findings seems to point to a discrepancy or perhaps cognitive dissonance between the legal understanding of belonging (which is – at least – partly situated in the host state) and the 'feeling' of belonging (which seems to be situated in the 'home

¹¹³ See L.E. BERNTSEN, *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015), 170–175; M. KULLMANN, *Enforcement of Labour Law in Cross-Border Situations. A Legal study of the EU's Influence on the Dutch, German, and Swedish Enforcement systems* (PhD thesis) (Deventer: Kluwer 2015), 211–225, 266–290 and I. WAGNER, *Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015), 70 – 76.

¹¹⁴ See A.A.H. VAN HOEK and M.S. HOUWERZIJL, 'Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2011) and 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', available at: <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016), at section 4.5 on legal remedies.

¹¹⁵ L.E. BERNTSEN, *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015), 171.

¹¹⁶ In the country reports for our PWD study commissioned by the European Commission, this was specifically mentioned by the Estonian expert. See A.A.H. VAN HOEK and M.S. HOUWERZIJL, 'Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2011) and 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2012) *Reports to the European Commission under contract VT/2009/0541 and contract VC/2011/0096*. Available at: <http://ec.europa.eu/social/main.jsp?catId=471&langId=en> (last accessed on 31 January 2016).

state' or 'wherever there is work').¹¹⁷ In such cases the law of the host state will only be enforced if enforcement is entrusted to host state authorities or interested third parties (such as social funds or the unions in the host state). The EPWD facilitates and stimulates this in some respects, but asks for a real effort with budgetary implications and strong political will at the level of the host Member State.

10. SUMMARISING CONCLUSIONS

Above, we mapped and critically analysed criteria and concepts used by the EU legislator and the CJ in order to establish place(s) where mobile EU workers 'belong' in relation to their labour law entitlements. As was demonstrated, both in (the interpretation of) the relevant provisions of Rome I and in the PWD, several lines of ordering are visible, informed by the specific goals of labour law. These ordering lines may carry with them different types of 'belonging', attributing workers to legal systems on the basis of the territory and/or the branch of industry in which the work is performed, or the organisational framework of the employing company. Why do the conflicts rules attribute a situation to the law of country A rather than country B? And what underlying system of ordering is at work here? Above, these questions were in particular explored for so-called peripatetic employees, expatriate employees and posted workers, since case-law primarily dealt with these groups. Below, we summarise and conclude. Where apt, we give some food for thought from the lens of 'belonging'.

Notwithstanding the practical difficulties to apply the habitual place of work as a connecting factor to peripatetic employees, the CJ took this approach in the *Koelzsch* and *Voogsgeerd* cases. By stretching this concept very far, the CJ gave priority to the habitual place of work over the place of establishment of the employer. From the first ordering perspective of preventing labour market competition (social dumping), we welcomed this approach. However, from the organisation of the business, designated as the second ordering perspective, our assessment was at first sight less positive. However, on a closer inspection of the judgments, we argued that the CJ effectively conflated the organisational framework and the actual place of performance into a single connecting factor:

¹¹⁷ In the PhD thesis of BERNTSEN, a long quotation from a Polish scaffolder, 28 years old, shows that the sense of belonging to the 'home country' may also be lost: 'I don't see my future in Poland. I see my future where there is work, because without work [...] you know how it is over there [in Poland], it is difficult to get a job', L.E. BERNTSEN, *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands Groningen* (PhD thesis) (Groningen: University of Groningen, SOM research school 2015), 24. Home, and hence a sense of belonging, may be where ever there is work.

the 'place where or from which the work is habitually performed'. Indeed, in its judgments the CJ attached weight to the place where the worker receives instructions concerning his tasks and organises his work, as well as to the place where his work tools are situated. These criteria refer – at least in part – to the organisational structure of the employer.

In contrast to its very broad interpretation of the 'habitual place of work', the CJ leaves little room for 'the place of engagement'. As clarified in *Voogsgeerd*, the latter connecting factor serves to provide legal certainty in a case in which the primary connecting factor is not able to provide a clear link to any particular jurisdiction. In absence of any case-law, it is difficult to predict for which category of (hyper-mobile) workers this connecting factor may act as a 'home for the homeless'.

No such uncertainties exist anymore with regard to the escape clause referring to the country of closest connection. As clarified for the situation of an expatriate employee in *Schlecker*, the applicable law must first be determined by reference to the pre-established connecting factors. However, the national court may disregard these connecting factors and apply the law of another country, 'even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country', where it is apparent from the circumstances as a whole that the employment contract is more closely connected with that country. By giving such a broad interpretation of the possibility to deviate from the law of the habitual place of work in favour of another law, the CJ seems – to a certain extent – to undo the effect of the decisions in *Koelzsch* and *Voogsgeerd*. The escape rule undermines the general applicability of the law of the habitual place of work and hence the territorial application of labour law.

Although it is too early to predict how extensive the CJ will interpret the escape clause in future cases (and for other categories of workers), it is beyond dispute that with *Schlecker*, the tax law and social security schemes applicable to the employee, has regained importance. The weight attached to these factors in *Schlecker* does point to prioritising a different kind of belonging – not the labour market on which the employee performed her work was deemed to be decisive, but the social structure in which she was embedded through the system of social charges (the third line of ordering). In conflicts concerning dismissal rules it might make sense to connect this specific element of employment law to the system of social security applicable to the worker concerned. It can be questioned however, whether the same rationale is also valid for wages, working time, safety at work and all those other rules which influence the day to day performance of the contract. Do other types of belonging retain (or regain) relevance there?

In the situation of posted workers the answer is yes. (Genuine) posted workers are deemed to belong to both host and 'home' country, depending on the subject matter of their labour law entitlements. From the lens of 'belonging',

the employment relationship of a (genuine) posted worker touches upon all different lines of ordering. Regarding wages, working time, safety at work and other (minimum) labour standards which influence the day to day performance of the contract, the 'belonging' of the posted workers is clearly determined in light of the first ordering line: prevention of social dumping. The other types of belonging retain relevance in relation to organisational and contractual matters more closely related to the continuing relationship between employer and posted worker, situated in the habitual country of work (which in genuine posting situations will usually coincide with the country of common origin). So, for said subject matters including dismissal law, the posted worker continues to 'belong' to the labour market on which he habitually works. However, this preference of the habitual over the actual place of work is by definition 'finite': the precondition is that the posting should remain an exceptional circumstance of limited duration within a contract habitually performed in another country.

Therefore, it is important that the PWD only covers workers who fulfil the definition of posted worker in Article 2 PWD. For this purpose, the concepts of 'posting' and 'posted worker' are crucial, but currently unclear in several aspects. For instance, in situations that workers are hired solely for the purpose of posting there will be no habitual place of work in the country of origin, at least not under the contract. Based on the assumption that the PWD can and should not be read in isolation from Article 8 Rome I, such a situation should in our view not qualify as a genuine posting within the meaning of the PWD. After the implementation of the EPWD (due 18 June 2016), this issue seems to be solved: the EPWD creates an explicit link between the concept of posting in the PWD and the 'habitual country of work' under the Rome I Regulation. A controversial issue not solved nor clarified by the EPWD, is the interpretation of what is 'temporary' in Article 8 Rome I and the interpretation of 'a limited period' in Article 2(1) PWD. Both from an internal market perspective and from a PIL perspective the predominant notion of 'temporariness' is unclear and impractical: everything is left to an assessment on a case-by-case basis without any (rebuttable) limitations in time. Moreover, the blurriness of the concepts and criteria also generates opportunities for non-compliance, resulting in social dumping and violation of labour law and other (fundamental) rights of migrant and posted workers.

The politically difficult quest for effective remedies against social dumping and misuse in transnational employment relationships based on 'the search of cheap labour', becomes even more complicated if the employment conditions do conform (more or less) to the standards of the home state. In such situations, the workers involved often seem to prioritise their job opportunities above claiming host state entitlements. Hence, the harm of their passive attitude in claiming their rights is (felt to be) done to third parties, and – more abstractly – to the social structure of the host state, rather than to one of the parties to the

individual contract. In such situations, empirical research clearly demonstrates a discrepancy or perhaps cognitive dissonance between the legal understanding of belonging (which is – at least – partly situated in the host state) and the ‘feeling’ of belonging (which is allegedly situated in the ‘home state’). Should that discrepancy lead to an adjustment of the balance between the distinct lines of ordering, prioritising the place of engagement or a country of closer connection, above the actual workplace? Recently, this stance, phrased as ‘the point of view of the posted worker from post-communist states’,¹¹⁸ entered the academic debate.

Authors such as Kukovec and Leczykiewicz acknowledge that social dumping and ‘a race to the bottom’ may occur if the concept of territorial application of labour law would be replaced by a home country control rule. However, in their view these disadvantages, which mainly befall the wealthier ‘central’ member states, are outweighed by the interests of the workers from the new, ‘peripheral’ member states to use their one comparative advantage – the possibility to compete on the basis of lower labour costs.¹¹⁹ Their argument can be placed in a discussion in which justice within the EU is mainly perceived as ‘access justice’: a theory in which justice is mainly concerned with the right of all citizens to participate in the benefits of the internal market.¹²⁰ This type of justice is contrasted with the more distributive role of the developed national welfare states that exist in (many of) the old member states.¹²¹ The system of distributive justice presupposes a more or less closed system of mutual rights and obligations. The narrative of ‘belonging’, while fitting nicely into the latter theory, does not seem to play any meaningful role in the former.

This is exemplified by Leczykiewicz where she states that ‘employment opportunities on the Swedish and Finnish market in no way ‘belong’ to Swedish and Finnish workers.’¹²² In her opinion this would also mean that the Finnish and Swedish workers are no longer legitimised to defend their system against

¹¹⁸ Expressed in less ambivalent wording than by the interviewed workers in the studies of Berntsen and Wagner, see L.E. BERNTSEN, *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015) and I. WAGNER, *Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry* (PhD thesis) (Groningen: University of Groningen, SOM Research School 2015).

¹¹⁹ See D. LECZYKIEWICZ, ‘Conceptualizing conflict between the economic and social in EU law after Viking and Laval’, in M. FREEDLAND and J. PRASSL (eds.), *EU law in the Member States: Viking, Laval and beyond* (Oxford: Hart Publishing, 2015) and D. KUKOVEC, ‘Hierarchies as law’ (2014) 21 *Columbia Journal of International Law*, 142.

¹²⁰ On the theory of ‘access justice’ versus ‘social justice’ see H. MICKLITZ, ‘Social Justice and Access Justice in Private Law’ (2012) 13 *European Journal of Comparative Law*, 233–266.

¹²¹ A. SOMEK, ‘The social question in a transnational context’ (2011) 39 *LSE ‘Europe in question’ Discussion Paper*, 31.

¹²² D. LECZYKIEWICZ, ‘Conceptualizing conflict between the economic and social in EU law after Viking and Laval’, in M. FREEDLAND and J. PRASSL (eds.), *EU law in the Member States: Viking, Laval and beyond* (Oxford: Hart Publishing, 2015) 21, under footnote 48. In relation to posting her argument sits uneasily with the legal fiction that posted workers ‘never’ have

underbidding by outsiders. Such a radical form of ‘access justice’ or ‘transnational solidarity’ by allowing workers to compete on wage levels runs counter to goals and underpinning of labour law, not only enshrined in the ordering lines we looked at above, but also in the EU Charter of fundamental rights (chapter on solidary) and in article 45 TFEU. Moreover, such forced openness from the part of the host state, would erode the basis for its national distributive institutions. All EU citizens may demand equal access to the national system, but who will build and maintain this system, if too many do no longer experience a sense of belonging (with the concomitant responsibility)? And, on a final note, one may wonder whether realisation of the ideal of ‘access justice’ would not turn into a trap, once the worker from the new Member State is for a longer period in the host Member State and actually becomes more embedded in this state (by starting a family life, hiring or buying a house, getting an accident, needing medical help etc.)? What type of belonging would s/he than prefer?

access to the labour market of the host state and cannot be deemed to be job seekers (and hence may not be seen as migrant workers).

