

TECHNICAL QUESTIONNAIRE

Crossing Borders: Applying Labour Law in Trans-National Settings

[We kindly request you to complete this questionnaire and return your national response to Fiona Crane (admin@ealcj.org) not later than Friday 24 May 2019]

The topic of the Association's 2019 Annual Congress, which will take place in Dublin, Ireland, between 6 and 8 June 2019, is "Crossing Borders: Applying Labour Law in Trans-National Settings". This event, which is generously being hosted by the Irish Labour Court at their premises in central Dublin, will consider a broad spectrum of issues arising in relation to the territorial scope and application of Labour Law, the implications of the rules developed since 1996 to deal with "the posting of workers", and some of the developing challenges arising more generally in relation to employment in trans-national settings.

BACKGROUND

When it comes to cross-border working a wide variety of rules set out in EU legislation and CJEU case-law are applicable. These include:

- Article 45 of the Treaty on the Functioning of the European Union;
- 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");
- 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 (the re-cast "Brussels I"); and
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

This questionnaire sets out first to present a background for consideration of broad jurisdictional issues – including those dealt with during the 2017 EALCJ Congress in Prague ("Working Abroad").

That will then provide a context within which to look at a number of issues which have arisen in relation to the operation of the 1996 Posting of Workers Directive, and which are addressed by the recent Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

A particular focus is directed towards the international road transport sector, with a view also to considering some of the implications of the "Labour Law"-related provisions included in the European Council's developing "Mobility Package" as discussed at a meeting held on 3 December 2018.

In order to provide some structure for our discussions, the questionnaire deals with questions around two themes:

1. General questions on jurisdiction and applicable legislation
2. The specific situation of the international road transport sector under the 1996 Posting of Workers Directive and the 2018 Amendment Directive.

The general questions on jurisdiction and the applicable legislation are developed out of case C-396/13, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna* (judgment of the court delivered on 12 February 2015).

The more specific questions deal with issues in the context of the international road transport sector within the European Union. This is an matter of particular interest, because – as is stressed in Recital 15 of the Preamble to the Amendment Directive on the Posting of Workers (Directive 2018/957) – given “the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and difficulties”.

Consequently, the Amendment Directive stipulates that, after the implementation period has expired, it will not apply to this sector. Instead, Recital 15 of the Preamble goes on to indicate that these issues are to be addressed in the framework of a so-called “Mobility Package”, through specific rules for international road transport (which will also aim at reinforcing the combating of fraud and abuse).

The original Directive 96/71 will not be replaced by Directive 2018/957. Instead, it will be amended as provided for in Directive 2018/957. Those amendments are already effective, and Member States have until 30 July 2020 to transpose the amendments into their national legal systems.

However, the Directive will only become effective for the international road transport sector once the special rules which are to be drawn up within the framework of the “Mobility Package” have been concluded.

QUESTIONS

A. General Questions concerning Jurisdiction and Applicable Legislation

In case C-396/13, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, the CJEU gave an interpretation of the notion of “wage”, including which elements of payments could be included and which not. Much has subsequently been said and written about this issue.

The CJEU also dealt with two other issues which, to date, have generated considerably less attention; namely, (1) the possibility of an action being brought by a trade union on behalf of workers, and (2) the possibility that it might be possible to set aside the (mandatory) law of one country in order to enable access to a court, based upon the right contained in Article 47 of the Charter of Fundamental Rights of the European Union.

The following questions in this Part deal with these two issues.

1.1 Do the legislative arrangements of your country allow for workers to transfer a claim against their employer to a trade union?

If so, please indicate the basis upon which this might be possible, what procedural rules might apply in such a situation, and how this operates in practice in your country.

1.2 Is it possible in your country for a trade union to:

- (a) bring a case to court (or otherwise) on behalf of their member workers;
- (b) bring a case on behalf of non-member workers;
- (c) start a “class action” (or similar)?

- 1.3 Have you ever dealt with a case where you considered the possibility to set aside the (mandatory) law of another country, because otherwise the claimant(s) would not have had access to your court?

If so, please provide a brief description of the case and its outcome, and give an indication of the main issues with which you struggled.

B. Questions on the specific situation of international road transport under the Posting of Workers Directive (96/71) and the Amendment Directive (2018/957)

Within the international road transport sector a substantial proportion of the work is performed by drivers from Central and Eastern European Member States (i.e. countries that acceded to the European Union in 2004 and 2007).

The (employment) relationships in this sector are often constructed in less than fully transparent ways, making it difficult to determine which Member States' working conditions (including, in particular, those relating to wages) should be applied on the basis of EU Law.

Current arrangements under EU Law offer a number of ways by which it may be possible to determine which law should be applicable. Article 8 of the "Rome I" Regulation provides an example of this.

When it comes to the international road transport sector the question of which law is, or should be, applicable appears often to be determined by:

- (a) the country where the employment contract is concluded;
- (b) the country from where the employment activities are directed/instructed (a matter in relation to which there is much discussion about how to determine this); or
- (c) per hour, in accordance with the law of the country in which the driver is located at that moment.

- 2.1 Which of these options (a)-(c) is mostly used in your country?

- 2.2 Are there other methods used in your country to determine which law regulates the employment relationships of international truck drivers?

If yes, please explain what these might be, and indicate the ways in which, in practice, the determination is made.

- 2.3 Having regard to the state of the current law in your country, and taking into account the position developed at the level of the European Union, to what extent do you think that international truck drivers could, or should, be regarded as "posted workers" [as defined in Article 1, paragraph 3 (a) or (c) of the 1996 Posting of Workers Directive (91/76)]?

- 2.4 Have there been any decided cases in your country in which the question has been (directly or indirectly) addressed as to whether an international truck driver could be regarded as a "posted worker" [as defined in Article 1, paragraph 3 (a) or (c) of the 1996 Posting of Workers Directive (91/76)]?

If there has been any such case-law, please indicate what considerations were taken into account when reaching the decision as to whether or not that "posted worker" status was applicable or not.

- 2.5 Up until now, have you been aware of the development at the level of the European Union of the so-called “Mobility Package” and the rules contained in it to protect drivers in the international road transport sector?

In relation to this development and other recent regulatory developments in the field of Social and Labour Law, what arrangements (other than your own personal research) are in place in your country to keep Labour Court Judges (and possibly judges in general) up to date with “the state of play” regarding such policy initiatives?

Do you have any suggestions as to how effective “alerting” or “information” arrangements might be put in place (or improved) for the benefit of Labour Court Judges (or judicial officers in general) when legislative/regulatory initiatives are being developed in their specialist field?

- 2.6 On the basis of the information currently available in relation to the “Mobility Package”, to what extent do you think the rules included in that “package” will provide for better/improved working conditions and circumstances for drivers in the international road transport sector?

Do you foresee any particular problems arising for Labour Court Judges in relation to any of the arrangements intended to be put in place for the international road transport sector?

In case *C-102/16, VadiTrans BVBA v. Belgische Staat* (judgment of the court delivered on 20 December 2017), the CJEU ruled that:

“Article 8(6) and (8) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 must be interpreted as meaning that a driver may not take the regular weekly rest periods referred to in Article 8(6) in his vehicle.”

This case seems to have been widely accepted by commentators as being something positive for the drivers concerned. However, an issue arises as to what the drivers themselves think of the ruling – the point being made that they may not consider the outcome of the case to be “positive” at all.

- 2.7 One of the foundations of Labour Law is said to be that it protects workers by setting standards.

What will (or can) you do when the workers who are supposed to be protected by a particular rule do not consider that rule to constitute “protection”, but, rather, see it as a deterioration in their working conditions?

Many thanks!