

ECJ rules: the posted workers directive is applicable to international road transport



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In a recent judgment in case no. C-815/18, the European Court of Justice (ECJ) ruled that international road transport falls within the scope of application of Directive no. 96/71/EC concerning the posting of workers. However, in order for a driver to be considered posted to the territory of a Member State, a sufficient connection must exist between the performance of the driver's work and the Member State concerned.

The facts in the case at hand

The case concerned three group companies active in road transport who were established in Hungary, Germany and the Netherlands. The Dutch company concluded charter agreements with the Hungarian and German companies, who provided these transport services with drivers in their employ. In general, the transport operations in question started and ended in the Netherlands. However, most of the transport operations took place outside the Netherlands, in several Member States. A dispute arose when a Dutch union claimed that the German and Hungarian drivers had to be classified as posted workers in the sense of Directive no. 96/71/EC, and that the Dutch collective bargaining agreement for the road transport industry should therefore be applied.

The judgment of the European Court of Justice

The dispute ended up before the Dutch Supreme Court, which submitted a number of preliminary questions to the ECJ. More specifically, the Supreme Court wanted to know if Directive no. 96/71/EC is applicable to international transport situations and, if so, what criterion should be used to determine whether a driver is posted "to the territory of a Member State", which would result in such Member State's minimum employment conditions becoming applicable.

In this respect, the ECJ ruled that Directive no. 96/71/EC applies to any transnational provision of

services involving the posting of workers, irrespective of the industry in which the services are delivered, including the road transport industry.

However, the highly mobile nature of the work performed by drivers active in international road transport makes it difficult to ascertain when a driver is considered to be posted to the territory of a Member State. In this respect, the ECJ returns to the notion of “sufficient connection”, which it first introduced in the *Dobersberger* case. A worker cannot be considered as posted to a Member State in the sense of Directive no. 96/71/EC unless the performance of his work has a “sufficient connection” to that Member State. Determining the level of connection requires an overall assessment of all the factors that characterise the work of the employee concerned, including:

- the characteristics of the provision of services to which the worker is assigned;
- the nature of the activities carried out by the worker in that territory;
- the degree of connection between the worker's activities and the territory of each Member State in which he operates;
- and the proportion represented by these activities in the entire service provision in question.

In its judgment, the ECJ provides some more guidance on how to determine the above-mentioned sufficient connection with a Member State. Firstly, the Court states that the fact that a driver starts and finishes his task in a Member State and receives his day-to-day instructions in said Member State is not sufficient in itself to conclude that the driver is posted to that Member State, if the driver does not have a sufficient connection to that Member State based on other factors. In addition, the ECJ states that the existence of a group affiliation between the undertakings that are parties to a contract of hiring-out of workers is not relevant to determine whether these workers must be classified as posted workers in the sense of the Directive.

Referring to its judgment in the *Dobersberger* case, the ECJ continues by arguing that a worker who only provides limited services in the territory of the Member State to which he is sent cannot be regarded as a posted worker. As an example of limited services in the framework of international road transport, the Court refers to the situation where a driver merely transits through a Member State.

In light of the above, the Court also assesses cabotage transport operations, i.e. transport between two locations in the same Member State, executed by a company located in another Member State. In this regard, the ECJ concludes that, since the entire transport operation is carried out in the same Member State, there is inherently a sufficient connection with the territory of that Member State. As such, the driver will be considered as posted to the territory of the Member State where the cabotage operations take place.

Conclusion

The ECJ has unequivocally stated that Directive no. 96/71/EC is also applicable to the highly mobile workers active in international road transport. The ECJ confirmed its previous case law

regarding the notion of “sufficient connection” - which must be present in order for a worker to be considered as a posted worker in a Member State - and further elaborated on this notion by identifying several criteria that can be used to make the necessary assessment in this respect.

However, analysing whether a sufficient connection exists with a given Member State is a highly fact-based exercise and, although the ECJ has provided some guidance in this respect, it will be interesting to see how local inspectorate services and courts will go about this assessment.

If you are a company active in international road transport, we recommend analysing the current legal set-up for your drivers in light of the above judgment.