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REPORT

THE APPLICATION OF THE EU POSTING RULES TO AIRCREW

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INTRODUCTION

1 BACKGROUND OF THE RESEARCH

1. Three social partner organisations in the EU Sectoral Social Dialogue Committee on Civil Aviation applied for funding under the EU call for proposal "support for social dialogue" for a project entitled "Should aircrew be declared posted? When, when not?" (grant VS/2019/0030). The Social Partners considered that, to progress in their social dialogue work on this matter, an external report by legal practitioners was necessary. This report is therefore designed to facilitate this dialogue by setting the current legislative framework and describing situations of employment of aircrew in the aviation industry falling and not falling under the scope of the Posting of Workers Directive.

2 PROBLEM SETTING

2. With Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereafter "the Directive" or the "Posting of Workers Directive"), the EU laid down the applicable rules for the working conditions of workers who were posted by their company in another EU Member State. To be clear, this research report will refer to "posting" as the secondment of workers from one EU Member State to another. Situations of internal posting, for instance from one company to another in the same country are not relevant for this research.

3. On the one hand, the EU wanted to protect the posted workers against being exploited by their posting employers and on the other hand it wanted to give the hosting Member States a tool against social dumping by employers who are sending their lower paid work force from Member States with lower wages and less protective labour conditions, to carry out work in Member States with higher wages and better labour conditions.

4. However, the enlargement of the EU towards new Member States (especially during the 80's and 2000's) has put the issue of social dumping high on the agenda of the EU, indicating i.a. difficulties with the application and enforcement of the posting rules.

This research focuses on the posting of workers in the aviation industry. The main problem seems to be that it is not clear in which situations the Posting of Worker Directive should be applied to the employment of aircrew (= cabin crew + pilots).

3 RESEARCH QUESTIONS

5. The context of this problem leads us to pose the following central research question:

- *How can the EU rules regarding posting of workers accommodate the situation of aircrew workers in the international aviation sector?*

6. In order to answer this central research question, the following sub questions need to be examined:

1. *In which cases are aircrew qualified as posted workers in the light of the Directive?*
2. *Is the current legislative framework appropriate for t aircrew in the aviation sector?*
3. *If not, how can the current legislative framework be adapted in order to become suitable for aircrew in the aviation sector?*

4 METHODOLOGY

7. Should aircrew be declared posted? When, when not? In our opinion, answering this research question requires i) determining the situations in which aircrew are posted (or not) and the obligations which would arise from such postings considering the specificities of the aviation sector, ii) assessing the suitability of the legislative framework based on, among others, input from members of the participating organizations, iii) formulating recommendations for adapting the legislative framework to theses specificities.

i) Current EU legislative framework

8. In the **first chapter**, the report examines the rules with regard to applicable legislation and posting in the aviation sector from both a labour law and a social security law perspective. This is a descriptive research, based on the existing European and national legislation, the case law and doctrinal work. The first chapter looks at the rules for the applicable employment legislation (Rome I Regulation), the rules for the applicable social security legislation (Regulation 883/2004), the rules for the competent jurisdiction (Brussels Ibis Regulation) and explains the main principles of the Posting of Workers Directive (as well as the Enforcement Directive and the Revised Posting of Workers Directive). This is the theoretical groundwork upon which the rest of the research is built.

ii) The situation in the Member States: implementation, application and enforcement

9. In the **second chapter**, the report has gathered insights on the national implementation of the Posting of Workers Directive and its application in the aviation sector

in all 28 Member States. To achieve such an overview, we have made use of a questionnaire that was completed by national legal experts.

10. The information that is drawn from the questionnaires in the second chapter are further supported by an overview of relevant and recent studies and reports with regards to posting in the aviation sector in the **third chapter**. In this way, the report forms a decent picture of the current situation with regards to the actual application of the posting rules to aircrew and it also identifies the possible situations in which true posting situations exist and situations where it does not.

iii) Evaluation of the situations of employment for which the posting rules should apply and of the suitability of the legislative framework

11. In the **fourth chapter**, our evaluative research is conducted in two ways. First, it will answer the first sub research question: In which cases are aircrew qualified as posted workers in the light of the Directive?

Based on the legislative framework and the information gathered from the second and third chapter, the report determines the situations of employment which fall and do not fall under the scope of the Posting of Workers Directive.

Whether the application of the posting rules is appropriate or suitable for each situation, is assessed in view of three guiding values:

- legal certainty: can national employment (and social security) rules applicable to the flying staff be easily predicted? Do these national rules remain applicable over time or are they everchanging depending on the country of posting?
- feasibility: do the existing rules lead to red tape administrative obligations, which, taken the high amount of flights (possible postings), would lead to an excessive amount of formalities for airline companies?
- fight against social dumping and unfair competition: related to the first value, can national employment rules applicable to the flying staff be objectively identified? Or can they be freely chosen by the airline companies, allowing forum shopping for the least protective rules?

12. Second, in a more general way, the second sub research question (is the current legislative framework appropriate for the aviation sector?) will be answered by this report, as it will assess the suitability and appropriateness of the existing legislative framework as a whole, using the same criteria of appropriateness.

iv) Reform of the legislative framework

13. In the last **fifth chapter**, a normative research is necessary to answer the third research question. Should the current legislative framework be found to be not adapted to the specificities of the aviation sector, normative reforms will be proposed along three axes:

- Scope of application: reforms going from the European, national through to subnational and company level would be considered, with a preference for European reforms which harmonize the level-playing field;

- Nature of the norms: hard law reforms would be considered under the form of European regulation/directive and/or national law implementing European law. Soft law reforms would also be a possibility where hard law is not feasible for legal and/or political reasons. Social dialogue at both European and national level would also be considered as well as judicial strategies aiming at refining the case law of the European Court of Justice on the situation of the workers of the aviation sector;
- Content of the norms: reforms could aim at exempting, in part or in full, the aviation sector from the rules on posting. These exemptions could be applied for a period limited in time such as been proposed by the Commission for road transport sector. Reforms could also aim at modifying, clarifying and/or interpreting the rules described above to decrease uncertainty arising from the application of these rules.

14. The normative proposals made in this chapter should help find an answer for the central research question: How can the EU rules regarding posting of workers accommodate the situation of highly mobile aircrew workers in the international aviation sector?

CHAPTER 1. EU LEGISLATIVE FRAMEWORK

1 INTRODUCTION

15. This chapter provides the theoretical background of this research report. It purports to describe the EU legislative framework applicable to the posting of workers with specific attention being paid to the situation of aircrew in the aviation sector.

16. More specifically, this chapter summarizes the rules with regard to applicable legislation both from a social security perspective (Regulation 883/2004) and from an employment law perspective (Rome I Regulation). While social security law applicable to aircrew depends on the home base (*Section 2*), applicable employment law is in principle determined on the basis of the habitual place of work (*Section 3*). The habitual place of work is also the main criterion to be used for determining the competent jurisdiction when a dispute arises between an employer and its employee (Brussels Ibis Regulation). In the *Crewlink* case[1], the European Court of Justice made clear that the home base is the predominant factor when it comes to locate the habitual place work but that it should give way when other factors point towards a place of work located in another member state (*Section 4*). Finally, EU posting of workers legislation, i.e. the (Revised) Posting of Workers Directive and the Enforcement Directive, applies to temporary work in another member state than the member state of the habitual place of work. The aviation sector is subject to the full force of these rules so that they should be examined with a particular focus on the issues their application raises for this sector and on the recent cases which have brought these issues to light (*Section 5*).

17. This chapter does not examine the posting of aircrew from a tax perspective. Nor does this chapter examine the employment and social security rules which would apply to posting of aircrew falling outside the scope of the EU legislative framework and for which research into national law and/or international law would become relevant.

2 SOCIAL SECURITY : THE HOME BASE AND ITS LIMITS

18. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereafter "Regulation 883/2004") determines which social security legislation should be applied in an EU context. It covers nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors, but Regulation (EU) No 1231/2010 extends modernized coordination to nationals of non-EU countries (third-country nationals) legally resident in the EU and in a cross-border situation. Their family members and survivors are also covered if they are in the EU.

[1] CJEU 14 September 2017, *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, C-168/16 and C-169/16, ECLI:EU:C:2017:688.

19. Regulation 883/2004 in principle retains the law of the place of work (*lex loci laboris*) as the only law applicable for social security purposes.

20. However, Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 has amended Regulation 883/2004 and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation 883/2004, with a view to refer to the "home base" to determine the social security legislation applicable to flight crew or cabin crew member performing air passenger or freight services in an EU context.

21. The fourth recital of Regulation 465/2012 specifies that the concept of 'home base', for flight crew and cabin crew members, under Union law is defined in Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation. In order to facilitate the application of Title II of Regulation 883/2004 to this group of persons, it is justified to create a special rule whereby the concept of 'home base' becomes the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the 'home base' principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands.

22. For the purpose of determining the legislation applicable, article 11 (5) of Regulation 883/2004 therefore provides that "an activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located".

23. Annex III to Regulation (EEC) No 3922/91 defines the home base as "the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned" (Subpart Q, OPS 1.1095, point 1.7). In that respect, it is important to note that an operator must nominate a home base for each crew member (point 3.1) and that this home base is decisive, as the title of Subpart Q indicates, for verifying respect of flight and duty time limitations and rest requirements.

24. The home base has been referred to with the aim of avoiding the risk of social dumping arising from the previous situation where the airline companies could *de facto* choose the applicable legislation in function of the place where they established their seat as the notion of substantial activity in the place of residence was difficult to apply to aircrew (F. Verbrugge, "Règlements européens de sécurité sociale – Développements récents", *Ors.*, 2013, p. 18; M. Morsa, "Dumping social dans le secteur du transport européen – Appel à un meilleur encadrement européen des pratiques sociales", *J.T.T.*, 2014, p. 422-423).

25. Difficulties arising from the previous situation came to the fore in the *Vueling* case for which the Advocate General Saugmandsgaard delivered an opinion on 11 July 2019[2]. In 2012, Vueling Airlines SA ('Vueling') was convicted for having employed flying personnel at Paris-Charles-de-Gaulle Airport at Roissy (France) without having affiliated them to the French social security scheme. The personnel in question had been covered by the Spanish social security scheme and placed on the 'posting of workers' scheme. Vueling had obtained E 101 certificates from the Spanish competent institution certifying that situation, but the French criminal court had disregarded them.

These references for a preliminary ruling are part of the aftermath of Vueling's conviction. They have been made by the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France) and by the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber, France), concerning claims for damages in respect of the same facts brought by (i) the caisse de retraite du personnel navigant de l'aéronautique civile (the retirement fund for civil aviation flying personnel; 'CRPNPAC') and (ii) Mr Jean-Luc Poignant against Vueling concerning the loss which they claim to have sustained as a result of not being covered in France. The question of the binding effect of the E 101 certificates obtained by Vueling is raised in that case and the European Court of Justice is invited to clarify the precise scope of its judgment in *Altun and Others*, in which it accepted, in principle, that the court of the host Member State is not bound by an E 101 certificate in the event of fraud. [3]

The Advocate General confirms that the court of the host Member State has jurisdiction to disregard an E 101 certificate when it has before it evidence establishing that that certificate was obtained or relied on fraudulently but more importantly, he analyses the concept of fraud in further details in the context of posting. For the Advocate General, the flying personnel of an airline that, like Vueling, is active in the international transport of passengers, cannot be posted to another member state and so be issued certificate E 101 on this basis.

For the Advocate General,

> *"that interpretation follows, first of all, from the scheme of Regulation No 1408/71. The rules on posting and those applicable to the travelling or flying personnel of international transport undertakings constitute, as the first part of Article 14 of that regulation indicates, two exceptions to the lex loci laboris principle laid down in Article 13(2)(a) of that regulation. The structure of Article 14 and its relationship with Article 13 underscore the fact that the first exception is not intended to be relied on in order to derogate from the second".*

For the Advocate General,

> *"that interpretation is unavoidable, next, having regard to the actual wording of the relevant provisions of Regulation No 1408/71, read in the light of the general context of which those provisions form part. It will be recalled that Article 14(1)(a) of that regulation refers to 'a person employed in the territory of a Member State … who is posted … to the territory of another Member State'. Conversely, Article 14(2)(a) of that*

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[2] *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines* SA, Joined Cases C-370/17 and C-37/18 ECLI:EU:C:2019:592.
[3] CJEU 6 February 2018, C-359/16, ECLI:EU:C:2018:63, *Altun and others..*

regulation refers to the situation of workers deemed to be employed, as stated in the first part of that paragraph, 'in the territory of two or more Member States. In that regard, although the concept of 'posting', within the meaning of Article 14(1)(a) of Regulation No 1408/71, is not defined in that regulation, the conditions laid down in that provision reflect the idea of a sedentary worker, habitually employed in one Member State, sent on a temporary basis to another Member State and eventually returning to the first Member State. The flying personnel of an airline, employed on board aircraft making international flights, cannot form part of such an arrangement, as they are not connected to the territory of a Member State where their work is habitually carried out. For those personnel, who are mobile by definition, the carrying out of activities in several Member States is a normal aspect of their working conditions. That context justifies the EU legislature having established, in that regulation, a criterion of specific connection for those personnel."

The findings of the Advocate General are useful for this study in the sense that they confirm that one could not possibly apply posting rules, here from a social security perspective, to flying staff which are mobile by definition because of the carrying out of activities in several Member States as a normal aspect of their working conditions. This resonates with the findings of this report but, for the rest, this opinion should be used with caution as it pertains to the old Regulation 1408/71 which contained a specific derogation to the *lex labori loci* for travelling or flying personnel of international transport undertakings which was not referring to the home base but to the registered office or place of business except where i) the said undertaking employed a person in a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, ii) a person was employed principally in the territory of the Member State in which he resides.

26. The following legal developments, relevant for this report, are contained in the 2013 practical guide on the applicable legislation published by the European Commission which was prepared and agreed by the Administrative Commission for the Coordination of Social Security Systems (p. 31 to 34):

- Regulation 465/2012, which applies as of 28 June 2012, refers to "home base" as the only decisive criterion for determining the social security legislation applicable to flight and cabin crew members. By introducing the concept of "home base", the legislator created in Article 11(5) of Regulation 883/2004 a legal fiction with the purpose of simplifying the determination of applicable legislation for flying personnel. The applicable legislation is directly connected to the "home base" as this is the location where the person is physically located and with which s/he has a close connection in terms of her or his employment. All new contracts with flight and cabin crew members concluded after 28 June 2012 should therefore be assessed on the basis of the new Article 11(5). Flight and cabin crew members who were engaged before 28 June 2012 are not affected by the new rules if their situation remains unchanged and they do not ask to be subject to the new rule.
- In accordance with Article 19(1) of Regulation 987/2009, the applicable legislation shall be determined and the Portable document A1 issued by the Member State where the "home base" is located, if the person concerned has only one stable home base.
- Where flight or cabin crew members have two or more home bases in different Member States, the designated institution of the Member State of residence shall determine the competent State on the basis of the conflict of law rules contained in

Article 13 of Regulation 883/2004. [4] The same goes for flight and cabin crew members who are engaged for short successive assignments of only a few months in different Member States (for example, who are engaged through employment agencies). If they have changed home bases regularly within a period of 12 calendar months preceding the last determination of the applicable legislation, or it is likely that they will regularly change home bases within the next 12 calendar months, their situation must be assessed in accordance with Article 13(1) of Regulation 883/2004. The procedure of Article 16 of Regulation 987/2009 applies to these situations, which means that the designated institution in the Member State of residence shall determine the applicable legislation for the person concerned.

- A temporary change of a home base, for example due to seasonal demands at specific airports, or the opening of a new "home base" in another country by the operator, does not lead to an automatic change of the applicable legislation for the person concerned. Short assignments can be dealt with by the posting provisions, which allow a secondment of up to 24 months without having to change the applicable legislation, provided that the posting conditions are fulfilled.
- If a situation cannot be dealt with under the posting provisions and there is a frequent or regular change of home bases, this shouldn't automatically lead to frequent changes in the applicable legislation for flight and cabin crew members either. It follows from Article 14(10) of Regulation 987/2009 that the applicable legislation is assessed on the basis of a projection of work for the following 12 calendar months and in principle should remain stable during that period. As expressed in Recital 18b of Regulation 465/2012 and laid down in Paragraph 6 of this Guide, the so called "yo-yo" effect must be avoided. This means that the determination of applicable legislation for flying personnel should not be subject to review for a period of at least 12 months following the last decision on applicable legislation, on the condition that there is no substantial change in the situation of the person concerned, but only a change in the usual work patterns.
- The concept of a 'home base' for flight and cabin crew members is a concept under EU law. Its use in Regulation 883/2004 as a reference point for the determination of applicable legislation is, as is the regulation itself, restricted to the territory of the EU. The concept cannot be applied if a person concerned – even if s/he is an EU national – has his/her home base outside the EU, from which s/he undertakes flights to different EU Member States. In this situation, the general conflict rule for working in two or more Member States continues to apply.
- In the situation where an EU national resides in a third country but works as a flight or cabin crew member from a home base in a Member State, that Member State shall be competent for his/her overall activities within the EU. A third country national who is legally resident in an EU Member State and who is working as a flight or cabin crew member from a home base located in another Member State falls under the material scope of Article 1 of Regulation (EU) No 1231/2010. Consequently, the Member State where the home base is located becomes competent on the basis of Article 11(5) of Regulation 883/2004.

27. It appears from the above that the home base rule does not apply :

[4] We can question whether it is actually possible to have two or more home bases at the same time. Indeed, according to the relevant flight time rule ORO.FTL.200 - CS FTL.1.200 each crew member can only be assigned one home base. This rule states:
"(a) The home base is a single airport location assigned with a high degree of permanence.
(b) In the case of a change of home base, the first recurrent extended recovery rest period prior to starting duty at the new home base is increased to 72 hours, including 3 local nights. Travelling time between the former home base and the new home base is positioning."

- If the worker has several home bases in the EU[5];
- If the home base of the worker is located outside the EU;
- If the home base is expected to change regularly within the next 12 months or in the case of short successive assignments of only a few months in different Member States (for example, flying personnel who are engaged through employment agencies);
- If the worker is a third-country national who has his home base in the EU member state where he is legally resident.

28. In said circumstances except the last one, one falls back on article 13(1) of Regulation 883/2004 which provides that:

> "*A person who normally pursues an activity as an employed person in two or more Member States shall be subject:*
>
> *(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or*
>
> *(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:*
>
> *(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or*
>
> *(ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or*
>
> *(iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or*
>
> *(iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence*."

29. According to the Commission's guide on the applicable legislation, this article covers the <u>normal pursuit of two or more activities in several member states</u>. As all the rules for determining the applicable legislation, the rules are designed to ensure that the social security legislation of only one Member State is applicable at a time (p. 24).

Article 14(5) of Regulation 987/2009 provides that a person who 'normally pursues an activity as an employed person in two or more Member States' is a person who simultaneously or in alternation exercises one or more separate activities in two or more Member States for the same undertaking or employer or for various undertakings or employers.

The provision was adopted in order to reflect the various cases already dealt with by the Court of Justice of the EU. The intention is to cover all possible cases of multiple activities with a

[5] See footnote 4.

cross-border element and to distinguish activities which, as a rule, habitually extend over the territory of several Member States from those that are exercised exceptionally or temporarily.

30. According to the same guide, activities that are performed simultaneously covers cases where additional activities in different Member States are carried out simultaneously under the same or different employment contracts. The second or additional activity could be exercised during paid leave, during the weekend, or in the case of part-time work, two different activities for two different employers may be undertaken on the same day. For example […] International road transport workers driving through different Member States to deliver goods are also an example of persons working 'simultaneously' in two or more Member States. In general, it can be said that coinciding activities are a normal aspect of the working pattern and there is no gap between the activities in one Member State or the other.

On the other hand, activities that are performed in alternation covers situations where the activities are not carried out simultaneously over the territory of several Member States, but consists in successive work assignments carried out in different Member States, one after another. To determine if the activities are carried out during successive periods, not only must the anticipated duration of periods of activity be considered, but also the nature of the employment in question. It is not relevant how often this alternation takes place but some regularity in the activity is required (p. 24).

31. It appears from article 13(1) that a person who normally pursues an activity as an employed person in two or more Member States shall be subject to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State. Only if it is not the case, the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated will become applicable. With a view to determine if a person exercises a substantial part of his or her activities in the member state of residence, the allocation of working time and/or remuneration between member states will examined. A substantial part of the activity will be pursued in the member state of residence when either of these criteria attain the 25% limit (p. 28, practical guide).

32. As regards, specifically international transport workers, where the working hours spent in the Member State of residence are not available, or when it is not clear from the circumstances as a whole that a substantial part of the activity is spent in the Member State of residence, then a method other than working hours can be used for determining whether or not a substantial part of the activity is pursued in the Member State of residence. In this regard it is suggested that the activity is broken down into different elements or incidents and a judgement concerning the extent of activity in the state of residence is made on the basis of the number of elements occurring there as a percentage of the total number of incidents in a given period (as outlined above, the assessment should be based as far as possible on work patterns over a 12 month period) (p. 30, practical guide). In the case of air transport, the focus could, for instance, be on boarding and onboarding and the different countries in which this takes place.

33. Except for the specific circumstances provided for in point 28, the home base should be applied and retained over a certain period of time (in principle 12 months) so that

a temporary change of home base does not lead automatically to a change of applicable legislation.

This stability results from the application of article 12 of Regulation 883/2004 on the neutrality of posting for the purpose of determining the applicable legislation :

> *"A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person."*

In that respect, article 14 (7) of Regulation 287/2009 sheds light on the main difference between posting and normal pursuit of several activities :

> *"For the purpose of distinguishing the activities under paragraphs 5 and 6 from the situations described in Article 12(1) and (2) of the basic Regulation, the <u>duration of the activity in one or more other Member States (whether it is permanent or of an ad hoc or temporary nature) shall be decisive</u>. For these purposes, an overall assessment shall be made of all the relevant facts including, in particular, in the case of an employed person, the place of work as defined in the employment contract."*

34. When the posting exceeds the 24 months limit, the temporary home base from which the aircrew exercises his activity becomes the permanent home base for the purpose of determining the applicable legislation unless an extension of the posting period has been granted for a maximum period of 5 years (art. 16, Regulation 883/2004).

35. To the authors' knowledge, the concept of home base introduced into Regulation 883/2004 in 2012 has not so far generated any litigation before the Court of Justice of the European Union. The only case where this concept is discussed pertains to the competent jurisdiction under Brussels I Regulation and not to social security legislation. Maybe the existence of specific guidelines concerning the determination of social security in the aviation sector in the EU practical guide has contributed to this regulatory stability.

3 EMPLOYMENT LAW: THE HABITUAL PLACE OF EMPLOYMENT

36. Employment law applicable in an EU context is determined in accordance with article 8 of 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), which provides as follows:

> "*1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.*
>
> *2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed 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. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."

37. The Rome I Regulation has replaced the Rome Convention of 19 June 1980 on the law applicable to contractual obligations for contracts concluded after 17 December 2009. The main difference between article 6 of the Rome Convention and article 8 of the Rome I Regulation is that the former refers to the habitual place of work as the place in which the employee habitually carries out his work whereas the article 8 of the Rome I Regulation refers also to the place *from which* the employee habitually carries out his work.

38. The Rome I Regulation is applicable within Member States' territories independently from the nationality or residence of the parties and is characterized by its universal application so that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State" (art. 2).

39. Therefore, the law of the habitual place of work is, according to article 8 of the Rome I Regulation, in principle applicable unless the parties agree otherwise. Even if the parties have chosen the applicable law, this could not have the effect of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice, so the law of the habitual place work and if this place cannot be determined the place of business through which the employee was engaged with the reservation that these two places could be discarded if the contract is more closely connected with another EU country.

40. In that respect, posting, which requires that a professional activity is exercised on a temporary basis from a place which is different from the place where the worker habitually carries out his work in performance of the contract, should not change the habitual place of work.

41. For transport services, the caselaw of the ECJ has clarified the factors to be taken into consideration with a view to determine the habitual place of work. In *Koelzsch* (C-29/10)[6], the European Court of Justice has held that:

"*42. It follows that, in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must be understood as guaranteeing the applicability of the law of the State in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and […] it is there that the business and political environment affects employment activities.*

[6] CJEU 15 March 2011, *Heiko Koelzsch v État du Grand Duchy of Luxemburg*, C-29/10, ECLI:EU:C:2011:151.

Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.

43. Consequently, in the light of the objective of Article 6 of the Rome Convention, it must be held that the criterion of the country in which the employee 'habitually carries out his work', set out in Article 6(2)(a) thereof, must be given a <u>broad interpretation</u>, while the criterion of 'the place of business through which [the employee] was engaged', set out in Article 6(2)(b) thereof, ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out.

44. It follows from the foregoing that the criterion in Article 6(2)(a) of the Rome Convention can apply also in a situation, such as that at issue in the main proceedings, where the employee carries out his activities <u>in more than one Contracting State</u>, if it is possible, for the court seised, to determine the State with which the work has a <u>significant connection</u>.

45. According to the Court's case-law, cited in paragraph 39 of the present judgment, which remains relevant to the analysis of Article 6(2) of the Rome Convention, where work is carried out in more than one Member State, the criterion of the country in which the work is habitually carried out must be given a broad interpretation and be understood as referring to <u>the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities</u>.

46. Moreover, that interpretation is consistent also with the wording of the new provision on the conflict-of-law rules relating to individual contracts of employment, introduced by Regulation No 593/2008, which is not applicable to the present case ratione temporis. According to Article 8 of that regulation, to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract is to be governed 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. That law remains applicable also where the employee carries out duties temporarily in another State. Furthermore, as stated in recital 23 in the preamble to that regulation, the interpretation of that provision must be prompted by the principles of favor laboratoris in that the weaker parties to contracts must be protected 'by conflict-of-law rules that are more favourable'.

47. It follows from the foregoing that the referring court must give a <u>broad interpretation</u> to the connecting criterion laid down in Article 6(2)(a) of the Rome Convention in order to establish whether the appellant in the main proceedings habitually carried out his work in one of the Contracting States and, if so, to determine which one.

48. Accordingly, in the light of the nature of work in the <u>international transport sector</u>, such as that at issue in the main proceedings, the referring court must, as proposed by the Advocate General in points 93 to 96 of her Opinion, take account of <u>all the factors which characterise the activity of the employee</u>.

> *49. It must, in particular, determine in which State is situated 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. It must also 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.*
>
> *50. In those circumstances, the answer to the question referred is that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer."*

42. In *Voogsgeerd* (C-384/10) [7], the European Court of Justice has confirmed the interpretation to be given to the notion of "habitual place of work" in the transport sector which is that "*in which or from which, in the light of all the aspects characterising that activity, the employee performs the main part of his duties to his employer*".

By ruling on the notion of "habitual place of work" as it did, the European Court of Justice has favored a consistent interpretation of the Rome I Convention (now Rome I regulation) in the light of the Brussels Convention (now Brussels Ibis Regulation) (see infra).

43. If the habitual place of work cannot be determined, the place of business through which the worker was engaged will determine the applicable law. In *Voogsgeerd*, the Court has insisted on the subsidiary nature of this criterion mentioned in article 6 of the Rome Convention (now article 8 of the Rome I Regulation), which must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment, even if this place does not have legal personality. It is only if the habitual place of work cannot be identified that the place of hiring will be taken into account.

This last criterium (the place of business through which the worker was engaged) creates unpredictability and opens the way to forum shopping by airline companies who will hire flying staff from places located in countries with less protective rules.

44. It should however be borne in mind that where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in accordance with the two aforementioned criteria, the law of that other country shall apply.

In that respect, according to the European Court of Justice[8]:

> "*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,*

[7] CJEU 15 December 2011, *Jan Voogsgeerd v Navimer SA*, C-384/10, ECLI:EU:C:2011:842.
[8] CJEU, 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*. C-64/12, ECLI:EU:C:2013:551, para. 41.

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."

4 COMPETENT JURISDICTION: THE HABITUAL PLACE OF EMPLOYMENT

45. 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 Regulation) (now replaced by Regulation (EU) No 1215/2012 – Brussels Ibis Regulation) provides that (art. 21):

"*1. An employer domiciled in a Member State may be sued*

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1."

46. The Brussels Ibis Regulation is applicable within Member States' territories but it cannot be invoked against defendants who are not domiciled in a Member State and for which national rules of the seized jurisdiction will apply. Nevertheless, employment contracts are an exception since employers who are not based in the EU may be sued by their employee in the Member State where they habitually carry out their work (art. 6).

47. It is noteworthy that the issue of the "habitual place of work" in cross-border situations has first of all emerged as regards article 5(1) of the Brussels Convention (current art. 21 of the Brussels Ibis Regulation), only to be later on transposed, with the *Koelzsch* case to the Rome Convention. Regarding cases where the employee carries out his work in more than one Contracting State, the Court gave its first ruling in 1993 in *Mulox*[9]. In that case, the Court held that Article 5(1) of the Brussels Convention must be interpreted as meaning that, in the case of a contract of employment in pursuance of which the employee performs his work in more than one Contracting State, the place of performance of the obligation characterising the contract is the place where or from which the employee principally discharges his obligations towards his employer.

48. In the *Rutten* judgment of 1997 the Court took the view that Article 5(1) of the Brussels Convention refers to the place where the employee has established the effective centre of his working activities. In its reasoning, the Court also pointed out that it is the place

[9] Case C-125/92 Mulox IBC [1993] ECR I-4075.

where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer[10].

49. In the *Weber* judgment of 2002, the Court held however that Article 5(1) of the Brussels Convention must be interpreted as meaning that the place where the employee habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer. The Court also pointed out that, if the employee works in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of that provision, and that, failing other criteria, that will be the place where the employee has worked the longest[11].

50. In *Pugliese* (C-437/00)[12], the European Court of Justice has ruled that in a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee's contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter.

51. In *Sandra Nogueira and others against Crewlink Ireland Ltd* (C-168/16) and *Ryanair* (C-169/16) [13], The European Court of Justice had to deal with a separate but related question. Can the concept of 'place where the employee habitually carries out his work', as provided for in Article 19(2)(a) of the Brussels I Regulation, be equated with that of 'home base', as provided for in Annex III to Regulation No 3922/91?

52. In the aforementioned case, the European Court of Justice has provided a convenient summary of the current state of the caselaw over the determination of the habitual place of work:

> "*55 […] it must be noted that the autonomous interpretation of Article 19(2) of the Brussels I Regulation does not preclude the* <u>*corresponding provisions in the Rome Convention*</u> *from being taken into account, since that convention, as is apparent from its preamble, also aims to continue, in the field of private international law, the work of unification of law which has already been done within the Union, in particular in the field of jurisdiction and enforcement of judgments.*
>
> *56 As noted by the Advocate General in point 77 of his Opinion, the Court has already* <u>*interpreted*</u>*, in the judgments of 15 March 2011, Koelzsch (C-29/10, EU:C:2011:151), and of 15 December 2011, Voogsgeerd (C-384/10, EU:C:2011:842),* <u>*the Rome Convention in the light in particular of the provisions of the Brussels Convention*</u> *relating to individual contracts of employment.*

[10] Case C-383/95 Rutten [1997] ECR I-57.
[11] Case C-37/00 Weber [2002] ECR I-2013; and Case C-437/00 Pugliese [2003] ECR I-3573.
[12] Case C-437/00 Pugliese [2003] ECR I-03573.
[13] CJEU 14 September 2017, *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, C-168/16 and C-169/16, ECLI:EU:C:2017:688.

57 As regards the determination of the 'place where the employee habitually carries out his work', within the meaning of Article 19(2)(a) of the Brussels I Regulation, the Court has repeatedly held that the criterion of the Member State where the employee habitually carries out his work must be interpreted broadly (see, by analogy, judgment of 12 September 2013, Schlecker, C-64/12, EU:C:2013:551, paragraph 31 and the case-law cited).

58 As regards an employment contract performed in the territory of several Contracting States and where there is no effective centre of professional activities from which an employee performs the essential part of his duties vis-à-vis his employer, the Court has held that Article 5(1) of the Brussels Convention must — in view of the need to establish the place with which the dispute has the most significant link, so that it is possible to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract and to avoid multiplication of the courts having jurisdiction — be interpreted as referring to <u>the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer</u>. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend such proceedings and where the courts best suited to resolving disputes relating to the contract of employment are situated (see, to that effect, judgment of 27 February 2002, Weber, C-37/00, EU:C:2002:122, paragraph 49 and the case-law cited).

59 Thus, in such circumstances, the concept of 'place where the employee habitually carries out his work' enshrined in Article 19(2)(a) of the Brussels I Regulation must be interpreted as referring to the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer.

60 In the present case, the disputes in the main proceedings concern employees employed as members of the air crew of an airline or assigned to the latter. Thus, the court of a Member State seised of such disputes, when it is not able to determine with certainty the 'place where the employee habitually carries out his work', must, in order to assess whether it has jurisdiction, identify 'the place from which' that employee principally discharged his obligations towards his employer.

61 As the Advocate General pointed out in point 95 of his Opinion, it is also apparent from the case-law of the Court that, to determine specifically that place, the national court must refer to a <u>set of indicia</u>.

62 That <u>circumstantial method</u> makes it possible not only to reflect the true nature of legal relationships, in that it must take account of <u>all the factors which characterise the activity of the employee</u> (see, by analogy, judgment of 15 March 2011, Koelzsch, C-29/10, EU:C:2011:151, paragraph 48), but also to prevent a concept such as that of 'place where, or from which, the employee habitually performs his work' from being exploited or contributing to the achievement of circumvention strategies (see, by analogy, judgment of 27 October 2016, D'Oultremont and Others, C-290/15, EU:C:2016:816, paragraph 48 and the case-law cited).

63 As observed by the Advocate General in point 85 of his Opinion, as regards work relationships in the transport sector, the Court, in the judgments of 15 March 2011, Koelzsch (C-29/10, EU:C:2011:151, paragraph 49), and of 15 December 2011, Voogsgeerd (C-384/10, EU:C:2011:842, paragraphs 38 to 41), mentioned several indicia that might be taken into consideration by the national courts. Those courts must, in particular, determine in which Member State is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found.

64 In that regard, in circumstances such as those at issue in the main proceedings, and as pointed out by the Advocate General in point 102 of his Opinion, the place where the aircraft aboard which the work is habitually performed are stationed must also be taken into account.

65 Consequently, the concept of 'place where, or from which, the employee habitually performs his work' cannot be equated with any concept referred to in another act of EU law.

66 As regards the air crew, assigned to or employed by an airline, that concept cannot be equated with the concept of 'home base', within the meaning of Annex III to Regulation No 3922/91. Indeed, the Brussels I Regulation does not refer to Regulation No 3922/91, nor does it have the same objectives, the latter regulation aiming to harmonise technical requirements and administrative procedures in the field of civil aviation safety.

67 The fact that the concept of 'place where the employee habitually carries out his work', within the meaning of Article 19(2)(a) of the Brussels I Regulation, cannot be equated with that of 'home base', within the meaning of Annex III to Regulation No 3922/91, does not however mean, as stated by the Advocate General in point 115 of his Opinion, that that latter concept is irrelevant in order to determine, in circumstances such as those at issue in the cases in the main proceedings, the place from which an employee habitually carries out his work.

68 More specifically, as is apparent from paragraphs 61 to 64 of the present judgment, the Court has already highlighted the need to use a circumstantial method in identifying that place.

69 In that regard, the concept of 'home base' amounts to a factor likely to play a significant role in the identification of the indicia, referred to in paragraphs 63 to 64 of the present judgment, making it possible, in circumstances such as those at issue in the main proceedings, to determine the place from which employees habitually carry out their work and, consequently, whether a court is likely to have jurisdiction over an action brought by those employees, in accordance with Article 19(2)(a) of the Brussels I Regulation.

70 That concept is defined in Annex III to Regulation No 3922/91, under OPS 1.1095, as the place from which the air crew systematically starts its working day and

ends it by organising its daily work there and close to which employees have, during the period of performance of their contract of employment, established their residence and are at the disposal of the air carrier.

71 According to OPS 1.1110 of that annex, the minimum rest periods of employees, such as the appellants in the main proceedings, vary according to whether that period is allocated away from or from that 'home base', within the meaning of Annex III to Regulation No 3922/91.

72 Furthermore, it must be noted that that place is not determined randomly or by the employee, but, in accordance with OPS 1.1090, point 3.1, of that annex, by the operator for each crew member.

73 It would only be if, taking account of the facts of each of the present cases, applications, such as those at issue in the main proceedings, were to display closer connections with a place other than the 'home base' that the relevance of the latter for the identification of 'the place from which employees habitually carry out their work' would be undermined (see, to that effect, judgment of 27 February 2002, Weber, C-37/00, EU:C:2002:122, paragraph 53, as well as, by analogy, judgment of 12 September 2013, Schlecker, C-64/12, EU:C:2013:551, paragraph 38 and the case-law cited).

74 Moreover, the autonomous nature of the concept of 'place where the employee habitually carries out his work' cannot be called into question by the reference to the concept of 'home base', within the meaning of that regulation, contained in the wording of Regulation No 883/2004, since that regulation and the Brussels I Regulation pursue different objectives. Indeed, whereas the Brussels I Regulation has the objective referred to in paragraph 47 of the present judgment, Regulation No 883/2004 has as its objective, as stated in recital 1 thereof, in addition to free movement of persons, 'contribut[ing] towards improving their standard of living and conditions of employment'.

75 Furthermore, the argument that the concept that the place where, or from which, the employee habitually carries out his work, to which Article 19(2)(a) of the Brussels I Regulation refers, is not, as is apparent from paragraph 65 of the present judgment, to be equated with any other concept, applies also as regards the 'nationality' of aircraft, within the meaning of Article 17 of the Chicago Convention.

76 Thus, and contrary to the claims made by Ryanair and Crewlink in the context of their observations, nor can the Member State from which a member of the air crew, assigned to or employed by an airline, habitually carries out his work be equated with the territory of the Member State of nationality of the aircraft of that company, within the meaning of Article 17 of the Chicago Convention.

77 In the light of the foregoing, the answer to the questions referred is that Article 19(2)(a) of the Brussels I Regulation must be interpreted as meaning that, in the event of proceedings being brought by a member of the air crew, assigned to or employed by an airline, and in order to establish the jurisdiction of the court seised, the concept

of 'place where the employee habitually carries out his work', within the meaning of that provision, cannot be equated with that of 'home base', within the meaning of Annex III to Regulation No 3922/91. The concept of 'home base' constitutes nevertheless a significant indicium for the purposes of determining the 'place where the employee habitually carries out his work'."

53. It is important to note that the reasoning of the European Court of Justice in this case can be applied by analogy to the notion of habitual place of employment in the Rome I Regulation, for the European Court of Justice itself has drawn such a parallel in the past, particularly in the *Koelzsch* case.

54. Based on the aforementioned cases, several indicia might be taken into consideration by the national courts with a view to determine the habitual place of employment in the aviation sector :

i. the place from which the worker carries out his transport-related tasks,

ii. the place where he returns after his tasks, receives instructions concerning his tasks and organizes his work,

iii. the place where his work tools are to be found,

iv. the place where the aircraft aboard which the work is habitually performed is stationed, and

v. the place where the 'home base' is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

55. If the habitual place of work cannot be determined, the employee will only be able to sue the employer before the jurisdiction of the place of business through which he was engaged or before the place of the employer's domicile.

5 THE IMPACT OF POSTING ON APPLICABLE EMPLOYMENT LAW

5.a The Posting of Workers Directive

56. With Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereafter "the Directive") [14], the EU laid down the applicable rules for the working conditions of workers who were posted by their company in another EU Member State.

57. This Directive is based on the previous Treaty establishing the European Community, and in particular Articles 57 (2) and 66 thereof, which pertain respectively to the procedures for adopting legislative acts facilitating the freedom to establishment recognized to nationals of a Member State in the territory of another Member State (art. 49 TFEU) and the freedom to provide services recognized to nationals of a Member State who are established in a Member State other than that of the person for whom the services are intended (art. 56 TFEU). This is noteworthy as the standard legal basis for implementing the Union's transport

[14] 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 OJ L 18, 21.1.1997, 1-6.

policy, which includes the freedom to provide services in the field of transport, is Article 91 TFEU. This article was not retained as a legal basis for the EU posting legislation. Should we infer therefrom that the Directive is not applicable to transport? This would be going too far as the EU legislator itself, as we will see below, has adopted specific provisions regarding transport *within* the EU legislation on posting.

58. As things stand, it should be noted that restrictions to both freedom may be lifted in accordance with ordinary legislative procedure involving the Parliament and the Council as co-legislators upon a proposal from the Commission (arts 50 and 59 TFEU). It should also be kept in mind that "*the freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport*" (art. 58 TFEU). A similar provision existed when the Directive was adopted (art. 61 TEC) and co-decision was the legislative procedure used at the time of its adoption, which corresponds to the current ordinary legislative procedure.

59. As freedom to provide services requires that services be temporarily provided in another Member State, it can be useful to remind how the European Court of Justice apprehends this concept even if it should be distinguished from the temporary posting of workers which may take place both in a free movement of services and freedom of establishment framework (see infra). For the European Court of Justice, 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, periodicity or continuity*"[15]. However, an activity carried out on a permanent basis or at least without a foreseeable limit to its duration does not fall within the freedom to provide services but rather pertains to the freedom of establishment[16].

60. Accord to the third recital of the Directive, "*the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed*". Further, according to the fifth recital, "*any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*". Therefore, as stated in the thirteenth recital, "*the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided*" so that "*a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting*".

61. As to the link with the Rome I Regulation (previously Rome Convention), the ninth recital provides that "*Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice*".

However, the tenth recital adds that "*Article 7 of the said Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to*

[15] Case 55/94 *Gebhard* ECR 1995 I-04165, para. 27
[16] Case 456/02 *Trojani* ECR 2004 I-07573, para. 28.

the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted".

Further, the eleventh recital provides that "*according to the principle of precedence of Community law laid down in its Article 20, the said Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts*".

62. We can infer therefrom that the Directive may be considered as a *lex specialis* compared with the Rome I Regulation in the sense that it specifies at EU level a set of overriding mandatory provisions which need to be applied to any posting situation that falls within its scope in accordance with article 9 of the Rome I regulation, despite that another law would be declared applicable by virtue of article 8 of the Rome I Regulation.

63. As to its specific scope, the Directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, to the territory of another Member State (art. 1 (1)).

The Directive does not apply to merchant navy undertakings as regards seagoing personnel (art. 1 (2)). No similar exemption exists for the aviation sector which is subject to the full range of rights and obligations contained in the Directive with the rest of the transport sector.

64. According to the Directive, transnational provision of services may take three different forms (art. 1(3)):

- Undertakings post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting (*standard posting*);

- Undertakings post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting (*intra-group posting*);

- A temporary employment undertaking or placement agency hires out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting (*interim agency posting*).

65. For the purposes of the Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works, while the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted (art. 2).

This definition may raise difficulties in the case of transport services as one could wonder if a transport worker who work in more than one Member State as part of his normal activity falls within its scope.

A preliminary question has been lodged with the European Court of Justice on this specific issue on 21 December 2018 by the Hoge Raad der Nederlanden (Netherlands)[17]. More particularly:

> "*1. Must the Posting of Workers Directive' be interpreted as meaning that it also applies to a worker who works as a driver in international road transport and thus carries out his work in more than one Member State?*
>
> *2.a. If the answer to Question 1 is in the affirmative, what criterion or considerations should be used to determine whether a worker working as a driver in international road transport is posted 'to the territory of a Member State' as referred to in Article 1(1) and (3) of the Posting of Workers Directive, and whether that worker 'for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works' as referred to in Article 2(1) of the Posting of Workers Directive?*
>
> *2.b. When answering question 2 (a), should any significance be attached to the fact that the undertaking posting the worker referred to in question 2(a) is affiliated — for example, in a group of companies — to the undertaking to which that worker is posted and, if so, what should that significance be?*
>
> *2.c. If the work undertaken by the worker referred to in question 2(a) relates partly to cabotage transport — that is to say: transport carried out exclusively in the territory of a Member State other than that in which that worker habitually works — will that worker then in any case for that part of his work, be considered to be working temporarily in the territory of the first Member State? If so, does a lower limit apply in that regard, for example, in the form of a minimum period per month in which that cabotage transport takes place?"*

The case is still pending but it raises important questions as to the notion of posted worker which are particularly relevant for the aviation sector as one could wonder if staff flying from and back to their home base on the same day or after a couple days may indeed be considered to be posted workers working temporarily in another member state than the one where they habitually work (see *infra*).

66. Another interesting case for the purpose of this report is *Dobersberger* in which a request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) was lodged on 9 January 2018 before the European Court of Justice[18]. In this case, a Hungarian company was employing Hungarian workers hired out by another Hungarian company on trains of the Austrian Federal Railways that were travelling to Salzburg or Munich, each of which had their starting or terminating station in Budapest and stopped at Vienna Central Station. A social inspection was conducted while the train stopped in Austria and the Hungarian company posting the worker was sued for non-compliance with the Austrian posting legislation.

By its first question, the referring court wishes to know whether the scope of Directive 96/71, in particular Article 1(3)(a), covers services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting in performance of a contract with a

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[17] Case C-815/18: Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 21 December 2018 — Federatie Nederlandse Vakbeweging v Van den Bosch Transporten B.V., Van den Bosch Transporte GmbH, Silo-Tank Kft

[18] Case C-16/18: Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 9 January 2018 — Michael Dobersberger OJ C 123, 9.4.2018, p. 10–11

railway undertaking established in the host Member State when these services are provided on international trains which also travel through the host Member State.

In his opinion, the Advocate General Szpunar considers that the provisions of the Directive are not applicable to this type of situation. Indeed, the Advocate General has difficulty in assuming that they are genuinely posted 'to the territory' of Austria. If anything, they are posted 'to the territory' of the train which, as it happens, passes through Austria. For the Advocate General, first, it is not only merchant navy undertakings as regards seagoing personnel that can be excluded from the scope of the directive. Other derogations are possible.

Secondly, mobile workers as for instance workers carrying out their duties on means of transport do not quite fit within the logic of the directive. To support this view, the Advocate General refers to the addendum to the minutes of the 1948th Council meeting held in Brussels on 24 September 1996. According to this addendum, a worker who is normally employed in the territory of two or more Member States and who forms part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water would not fall within the scope of Article 1(3)(a) of Directive 96/71.

In reply to the argument of the Austrian Government which points to Article 9(1)(b) of Directive 2014/67 which, in the context of administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in Directives 2014/67 and 96/71, allows Member States to impose the obligation to keep or make available documents for mobile workers in the transport sector, the Advocate General replies that the situation of highly mobile workers such as those in the case at issue is noticeably different from that of other mobile workers. What differentiates such highly mobile workers from other mobile workers is that their place of work is, in reality, immaterial. It does not matter whether the means of transport on which they carry out their duties happens, at a specific point in time, to be in Hungary, Austria or Germany. Put differently, the entire logic of the country of origin (or posting) and the country of destination does not apply in such a situation, as there is no country of destination: the train departs in Budapest. It comes back to Budapest. If anything, the country of destination is Hungary itself. Country of origin and destination coincide.

The Advocate General therefore fails to see how the situation of the workers of the case at issue differs from those working, say, on the Budapest tram. These workers normally work in or from Budapest where they start their work, load the trains, keep account of the stocks and so forth. Crucially, it is here where they have their (economic) centre of life, without being temporarily posted to the territory of the member states through which the train on which they work passes.

67. For the posting situations that fall within its scope, art. 3 (1) of the Directive imposes on the receiving Member States to establish provisions which render certain minimum terms and conditions of employment applicable to posted workers.

These minimum terms and conditions concern:

- maximum work periods and minimum rest periods;

- minimum paid annual holidays;

- the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

- health, safety and hygiene at work;

- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

- equality of treatment between men and women and other provisions on non-discrimination.

68. These terms and conditions shall not prevent application of terms and conditions of employment which are more favourable to workers in the state of origin (art. 3(7)).

69. Besides, there are exceptions to the application of these minimum terms and conditions provided for in the Directive. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the rules on minimum paid holidays and minimum rates of pay shall not apply, if the period of posting does not exceed eight days (art. 3(2)). Likewise, Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the minimum rates of pay in the cases of standard posting or intra-group posting when the length of the posting does not exceed one month (art. 3(3)). Member States may also authorise the social partners to conclude sectoral collective bargaining agreements in that respect for so long the posting does not exceed one month (art. 3(4)). Finally, Member States may provide for exemptions to be granted from the rules on minimum paid holidays and minimum rates of pay in the cases of standard posting or intra-group posting on the grounds that the amount of work to be done is not significant (art. 3(5)).

70. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting. For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker (art. 3(6)).

71. Moreover, the Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of (art. 3 (10)):

- terms and conditions of employment on matters other than those referred above in the case of public policy provisions,

- terms and conditions of employment laid down in the collective agreements or arbitration awards concerning activities other than those referred to in the Annex.

72. Finally, specific provisions are made for administrative cooperation between the public authorities competent for monitoring respect of the minimum terms and conditions, while adequate procedures should available for posted workers in order to enforce their rights before the jurisdictions of the member state of posting which must be competent, beside the competent jurisdiction according to the Brussels Ibis Regulation.

5.b The Enforcement Directive

73. Over the years, the Directive has received strong criticism. Especially after the eastern expansion of the EU in 2004 and 2007, it became clear that the Directive was not the effective instrument in the fight against social dumping it was intended to be. Some rulings of the Court of Justice of the EU have further intensified this criticism (e.g. *Viking*, C-438/05 and *Laval*, C-341/05). [19] The EU took steps to improve the enforcement of the Directive and its provisions by adopting Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC and amending Regulation (EU) No 1024/2012.[20]

74. In a nutshell, the Enforcement Directive was adopted with the aim to strengthen the practical application of posting rules by addressing issues related to

- fraud,
- circumvention of rules,
- inspections and monitoring,
- joint liability in subcontracting chains,
- exchange of information between the Member States.

75. With a view to identify genuine posting and prevent fraud and circumvention, the Enforcement Directive sets out a list of indicative criteria to be taken into account when assessing if an undertaking genuinely performs substantial activities in the member state of establishment (art. 4):

- the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;
- the place where posted workers are recruited and from which they are posted;

[19] CJEU 11 December 2007 , *ITF and FSU v. Viking Line* C-438/05, ECLI:EU:C:2007:772; CJEU 18 December 2007, *Laval und Partneri v. Svenska Byggnadsarbetareförbundet a.o.*, C-341/05, ECLI:EU:C:2007:809.

[20] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 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 L 159, 28.5.2014, 11-31.

- the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- the place where the undertaking performs its substantial business activity and where it employs administrative staff;
- the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

76. An indicative list of criteria is also provided for determining 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 (art. 4):

- the work is carried out for a limited period of time in another Member State;
- the date on which the posting starts;
- the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;
- the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
- the nature of activities;
- travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- any previous periods during which the post was filled by the same or by another (posted) worker.

77. The elements that are referred to above used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. They can therefore be used so as identify situations of false self-employment. In this respect, Member States should be guided, *inter alia*, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.

78. The Enforcement Directive also improves access to information and further administrative cooperation between Member States (art. 5-8).

79. More importantly for our purpose, the Enforcement Directive strengthens the monitoring of compliance by providing a list of administrative requirements and control measures that Member States may impose in case of posting (art. 9):

a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State,

containing the relevant information necessary in order to allow factual controls at the workplace;

b) an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;

c) an obligation to deliver the documents referred to under point b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;

d) an obligation to provide a translation of the documents referred to under point (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State;

e) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be;

f) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which the services are provided. That person may be different from the person referred to under point (e) and does not have to be present in the host Member State, but has to be available on a reasonable and justified request;

80. Member States may impose other administrative requirements and control measures, in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate (art. 9).

81. Member States should also make sure that the authorities designated under national law carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC (art. 10). They must also facilitate the defence of rights and the lodging of complaint by posted workers or their representatives both in the member state of origin and the member state of destination (art. 11). Besides, they must set up mechanisms of joint liability in subcontracting chains (art. 12). Finally, they must facilitate cross-border enforcement of financial administrative penalties and/or fines (art. 13-19).

5.c The Revised Directive

82. Next, the Juncker Commission undertook to revise the Directive, which led to the adoption of Directive (EU) 2018/957 on 28 June 2018 (hereafter "the Revised Directive"). [21]

83. The main changes brought to the now Revised Directive can be summarised as follows:

- Member States must provide that the temporary employment undertakings referred above guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out (art. 3). In addition to these basic working and employment conditions, Member States may require temporary employment undertakings as referred to in Article 1(1) to guarantee other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out.

- The Revised Directive specifies that where a worker who has been hired out by a temporary employment undertaking or placement agency to a user undertaking established in another Member State is to carry out work in the framework of the transnational provision of services by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or placement agency, or for the user undertaking, the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or placement agency with which the worker is in an employment relationship (art. 1).

- All the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in the Member State of posting, have been declared universally applicable will apply to posted workers (instead of the "minimum rates of pay") (art. 3).

- The rules of the receiving Member State on i) workers' accommodation where provided by the employer to workers away from their regular place of work and ii) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons(where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work), will be applied to posted workers (art. 3).

- Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall in

[21] 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, OJ L 173, 9.7.2018, 16-24.

principle reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.

- In case of long-term postings (longer than 12 or, exceptionally, 18 months), all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with the Directive, must be respected. This does not apply to i) the procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and ii) supplementary occupational retirement pension schemes. With a view to avoid circumvention of this rule by posting several workers in a row on the same job, the Revised Directive provides that where an undertaking replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this rule, be the cumulative duration of the posting periods of the individual posted workers concerned (art. 3).

- Cooperation on information between public authorities on a cross-national basis is strengthened. So is monitoring, control and enforcement (art. 4-5).

84. These changes should allow the receiving Member States to apply more extensively their national labour standards to the posted workers, which helps in creating a level play field in order to combat social dumping. Circumvention of the rules should also become more difficult since replacement of a worker by another worker is taken into account for calculating the 12 to 18 month period. The situation of temporary employment undertakings has also been clarified.

85. The Revised Directive must be implemented by the Member States by 30 July 2020 and cannot be applied before that date.[22]

86. During the legislative debates preceding the adoption of the Revised Directive, it became clear that the Revised Directive would be applicable to international transport. However, with regards to international road transport, the preamble of the Revised Directive contains the following consideration (para. 15) :

"*Because of the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport also reinforcing the combating of fraud and abuse*."

[22] Art. 3.1 of the Revised Directive.

87. Therefore, the (old) Directive will continue to apply to the international road transport sector until sector-specific rules are implemented (the so-called "lex specialis"). In that respect, a legislative proposal of the Commission is currently under discussion between the European Parliament and the Council. [23]

88. According to the preamble of the proposal, difficulties have been experienced in applying the rules on posting of workers specified in the Directive and the Enforcement Directive to the highly mobile road transport sector. The uncoordinated national measures on the application and enforcement of the provisions on posting of workers in the road transport sector have generated high administrative burdens for non-resident Union operators. This created undue restrictions to the freedom to provide cross-border road transport services having negative side-effects on jobs.

89. The preamble further specifies that in order to ensure the effective and proportionate implementation of the Directive in the road transport sector, it is necessary to establish sector-specific rules reflecting the particularity of the highly mobile workforce in the road transport sector and providing a balance between the social protection of drivers and the freedom to provide cross-border services for operators.

90. Such balanced criteria should, according to the preamble, be based on a concept of a sufficient link of a driver with a territory of a host Member State. Therefore, a time threshold should be established, beyond which the minimum rate of pay and the minimum annual paid holidays of the host Member State shall apply in case of international transport operations unless for cabotage operations since the entire transport operation is taking place in a host Member State. This time threshold is set in article 2 of the proposal at 3 days during any period of one calendar month so that when the period of posting is longer than 3 days, Member States must apply the minimum rate of pay and the minimum annual paid holidays for the entire period of posting to their territory during the period of one calendar month referred above.

91. However, no such exemption or derogatory provision are envisaged for the aviation sector, while it could be argued that certain workers in this sector (the aircrew) are even more mobile than the workers of the sector of international road transport.

6 CONCLUSIONS

92. This chapter illustrates that the EU legislative framework concerning posted workers is a complex one where social security law and employment law intertwine while raising at the same time jurisdictional issues directly related to the two aforementioned fields of law. From that viewpoint, even if our report focuses on the suitability of EU legislation applicable to posted workers for the aviation sector, limiting the analysis to posting would be a mistake.

93. With this wider frame of analysis in mind, we have seen that the home base is the predominant factor when it comes to determining the social security legislation applicable to

[23] European Commission, Proposal for a directive amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, COM(2017) 278 final.

aircrew by virtue of Regulation 883/2004. For the very specific cases where the home base does not apply, one falls back on the country of residence if a substantial part of the worker's activity takes place there. Only if it is not the case, will the place of business becomes the relevant factor. Such a legislative framework does not seem to raise many disputes since the only case concerning aircrew pending before the European Court of Justice actually pertains to the previous legislative framework which has since then been clarified thanks to the introduction of the home base in Regulation 883/2004. Legal certainty also seems to be reinforced by the practical guide on the applicable legislation which contains very specific examples and guidelines for the aviation sector.

94. Applicable employment law is influenced by social security legislation since the European Court of Justice has recently recognized that the home base should be a significant indicium for the purposes of determining the 'place where the employee habitually carries out his work' by virtue of the Brussels Ibis Regulation and so Rome I Regulation whose relevance would only be undermined if a closer connection were to be displayed with another place. If the habitual place of work cannot be determined, which most of the time will not be the case especially now that the home base can be taken into account, the place of hiring will become the factor to be taken into consideration but only if a closer connection cannot be found with another place. Various factors may be used to assess the closer connection among which the tax and social security status. So the place of hiring will only be decisive in the very few cases where an habitual place of work and/or a closer link cannot be identified.

95. The competent jurisdiction to hear a claim filed by a member of aircrew against his employer will also be the one of the habitual place of work by virtue of the Brussels Ibis Regulation. This concept is to be understood in the same way as for the Rome I Regulation so that most of the time applicable law and competent jurisdiction will coincide. If the habitual place of work cannot be identified, the place of business through which the employee was engaged or the place of the employer's domicile will have to be chosen.

96. Posting of workers triggers the application of a nucleus of mandatory rules in the host member state. There are also formalities and administrative requirements that may be imposed by the host member state so as to make sure that his posting legislation is complied with. Posting legislation applies notwithstanding the applicable law by virtue of the Rome I Regulation. Posting is to be understood as temporary work outside the habitual place of work. This chapter has shown that it is a difficult concept to apply for international transport workers especially in the aviation sector in view of the mobile nature of their work which very often involves simultaneous or consecutive work in several Member States rather than temporary work in another member state than the member state of the habitual place of work *stricto sensu*.

97. While the regulatory environment seems to have reached a certain level of stability with regards to applicable social security law, applicable employment law and competent jurisdiction with the emergence of the home base as the predominant factor, conceptual boundaries are blurred when one examines the EU posting legislation from the viewpoint of aircrew. The two pending cases before the European Court of Justice might bring some clarity in the near future but one cannot be sure about that since these cases do not directly concern aircrew. One of the main purposes of this report will therefore be to fill that gap with practical

guidelines designed to help the aviation navigating through this complex regulatory environment.

CHAPTER 2. APPLICATION OF AND COMPLIANCE WITH THE POSTING OF WORKERS RULES IN THE AVIATION INDUSTRY WITHIN THE EU MEMBER STATES

1 METHODOLOGY AND CONTRIBUTORS

98. In order to get a comprehensive picture of the situation in the EU Member States with regard to the application of and compliance with the posting of worker rules in the aviation industry, the research has used a concise questionnaire, including relevant questions, which was sent to employment law experts in every Member State. The use of this questionnaire should be seen as a sort of written interview method. In this case it was not possible to do a large number of interviews which would lead to a high quantity of answers, as the questions request a high level of knowledge on EU and national employment law and the posting of workers rules. Therefore, the questionnaires were only sent to recognised legal experts in order to guarantee the quality of the answers and of this part of the research in general. The contributing experts for each Member State are:

- Austria: dr. **Hans Georg Laimer**, Partner at Zeiler.partners, Vienna
- Belgium: dr. **Pieter Pecinovsky** and dr. **Gautier Busschaert**, Of Counsel and Senior Associate at Van Olmen & Wynant, Brussels
- Bulgaria: ms. **Youliana O. Naoumova** and **Viktoriya Marincheva**, Partner and Associate at Djingov, Gouginski, Kyutchukov & Velichkov, Sofia;
  Mr. **Encho Dinev** and ms. **Valeria Nikolova,** Partner and Associate at Tocheva and Mandazhieva law office, Sofia;
  Ms. **Vesela Kabatliyska** and ms. **Maya Todorova**, Partner and Senior Attorney at Dinova Rusev & Partners Law Office, Sofia
- Croatia: ms. **Marija Gregorić** and mr. **Lovro Klepac**, Partner and Associate at Babic & Partners Law Firm LLC, Zagreb
- Cyprus: confidential source
- Czech Republic: Dr. **Dominik Brůha**, Partner at Dominik Brůha Law Office, Prague
- Denmark: mr. **Jeppe Høyer Jørgensen**, Partner at Labora Legal, Copenhagen
- Estonia: mr. **Toomas Taube**, Partner at Primus-Derling, Tallinn
- Finland: confidential source
- France: confidential source
- Germany: dr. **Dirk Freihube** and ms. **Meike Rehner**, Partner and Counsel at Pusch Wahlig Workplace Law, Frankfurt am Main
- Greece: ms. **Dimitra Nanou,** Attorney at Bakopoulos Katharios Law Firm, Athens
- Hungary: ms. **Zsófia Oláh**, Senior Associate at Orban Perlaki Law Firm, Budapest
- Ireland: ms. **Aoife Bradley**, Partner at LK Shields, Dublin
- Italy: mr. **Luca Failla**, mr. **Marcello Buzzini** and ms. **Laura Cinicola**, Partners and Senior Associate at LabLaw, Milan
- Latvia: mr. **Andis Burkevic**, Counsel at Sorainen, Riga
- Lithuania: confidential source
  Assoc. Prof. dr. **Justinas Usonis**, Associated Professor at the Law Faculty of Vilnius University
- Luxembourg: mr. **Philippe Ney**, Partner at Kleyr Grasso, Strassen
- Malta: dr. **Ann Bugeja**, Senior Associate at GVZH Advocates, Valletta
- The Netherlands: mr. **Karol Hillebrandt**, Partner at Palthe Obermann, Amsterdam
- Poland: ms. **Alina Giżejowska**, Partner at Sobczyk & Partners, Cracow
- Portugal: ms. **Paula Ribeiro Farinha**, Managing Associate at Morais Leitão, Lisbon
- Romania: ms. **Corina Radu**, Partner at SCA Magda Volonciu & Associates, Bucharest

- Slovakia: ms. **Juliana Turcekova** and mr. **Peter Fedor**, Attorney and Associate at Čechová & Partners, Bratislava
- Slovenia: confidential source
- Spain: mr. **Juan Bonilla**, Partner at Cuatrecasas, Madrid
- Sweden: mr. **Robert Stromberg** and mr. **Jonas Lindskog**, Partner and Senior Associate at Cederquist, Stockholm
- UK: mr. **Nick Elwell-Sutton** and ms. **Ruth Bonino**, Partner and Professional Support Lawyer at Clyde&Co, London

99. Thanks to these exceptional national experts, the research has drawn up an overview of the situation in the different Member States. The addressed topics of this overview follow the logic of the questionnaire itself. Please be aware that the findings in the other chapters of this Report do not necessarily represent the opinions of the national contributors.

2 THE APPLICABILITY OF THE POSTING OF WORKERS RULES TO AIRCREW

100. The first question asked whether the national rules on posting of workers (which have implemented the EU Posting of Workers Directive) are applicable to the aviation sector and to the aircrew workers. It became apparent that the vast majority of Member States does apply the posting of worker rules to aircrew. This is logical, as in the reasoning of the EU Commission, as well as of various national experts, the Posting of Workers Directive only foresees an explicit exemption for (maritime) seafaring workers. A contrario, this means that all other sectors or workers should fall under the scope of the EU Posting of Workers Directive and therefore also the national implementing rules should capture these workers under their scope. Nonetheless, this is not the case in every Member State. In four countries, Cyprus, Hungary, Poland and Slovenia, the ruling opinion is that aircrew workers do not fall under the scope of the posting of workers rules. Also in other countries the application is not always self-evident.

101. After extensive research into the law of **Cyprus** and liaising with different officials from the relevant authorities (Labour Office and Civil Aviation department), the Cyprus national expert was informed that in the opinion of the authorities aircrew workers are considered as "moving workers" and therefore treated in the same manner as shipping crew workers for the purposes of the relevant law on posting of workers within the EU, meaning that this law does not apply to aircrew workers. This exemption is not formal, as there is no legal instrument that excludes aircrew from the scope. There is neither any case law on this issue. Therefore, the exemption is not official. But, in practice, Cyprus does not treat aircrew as posted workers.

102. In contrast, the exemption is rather explicit and formal in **Poland**. Article 2 subparagraph 1 item 2 of the Act on Posting of Employees for Performance of Services of 10 June 2016, which implements the Posting of Workers Directive (96/71/EC) states: "The Act does not apply to international transportation". [24] In the preparatory legislative process of this Act, it was agreed that the transport operations are not subject to the regulations concerning posting of employees because the specifics of the international transportation operations

[24] Ustawa z dnia 10 czerwca 2016 r. o delegowaniu pracowników w ramach świadczenia usług, no. 2016/868, *Dziennik Ustaw* 17 June 2016.

prevent the application of the regulations concerning posting of workers. However, this Act does not define the concept of "international transportation", nor is it defined in other Polish acts. The only reference to be found in this regard is the interpretation of the Polish Minister of Labour of Regulation (EU) No 465/212 of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. According to this interpretation, when referring to the "international transportation employees" one should understand (sailors and) aircrew members and personnel. This interpretation and understanding of "international transportation employees" can also be applied to the notion of "international transportation" used in the Polish Act on Posting of Employees for Performance of Services. Hence, this Act does not apply to the posting of aircrew.

Likewise, in accordance with the general interpretation of the **Slovenian** legislation on posting, aircrew workers are not considered as posted workers.

103. Under **Hungarian** law only seagoing ship employees are exempt from posting rules in line with the EU Posting of Workers Directive. [25] However, just like in Cyprus, the Department of Labour Inspection of the Ministry for National Economy Department unofficially confirmed that it does not regard the posting rules applicable to aircrew.

104. In the other countries the posting of workers rules are in principle applied to aircrew. But some Member States do somewhat limit the scope. In **Austria**, employees of flight carriers (goods and persons), who are employed in Austria only "in transit" and who do not have their home base in Austria, the implementing act (LSD-BG) [26] does not apply at all. "In transit" in this context means that goods or persons must neither be boarded or loaded nor unloaded in Austria. This exemption is thus only applicable to the situation in which there is barely any work to be done by the aircrew and seems to exclude the situation in which an airplane makes a transit-stop to board or load new passengers or goods.

105. The **Czech Republic** has adopted an exemption in general (not a specific rule for the aviation sector), if the period of posting of the employee for the performance of work within transnational provision of services in the Czech Republic does not exceed in aggregate thirty days within a calendar year. [27] However, this exemption shall not apply if an employee is posted for the performance of work within transnational provision of services by an employment agency (agency work). The exemption is related to the minimum duration of annual leave or its proportional part and the minimum salary, the relevant minimum level of guaranteed salary and extra pay for overtime work. Therefore, this exemption is in conformity with the allowed exemptions of art. 3.3 and 3.4 of the EU Posting of Workers Directive. In practice it is possible that aircrew would be posted less than 30 days per year to the Czech Republic.

[25] Section 296 of the Hungarian Labour Code.
[26] Anti-Wage and Social Dumping Act – Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG (BGBl I 44/2016).
[27] Section 319, §2 Czech Labour Code of 2006 (Act. No. 262/2006).

106. A similar exemption is to be found in **Spain**, where working conditions established in the Spanish labour legislation regarding the annual paid vacation and the amount of the minimum salary will not be applied in case of posting that does not exceed eight days. [28]

Furthermore, according to the Danish expert, the **Danish** law does not regard air crew flying in and out of Denmark without having Denmark as primary boarding base as comprised by the Danish posting of workers rules. Therefore, the Danish system would only apply the rules to aircrew who de facto have their (home or secondary) base in Denmark.

107. Next, in **France**, the aviation sector is not excluded from the scope of the posted workers rules. [29] However, the only provisions that exist under French law relating to aircrew members exclude aircrew that are operating from air transport companies' "bases d'exploitation" (hereafter, operating bases) located in France, from the posting of workers rules. In principle under French law, an employer may not avail itself of the provisions applicable to the posting of employees when it carries out, in the Member State in which it is established, activities relating solely to internal or administrative management, or when its activity is carried out on the French national territory in a usual, stable and continuous fashion. It may not, in particular, avail itself of these provisions when its activity involves the research and prospection of a clientele or the recruitment of employees on French soil. In these situations, the employer is subject to the provisions of the Labour Code ('Code du Travail') applicable to companies established in the French national territory. [30] This principle is specified for the aviation sector by Article R.330-2-1 of the French Civil Aviation Code. This article provides that air transport companies cannot have recourse to provisions applicable to the posting of workers for their employees who are employed in their operating base located on French soil. Article R.330-2-1 defines the operating base as "a collection of facilities or infrastructures from which the company operates in a stable, usual, and continuous fashion, an air transport activity" and "with employees who have their effective centre of their professional activity in this home base". For the purposes of the mentioned provisions, the centre of an employee's professional activity is "the place where he habitually works or where he takes up his service and returns after the completion of his mission." As a result, aircrew assigned to a French operating base, from which they depart and to which they return after daily flights, cannot claim the status of posted worker. They are subject to the French Labour Code and the full corpus of French employment law, even if the employer is established outside France and the employment contract designates the law of another country as applicable law. In fact, the operating base is thus the habitual place of work and the home base of the worker (see Chapter 4).

108. In a similar fashion, the application of the **Croatian** posting of workers rules would depend on whether the workers are temporarily assigned to perform work in Croatia within the cross-border provision of services, or whether they are transferred to Croatia as their home base. For example, if the aircrew worker with his or her home base in another EU Member State performs work in Croatia on a temporary basis under a wet lease agreement between the airlines, such aircrew should be regarded as posted to Croatia and subject to the Croatian posting of workers rules. On the other hand, if the aircrew is transferred to Croatia

[28] Art. 3, §3 Act 45/1999 of 29 November 1999 concerning the posting of workers in the framework of the transnational provision of services, *BOE* 30 November 1999.
[29] Articles L.1261-1 and seq. and Articles R.1261-1 and seq. of the French Labour Code.
[30] Article L.1262-3 of the French Labour Code.

as its new home base, it is likely that such workers would not be qualified as posted workers and Croatian posting of workers rules would not apply to them.

109. Further, in **Germany**, the Arbeitnehmer-Entsendegesetz (AentG) [31], which has implemented the Posting of Workers Directive provides a general protection for posted workers, but also leaves a lot of space for regulation by collective bargaining agreements. The AEntG states that the terms of a nationwide collective bargaining agreement are also applicable to the employment relationship between a foreign posting employer and his posted employee in the territorial scope of Germany. Generally, the applicability of collective bargaining agreements is limited to generally binding collective bargaining agreements in certain sectors of business, which are listed in the law. The aviation sector is not included in this list. However, the law also provides that at the joint request of the parties to a collective bargaining agreement, the Federal Ministry of Labour and Social Affairs may by statutory order determine that the legal provisions of a collective bargaining agreement shall be extended to all employers and employees falling within its scope, despite them initially not being bound by it, if this is necessary in the public interest in order to achieve the goals of the AEntG of establishing and enforcing an adequate minimum of working conditions for cross-border posted workers who are regularly employed in Germany. Until now there has been no such collective bargaining agreement for the aviation sector.

110. Finally, in the eyes of the experts of **Slovakia**, the work regime of aircrew during a standard flight operation (i.e. a plane with aircrew departs from the airport and lands in another country airport) is in principle to be considered as a foreign business trip rather than posting of employees, which has a different conditions and rules applicable under Slovak law.

111. In the other Member States, no such full or partial exemptions are to be found and the posting of workers rules are applied in full to aircrew. In fact, not all of the mentioned exceptions are true exemptions to the principal application of the Posting of Workers Directive, as e.g. the reasoning of the French and Croatian legal system seem to fit the logic of the application rules of the Posting of Workers Directive: if the workers are not posted to a secondary base, but are employed at their new home base in another Member State, there is no posting but a change of home base and the full employment legislation can be applied (see Chapter 4).

112. In conclusion, most Member States do partially or fully apply the posting rules to aircrew, yet there is quite some variation in the application and it seems problematic that some Member States officially or unofficially exclude aircrew from the scope of application while there does not seem to be any EU provision that allows for such an exemption.

3 THE NATIONAL IMPLEMENTATION

113. All of the Member States have implemented the provisions of the EU Posting of Workers Directive into their national legislation. However, in the vast majority, there is no specific regulation with regard to posting for the aviation sector or for aircrew. This means that the rules will in general not be adapted to the specific circumstances or needs of the aviation sector and workers.

[31] Gesetz 20 April 2009 über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen.

114. Also in **Portugal** there are no sector specific provisions next to the general rules in the Portuguese Labour Code. [32] However, there are company-level collective bargaining agreements to be found which deal with the matter. Namely the company agreement entered into between TAP (Transportes Aéreos Portugueses, S.A.) and SPAC (Sindicato dos Pilotos da Aviação Civil), published in Boletim do Trabalho e Emprego, nr. 24, of June 29th, 2010 and two other company agreements entered into between (i) SATA Internacional (Serviços e Transportes Aéreos, S.A) and SNPVAC (Sindicato Nacional do Pessoal de Voo da Aviação Civil), published in Boletim do Trabalho e Emprego, nr. 46, of December 15th, 2008 and between (ii) SATA Internacional and SPAC, published in Boletim do Trabalho e Emprego, nr. 38, of October 15th, 2008, which define the situation of posting of workers, although without establishing a special regime for that situation.

115. Further**, Sweden** has laid down specific rules on working time for aircrew in the Act on Working Hours for Air Personnel in Civil Aviation. [33] Furthermore, specific provisions relating to aircrew are to be found in collective bargaining agreements.

116. As mentioned, **Germany**, has a general law (AentG) implementing the Posting of Workers Directive, but as the aviation sector did not lay down generally binding collective bargaining agreements about the posting rules and minimum standards, most employer obligations are not in force at the moment.

117. Unlike most other Member States, the **UK** has no national posting of workers rules as, from the time the Posting of Workers Directive was officially adopted, the UK has not deemed it necessary to enact any specific implementing legislation. Instead, from inception of the Posting of Workers Directive, the UK considered that the domestic law already in place for dealing with the subject areas covered by the Posting of Workers Directive should apply to workers, regardless of whether they were permanent or temporary and whether they are local or posted from other countries to the UK.

118. Nonetheless, apart from some specific collective bargaining agreements, which often do not really go much into detail with regard to the posting rules (but provide for some specific working conditions), it seems safe to say that Aviation-specific posting rules are absent in the national jurisdictions of the EU.

4 THE HARD CORE PROVISIONS

119. Art. 3.1 of the EU Posting of Workers Directive obliges the Member States to ensure that, whatever the law applicable to the employment relationship, the airline company guarantees workers posted to their territory the terms and conditions of employment covering the following matters:

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual holidays;
(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

[32] Articles 6, 7 and 8 of the Portuguese Labour Code and Law 29/2017
[33] Sw. Lag (2005:426) om arbetstid m.m. för flygpersonal inom civilflyget.

(e) health, safety and hygiene at work;
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination.

120. Through the questionnaire it became apparent that indeed every Member State would apply these minimum provisions of the 'noyau dur' of Article 3.1. In Belgium and Italy, the legislator went beyond this list of conditions.

121. In **Belgium**, the Act of 5 March 2002 [34] states that an employer who posts his workers to Belgium must, for work carried out in Belgium, comply with the working, remuneration and employment conditions laid down by Belgian law, administrative regulations or agreements which are criminally sanctioned. The concept of working, remuneration and employment conditions which are criminally sanctioned comprises a wide range of provisions relating to, for example, the working time and working schedule (limits on working hours, rest periods, Sunday rest, breaks), safety at work, terms and conditions of employment, salary protection (time, manner and place of payments, permitted salary deductions), social records, minimum wage scales, the prohibition of agency work and lending of employees, holidays and annual leave and discrimination. De facto, almost the full extent of Belgian labour law is criminally sanctioned, except for the important rules of the Employment Agreements Act of 3 July 1978, which, amongst others. lays down the notice periods.

122. Likewise, the **Italian** legislation [35] provides that posted workers are subject, for the whole length of the posting, to the same employment terms and conditions which are applied to the workers/employees performing the same duties in the country of secondment (i.e. in Italy). These terms and conditions are usually provided by the applicable National Collective Agreement.

123. As seen, in several countries the applicable conditions are laid down not only in the legislation but also by national, sectoral and company-level collective agreements. By example, in **Greece**, a sectoral collective agreement ruling the employment terms and conditions of foreign airlines personnel is currently in force (since 1.1.2017 until 31.12.2019). This collective agreement, which has been declared as generally binding by the Minister of Employment, sets out particular terms as regards working time, rest periods, remuneration, leaves etc.

124. With regards to the minimum standard of minimum wage, we have to highlight the case of **Sweden**, as there is no statutory minimum wage. Therefore, there is no specific salary level that automatically applies to those posted in Sweden. Instead, regulations on minimum wages can be found in collective bargaining agreements that vary between different industries. To uphold the demands regarding minimum wage of the Posting of Workers Directive, Sweden has chosen a system prescribed in Article 5, § a-d of the Posting of Workers Act where trade

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[34] Act of 5 March 2002 concerning the posting of workers in the framework of the provision of services, and introducing a simplified system for the maintenance of social records by undertakings that post workers to Belgium, *Belgian Official Gazette* 13 March 2002.
[35] Legislative Decree n. 136/2016.

unions can take industrial actions in order to compel a posting employer to enter into a collective bargaining agreement.

5 MONITORING AND ENFORCEMENT MECHANISMS

125. The Enforcement Directive of 2014 allows Member States to impose certain administrative requirements and control measures in order to monitor posting of workers on their territory. These optional monitoring measures are:

a) a **prior declaration** of the posting to the administration or the social inspectorate of the receiving Member State;
b) the obligation to **keep social documents** available for the social inspectorate (permanently or at request)
c) The obligation to keep the social documents available during a **reasonable time** after the end of the posting
d) obligations regarding the **mandatory translation** of the social documents;
e) the obligation to designate a **liaison person** whom the authorities can contact in relation to the posting (who has to be present in the country or not);
f) the obligation to appoint a **contact person** for the purpose of engaging into collective bargaining with the local workers representatives or trade unions;
g) **other requirements**.

126. All the Member States have made used of one or more of the monitoring and enforcement mechanisms, except the **UK**, which has not deemed it necessary to introduce any of these measures. Meanwhile, in **Germany**, the enforcement obligations are only applicable in case of a generally binding collective bargaining agreement, which is not the case for the aviation sector.

5.a Prior declaration of the posting

127. The obligation for the posting employer (and/or of the receiving entity) to do a prior declaration is one of the most popular monitoring measures among the EU Member States. Some Member States, like Belgium, already had such a system before it was explicitly allowed by the Enforcement Directive. But now almost all Member States have introduced a prior declaration. The prior declaration, which usually has to be done digitally by the posting employer before the actual posting, is an important tool for the authorities to keep an overview of the amount of posting and allows them to do targeted checks in companies or sectors which regularly use posted workers.

128. The main exceptions are the Czech Republic, the UK and Belgium. The **Czech Republic** has, following the Enforcement Directive, introduced some measures, but not a prior declaration. Also the **UK** has not introduced such an obligation. In contrast, the **Netherlands** has implemented the prior declaration in the WagwEU (Posted Workers in the European Union (Working Conditions) Act[36]), but it has not entered into force yet. The obligation is expected to enter into force in the course of 2019 (however this was not the case at the time of the publication of this Report).

[36] Posted Workers in the European Union (Working Conditions) Act, in Dutch: "Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie" hereafter referred to as "WagwEU".

129. In **Austria**, notifications of cross-border postings within the transport sector are only required per employee in summary form for each six-month period, regardless of the individual posting. The same is not officially stated in **Belgium**, but in practice it is allowed by the authorities to do the LIMOSA-declaration for posted workers covering a longer period of time for several distinct postings. As mentioned, although a general notification obligation exists, an exception is applicable for what concerns the aviation sector in Belgium, as an executive decree has excluded *"workers employed in the sector of the international transport of persons or goods, unless these workers carry out cabotage activities on Belgian territory"* from the scope of the obligation. [37]

130. Next, in **France**, there are specific notification forms for the road and inland waterway transport sector but not for the aviation sector.

131. In **Denmark,** there is an obligation for the service provider to register itself with the Danish Business Authority (RUT) and respond to a number of questions in relation to posting workers to Denmark.

132. Further, in **Lithuania**, advance notice should be given to the territorial office of the State Labour Inspectorate where the job function of the posted worker will be performed about the conditions that will apply to the posted worker, but only if the posting is for a period of more than 30 days or to perform construction work.

133. Although most countries have installed the obligation of a prior declaration, it is unclear whether the Airline companies comply with the notification requirements. This might be doubtful, especially when we look at the statistics on A1-declarations, which are compulsory for posting companies to attest that their posted workers would remain under the scope of the social security legislation of the Member State of origin. Of course, the social security A1-declarations are obligatory in the whole EU, while the labour law notifications depend on the installed system per country, so the comparison between the two should be handled with caution. However, according to a study of HIVA for the European Commission on the number of Portable Documents A1 (PD A1) issued by the EU Member States and EFTA countries during reference year 2016 [38], there were only 697 A1 declarations for flight or cabin crew members. Several countries, amongst which Bulgaria, Croatia, Estonia, France, Hungary, Latvia, Luxembourg and Slovenia had zero A1 declarations in this category. The top three was Finland (193), Germany (192) and Slovakia (193). All other countries, except Ireland (60) noted below 25 A1 declarations. These remarkably low numbers might suggest the same low amount (or even lower) for prior declarations to the authorities of the receiving Member State with regards to labour law. We will examine this HIVA Study and other studies in Chapter 3.

5.b Obligation to keep social documents available

134. Next to the prior declaration, the Member States also massively make use of the requirement to keep or make available copies of employment contracts and/or other social documents in an accessible and clearly identified place during the posting. Of course, this

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[37] Koninklijk besluit 20 maart 2007 tot uitvoering van het Hoofdstuk 8 van Titel IV van de programmawet (I) van 27 december 2006 tot voorafgaande melding voor gedetacheerde werknemers en zelfstandigen, BS 28 maart 2007.
[38] F. DE WISPELAERE and J. PACOLET, *Posting of workers, Report on A1 Portable Documents issued in 2016*, EU Commission, December 2017.

obligation can take different forms. On the one hand it can be compulsory to keep the documents permanently available at the place of work of the posted worker, on the other hand it is also a possibility that certain social documents only need to be presented whenever this is requested by the social inspection.

135. The social documents usually include (but are not limited to):

- a statement of the employment conditions or the individual employment contract of the posted workers;
- working hours register;
- pay slips or other wage-related documents;
- proof of prior declaration and A1-declaration.

136. Only the **UK** has chosen not to introduce any requirement with regards to social documents. In theory, **Sweden** could be added, as there is no obligation to keep documents accessible at an identified place during the posting. There is however an obligation to keep documents available to a Swedish trade union if an employer and the trade union are bound by collective bargaining agreements that regulates the terms for posted workers. This latter obligation applies during, and four months after, the posting.

137. In principle, the prior Limosa-declaration exempts foreign employers from drawing up most social documents during the period of employment in **Belgium**, for a maximum period of 12 months. The same exception is valid for categories of employers who are exempted from the Limosa-notification. After this period of 12 months, all social documents are in principle required to be drawn up. However, pay slips and the individual account for the employee have to be drawn up from the beginning and kept available for the inspection until one year after the end of the posting, except if they keep comparable foreign documents from the country of origin and/or a translation into French, Dutch, German or English of these comparable documents at the disposal of the Belgian Labour Inspectorate, at the latter's request.

138. **Austria** has in general chosen the option to oblige employers to keep social documents permanently available at the workplace of the worker, but it also has made a specific obligation for the (international) transport sector. Certain documents are to be kept readily available in the vehicle with which the posted worker is currently carrying out transports in Austria. This concerns the social insurance certificate A1, the copy of the prior notification of posting, the employment contract (or statement of terms and conditions) and a record of hours worked. Other documents have to be submitted to the authorities only in case of an inspection but need not to be kept readily available (payslip, proof of payment by the employer or bank transfer statements and documents relating to pay categorisation). These have to be submitted upon request of the authorities within 14 days after the end of the calendar month of the inspection.

139. Other noteworthy facts are that for posted employees in the **Greek** transport sector, copies of the social documents must be kept during the posting period in the operation base and in **Spain** the employers have the right to keep the social documents in the work place or to keep a digital copy.

5.c Obligation to keep the social documents available during a reasonable time after the end of the posting

140. When a Member State obliges the employer to keep certain social documents available, they often also oblige the employer to keep these documents for a certain reasonable period after the end of the posting, which amongst others would make an ex-post control possible. As in **Sweden** the social documents only need to be made available to trade unions in case of a collective agreement, there is no obligation to keep the documents available after the posting. Also **Lithuania** does not oblige employers to keep the social documents available after the posting. In the other Member States the retention periods vary from 1 year (**Bulgaria**, **Luxembourg** and **Portugal**) to even 7 years (**Estonia**). However, most countries have settled for 2, 3 or 5 years or have left the period undetermined and just ask for "a reasonable period" (e.g. **Malta**). One could even question whether 7 years still can be qualified as a reasonable period. Finally, in **Austria**, the social documents need to be kept as long as the posting company still has other posted workers in Austria.

5.d Obligation to translate the social documents to an official or accepted language

141. When a Member State obliges the employer to keep certain social documents available, they often also oblige the employer to have these social documents drawn up or translated in the official language or an accepted language. Not all the experts have specified if the translation is only necessary at the request of the authorities or always and to which languages the documents have to be translated. But we give a short overview of the information we received.

142. Some countries only oblige the translation when it is necessary and after it is requested by the social inspection or other authorities, by example **Estonia**, **Finland**, **Hungary** and **Ireland**. Next, several Member States also accept English although this is not their official language (**Belgium** and **Finland**). In contrast, certain Member States only accept their official languages, like **Austria** (German), **Bulgaria** (Bulgarian) **Croatia** (Croatian), **Estonia** (Estonian), **Hungary** (Hungarian), **Spain** (Spanish or a regional language), **Lithuania** (Lithuanian and another language chosen by the parties) **Luxembourg** (German or French), **Portugal** (Portuguese) and **Romania** (Romanian).

143. The **Netherlands** has no explicit legal obligation in the WagwEU to translate the social documents to Dutch, yet in practice such an obligation is implicitly derived from the WagwEU's provisions. The only Member States where no such obligation exists are **Sweden** and the **UK**, as in these countries there is no general obligation to keep social documents.

144. In any case, the high amount of official languages in the EU make it difficult for employers to fulfil their obligations. Sometimes, the translations need to be done by a recognised translator, which is time-consuming and costly. It could therefore be questioned if it would not be better, or at least more practical, to allow informal English translations in every Member State. However, the Member States officials do not all have a good knowledge of English and such a rule might be too culturally provocative for certain Member States who see the use of English as a threat to their national language and even culture. In any case for **Ireland** and **Malta** the documents will have to be translated to English anyway, as this is their official language.

5.e Designation of a liaison person

145. The obligation to designate a liaison person of liaison officer in the host Member State whom the competent national authorities can contact in order to control the posting or for any other purposes is also popular among the Member States. Only the **Czech Republic**, **Greece** and the **UK** have not used it. It is not always specified, but the liaison person does not always need to be physically present on the territory of the receiving Member State (by example in **Belgium** and **Malta** this is not necessary). In other countries the presence of the liaison person is mandatory (e.g. in **Croatia**, **Luxembourg** and **Finland**).

146. In **Austria**, one of the employees posted to Austria or a person established in Austria and authorised to professionally represent the parties (e.g. attorney-at-law) must be appointed as liaison person. For the transport sector, the national act determines the vehicle's driver as the liaison person. If the driver shall not be the liaison person, the employer has to notify a person established in Austria and authorised to professionally represent the parties as contact person. It is not clear if the same rule can be applied to an airplane and its pilot. In any case it is rather peculiar to designate a posted employee as a representative of the employer, as the interests of the posted worker might not align with the interest of the posting employer if the authorities start an investigation.

147. Finally, in **Denmark**, there is no explicit mention in the legislation of such a requirement, but it in the assessment of the Danish experts, there does exist a right of the Danish authorities to require a designation of a liaison person. The same is the case in **Lithuania**.

5.f Designation of a contact person

148. The mandatory designation of a contact person or representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining is remarkably less popular among the Member States. Only some countries have introduced such an obligation, including **Bulgaria**, **Estonia**, **Hungary**, **Italy**, **Latvia**, **Portugal** and **Sweden**.

149. In these countries it is to be assumed that the liaison person and the contact person can be the same. Although this only explicitly confirmed by the experts from **Hungary** and **Sweden.** In **Hungary**, the contact person must either be permanently present on Hungarian soil or accessible for reasonable and justified requests.

150. There is no general obligation to appoint a contact person in **Sweden**, but an obligation does arise when it is requested by a Swedish trade union. In this case, the employer shall appoint a representative who has the authority to negotiate and enter into a collective bargaining agreement. While in **Denmark**, again there is no explicit legal obligation, but the Danish experts do think that the Danish authorities can require a designation of a contact person.

5.g Other requirements

151. Only a handful of Member States have introduced other requirements, which are different from including specific information requests in the prior notification form or installing penal or administrative sanctions on the non-conformity of posting employers with the other requirements, which most countries have done.

152. **Bulgaria** has laid down a specific obligation for the notification with the Bulgarian Labour Inspectorate for each change of the declared terms and conditions of the posting within 7 days from the effective date of the change. In **Denmark**, the Danish unions are entitled to require certain information on salary and employment and working terms and request for collective agreements. **Finnish** law further requests a provision of information to the contractor in the case of subcontracted or temporary agency work and the provision of certain information to staff representatives. Next, in **Luxembourg**, the receiving company in the host country is required to verify that all conditions have been fulfilled by the company of origin. **Spain** obliges employers to notify the labour authority in writing of any damage to the health of posted workers which has occurred on the occasion of or as a result of work carried out in Spain. [39]

153. According to Article 9 of the **Swedish** Posting of Workers Act, the posting employer is obliged to hand in employment terms and conditions of collective bargaining agreements regarding minimum wage and other minimum terms of the core of rights to the Swedish Work Environment Authority, which is in accordance with article 5 of the Enforcement Directive. In addition, according to § 24 of the Posting of Workers Act, the posting employer can be liable to pay damages to a trade union if the employer has not fulfilled the obligation to keep documents available to the trade union and to designate a representative with the authority to negotiate.

6 NON-APPLICATION AND EXCEPTIONS

154. As mentioned under section 2 of this chapter, only a small minority of the Member State seems to exclude the application of the posting rules to aircrew. The clearest example is **Poland**, where the Act on Posting of Employees for Performance of Services of 10 June 2016, explicitly states that it does not apply to international transportation. In other Member States, like **Cyprus**, **Hungary** and **Slovenia**, the non-application is not or less explicitly included in the national legislation, and it is mostly derived from the jurisprudence or even from the unofficial views of the government or the administration. Even if these instances of non-application are legally questionable and not very sustainable, in practice it does lead to a complete lack of enforcement of the posting rules.

155. But, also in **France**, there is a debate in the legal doctrine regarding the non-application of the posting of workers rules to the aviation sector since it could be considered that the aircrew members do not satisfy with the application criteria of the posting of workers. Aircrew members are, by nature, mobile workers who are frequently moving from one EU Member State to another. As a consequence, performing their tasks in different countries could be considered as their normal and permanent professional activity, which is not

[39] Section 6.4 of Act 45/1999.

compatible with the definition of the posting of workers. In Chapter 4 it will become clear that this reasoning corresponds with our view that standard flights do not fall under the scope of the posting rules.

156. Also, several national experts, by example for **Croatia** and **France**, have mentioned that posting of workers would not apply to aircrew who are habitually occupied in a 'base d'exploitation' (France) or in their home base (Croatia). In those cases, the full spectrum of the national employment law will be applicable. This reasoning fits perfectly in the logic of the Posting of Workers Directive: if an employee is performing his activities in usual, stable and continuous fashion in the home base or what seems to be secondary base, he cannot be seen as a posted worker as defined by Article 2 of the Posting of Workers Directive: "*a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works*." However, the question then remains regarding the applicability of the posting rules for aircrew who fly to other Member States to carry out work there for a short period (even just for some hours).

157. Next, only three Member States have made use of the exception allowed by article 3.3 and 3.4 of the Posting of Workers Directive for activities of less than 30 days. First, **Slovenia** has made use of this, but it does not apply the posting rules to aircrew in any case. Therefore, this exception is not too important for our research. Next the **Czech Republic** and **Spain** also have introduced such an exception. The Czech posting act states that it shall not apply if the period of posting the employee for the performance of work within transnational provision of services in the Czech Republic does not exceed in aggregate thirty days within a calendar year. However, the exception is not applicable if an employee is posted for the performance of work within transnational provision of services by an employment agency.

158. Finally, it is noteworthy that not a single Member State has made use of the exemption in article 3.5 of the Posting of Workers Directive with regard to services for which the work to be done in the host Member State is not significant.

7 COMPLIANCE OF THE AVIATION SECTOR WITH THE POSTING RULES

159. In general, the question whether the aviation sector is compliant with the posting rules is very difficult to answer within the scope of the questionnaire. The recent Ricardo study is better suited to find answers as the contributors to the questionnaires, who are legal experts and not social scientists could not be expected to do a complicated and time-consuming compliance study. Therefore, in most cases, the experts made notice of a complete lack of data (and case law) on the issue at hand. Several experts concluded that the lack of case law or data must mean that the aviation sector is compliant. This is the case for Czech Republic, Denmark, Italy, Luxembourg, Malta, Spain and Sweden. However, the lack of data and case law could also be the consequence of a lack of enforcement or because of the barriers that aircrew and trade unions face when they would complain.

160. Some experts were able to give more precise answers. By example in Croatia, according to the information provided by the officials of the Ministry of Labour and Pension Systems, it appears that Croatian posting rules are not applied in aviation sector. A possible explanation for non-application of posting rules may be that it is not common to temporarily

use aircrew outside their home base. Officials of the Ministry have unofficially confirmed that so far, the Ministry has not dealt with any cases concerning the posting of workers in Croatia in the aviation sector. In this regard, it is likely that the airlines typically do not deem the posting of workers rules applicable to aircrew performing work in Croatia.

161. According to feedback by the Greek Labour Authorities, one may doubt that the air carriers and other relevant service providers in the aviation sector would always apply the posting rules in practice, especially in cases where there is no established undertaking in Greece. As a consequence, the provisions of the relevant Presidential Decrees do not seem to be applied/implemented in practice in the aviation sector. The Greek experts also mention that in any case the aircrew personnel often conclude independent services contracts, which would result in their exclusion from the field of application of said posting rules.

162. Another example of avoidance is mentioned by the **Romanian** expert: in order to avoid the formalities required by the cross-border secondment, there is a general tendency to resort to the conclusion of fixed-term employment contracts for the periods of activity increase (especially in the case of the low-cost companies during the summer period when they face a serious shortage of staff). The tendency to resort to the conclusion of fixed-term employment contracts is widely used, not only in the aviation sector.

8 SYSTEMATIC CONTROL BY THE NATIONAL ADMINISTRATION

163. In all countries there are inspection services which are competent to control the posting of workers rules. This could be the social inspection (labour and/or social security law), financial inspection, custom authorities etc. In Sweden, if the employer is bound by collective bargaining agreements that derogates from the regulations for which the Swedish authorities monitor the compliance, the different trade unions will instead be responsible to make sure the employer follows the terms and conditions of the collective bargaining agreement for posted workers.

164. First, a large number of Member States, indicates that the competent administration is not conducting a systematic control on the posting rules and certainly not specifically for the aviation sector. This is the case for **Belgium, Croatia, Czech Republic, France, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg** and the **UK**. In a second group of countries, the experts have stated that the systematic nature of the monitoring by the competent authorities is unclear, mostly because of the lack of official data. These Member States are **Austria**, **Bulgaria**, **Estonia**, **Finland** and **Spain.** A third larger group of Member States, although the experts sometimes mention a lack of data, states that there is in fact a systematic control by the inspection services: **Denmark, Italy, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia** and **Sweden**.

165. In general, there are insufficient available data in order to be able to give a clear answer to the question whether there is a systematic control of the posting rules by the authorities. Naturally, the specific situation for the aviation sector is even more unclear. Nonetheless, in many countries the feeling is that such a control is currently absent or at least only sporadic. Even when the national experts have stated that a systematic control is taking place, this is difficult to verify. In any case, the answers given lead to the conclusion that in

many Member States the monitoring and enforcement of the posting rules by the administration is currently not very effective.

9 GENERAL ENFORCEMENT OF THE POSTING RULES BY THE COURTS

166. In many Member States, posting of workers seems to be a rare issue before the courts. In **Croatia, Czech Republic, Estonia, Greece, Hungary, Malta** and **Romania** no pending or recent case law on posting of workers could be found by the experts. In **Austria**, entitlements arising from the employment relationship generally forfeit within a very short period (e.g. in some cases after 3 months). Therefore, the employee must assert the claims relatively quickly. However, the posted employees may only realise their entitlements arising from the posting rules at the time the authorities start investigations or imposes fines. In such cases, civil claims might already be forfeited. Nevertheless, there is an interesting Austrian case on posting in the international transport industry currently pending before the CJEU (*Dobersberger*, C-16/18).

167. In **Luxembourg, Portugal, Slovenia** and **Spain** there is merely rare case law to be found on the topic. Next, in **Latvia** and the **UK** case law on posting does exist, but no recent cases could be identified.

168. In contrast, several Member States do have a substantial amount of case law on posting. This is the case in **Belgium**, **Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands**, **Poland** and **Slovakia.** By example, many **German** courts settled disputes concerning the minimum wage entitlement under the AEntG.

169. Most interestingly, the **Dutch** Supreme Court (Hoge Raad) has asked preliminary questions to the CJEU about the Posting of Workers Directive. [40] The case was started by one of the main Dutch trade unions. In case, the question of whether the Posting of Workers Directive applies to drivers working in international road transport is raised in the context of the applicability of the Dutch collective labour agreement on freight transport. To answer this question, the Dutch Supreme Court asks preliminary questions about the interpretation of the concept "within the territory of a Member State" within the meaning of art. 1 and 2 of the Posting of Workers Directive, and the term "declared generally binding" within the meaning of art. 3 Posting of Workers Directive. The answer that will be given regarding the concept "within the territory of a Member State" could be important for the aviation sector too.

10 SPECIFIC CASE LAW REGARDING POSTING OF AIRCREW

170. While in the majority of Member States there is case law to be found on the posting rules. Cases regarding posting in the aviation sector or relating to the posting of aircrew is a true rare find. Only in four countries the experts found such jurisprudence: **Belgium, Denmark, France** and **Portugal**.

[40] Hoge Raad 14 December 2018 - ECLI:NL:HR:2018:2322; ECLI:NL:HR:2018:2174.

171. In **Belgium**, the Hainaut labour court of appeal has recently declared itself competent to judge the dispute between the airline Ryanair and a former Spanish steward based in Charleroi Airport and in another similar dispute between Crewlink (intermediary company providing aircrew to Ryanair) and several aircrew workers working from Charleroi Airport. [41] In those two cases, the labour court of appeal had referred a preliminary question to the Court of Justice of the EU to ask whether the Belgian Courts have the jurisdiction over such a case. The Court of Justice decided that, based on the Brussels Ibis regulation, it is indeed the Belgian court who might have competence to judge this labour conflict. [42]

Especially the circumstance of the Crewlink case are interesting. There were six aircrew employees who had an employment contract with an Irish intermediary company (Crewlink), for which they provided services for the airline Ryanair. Their working day began and ended at Charleroi airport. They had to live less than an hour from this workplace and sometimes had to be on stand-by at this airport in order to be able to replace a staff member who had fallen ill. Their employment contracts were drawn up in accordance with Irish law and contained a clause stating that the Irish courts had jurisdiction to hear disputes between the parties in connection with the performance and termination of the employment contract. Nevertheless, after the termination of their employment contracts, these employees argued that Belgian labour law applies and that the Belgian courts were competent. The lawyers of Ryanair had always considered that it was the Irish courts which had jurisdiction to rule on this case.

The Brussels I Regulation provides that an employee may sue his employer in the courts for the place where the employee habitually works or in the courts for the place where he has habitually worked. According to the Court of Justice, this is in line with the objective of the Regulation, which is also intended to protect the weaker party in an employment relationship. The Court therefore considers that consideration should be given to the place where the employee has less difficulty in bringing legal proceedings against his employer and the place where the judge is best placed to settle the dispute relating to the employment contract.

This place, and in particular the place where the employee has the real centre of his professional activity, is not always easy to identify in the transport sector. With reference to the *Koelzsch* judgment (no. C-29/10), the Court of Justice gives guidance which the national court must take into account: the place from which the employee carries out his transport assignments, the place where the employee returns after his assignments, the place where the employee receives his assignment and organises his work, as well as the place where the employment instruments are located. This place can, but need not, coincide with the "home base" concept in Regulation 3922/91, which harmonises rules and procedures in the air transport sector. Nonetheless, it is a significant indicium, that will be discarded only if there is a closer link with another Member State.

Next to the acceptance of its own jurisdiction, the Hainaut Labour court of appeal has also ruled that Belgian labour law applies to the aircrew workers of Ryanair. Ryanair had noted that several labour courts in Italy, Spain and Germany had issued judgments confirming that the appellants' place of work was the aircraft and not the airports. In light of the judgment of the CJEU, this interpretation was no longer viable. The decision of the Hainaut labour court of

[41] Cour de Travail de Hainaut, 14 June 2019.
[42] CJEU 14 September 2017, C-168/16 en C-169/16, S. Nogueira, V. Perez-Ortega, V. Mauguit, M. Sanchez-Odogherty and J. Sanchez-Navarro/Crewlink Ireland Ltd; and M. J. Moreno Osacar/Ryanair Designated Activity Company, formerly Ryanair LtdF; TEMMING, "The case of Sandra Nogueira and Others v Crewlink Ireland ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company. Comment to Court of Justice of the European Union (Second Chamber), judgement of 14 September 2017, Case C-168/16", *ELLJ* 2018, vol. 9, afl. 2, 206–215; also see the case not of G. BUSSCHAERT in *EELC* 2019/3.

appeal will be of interest to all European courts and sets a precedent. This judgment is also followed by the conclusion of collective bargaining agreements between Ryanair and its pilots and cabin personnel in late 2018 and in 2019 in Belgium (and in other countries), by which Ryanair recognises the application of national labour law.

In any case it shows that these foreign employees were, in fact, not posted workers, but were working habitually in Belgium with Charleroi Airport as the centre of their professional activities (their home base). Therefore, Belgian labour law should apply to its full extent.

172. Also, in **Denmark**, there was a remarkable case against Ryanair in 2015 where the Danish labour court established that Ryanair had an operating base in Denmark, which allows the trade unions to make a claim for the conclusion of collective bargaining agreements. At the moment, the Danish Trade Union for aircrew has filed a complaint before the Danish labour court about a foreign air carrier that has hired aircrew with Vilnius as their home base while having Denmark as the primary boarding country (the aircrew is passively flown from Denmark to Vilnius back and forth in relation to each flight schedule).

173. Next, in **France**, article L.1262-3 of the French Labour Code and R.330-2-1 of the French Civil Aviation Code have been invoked by the French Supreme Court in its decisions regarding Vueling and Easyjet. These decisions are mostly social security cases relating to undeclared work ('travail dissimulé'). This is an infringement that notably consists in an absence of declaration by the employer of his employees to the French social security administration. The airlines generally hide themselves behind the A1-certificates (= E 101 certificate) provided by other Member States. However, the Criminal chamber of the French Supreme Court has not accepted the A1-certificates provided by another Member State in the Vueling decision. [43] In this decision, the French Supreme Court ruled that Vueling could not invoke the posting rules applicable in social security matters. However, since then, the position of the French Supreme Court has evolved. It overruled on 18 September 2018 three French Courts of Appeal decisions that sentenced the air transport companies City Jet, Ryanair and Air France for illicit work due to a lack of declaration of some employees to the French social security Administration. [44]

174. The Supreme Court ruled that the French Judges cannot decide to assess the validity of the A1 certificates issued by the companies as regards the employee's affiliation to a non-French social security scheme, unless they can demonstrate that these certificates are fraudulent.

The French Vueling case led to two preliminary questions before the European Court of Justice registered under the numbers C-370/17 and C-37/18 on which Advocate-General Saugmandsgaard has delivered an opinion in which he concludes that the court of the host Member State (where the worker is posted to) has jurisdiction to disregard an E 101 certificate when it has before it evidence establishing that that certificate was obtained or relied on fraudulently. [45] Naturally, the final outcome of the *Vueling* case [46] will be very important for the coordination of social security legislation in the EU, which will have an impact on the

[43] Cass.crim (Fr.) 11 mars 2014, n° 12-81461, 11-88420.
[44] Cass.Crim (Fr.) Septembre 2018, n° 13-88632, 11-88040, 15-80735, 13-88631.
[45] Opinion of AG. Saugmandsgaard, 11 July 2019, C-370/17 and C-37/18, Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) V Vueling Airlines SA and Vueling Airlines SA vJean-Luc Poignant.
[46] At the moment of the publication of this Report, the case was still pending before the CJEU.

posting of workers, but it does not directly have consequences for the application of the Posting of Workers Directive, nor does it refer to the current legislative provisions on social security coordination.

175. It has to be mentioned that similar case law on the application of A1-declarations is to be found elsewhere in the Member States (usually in the hosting Member States), yet only in France these cases are related to aircrew.

Also the law applicable to the employment contract of aircrew has been the subject of litigation. The French Supreme court, in its Labour chamber, has ruled in favour of the application of French law, and bases this application on the Rome I Regulation when the crew member performs his work from France, quite similarly to the Belgian judgment mentioned above. [47]

176. Lastly, in **Portugal**, the only decision found regarding posting of aircrew is from the Court of Appeal of Lisbon on 16 November 1994. This decision concerns a previous company agreement entered into between AIR ATLANTIS, TAP and SPAC of 31 July 1989, according to which the posting of aircrew was made dependent on certain equity criteria (mainly, the seniority of the employees). However, this case has little importance for our research.

11 THE IMPACT OF THE REVISED DIRECTIVE ON THE SITUATION OF AIRCREW

177. Most national experts consider the future impact of the Revised Directive on the situation of the aircrew as hard to asses, unclear or even minimal to non-existent. When the national experts do foresee some positive or negative consequences, this stays very general and not aircrew-specific. The extension of the hard-core provisions of article 3.1 of the Posting of Workers Directive is of course mentioned. But also the new rules on accommodation and allowances or reimbursement of expenses.

12 CONCLUSIONS

178. The overview above leads to several problematic conclusions. First of all, it is remarkable that some Member States, officially or in practice, hold the view that the Posting of Working Directive is not applicable to aircrew. This interpretation seems to be in contrast with the intentions of the EU legislator and does not have a ground in the Posting of Workers Directive. Also other, more limited exemptions (e.g. for a posting of less than 30 days) could cause aircrew not to fall under the posting rules in some Member States while they would in others. Nonetheless, when the posting rules are applied, the Member States would apply the full set of hard-core labour law provisions as foreseen by Art. 3.1 of the Posting of Workers Directive.

[47] Cass. (Fr.), Labour Chamber, 11 April 2012, n° 11-17.096, 11-17.097

179. Second, the Enforcement Directive clearly had an impact, as most Member States have established certain enforcement mechanisms and instruments. The prior declaration of the posting, the obligation to keep social documents available and the designation of liaison officer are popular among Member States. Nonetheless, there are Member States who are lagging behind. Furthermore, one could question the obligation in several member states to translate social documents into an official language, while not accepting English documents, as a costly burden on the posting companies.

180. Third, the general lack of data on the control and enforcement of the posting rules in the aviation industry and the information received from the national authorities via the national experts seem to indicate that the application of the posting rules in the aviation industry is not really a priority in most of the Member States. In Chapter 3 and 4 we will see that this lack of enforcement has serious consequences. Also case law on the posting of aircrew is very rare, even if there is some interesting case law at national and EU level, with some important cases still pending before the CJEU.

CHAPTER 3. POSTING OF WORKERS IN THE AVIATION SECTOR: WHAT DO THE STUDIES SAY?

181. In general, there is a lack of legal and scientific literature on the specific topic of posting of workers in the aviation sector. However, several useful and recent reports and studies that are relevant for our research exist, amongst others[48]:

1. The **Atypical employment in aviation Report of 2015** by researchers of Ghent University, just like the current research commissioned by ECA, AEA and ETF (financed by the European Social Dialogue Committee). [49]
2. The **Reports on A1 Portable Documents** issued in **2016** and **2017** (Posting of Workers) undertaken by HIVA[50] as commissioned by the European Commission (Directorate-General for Employment, Social Affairs and Inclusion). [51] This is a yearly report on the amount of A1 Declarations in light of the Social Security Coordination rules.
3. The **2019 Ricardo Study**, ordered by the European Commission (DG MOVE), gives a look into the working conditions of aircrews in the European internal market. [52]
4. A **2019 European Commission Report** on the Aviation Strategy for Europe: Maintaining and promoting high social standards. [53]

1 ATYPICAL EMPLOYMENT IN AVIATION REPORT

182. The report of the team of professor Yves Jorens of Ghent University does not focus on posting of workers in the aviation industry but highlights the increasing use of atypical forms of employment in aviation. As atypical forms of employment are defined:

1. Fixed term employment
2. Part-time employment
3. Temporary agency work
4. Bogus self-employment and other problematic employment relations

183. The authors of this study, which also looked at the situation in several specific Member states, have identified the issue that mostly low cost carriers have increasingly made use of atypical forms of employment in an attempt to cut down on personnel costs, leading to a downwards shift of working conditions of aircrew.

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[48] Other studies on the aviation in the EU, but less relevant for the topic, are STEER DAVIES GLEAVE, Studies on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010, July 2012 and STEED DAVIES GLAVE, Study on employment and working conditions in air transport and airports, October 2015.

[49] Y. JORENS, D. GILIS, L. VALCKE and J. DE CONINCK, "Atypical forms of employment in the Aviation sector", European Social Dialogue, European Commission 2015.

[50] HIVA, Research Institute for Work and Society is a multidisciplinary research institution at KU Leuven.

[51] F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2016", EU Commission, December 2017; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2017", EU Commission, December 2018.

[52] Ricardo Energy & Environment, Study on employment and working conditions of aircrews in the EU internal aviation market, DG MOVE/E1/2017-556, January 2019, further referred to as "Ricardo Study 2019".

[53] EUROPEAN COMMISSION, Aviation Strategy for Europe: Maintaining and promoting high social standards, COM(2019) 120 final, Brussels, 1 March 2019.

184. With regards to posting, the authors of the report assume that the Posting of Workers Directive should in principle apply, by example when temporary work agencies provide workers to user undertakings/airlines in a different Member State [54] In general, aircrew members performing activities for their companies in another country within the framework of the free movement of services are basically posted workers. [55] Therefore, according to the study, their employment conditions must be looked at from the perspective of the provisions concerning the posting of services. The study further states that *"it cannot be excluded from the beginning that air crew members are considered as posted workers. If and to what extent the host country can then apply its labour law provisions must also be assessed along these lines."* [56]

185. These remarks are given in light of the situation in France, where the law states that the French Labour Code is applicable to airlines which have a 'base d'exploitation' in France. The notion of a 'base d'exploitation' is conceptually linked to the EU notion of 'home base', and is defined as being a unit or infrastructure from which a company runs an air transport business in a stable, habitual and continuous manner, with employees whose work is centred there. [57] The centre of work is the place where the employee usually works, or where he or she begins working from and returns to after completing his or her tasks. This creates a direct link between the home base and the worker's place of habitual work.

186. Although this legislation is confirmed by the French case law, the Ghent study is critical for an automatic application of the French provisions to foreign air crew personnel, as the Posting of Workers Directive does not allow a country to impose its entire national legislation to posted workers, but only the number of provisions listed in art. 3.1 of the Directive. [58] The French law might therefore infringe the free movement of services.

187. Interestingly, the study also has a look at the issue of the applicable social security law connected to the possibility of air carriers to change the secondary base or home base of the aircrew workers. However, our own research has covered this extensively in its first Chapter.

2 REPORTS ON A1 PORTABLE DOCUMENTS 2016-2017

188. Thus far, five reports have been published, analysing the A1 declarations of 2012-2013, 2014, 2015, 2016 and 2017. [59] The 2018 Report is expected in December 2019. Our research had a look at the most recent reports of 2016 and 2017. Jozef Pacolet and Frederik

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[54] Y. JORENS, D. GILIS, L. VALCKE and J. DE CONINCK, "Atypical forms of employment in the Aviation sector", European Social Dialogue, European Commission 2015, 38.
[55] Y. JORENS, D. GILIS, L. VALCKE and J. DE CONINCK, "Atypical forms of employment in the Aviation sector", European Social Dialogue, European Commission 2015, 236.
[56] Idem.
[57] Idem, 234.
[58] Idem, 236-237.
[59] F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2012 and 2013", EU Commission, 2014; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2014", EU Commission, 2015; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2015", EU Commission, 2016; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2016", EU Commission, December 2017; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2017", EU Commission, December 2018.

Dewispelaere of KU Leuven's HIVA have collected the data on the number of Portable Documents A1 (PD A1) issued by the EU Member States and EFTA countries during the reference years. Not all of the A1-declarations where connected to posting, but they do tend to be the majority of the cases: in 2016, it concerned 1.6 million of the total of 2.3 million declarations [60], in 2017 this increased to 1.7 million out of 2.8 million declarations in total [61]. These reports are interesting because they also recorded the data with regard to the amount of A1-declarations in the aviation industry. As said before, not all of the numbers are connected to posting, but the majority does, and therefore these statistics give not only an indication about the application of the social security coordination rules by the European air carriers (and the Member States), but also about the application of the posting of workers rules.

189. Shockingly, the amount of A1-Declarations for aircrew are extremely low. For 2016, out of 2.3 million declarations, 697 were done for flight or cabin crew members, or only 0,03%. In 2017, this number increased to 2,759 out of 2.8 million declaration, equalling 0,1%.

190. Per sending Member State (including EFTA), the amount of A1-declarations for flight or cabin crew members were [62]:

Country	Absolute 2016	Absolute total 2016	Relative 2016	Absolute 2017	Absolute total 2017	Relative 2017
Belgium	2	104.307	0.0%	27	134.398	0.0%
Bulgaria	0	19.595	0.0%	0	36.220	0.0%
Czech Rep.	6	47.578	0.0%	16	67.933	0.0%
Denmark	n.a.	29.595	0.0%	1186	37.848	3.1%
Germany	192	260.068	0.1%	154	399.745	0.0%
Estonia	0	17.953	0.0%	2	18.977	0.0%
Ireland	60	7.339	0.8%	83	7.745	1.1%
Greece	/	6.924	0.0%	n.a.	7.204	0.0%
Spain	25	147.424	0.0%	108	191.148	0.1%
France	0	135.974	0.0%	0	111.659	0.0%
Croatia	0	42.602	0.0%	0	60.026	0.0%
Italy	12	114.515	0.0%	7	152.528	0.0%
Cyprus	0	3.552	0.1%	0	4.040	0.0%
Latvia	8	10.830	0.0%	1	20.689	0.0%
Lithuania	0	30.723	0.0%	n.a.	70.180	0.0%
Luxembourg	0	68.725	0.0%	0	73.875	0.0%
Hungary	0	65.185	0.0%	n.a.	82.881	0.0%
Malta	3	504	0.6%	4	1.388	0.3%
Netherlands	4	98.687	0.0%	19	103.738	0.0%
Austria	6	75.132	0.0%	3	68.956	0.0%
Poland	n.a.	513.972	0.0%	639	573.358	0.1%

[60] F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2016", EU Commission, December 2017, 9.
[61] F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2017", EU Commission, December 2018, 9.
[62] F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2016", EU Commission, December 2017, 15; F. DE WISPELAERE and J. PACOLET, "Posting of workers, Report on A1 Portable Documents issued in 2017", EU Commission, December 2018, 18.

Portugal	12	64.459	0.0%	2	85.074	0.0%
Romania	/	50.855	0.0%	2	84.743	0.0%
Slovenia	0	164.226	0.0%	0	190.976	0.0%
Slovakia	26	112.028	0.0%	8	112.978	0.0%
Finland	193	8.155	2.4%	167	8.061	2.1%
Sweden	/	11.456	0.0%	116	10.710	1.1%
UK	129	49.210	0.0%	187	49.496	0.4%
Iceland	3	239	1.3%	4	293	1.4%
Liechtenstein	n.a.	1.343	0.0%	n.a.	1.024	0.0%
Norway	n.a.	4.134	0.0%	12	4.097	0.3%
Switzerland	16	23.887	0.1%	12	31.291	0.0%
Total	**697**	**2.291.176**	**0.0%**	**2.759**	**2.803.279**	**0.1%**

191. In an international industry as aviation, the amount of A1-declarations for cabin crew seems abnormally low in most countries. The increase of declarations is mostly due to the 1186 Danish declarations of 2017. Furthermore, also Poland did 639 declarations. [63] Not all amounts seem unbelievable (by example Finland, Iceland and Sweden) but it general, the numbers are not what you expect from this industry, which is not the biggest sector in the Member States, but often does have a considerable size. Therefore, the data seems to indicate a lack of compliance or application of the rules of the social security coordination regulation which also gives a good indication about the non-application of the posting rules by air carriers (and authorities). This situation is confirmed by the information which the authors received from several stakeholders. [64]

3 THE RICARDO STUDY: STUDY ON EMPLOYMENT AND WORKING CONDITIONS OF AIRCREWS IN THE EU INTERNAL AVIATION MARKET

192. In 2019 a Study on employment and working conditions of aircrews in the EU internal aviation market was published, ordered by the Directorate-General for Mobility and Transport (DG Move) of the European Commission. [65] The study has the objective to help develop a comprehensive view of the different forms of employment and working conditions of aircrew workers employed by European Economic Area (EEA)-licensed air carriers –based inside and outside the EEA and to help understand whether and how the existing EU and national social rules effectively cover the activities of aircrew workers, identifying the legal challenges in protecting this category of highly mobile workers in the fast-developing aviation market. [66]

193. Amongst other methodologies, the findings of the study are based on a survey of a.o. 5957 pilots, 2195 cabin crew workers, 27 air carriers and 9 labour inspectorates in seven Member States. [67] Therefore, the study is not fully representative for the industry, but has a

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[63] This seems in contrast with the view of the national expert of Poland in Chapter 3, which stated that aircrew are exempted from the Polish posting rules.
[64] However, these sources are confidential.
[65]Authors are: Charlotte Brannigan, Sofia Amaral, Chris Thorpe, Samuel Levin, Hannah Figg, Rui Neiva, Samantha Morgan-Price (Ricardo) Miguel Troncoso Ferrer, Clara García Fernández, Sara Moya, Izquierdo, Laura Castillo, Jesús Tallos, Clara Molina (GA_P).
[66] Ricardo Study 2019, iv.
[67] Ricardo Study 2019, v.

good coverage of the relevant target groups. The authors estimate that they were able to gather answers from 11,5% of the commercial pilots, 4,4% of the cabin crew and 7,5% of licenced carriers.

194. The Ricardo Study covers many different topics related to working conditions that are worth looking into to understand the situation of working condition in the European aviation sector, but most relevant for our research is naturally the part on posted of workers. Also, the authors of this study seem to be unsure whether the Posting of Workers Directive is applicable to pilots and cabin crew. [68] They therefore start out by pointing at the HIVA reports that we've looked into above to conclude that the available data "*suggests a very limited issuing of A1 documents for pilots and cabin crew which, given that even those might not be posted workers according to the respective Directive, indicates very low usage of the mechanism*". [69] From their own survey, they conclude that around 25% of aircrew workers that have been placed on a temporary basis outside their home base had been issued an A1 document.

3.a Temporary placement in another Member State

195. Next, the study has a look at different options to temporary place aircrew in another Member State: the placement on a temporary basis outside home base, wet leasing or other temporary placements. First, it seems that the temporary placement outside the home base, which could be seen as a traditional posting of workers, is not used very commonly (6% of pilots and 3% of cabin crew). [70] Only six out of 24 air carriers have said to have used this method. However, such posting is more common for low-cost carriers (74% of the cabin crew and 57% of the pilots). The authors suggest that the overall numbers might be this low because the question was posed in the present tense and therefore did not ask if posting was used in the past. [71]

196. A second form of placing air crew workers in another Member State is the method of 'wet leasing', whereby an air carrier with its seat in Member State A can enter into a lease agreement with an operator of Member State B or a third country. [72] By means of the agreement, the latter ("lessor") temporally puts at the disposal of the former ("lessee") an aircraft, all or part of the aircrew, and possibly as well maintenance services and insurance. Wet leasing contracts usually last from 1 month up to a year. During the wet leasing contract, the employment contracts of the aircrew with the lessor stay unaltered. Therefore, the cabin crew keep on being employees of the lessor. In certain cases, air crew will work outside of their home base to carry out the wet leasing contract. This situation can be equalled to a form of posting. According to the survey, 3,4% of the pilots stated they were working on a wet lease with another carrier from their home base and 2,6% with a carrier from outside of their home base. Also 2% of cabin crew stated they were working on wet leases from their home base and 1% from outside of their home base. Therefore, also for wet leasing the survey did

[68] Ricardo Study 2019, 121.
[69] Ricardo Study 2019, 123.
[70] Ricardo Study 2019, 123-124.
[71] Ricardo Study 2019, footnote 91.
[72] In practice, there are also companies whose main business model is the wet leasing of planes and aircrew.

not indicate high amounts of posting amongst aircrew. [73] Other data shows that the use of wet leasing is not very standard. [74]

197. The third and residual category of other arrangements that could be considered as temporary placement in another Member State does also not take up a big part of the overall employment situations, with 4% of the pilots and 2% of the cabin crew.

198. Next, pilots and cabin crew that indicated that they are in temporary placement were asked whether they were expected to return and resume working from their contractual home base after working from a different operating base. 9% of the cabin crew and 13% of the pilots answered no and 26% of the cabin crew and 9% of the pilots did not know, which according to the researcher indicates that they are not in a temporary placement but in a permanent one. [75] In this case, the Posting Directive would not apply.

199. Overall, it seems that around 6% of cabin crew (100 of the 1,668 answering the survey) and 12% of pilots (584 of the 4,922 answering the survey) are in some form of temporary placements in another Member State. These numbers are higher among low-cost carriers (7% cabin crew; 15% pilots). [76] It is these categories of aircrew workers which could potentially fall under the scope of the Posting of Workers Directive.

3.b Actual application of Posting of Workers Directive

200. The Ricardo Study continues to see whether the Posting of Workers Directive is actually applied for aircrew workers which could fall under its scope.

201. In first instance, the researchers have simply asked the aircrew which considered themselves as temporary placed whether they know or think if their employer applies the Posting of Workers Directive. Of the cabin crew, 11% answered yes, 27% answered no and 61% did not know (for 1% it was not relevant). Of the pilots 19% answered yes, 26% answered no and 47% did not know (for 9% it was not relevant). [77] These answers indicate a limited use of the posting rules. Next, from the 9 national employment authorities, only Malta stated that the Directive was applied by air carriers. The labour inspectorates of Austria, Croatia, Estonia and Malta (out of 12 interviewed ones) confirmed the application. The national authority of Sweden specified that *"posting is not common, its more common to open new AOC [air operator certificate] in the country of question",* thereby hiring new workers in the new country. [78] Finally, none of the 27 air carriers said to have applied the Posting of Workers Directive. [79] However, according to the trade unions EurECCA and the Norwegians Pilots Group, low-cost carriers sometimes use it to post workers with lower-paid contracts signed in Eastern Europe into countries in Western Europe with higher costs of living, and avoiding

[73] Ricardo Study 2019,124-125.
[74] Ricardo Study 2019, 125-127.
[75] Ricardo Study 2019, 128.
[76] Idem.
[77] Ricardo Study 2019, 129.
[78] Idem.
[79] Idem.

hiring people in these countries with higher costs – this was a view also supported by the Norwegian Pilots Group.[80]

202. Another indication of the low application of the posting rules is the low amount on positive answers to the question to the aircrew whether the employer informed them of the rights applicable in the Member States where they are temporarily posted. Only 12% of the cabin crew and 8% of the pilots confirmed. [81]

203. Second, the Ricardo study has singled out two situations in which aircrew could be qualified as posted workers: aircrew occupied in the context of a wet leasing contract and the temporary assignment of aircrew to a different secondary base from home base.

204. With regards to wet leasing, it states that "In order to determine if the Posting of Workers Directive is applicable to a particular wet lease agreement, it should be analysed if there is a temporary posting to a different Member State. If the analysis shows that there is no temporary posting but a permanent one or if the employee is just providing services for several different countries, the Posting of Workers Directive would not be applicable." [82]

Therefore, wet leasing should fall under the scope of the Posting of Workers Directive if it is a temporary situation and if the works is carried out in or from a different member state. By example, this would be the case if, for instance, a pilot of a Belgian airline company who usually works from Brussels airport is asked to fly a leased plane for a German air carrier for two months (due to an increase of demand) from Dusseldorf Airport.

205. Regarding the temporary assignment of air crews to a different secondary base from the home base, the researchers found some of the reasons that were given by air carriers not to apply the posting rules as legally invalid. [83] By example, they would include in the employment contract that the applicable employment law is the same as the nationality of the airplane (country where the plane is registered), based on the 1944 International Civil Aviation Agreement (also known as the Chicago Convention). In this way, it would not matter where the "home base" of the aircrew worker is. However, the Court of Justice has dismissed this practice, as this is clearly violating the Brussels Ibis Regulation which stipulates that the competent judge should be the place in which the employee habitually carries out his work and which makes it indirectly clear that the same reasoning should be followed for the Rome I Regulation regarding the applicable employment law. [84] As mentioned, the Rome I Regulation does not preclude the application of the Posting of Workers Directive. Some low-cost air-carriers also declared that Regulation (EU) No. 465/2012 precludes the application of the Posting of Workers Directive. This Regulation provides some guarantees for aircrew, but it mainly regulates the applicable Social Security legislation and not the employment law and therefore is complementary with and not excluding the Posting of Workers Directive.

[80] Idem.
[81] Ricardo Study 2019, 130.
[82] Ricardo Study 2019, 131.
[83] Ricardo Study 2019, 132-133.
[84] CJEU 14 September 2017, Joined cases C-168/16 and C 169/16, Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Oscar v Ryanair.

206. In any case, the Ricardo Study concludes that in some instances the Posting of Workers Directive should be applied and should not be applied. [85]

207. The Posting of Workers Directive should not be applicable to:

1. **self-employed** aircrew workers or contractors (posting only applies to employees)
2. When there is **no temporary assignment**, but operation of flights **from-to the home base**. This seems to include even flight assignments which stretch over multiple days and different locations.
3. **Mobile workers** which are on a temporary and/or precarious situation, but are not considered as posted workers, because they are not yet integrated in the labour market of the host Member State. The study refers to two documents of the EU Commission to support this view. [86] However, we fail to see how this view can be deducted from the documents which do not seem to relate to employment matters for aircrew.

208. In contrast, the **Directive would be applicable** to those aircrew workers:

1. who are **temporarily posted to the territory of a Member State** on the employer's account and under its direction and provided there is an employment relationship between the undertaking making the posting and the employee during the period of posting; and
2. in cases of **transnational services** in the framework of **temporary employment agencies or placement agencies**.

4 EU COMMISSION AVIATION STRATEGY FOR EUROPE: MAINTAINING AND PROMOTING HIGH SOCIAL STANDARDS 2019

209. This Report is the follow up of the 2015 Aviation Strategy for Europe of the Commission. [87] The 2015 Report focused on:

- Tapping into growth markets, by improving services, market access and investment opportunities with third countries, whilst guaranteeing a level playing field;
- Tackling limits to growth in the air and on the ground, by reducing capacity constraints and improving efficiency and connectivity;
- Maintaining high EU safety and security standards, by shifting to a risk and performance based mind-set.[88]

210. Although "reinforcing the social agenda and creating high quality jobs in aviation" was included in the report, this was not the main ambition of the Commission at the time. Nevertheless, the report does mention the fact that "*the situation of highly mobile workers who have their secondary basis ('home base') located outside the territory where the airline is licensed deserves specific attention. It is important to bring clarity on the applicable labour*

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[85] Ricardo Study, 133-134.
[86] EUROPEAN COMMISSION, "Aviation: An open and connected Europe for Jobs, Growth, Investment and Global Leadership", 8 June 2017, Press Release, http://europa.eu/rapid/press-release_IP-17-1552_en.htm ;
EUROPEAN COMMISSION, "EU Air Carriers by country holding an active operating licence, 16 May 2018, https://ec.europa.eu/transport/sites/transport/files/eu_air_carriers_by_country_holding_an_active_operating_licence.pdf.
[87] EUROPEAN COMMISSION, An Aviation Strategy for Europe, Brussels, 7 December 2015, COM(2015) 598 final.
[88] EUROPEAN COMMISSION, An Aviation Strategy for Europe, Brussels, 7 December 2015, COM(2015) 598 final, 3.

law and on the competent court in charge of disputes." [89] In this context, the Commission issued a practice guide on applicable labour law and the competent court in 2016. [90]

211. In contrast the Aviation Strategy of 2019 is all about the social aspects of the European aviation industry, including the problems surrounding the application of the Posting of Workers Directive. In the 2019 Strategy, the Commission states that the rules regarding the air transport market for operators have been harmonised in the EU, however, the social protection and labour law remain primarily a national competence: "*This means that while all aviation staff benefit from the protection offered by EU law they may enjoy different rights and levels of protection depending on the national law that applies to them. This situation can be particularly challenging for aircrew (i.e., cabin crew and pilots) due to the cross border nature of their jobs.*" [91]

212. The Commission highlights practices of air carriers to hire aircrew via intermediaries or as self-employed or "pay-to-fly" (a form of on-call work) to reduce costs. According to the Report, the European Parliament, the European and Economic and Social Committee, Member States, airlines and social partners have expressed concerns about the negative impact that some practices by certain airlines have had on the employment and working conditions of some aircrew workers.

213. Concerning posting of workers, the Commission heavily supports its views on the Ricardo Study, as it copies its findings and confirms that the Posting of Workers Directive could apply in three cases:

- the transnational provision of services by temporary employment agencies or placement agencies;
- wet leasing;
- temporary assignment of aircrew to a secondary base outside their home base. [92]

214. Although a case by case analysis is needed, in principle the Directive can be applied if the situations meet its requirements. The Commission Report also refers to the findings of the Ricardo Study which make it clear that the Posting of Workers Directive is generally not applied in the case of aircrew, due to a lack of awareness among stakeholders, including national authorities and enforcement issues.

215. In order to tackle this issue, the Commission is not proposing any new EU legislation or adaptions to the existing legislation in the field of posting of workers. But it identifies possible improvements in the following fields:

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[89] EUROPEAN COMMISSION, An Aviation Strategy for Europe, Brussels, 7 December 2015, COM(2015) 598 final, 11.
[90] EUROPEAN COMMISSION, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, https://publications.europa.eu/en/publication-detail/-/publication/41547fa8-20a8-11e6-86d0-01aa75ed71a1.
[91] EUROPEAN COMMISSION, Aviation Strategy for Europe: Maintaining and promoting high social standards, Brussels, 1 March 2019, COM(2019) 120 final, 1.
[92] The concept of "secondary base", as it is used for the specific purpose of this study, is explained in detail at § 224.

1. First, the **recent amendments to the Posting of Workers Directive** which establishes the principle of equal pay for equal work on the same place need to be transposed by Member States by 30 July 2020 and applied as from that date, which will facilitate the transnational provision of services, whilst ensuring fair competition and respect for the rights of posted workers. The Commission specifically refers to the extension of the principle of equal treatment (workers employed by a temporary work agency, who work temporarily under the supervision and direction of a user undertaking, must be provided with at least the same basic working and employment conditions as if they had been recruited directly by the undertaking to occupy the same job) to posted temporary or placement agency workers, including aircrew. This means that air carriers should not be able to escape the application of this principle by work with temporary workers through intermediary agencies. However, the Commission does not really clarify how the implementation of the revised Directive will improve the proper application of the posting rules in the aviation sector.

2. Second, and rather obvious, the **effective application and enforcement** of the Posting of Workers Directive by the relevant national authorities to situations that fall within the scope of the Directive. The Commission refers to **art. 4 of the Enforcement Directive**, which lists factual elements that may be taken into account in the overall assessment of each specific case in order to identify genuine posting situations and to prevent abuse and circumvention of the rules. We will study the usefulness of art. 4 of the Enforcement Directive in chapter 4.

3. Third, the Report mentions the creation of the **European Labour Authority** (start at the end of 2019 and full capacity in 2023) which will a.o.:
    - support cooperation between EU countries in the cross-border enforcement of relevant EU law, including in tackling undeclared work
    - facilitate joint inspections.
    - mediate and facilitate a solution in cases of cross-border disputes between national authorities.
    - make it easier for individuals and employers to access information on their rights and obligations and to access relevant services.

5 CONCLUSIONS

216. The abovementioned studies and reports do help the analysis of the problem with the application of the Posting of Workers Directive in the aviation sector. Especially the Ricardo Study is of utmost importance, as it not only identifies the issues, but also suggests some solutions.

217. It is possible to draw some conclusions which are for a good deal the same as those which resulted from the answers to our questionnaire by experts from the EU member states:

- The aviation sector resorts to very complicated forms employment with lots of intermediary structures, temporary agency work and other contractual mechanisms, like wet leasing.
- According to the Ricardo Study, the actual amount of aircrew which in principle could fall under the scope of the Directive is 6% of the cabin crew and 12% of the pilots. Posting of workers is not very common, but it also is not a practise to be overlooked.

> Moreover, from the HIVA Reports on A1 Portable Documents as well as from the answers of the relevant interviewees in the Ricardo Study it is very clear that the actual application of the Posting of Workers Directive is way lower than 6% (cabin crew) or 12% (pilots). There seems to be a general lack of awareness of the posting rules, which also was clear from the answers to our questionnaire.

218. Mostly the Ricardo Study and the 2019 Aviation Strategy of the Commission give us material to work with in our evaluative research on the application of the Directive, as they have identified three instances in which the Posting of Workers Directive should in principle apply (the transnational provision of services by temporary employment agencies or placement agencies; wet leasing; temporary assignment of aircrew to an secondary base outside their home base). Furthermore, the Ricardo Study also gives an idea of the situations that should not fall within the scope of the Directive. Finally, the idea of the Commission to use art. 4 of the Enforcement Directive can be useful for our evaluation.

CHAPTER 4. EVALUATION OF THE SITUATIONS OF AIRCREW EMPLOYMENT THAT (DO NOT) FALL UNDER THE SCOPE OF THE POSTING OF WORKERS DIRECTIVE AND OF THE SUITABILITY OF THE LEGAL FRAMEWORK

1 INTRODUCTION

219. This chapter contains an evaluative research in two ways. First, the majority of this chapter will be focused on the evaluation of the specific situations of aircrew employment that do fall and do not fall under the scope of the Posting of Workers Directive. Second, a more general evaluation will take place on the suitability and appropriateness of the existing EU (but also national) legal framework with regard to posting of workers for aircrew.

220. The examination of the different EU studies relevant to the aviation sector has led us to three situations in which the Posting of Workers Directive can apply:

- Temporary assignment of aircrew to a secondary base outside their home base.
- Wet leasing.
- The transnational provision of services by temporary employment agencies or placement agencies.

The Ricardo Study also indicated that the posting rules should not be applied in some cases (see below).

221. It is the purpose of the first part of this chapter to analyse if indeed these situations fall under the scope of the Posting of Workers Directive and to identify if other situations should be taken into account.

222. In order to complete this evaluative research, we will also see if the situations that do and do not fall under the scope of the directive meet (or do not meet) the three criteria of appropriateness, for evaluating the existing legal framework for posting:

- **feasibility**: do the existing rules lead to red tape administrative obligations, which, seen the high amount of flights (possible postings), would lead to an excessive amount of formalities for airline companies?
- **legal certainty**: can national employment (and social security) rules applicable to the flying staff be easily predicted? Do these national rules remain applicable over time or are they everchanging depending on the country of posting?
- **fight against social dumping and unfair competition**: related to the first value, can national employment rules applicable to the flying staff be objectively identified? Or can they be freely chosen by the airline companies, allowing some kind of forum shopping for the least protective rules?

223. As a general caveat for this first part, we have to warn the reader that the evaluation below is based on the relevant legal texts, our questionnaire, the studies discussed

in the previous chapter and other relevant political documents and academic literature. However, there is no specific CJEU case law available nor are there clear guidelines of the EU Commissions which are tailor-made for the aviation sector. The EU Commission did recently create a new Practical Guide on Posting, but this is relatively short and not specific for the aviation industry. [93]

224. For the second part of this chapter, the same three criteria of appropriateness will be used to evaluate if the current (and future[94]) legal framework with regard to posting of workers is suitable and appropriate for to the situation of aircrew.

2 HOME BASE AND SECONDARY BASE

225. It is useful to clarify two important concepts which will be used in the evaluation of the different situations:

> **Home base:** as seen in Chapter 1, the "home base" is a legal concept which is used in several EU legal norms. However, our concept of home base is wider than the specific legal concept under EU law.
>
> In the first place, the concept of "home base" comes from EU social security law. Article 11 (5) of Regulation 883/2004 provides that "an activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located. Annex III to Regulation (EEC) No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation defines the "home base" as ""*the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned"*. A home base is to be established taking into consideration the pattern and frequencies of flight duties, with the objective of providing crew members adequate and appropriate resting periods in compliance with the aforementioned provisions. This concept of home base is not only used to determine the applicable social security legislation, but is also a concept used by EU legislation relating to flight time limitations and minimal rest periods. [95]
>
> For most aircrew, the "home base" nominated by the air carrier will coincide with the "Member State in which he normally works" as used in the definition of posted workers in Article 2.1 of the Posted Worker Directive or the concept of "the habitual place of work" as used in Article 8 of the Rome I Regulation and Article 21 of the Brussels Ibis Regulation. Therefore, we assume in the evaluation below that the nominated home base is also the de facto home base of the aircrew: his/her habitual place of work. If this is not the case, the chances are great that the air carrier is abusing the nomination of the home base for social dumping practices. The fraudulent nomination of a home base which is not the real home base can lead to a multitude of problems with identifying the correct rules to be applied. Therefore, it is important that this practice is controlled and sanctioned by the authorities. The de facto home base or habitual place of work can be identified by several elements. As shown in Chapter 1, some useful indicia were found in the case law, regarding the concept of the habitual place

[93] EU COMMISSION, Practical guide on posting of workers, 2019

[94] Seen the fact that the Revision of the Posting of Workers Directive still needs to be implemented by the Member States.

[95] Y. JORENS, D. GILIS, L. VALCKE and J. DE CONINCK, "Atypical forms of employment in the Aviation sector", European Social Dialogue, European Commission 2015, 26.

of work in the Brussels 1bis Regulation (most recent, the *Crewlink* & *Ryanair* case [96]) and the Rome I Regulation:

- the place from which the worker carries out his transport-related tasks,
- the place where he returns after his tasks, receives instructions concerning his tasks and organizes his work,
- the place where his work tools are to be found,
- the place where the aircraft aboard which the work is habitually performed is stationed, and
- the place where the 'home base' is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

In this *Crewlink and Ryanair* case, the CJEU ruled on the one hand that concept of 'place where the employee habitually carries out his work', within the meaning of the Brussels Ibis regulation, could not be equated with that of 'home base', as this is more of a social security concept. However, the Court also added: "*the concept of 'home base' constitutes nevertheless a significant indicium for the purposes of determining the 'place where the employee habitually carries out his work*" unless closer connections were to be displayed with a place other than the 'home base'.

- **Secondary base:** Unlike the home base, the secondary base is not a legal concept. The secondary base is the identifiable location from where the aircrew is de facto working from for a limited period of time during the posting. In a posting situation, the aircrew should be working from the secondary base in another Member State than the home base. An aircrew cannot be posted to a new home base, as he/she cannot be posted to his/her habitual place of work, because this is the place he normally works from. In case the new base is a new home base, we are not talking about a posting situation, but about a change of home base, which could bring along a chance of applicable employment legislation and social security legislation. To be clear, our concept of secondary base is linked to the aircrew worker and not to the air carrier. Therefore, it should not be confused with operational bases, secondary establishments or secondary hubs of air carriers, which should be distinguished from their main hubs.

226. In other words, in case of a posting of workers, the aircrew temporarily leaves the home base (= habitual place of work) to work from a secondary base in another Member State. If the new location becomes the habitual place of work, there is a new home base and there is no longer any posting situation.

227. AG Saugmandsgaard has, in his opinion in the *Vueling* case, reflected on the different business models of historical airlines and low cast carriers [97]:

(116) "The 'historical' airlines are traditionally organised on the basis of what is known as a 'hub-and-spoke' transport model. Thus, they have one operating base (sometimes several), or a 'hub', a central airport around which they organise routes ('spokes') and where connections between the different routes are also made. That operating base brings together, in particular, the airline's headquarters and the fleet of aircraft and constitutes the 'home base' of its flying personnel, that is, the airport at which the flying personnel

[96] CJEU 14 September 2017, C-168/16 and C-169/16, Crewlink & Ryanair, ECLI:EU:C:2017:688.
[97] Opinion of AG. Saugmandsgaard, 11 July 2019, C-370/17 and C-37/18, Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines SA and Vueling Airlines SA v Jean-Luc Poignant, §116-118.

receive their flight plans, from which they begin their duties and to which they return on completion thereof. On the other hand, the routes are only layover airports.

(117) The low-cost airlines, on the other hand, have gradually adopted a different model, called 'point-to-point'. While they still generally have a main operating base serving as a hub, they essentially provide relatively short links between two destinations that enable multiple aircraft flights at a sustained pace. The objective of facilitating those flights as much as possible encouraged those airlines to post personnel and equipment for extended periods to the airports which they serve and, in that context, to establish new bases which gradually become important in logistical and human terms.

(118) In that context, some low-cost airlines have developed a practice consisting in recruiting workers whom they permanently post to secondary operating bases in other Member States, while applying to them the social law and social security law of their main operating base, and not the standards and contributions provided for in the Member States in which their secondary bases are located. To that end, those airlines employ, in particular, the model of posting of workers, arguing that their presence in Member States other than the Member State of the main operating base is an application of the freedom to provide services."

These reflections by A.G. Saugmandsgaard are interesting as they give an insight in the view of low-cost air carriers. However, it is clear that the mentioned secondary bases in this example, are actually home bases, and the aircrew are not in a situation of posting in view of the permanent nature of the assignment. This will become more evident when looking further below at the situation of posting and the situations which fall outside the scope of the Directive.

3 PROTECTION IF IT IS NOT A POSTING SITUATION

228. It is important not to forget that even if certain situations of employment of aircrew do not fall under the scope of the Posting of Workers Directive, these aircrew will still be protected by the provisions of i.a. the Rome I Regulation on the applicable employment law and of the Social Security Coordination Regulation (and Brussels Ibis Regulation) and therefore not completely left exposed to the will of the air carrier (See Chapter 1).

229. Art. 8 of the Rome I Regulation will look at the habitual place of work to determine the applicable employment law, which can also function as an effective tool against social dumping.

230. Further, the important condition that a posting should be temporary (limited period of time, see below) also follows from the Rome I Regulation, as this regulation states that the applicable employment legislation does not change if the work in another Member State is merely temporary: "*The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*"[98] In addition, the 36th recital of the Regulation states: "*As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.*" This results in an intention

[98] Art. 8. 2 Rome I Regulation.

to return and it is noticeable that an emphasis is placed on parties' intentions over, for example, a time indication. [99]

231. This also indicates that, in case the "posting" includes a change of habitual place of work (which should be the home base), there actually cannot be a posting in the meaning of the Posting of Workers Directive as one should not apply only the posting rules (the hard core labour provisions of the "hosting" Member State), but the whole employment law of this country.

232. Therefore, in a situation where there is no posting to a secondary base, but a change of home base, we do not have to rely on the protection offered by the Posting of Workers Directive, but on the rules of the Rome I Regulation as discussed in the 1st Chapter. The law of the habitual place of work (home base) is, according to article 8 of the Rome I Regulation, in principle applicable unless the parties agree otherwise. Even if the parties have chosen the applicable law, this could not have the effect of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice, so the law of the habitual place work and if this place cannot be determined the place of business through which the employee was engaged with the reservation that these two places could be discarded if the contract is more closely connected with another EU country.

233. This means that an air carrier who would like to evade the posting rules, e.g. in order to not have to apply the core provisions of the hosting Member State, will still have to take into account the employment law of the new home base, even if the individual employment agreement opts for another applicable legislation. All the mandatory rules of law, which do not allow derogations by agreement, will apply. E.g. in Belgium, almost the full scale of employment law provisions is assumed to be mandatory.

234. This does not mean that the parties have to conclude a new employment contract, but any provision that contradicts the mandatory employment law provisions of the home base will be null and void. In some cases, it could therefore be wise to adapt the employment contract, taking into account the mandatory provisions.

235. In case the home base regularly switches (e.g. every 2 months), one can wonder if it is still possible to identify a habitual place of work to determine the applicable employment law. This situation is not unknown in the case law. The CJEU has indeed ruled[100] that when the place of work changes regularly, one has to take account of the whole duration of the employment relationship, in order to identify where the employee has worked the longest. Only if it is not possible to do so, the place of engagement of the aircrew will be taken into account, except if the aircrew has a closer link with one of the involved countries. Therefore, it will only be possible to "evade" the protective rules of the Rome I Regulation if it is impossible to identify the habitual place of work and if there is no closer link between the aircrew and any of the countries he worked from.

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[99] F. VAN OVERBEEKE, Sociale concurrentie en conflictenrecht in het Europees wegtransport, PhD Thesis defended at the University of Antwerp, 2018, open access: https://repository.uantwerpen.be/docman/irua/f21992/155699.pdf

[100] CJEU 27 February 2002, C-37/00, EU:C:2002:122, *Weber.*

236. In many cases, it does not seem beneficial for air carriers to evade the posting rules as changing the home base of the aircrew could bring with it extensive legal consequences and administrative and legal costs as well, e.g. to adapt the employment contract.

237. In addition, if air carriers are trying to evade the posting rules by changing the home base, they should also take into account that this might have consequences for the applicable social security legislation.

4 THE FACTUAL ELEMENTS OF POSTING ACCORDING TO THE ENFORCEMENT DIRECTIVE

238. The Enforcement Directive of 2014 enlists several factual elements in art. 4, §3, in order to assess 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. All factual elements characterising such work and the situation of the worker can be taken into account and the failure to satisfy one or more of the factual elements does not automatically preclude a situation from being characterised as one of posting. The list is therefore not limitative. The listed elements are:

(a) the work is carried out for a limited period of time in another Member State;

(b) the date on which the posting starts;

(c) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;

(d) the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;

(e) the nature of activities;

(f) travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;

(g) any previous periods during which the post was filled by the same or by another (posted) worker.

These factual elements are logical and useful, but they are not always easy to verify in the employment situations of aircrew. Especially elements a) and d) seem crucial to us, as they also follow from the Rome I Regulation (see above).

5 EVALUATION OF THE SITUATIONS THAT FALL OUTSIDE THE SCOPE OF THE POSTING RULES

The following exclusions of the scope of the posting rules can be identified:

5.a When there is no posting activity

239. This instance is not explicitly mentioned by the Ricardo Study, but it is important to keep the scope of the Directive in mind, which in art. 1.3 limits its application to:

- undertakings that post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting (standard posting); or
- post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting (intra-group posting); or
- being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting (temporary agency posting).

240. Therefore, if there is just the air carrier as an employer who is flying its aircrew to other locations, without any link to other parties or to establishments of the company or undertakings owned by the group in the territory of a Member State, the Directive is simply not applicable. Most standard flights will therefore not fall under the scope of the posting rules (however, see part. 3.1). This was confirmed in a Commission Staff Working Document of 2006 which referred to the minutes of a Council Meeting on the Posting of Workers Directive of 1996:

> *"However, in a statement included in the minutes of a Council meeting, the Council and the Commission pointed out that Article 1(3)(a) of the [Posting of Workers] Directive presupposes*
>
> *the transnational provision of services by an undertaking on its own account and under its direction, under a contract concluded between the undertaking providing the services and the party for whom the services are intended and posting as a part of such provision of services.*
>
> *Accordingly, where the aforementioned conditions are not met, workers who are normally employed in the territory of two or more Member States and who form part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water do not fall within the scope of Article 1(3)(a).*
>
> *This situation is justified by the fact that it would be difficult to manage the practical consequences of applying different national laws to the existing relationship between the international transport undertaking (operating on its own account or on behalf for hire or reward) and its mobile staff, depending on the country to which the passengers/goods were being transported.* [101]

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[101] EU COMMISSION, Commission Staff Working Document: Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Brussels, 4 April 2006, SEC(2006) 439, 12, www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/sec/2006/0439/COM_SEC(2006)0439_EN.pdf; Council document No 10048/96 SOC 264 CODEC 550, statement No 3.; S. FEENSTRA, "Detachering van werknemers in het kader van het verrichten van diensten – het arbeidsrechtelijke kader – Richtlijn 96/71/EG" in Y. JORENS, *Handboek Europese Detachering en vrij verkeer van diensten*, Brugge, die Keure, 2009, 252-253.

241. In addition, according to the Ricardo Study, the Posting of Workers **Directive should not be applicable** to the following situations:

5.b Self-employed aircrew workers or contractors (posting only applies to employees)

242. The studies and our own questionnaire made clear that more and more air carriers are shifting their employees towards independent forms of employment, especially for pilots the status of self-employed is becoming a standard practice. Of course, this seems the perfect way to avoid the application of the Posting of Workers Directive, and most other EU social rules (except safety provisions). However, national authorities should be very aware of bogus self-employment.[102]

243. Bogus self-employment is defined by the OECD as consisting of 'people whose conditions of employment are similar to those of employees, who have no employees themselves, and who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers' responsibilities'. [103] The EU Commission refers a similar definition: "*Often referred to as false self-employment or dependent self-employment, this is commonly understood as involving persons/workers registered as self-employed whose conditions of employment are de facto dependent employment. National legislation and/or court decisions determine this status. This employment status is used to circumvent tax and/or social insurance liabilities, or employers' responsibilities*."[104] The CJEU has laid down three main criteria to be qualified as an employee:

- Whether there is an authority relationship [105];
- Whether workers form part of the employer's economic unit [106];
- Whether there is a relation of subordination [107].

244. The Member States have their own criteria but usually the most important element is the relation of subordination. The Ricardo Study used two specific criteria to identify bogus self-employment amongst pilots:

- The extent that self-employed pilots are free to work for more than one air carrier; and
- The extent that self-employed pilots have complete flexibility to decide when and how many hours they fly.

These criteria are obviously related to the main criteria of forming part of the employer's unit and the relation of subordination. Therefore, a pilot or cabin crew member who always or mostly works for the same air carrier and does not really have any say in which flights he or she will perform or to which secondary base he or she is transferred, seems at odds with the self-employed status. In contrast, e.g. a pilot who offers his services to several carriers, or only temporary works for certain carriers and who has a certain degree of freedom in the choice of his flights, should not fall under the scope of the Directive.

[102] See Ricardo Study 2019, 98 e.v.;
[103] OECD, Employment Outlook 2014, Paris.
[104] European Commission, Glossary of DG EMPL, https://ec.europa.eu/social/main.jsp?catId=1323&langId=en#chapter_B.
[105] CJEU of 4 December 2014, C-413/13, FNV Kunsten Informatie en Media v Staat der Nederlanden
[106] CJEU of 16 December 1975, cases 40-48, 50, 54-56, 111, 113 and 114/73, Suiker Unie UA e.a. v CE.
[107] CJEU of 11 November 2010, case C-232/09, Dita Danosa v LKB Līzings SIA.

245. According to the Ricardo Study, around 9% of the pilots are declared as self-employed. [108] This number is significantly higher among low cost carriers. The Ricardo Study also made clear that almost all self-employed pilots do not consider that they are free to work for more than one air carrier in parallel (90%), and that they have complete flexibility to decide when and how many hours they fly (93%). [109] This indicates that there is a major issue with bogus self-employment. Especially pilots and cabin crew hired through temporary employment agencies or wet leasing companies seem to be often declared as self-employed, while it seems completely at odds with their actual working conditions and the relation with the air carriers they are working for. [110]

246. Applying the posting rules to true self-employed persons would not be **feasible** and would be problematic in view of the criterium of **legal certainty**, as it would be certainly confusing to apply certain labour conditions to independent workers. However, the criterium of the **fight against social dumping and unfair competition** demands that bogus self-employed aircrew be brought within the scope of the EU posting rules.

247. In practice, there seems to be a substantive problem with bogus self-employment in the EU aviation industry. Even if only 9% of the pilots are self-employed, their numbers are rising and if the authorities do not interfere, we could end up with an industry of precarious workers who fall outside the scope of the protection of employment law. The fact that many temporary employment agencies and wet leasing companies are declaring their aircrew as self-employed also means that there is no level-playing field for companies who qualify their aircrew as employees and therefore bear the social costs for these employees. By allowing such a practice of bogus self-employment to exist, companies who rightfully declare their aircrew as employees are currently being pushed out of the market.

248. In conclusion, the Posting of Workers Directive is still applicable to bogus self-employed aircrew, but first the national authorities or courts will have to deal with the qualification issue of the labour relation between air carrier (or intermediaries) and aircrew. At the moment, the EU and the national authorities seem to underestimate this problem. The lack of control is allowing air carriers to use false self-employed aircrew which not only fall outside the scope of the posting rules, but also outside the scope of employment law in general.

5.c When there is no temporary assignment, but operation of flights from-to the home base

249. Most aircrew which operate on standard flights will be excluded from the application of the posting rules. A simple flight schedule from home base A to location B in another Member State and back to A does not fall under the scope of the Directive as the employment legislation of the home base will continue to be applicable during the flight and even during the time which the aircrew spends in location B. However, one could argue that an aircrew who flies to another member state, at first sight, can fall under the definition of art. 2 of the Posting of Workers Directive: "*a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works*". The Ricardo

[108] Ricardo Study 2019, 101.
[109] Ricardo Study 2019, 105-106.
[110] Ricardo Study 2019, 102.

Study states that there is not a temporary assignment when there is a displacement which starts and finishes at the employee's home base, in which case it is arguable that the applicable legal law is the one in which the home base is located.[111]

250. This exclusion is also based on the abovementioned definition of art. 2 of the Posting of Workers Directive, according to which a posted worker needs to carry out a work in a member state of a "limited period of time". Unfortunately, the Directive has not clarified what a "limited period of time" means. But the flights from-and-to-the-home-base do not seem to fit in the concept of a "temporary assignment", as the aircrew worker is in this case actually not on a temporary assignment but just continuing to do his or her regular work under normal circumstances.

251. When looking at our criteria of appropriateness, it becomes clear that there are good arguments to exclude this "standard" situation from the scope of the Directive:

- **Feasibility**: applying a hard core of labour conditions of another member state every time an aircrew flies to another country is hardly feasible for the employer. It would not only be very complicated for the air carrier and the aircrew, as they would constantly have to switch from applicable hard-core labour conditions, but also for national authorities for whom it would be nearly impossible to control the application and to enforce the rules.
- **Legal certainty**: the fast variation of applicable (hard core) labour conditions is very confusing and is definitely harming for the legal certainty for all involved actors.
- **Fight against social dumping and unfair competition**: Next to the argument that the enforcement would be a nearly impossible task, it seems also more effective if the employment legislation of the home base continues to apply. The application of the posting rules would have little beneficial effects for the fight against social dumping, as these standard situations are usually not problematic.

252. The situation becomes more complicated if the flight assignment stretches over multiple days and different locations. By example the aircrew workers fly from home base A to location B in another member state, then to location C in another member state, where they stay for one night in a hotel. The next day they fly to location D in yet another Member State and then back to home base A. It is not immediately clear if this series of flights falls under the "operation of flights from-to the home base" as it is not a simple go-and-return flight. Furthermore, the series of flights can become more complicated and longer with different stayovers and locations, which would mean that the aircrew would only return to their home base after several days or even a week. Yet, if we use the same evaluation criteria, the application of the Posting of Workers Directive seems just as or even more problematic than is the case for a simple flight from and to the home base as this would also mean that the applicable (hard core) labour conditions would constantly change, in a way which is damaging the feasibility, legal certainty and the fight against social dumping even more. It is hard to imagine what good would come from applying five or ten different hard-core labour conditions over a period of several days.

253. An analogy can be made with the *Dobersberger* case which is currently pending before the CJEU. This case revolves around the question of whether the provisions of the Posting of Workers Directive are applicable to a situation in which an international train crosses

[111] Ricardo Study 2019, 133.

Austria on its way from Budapest (Hungary) to Munich (Germany) and later returns to Budapest. Austria claimed that the Austrian hard-core labour provisions can be applied to the workers of the train as they are posted to Austria, but the Advocate-General disagreed in his opinion of 29 July 2019. [112] He stated that the workers on the train should be considered to be "highly mobile workers" who's place of work is, in reality, immaterial. For the Advocate-General "*it does not matter whether the means of transport on which they carry out their duties happens, at a specific point in time, to be in Hungary, Austria or Germany. Put differently, the entire logic of the country of origin (or posting) and the country of destination does not apply in such a situation, as there is no country of destination: the train departs in Budapest. It comes back to Budapest. If anything, the country of destination is Hungary itself. Country of origin and destination coincide. I fail to see how the situation of the workers of the case at issue differs from those working, say, on the Budapest tram.*" The opinion of the AG in the Dobersberger case seems to follow our logic for the exclusion of flights from-to the home base, if you replace a train-ride by a flight.

254. Therefore, we must conclude that the Ricardo Study was right to exclude this category from the application of the posting rules and that it is preferable to maintain the normal application of the legislation of the home base. However, if the series of flights is of a nature that it becomes hard to speak of a true home base (the aircrew is constantly moving and does not regularly return to the home base), they can be considered as highly mobile workers (see below).

5.d Highly Mobile workers

255. According to the Ricardo Study, mobile workers are in a temporary and/or precarious situation, but are not considered as posted workers, because they are not yet integrated in the labour market of the host Member State. The study refers to two documents of the EU Commission to support this view. [113] However, we fail to see how this view can be deducted from the documents which do not seem to relate to the employment matters of aircrew. Moreover, it is not very clear what is meant with "mobile workers". The Directive 2002/15/EC of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities defines "Mobile workers" quite broadly as "any worker forming part of the travelling staff, including trainees and apprentices, who is in the service of an undertaking which operates transport services for passengers or goods by road for hire or reward or on its own account" [114]. This definition is specific for the road transport sector and is of little help to our research as it is too broad. Also the concept of "mobile workers" used by AG Szpunar in his opinion in the pending *Dobersberger* case (C-16/18) is too broad as this seems to include all workers carrying out their duties on means of transport. [115]

256. In our opinion, the mobile workers referred to in the Ricardo Study can refer to aircrew who work long enough from one location to identify a de facto base, but who also do

[112] Opinion of A.G. Szpunar of 29 July 2019, C-16/18, ECLI:EU:C:2019:638, Michael Dobersberger, §53-65.
[113] EUROPEAN COMMISSION, "Aviation: An open and connected Europe for Jobs, Growth, Investment and Global Leadership", 8 June 2017, Press Release, http://europa.eu/rapid/press-release_IP-17-1552_en.htm ;
EUROPEAN COMMISSION, "EU Air Carriers by country holding an active operating licence, 16 May 2018, https://ec.europa.eu/transport/sites/transport/files/eu_air_carriers_by_country_holding_an_active_operating_licence.pdf.
[114] Art. 3, d of Directive 2002/15/EC.
[115] Opinion of A.G. Szpunar of 29 July 2019, C-16/18, ECLI:EU:C:2019:638, Michael Dobersberger, §54.

not have one single home base from where they are posted (and where they return to). In fact, the de facto base is also their home base and thus this home base changes very fast (e.g. after each period of two months). This lack of a true home base makes it difficult to apply the posting rules, as there is no clear temporary assignment in another Member State. Also when taking into account the factual elements of art. 4.3 of the Enforcement Directive, it becomes clear that mobile workers are not in a situation of posting, as they do not fulfil the element d) that the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted.

257. To distinguish these workers from a too broad concept of mobile workers, we call them "**highly mobile workers**".

258. These highly mobile aircrew are continuously moving their home base between Member States and the posting rules do not apply on such a situation. The applicable employment law should be traced down according to the provisions of art. 8 of the Rome I Regulation (see part 3 of this chapter). In this way, these workers can be in a precarious situation as the lack of clear connection to a Member State (which makes it difficult to identify their habitual place of work) might open the way for a free choice of the applicable legislation by the parties or at most the application of the legislation of the place of hiring. These options both often come down to the air carrier choosing the least protective employment law. This situation is certainly problematic, but it cannot be solved by the posting rules. In fact, as seen in Chapter 1, art. 8 of Rome I Regulation also provides a protection for these situations by leaving open the possibility for a judge to identify a closer link between the aircrew and another Member State than the "chosen one", in which case the employment legislation of the Member State with the closer link would apply. In very few cases, it might become difficult to apply the rules of the protective rules of the Rome I regulation, with the consequence that the place of hiring would determine the applicable law, which would indicate a gap in the EU protection of these precarious workers. In these cases, we would be talking about aircrew being replaced to different home bases every couple of months, while making sure that none of these home bases have a close link with the aircrew (for instance, because he stayed there the majority of his time, or because it is the Member State where his family lives). It seems to be logistically difficult to arrange such a schedule for all the aircrew. Yet, this practice seems to gain ground (e.g. floating pilots, see below). As a result, the EU should monitor this type of arrangement and could consider to introduce e.g. a cap on the amount of changes of home base (per year) or a minimum period before one can change a second time from home base during the same year.

259. In practice, some air carriers make use of so-called "floating pilots" or "mobile pilots" who do not have a fixed home base but are sent to a base where they are needed the most. In this case, the base they are sent to for a month or two or three will be their home base which will change as soon as they are sent to a new location. These pilots can be qualified as highly mobile workers.

260. Moreover, also according to the criteria of appropriateness, it seems not the best idea to apply the posting rules:

- **Feasibility**: Even more than it was the case for flight from-to the home base, it would not be feasible for air carriers to constantly have to take into account the hard-core

provisions of every Member State the employee is flying to and staying in. The same arguments of complexity and practical impossibility for all partners return in this situation.

- **Legal certainty**: the fast variation of applicable (hard core) labour conditions is very confusing and is definitely harming for the legal certainty for all involved actors. Moreover, the lack of home base and/or secondary base makes the situation even less clear.
- **Fight against social dumping and unfair competition**: Although these highly mobile aircrew need an adequate protection against social dumping practices. Applying the posting rules is not the best solution. It would be better to make certain that they are covered by the employment legislation of one Member State, while preventing that air carriers can quasi unilaterally decide the applicable law in the employment contract.

6 EVALUATION OF THE SITUATIONS THAT FALL WITHIN THE SCOPE OF THE POSTING RULES

261. In this part, we will make an evaluation of the situations which are identified as in principle falling under the scope of the Posting of Workers Directive. First, there is the general situation of an aircrew who is posted for a limited period of time to the territory of another Member State. This can happen in the framework of a services agreement with another party (air carrier) or the aircrew can be posted to an establishment of the company in the other Member State or to an undertaking of the company group in the other Member State. Next, we will focus on two more specific situations which can make it harder to recognise a posting situation: wet leasing and posting in the context of temporary agency work.

6.a In general: aircrew who are temporarily posted to the territory of another Member State

262. The first situation is the general and residuary group. It deals with aircrew who are temporarily posted to the territory of another Member State on the employer's account and under its direction and provided there is an employment relationship between the undertaking making the posting and the employee during the period of posting. To be clear, to be posted is not meant as a simple flight to another Member State. A normal flight is not a situation of posting, as seen in the previous part. In contrast, this situation demands a real temporary assignment.

263. First, this means that for a limited period in time, the aircrew will work from another secondary base than the place where he or she habitually carries out his work from (the home base). Second, the posting should be provided:

- in the **framework of a services agreement** between the employer of the aircrew (the air carrier making the posting) and the party for whom the services are intended
- or the posting should happen to an **establishment of the company in another Member State** or to an **undertaking owned by the group in another Member State**. [116]

[116] See the scope of the Posting of Workers Directive in art. 2.

264. As said before, if there is no such other party or an establishment or undertaking owned by the group, there is no posting. However, very often air carriers will have a sort of establishment or an undertaking within their group at another airport. By example, they will have a ticketing office or a place where their aircrew can rest or will be briefed about flights etc. Therefore, it can be fairly easy to fulfil the second condition.

265. It is thus mostly the first mentioned condition, that for a limited period of time the aircrew worker carries out his work in the territory of a Member State other than the Member State in which he normally works, which is important. In practice, this means that there will be a temporary **new secondary base for the worker in another Member State**. This does not mean that the applicable employment law is changing, as this is merely a temporary assignment and art. 8.2 of the Rome I Regulation clearly states that "*The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country"*. But the posting rules will have to be applied as the Posting of Workers Directive is applicable. Therefore, the hosting Member State can apply its hard-core employment provisions to the posted worker.

266. The problem is mostly that there is a **grey zone between a temporary assignment to another Member State and a series of flights**, in which case the aircrew eventually returns to the home base. Possibly a week or multiple weeks might pass before the aircrew worker returns to his/her home base. As said before, the Posting of Workers Directive does not define "a limited period of time" and therefore it can be difficult to identify whether it is a posting or just a series of flights without an assignment to a secondary base. Of course, when the series of constantly changing flights is long and the aircrew is barely in his or her "home base" anymore, one could wonder if the aircrew really does have a home base where he/she returns to and if he or she is not a highly mobile worker, in which case the posting rules would not apply. It is only a posting if the worker is assigned to a secondary base located in another Member State, if not, either the aircrew has no consistent home base (highly mobile worker) or the series of flights should be considered as an operation of flights from-to the home base. In neither of these cases, the Posting of Worker Directive is applicable.

267. Furthermore, a real temporary assignment should constitute a certain **fixed period of time** during which the work of the aircrew will take place from a secondary base. This time period, in principle, cannot be too short, as it would just be considered a series of flights from-to the home base. But it also cannot be too long, as it would not be considered as "temporary" anymore. It is difficult to put an exact amount of time on the minimum or maximum [117] duration of a posting. One has to **take the context into consideration**. [118] According to the case law of the CJEU, one can look to the frequency, the periodicity, the continuity of the services. [119] If during one week the base is effectively changed from the home base A to secondary base airport B in another Member State and basically all the flights during this week are seen as flight from-to this airport B in the other Member State, one can consider this as a posting even if it only lasted one week. However if the Airport B is merely

[117] Except in light of the social security, where the maximum of a posting is principle 24 months.

[118] S. FEENSTRA, "Detachering van werknemers in het kader van het verrichten van diensten – het arbeidsrechtelijke kader – Richtlijn 96/71/EG" in Y. JORENS, *Handboek Europese Detachering en vrij verkeer van diensten*, Brugge, die Keure, 2009, 255-256.

[119] CJEU 30 November 1955, C-55/94, ECLI:EU:C:1995:411, *Gebhard*, §27 ; CJEU 13 February 2003, C-131/01, ECLI:EU:C:2003:96, §22.

the place where the aircrew starts and ends the week, while flying to and staying in a collection of other locations and Member States, it can be questioned whether this is a true posting, as the aircrew has no real link with the new location (Airport B) and there is no effective assignment to a secondary base. In any case, if the temporary assignment takes a longer but limited period of time (multiple weeks, months), the chances get higher that it is a real posting as a real assignment to a secondary base might become evident. [120]

268. The application of the posting rules to situations of temporary assignments to other Member States, in the meaning that the worker are temporarily assigned to a secondary base, also seems justified when we look at the criteria of appropriateness:

- **Feasibility:** As said before, a temporary posting should be for a fixed period of time. This makes it possible for the air carriers to foresee the legal consequences of such temporary assignments. As there will be a clear assignment of the aircrew to a secondary base, it does not seem unreasonable to demand the application of the hard-core provisions of the member state where the secondary base is situated. If there is no real assignment to a secondary base or if the duration is too short to make it feasible, there actually is no posting, and so there is no problem with regard to the criterium of feasibility.
- **Legal certainty:** As demonstrated above, the distinction between this situation and a series of flights from-to the home base or highly mobile workers is not always easy to recognise. However, it should be clear that, when there is a genuine case of posting, the Posting of Workers Directive does apply. Therefore, we need to guarantee that the stakeholders can easily identify a posting situation (see Chapter 5). If this is the case, there is no issue with legal certainty. In fact, the current lack of application of the posting rules by air carriers (and the lack of enforcement by the Member States) is an important consequence of legal uncertainty.
- **Fight against social dumping:** As the Posting of Workers Directive is an important legal tool in the fight against social dumping, not applying the posting rules would be very counterproductive and leave it up to some air carriers to just employ the most inexpensive aircrew everywhere and anytime they want, while creating an important unfair competition with air carriers that do respect the law and prefer to offer their employees decent working conditions.

269. Next to this general category of posting, there are two more specific cases of posting in the aviation industry that, in principle, fall under the scope of the Posting of Workers Directive.

6.b Wet leasing

270. The method of wet leasing, in which an air carrier leases an airplane and (a part of the) aircrew to another air carrier does make the legal construction more complicated for everyone to see whether there is a situation of posting of workers or not. However, if we look at the conditions for a posting situation, a wet leasing context can perfectly be qualified as a situation of a posting of aircrew provided in the framework of a services agreement between the employer of the aircrew (the air carrier making the posting) and the party for whom the services are intended (the air carrier who is paying the employer to provide the air crew and the plane for his use). As stated in the Ricardo Study, in order to determine if the Posting of

[120] With two remarks: first, if the assignment takes too long, it is also no posting cause it is not temporary and second, if the assignment takes long but there is no clear de facto home base during the assignment, the worker is most probably a mobile worker and not a posted worker.

Workers Directive is applicable to a particular wet lease agreement, it should be analysed if there is a temporary posting to a different Member State. If the analysis shows that there is no temporary posting but a permanent one or if the aircrew is just providing services for several different countries while not being assigned to a secondary base, the Posting of Workers Directive would not be applicable. [121]

271. Therefore, an aircrew worker who is not assigned to a secondary base but who is, by example, hired for the first time to be employed in his home base in a wet leasing situation, is not a posted worker. In this case, the place where the wet lease contract is executed, is the place where the aircrew worker usually carries out his work according to art. 8 of the Rome I regulation, and therefore the legislation of that home base shall in principle apply, without any application of the Posting of Workers Directive as there is no temporary assignment in another Member State.

272. When looking at the criteria of appropriateness it becomes clear that wet leasing might create technical obstacles for the application of the posting rules, but there are enough reasons to overcome these technical obstacles:

- **Feasibility**: if an air carrier is temporarily wet leasing a plane and aircrew to an air carrier who will operate the airplane and aircrew from a secondary base, it constitutes a posting. Such a wet leasing operation is obviously a legal contract, possibly preceded by serious negotiations between both parties and due legal analyses to prevent any legal issues with the commercial aspect of the lease. However, the parties also should take into account the social (law) aspects of the lease. This does seem feasible, especially for the air carrier which provides the plane and the aircrew, before concluding the wet lease contract. If necessary, the costs of the posting rules could be included in the price of the wet leasing.
- **Legal certainty:** as said before, it is possible to distinguish the situations in which the Posting of Workers Directive applies. Not applying it to situations of wet leasing, merely because there are multiple actors involved or when the wet leasing contract is very complicated, cannot be accepted as it would be harmful for the legal certainty if a posting situation would not fall under the scope of the Directive.
- **Fight against social dumping:** it would be contrary to the spirit of the posting rules if the parties (air carriers) of the wet leasing agreement would be allowed to hide behind complicated legal construction to evade the application of the posting rules. Therefore, it is important to apply the posting rules in case an aircrew is posted in a situation of wet leasing.

273. The situation becomes more complicated when the "posting" is organised by a company which is specialised in the wet leasing of planes and aircrew. Such a company is not a traditional air carrier, but its business model is the wet leasing-practice itself. The wet leasing company will usually nominate its place of business as the home base, from where the workers are posted to the client air carriers. However, if the aircrew are not returning to this so-called home base and actually are never connected to this base or working from this base, it will not be possible to call it their home base and there would be no posting situation. In this case, the aircrew could be seen as highly mobile workers. Therefore, it is necessary to investigate the concrete circumstances of the relation between the place of business of the company and the aircrew.

[121] Ricardo Study 2019, 131-132.

274. Just as is the case for temporary employment agencies (see below), the studies and the information that we have received indicate that in practice wet leasing companies seem to have difficulties to apply the posting rules. In general, these are often completely ignored and also A1-declarations are not requested for posted aircrew. More and more, wet leasing companies are declaring its aircrew as self-employed workers, which fall outside the scope of the Posting of Workers Directive. It follows that many of the aircrew are bogus self-employed, as their working conditions and the relation with the company indicate an employment relationship. But also for aircrew which do have an employment contract, the posting rules are often not applied.

6.c Cases of transnational services in the framework of temporary employment agencies or placement agencies.

275. In this case, the temporary employment agency sends (posts) its aircrew workers to an air carrier to work from a secondary base in another member state. The temporary employment agency is the posting entity. We will use the term "temporary employment agency", even if some of these intermediary companies or placement agencies only declare their aircrew as self-employed persons and not as employees.

276. Some posting situations are hidden by the fact that the aircrew are not employed by the air carrier but by temporary employment agencies or placement agencies. However, the fact that the air carrier is not the employer does not change the fact that in case of a temporary assignment in another Member State during which the worker is assigned to a secondary base, the Posting of Workers Directive should apply. The fact that some air carriers use employment agencies to not apply the posting rules is not a legally acceptable practice.

277. In general, posting temporary agency aircrew workers to another Member state will fall under the scope of the Posting of Workers Directive. However, there can be exceptions, by example when the agency is posting the aircrew to (secondary) bases which changes after relatively short intervals (e.g. 2 months) to other Member states and the aircrew worker is never really returning to a home base from which he/she would normally work, this means that the secondary bases actually are his/her home base. Therefore, this is what we called a highly mobile worker and the Posting of Workers Directive does not apply to such a situation.

278. Likewise, a situation which would resemble the circumstances of the aircrew in the CJEU case regarding *Ryanair* and *Crewlink* should not be qualified as falling under the scope of the posting rules. [122] In this case Ms Nogueira and others, of Portuguese, Spanish or Belgian nationality, concluded, in the course of 2009 and 2010, contracts of employment with Crewlink, a legal person established in Ireland. Each of their contracts of employment provided that those workers would be employed by Crewlink and seconded (posted) as cabin crew with Ryanair. [123] The employment contracts also specified that their work relationship was subject to Irish law and that the courts of that Member State had jurisdiction over all disputes relating to the performance or termination of those contracts. However, Charleroi (Belgium) was their home base and all their tasks where performed in and out from Charleroi. This case was not about the application of the Posting of Workers Directive, nor about the applicable legislation

[122] CJEU 14 September 2017, C-168/16 and C-169/16, *Crewlink* & *Ryanair*, ECLI:EU:C:2017:688.
[123] These are specifically the facts for case C -168/16 as in case C-169/16 the aircrew was not hired through an agency but directly by Ryanair.

(Rome I) but about the competent jurisdiction (Brussels Ibis Regulation). The CJEU ruled that the Belgian judge was competent to handle the case, basing its decision on the concept of the habitual place of work. As this same concept is also the core element of Art. 8 of the Rome I Regulation, it is evident that the same reasoning can be followed for the application of the (Belgian) employment legislation. [124] In addition, this means that Crewlink was not posting these aircrew workers from Ireland to Charleroi (their home base), in the meaning of the Posting of Workers Directive: it is not only the Belgian hard-core labour provisions that should be applied, but the full Belgian employment law.

279. Taking into account the criteria of appropriateness:

- **Feasibility:** it is true that it might complicate the application of the posting rules when the employer is not the air carrier who gives the temporary assignment to the aircrew worker, but an employment agency has the responsibility of an employer and if a client-user wished to use the agency's aircrew workers in another Member State, he should be able to apply the posting rules and possibly calculate the costs for this in the price for the user. This does not seem practically impossible at all. If the air carrier was already using the temporary agency aircrew workers before and then puts them on a temporary assignment which changes their base to a secondary base, he should discuss the consequences of this use in advance with the temporary employment agency or even better, they should have dealt with this matter in the original contract between them.
- **Legal certainty**: as said above, when the agency-employer analyses the plans of the air carrier-user and sees that the air crew would be send to work from a secondary base in another Member State during his temporary assignment, the application of the posting rules is foreseeable. There is no problem with legal certainty, as long as it is clear who has the legal responsibilities to give consequence to the provisions of the Posting of Workers Directive, which could be stipulated in the contract between the employment agency and the user.
- **Fight against social dumping**: again, parties should not be able to hide behind complicated legal constructions of agency work to evade the posting rules. Of course, it can form an extra challenge for the social inspectorates to find out who is the actual posting employer. But this could be overcome by declaration systems as provided for by the Enforcement directive and possibly also with the A1 declarations, combined by a stricter control mechanism.

280. According to the information of the studies of Chapter 3 (especially the Ricardo Study) and the information we received, currently most temporary employment agencies are not applying the posting rules, nor are they requesting A-1 declarations for their aircrew. This issue of non-application seems to be closely connected to the widespread use of self-employed aircrew. As stated above, in many situations, the aircrew which are now declared as self-employed workers by the temporary employment agencies are very likely to be false self-employed or bogus self-employed. As a consequence, these temporary aircrew workers are not protected by the posting rules, nor by the protective rules of the Rome I Regulation. In addition, temporary employment agencies who declare their aircrew as employees are met with unfair competition. Such practices of social fraud should not be tolerated by the EU and the Member States.

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[124] F. TEMMING, "The case of Sandra Nogueira and Others v Crewlink Ireland ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company. Comment to Court of Justice of the European Union (Second Chamber), judgement of 14 September 2017, Case C-168/16", *European Labour Law Journal* 2018, no. 2, 206-215; P. VAN DEN BERGH, "Ryanair: missing link tussen Rome en Brussel", *Arbeidsrechtjournaal* 2017, no. 2, 17.

7 CONCLUSIONS WITH REGARD TO THE SITUATIONS OF APPLICATION/EXCLUSION

281. This evaluation first leads us to the important 5 cumulative conditions which need to be fulfilled to fall under the scope of the Posting of Workers Directive:

1. The posted aircrew worker has an employment relationship

The employment relationship of the aircrew can be with an air carrier or with a temporary employment agency. The aircrew worker is not self-employed. There still is an important issue relating to bogus self-employment of aircrew (to which the Directive should apply), but this is not the focus of this research.

2. The posting falls within the framework of art. 1.3 Posting of Workers Directive

The posting should be:

- to another party in the framework of a services agreement (standard posting); or
- to an establishment of the company or to an undertaking of the group in another Member State (intra group posting); or
- to a client (user) of a temporary agency posting its workers to another Member State (temporary agency posting).

3. The aircrew is posted under a temporary assignment

We need to take into consideration the context of the assignment to see whether it fulfils the condition that it is for a limited period of time. However, a too short period can often not be qualified as a true posting assignment as it is too short to be seen as an assignment to a secondary base (see condition 4) and a too long period could not be a temporary posting but hide a permanent employment.

4. The posted aircrew is assigned to a secondary base in a Member State other than where he/she has his/her home base.

The posted worker needs to be truly assigned to a secondary base. If during the posting the aircrew continues to regularly work from his/her original home base, there might be no posting. If the posting assignment only takes a short time (e.g. a week) and there is no clear secondary base during this period, there is no posting. However, if during this period there is a secondary base in another Member State which is clearly used regularly by the posted worker, there is a posting.

5. The aircrew is supposed to return to the home base at the end of the posting

A true posting situation demands that the aircrew is posted from the home base to a secondary base, which does not become the new home base of the aircrew worker. The secondary base and home base cannot be the same location. Art. 4, d) of the Enforcement Directive of 2014

makes clear that a real posting situation can be recognised by the fact that the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted. Therefore, if the aircrew is continuously assigned to other bases (by example every two months), without returning (at least in between or regularly) to a well-defined home base, it is doubtful whether the place from where the aircrew is posted is his/her actual home base. In this case, the aircrew is just changing from one home base to another and the posting rules should not be applied. In this case the aircrew is still protected by the provisions of the Rome I regulation (see section 3 of this chapter).

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282. First, the temporary posting of an aircrew to a secondary base in another Member State, posting in the situation of a wet leasing contract and posting of an aircrew in the framework of temporary agency work can all meet these five conditions. In contrast, the situations of self-employed aircrew, simple flights from A to B or (a series of) flights from-to the home base and highly mobile workers do not meet one or more of the conditions.

283. Second, we have used the three criteria of appropriateness (feasibility, legal certainty, fight against social dumping) to double check the purely legal evaluation. This evaluation has led us to conclude that although it might not always be without administrative costs and efforts to apply the posting rules (for the posting entities but also for the authorities), but the application of the posting rules does not constitute an excessive burden in the cases we have identified as falling under the scope of the Posting of Workers Directive. In certain cases the legal certainty can be further improved and the work of the social inspectorates will not always be easy when the air carriers use wet leasing constructions or temporary agency workers, but certainly in such cases the fight against social dumping demands an extra effort of the national authorities to protect the aircrew in extra precarious situations and to prevent unfair competition between air carriers.

284. In contrast, applying the posting rules to flights from-to the home base seems unnecessary and almost impossible. Also, for highly mobile workers this would not be feasible nor would help it to improve the legal certainty. For highly mobile workers, other solutions are smarter to redress the precarious working conditions of the affected aircrew, e.g. by using the provisions of the Rome I Regulation (with regard to the applicable employment law).

8 EVALUATION OF THE SUITABILITY OF THE LEGAL FRAMEWORK

285. The final part of this chapter highlights the issues which were brought up in the previous chapters and the first parts of this chapter, while taking into account the criteria of appropriateness (feasibility, legal certainty, fight against social dumping) in order to evaluate whether the current legal framework of the Posting of Workers Directive is suitable to solve the identified issues.

286. With the legal framework we mean:

- The Posting of Workers Directive
- The Revised Directive and the Enforcement Directive
- Other EU legislation referred to in Chapter 1:
    - Rome I Regulation

  - Brussels Ibis Regulation
  - Social Security Coordination Regulation
- The national implementation of the Posted of Workers Directive and Enforcement Directive

287. The list above makes it clear that the question of suitability goes beyond the Posting of Workers Directive alone. We also need to take into account the national implementation and other relevant EU rules to see if the combined set of rules are suitable and appropriate to regulate the posting of aircrew.

288. In the second chapter, this report features an overview of the national implementation of the posting rules and its application to aircrew. Next, the third chapter also gives insights into scientific studies and political reports on the actual application of the posting rules in the aviation industry.

8.a Feasibility

289. The previous parts of this chapter have made an evaluation of certain situations which fall under the scope of the Posting of Workers Directive and other situations which do not. In case of the situations which were qualified as posting situations, it should be feasible for air carriers, aircrew and national authorities to apply the posting rules. Therefore, this criterium of feasibility is not an automatic obstacle for the suitability or appropriateness of the legal framework.

290. This means that, in case of aircrew who are temporarily posted to the territory of another Member State, wet leasing situation or posting via temporary employment agencies and if the five cumulative conditions included in part. 7 of this chapter are fulfilled, it should be feasible to apply the posting rules. Certain administrative efforts of air carriers (and the controlling national authorities) would be necessary. But it does not create an excessive burden.

291. Only in the other cases (the situations which were deemed to not fall under the scope), it would indeed be very difficult to follow the movements of highly mobile aircrew and to apply the posting rules or it would constitute an unnecessary and excessive burden, e.g. in case of simple from-to home base flights.

292. In general, when the legal framework is correctly applied to the right situation, there is no problem with feasibility. When looking at the second chapter, it does seem necessary that certain national social inspectorates and other authorities reinforce their efforts regarding compliance with posting rules, but this issue might be more closely related to the criterium of legal certainty.

8.b Legal certainty

293. This criterium of appropriateness constitutes the biggest obstacle for the suitability of the legal framework. First, the answers to the questionnaire in the second chapter lead to the conclusion that the implementation of the Posting of Workers Directive by the different Member States is not very harmonious and that the interpretation by the different jurisdictions

of the applicability of the posting rules to aircrew is certainly not uniform. As the legal framework, and especially the Posting of workers Directive gives little to no indications on the application of the posting rules to aircrew, some Member States have used legal reasonings to exclude aircrew from the scope without any legal basis for it. The lack of clear guidelines for the aviation sector has created a substantial problem of legal uncertainty. During our research, it appeared that legal experts and the EU Institutions themselves were also not very certain about the applicability of the posting rules for aircrew. Next to the lack of (legal) indications or guidelines; there is also a lack of EU and national case law on the matter.

294. In addition, the information of the second chapter, but also certainly the studies in the third chapter have shown a clear lack of actual application of the rules. This is obviously the main consequence of the current lack of legal certainty. A lot of aircrew workers are not aware of the existence of the posting rules and/or are certainly not in a position to certify whether they are in a posting situation or not. Also, some air carriers have no idea whether they should apply the posting rules and others are simply making use of the current lack of legal certainty in order to avoid the application of the rules. It is even difficult to blame them, when also the Member States and legal experts are this confused on the matter. Of course, the multitude of flight patterns and different employment situations of aircrew further increase the complexity.

295. Nonetheless, the previous parts of this chapter have shown that it is possible to apply the current posting rules to aircrew and when using the five conditions of application, the legal certainty of the framework will become less problematic. We have to highlight the fact that the current legal certainty is mostly related to the application-question. Once it is clear whether the Posting of Workers Directive is applicable, most issues of legal certainty can be solved. However, this can be only successful if also the issue of bogus self-employment is confronted.

8.c Fight against social dumping

296. The Posting of Workers Directive, especially combined with the Enforcement Directive and after the Revised Directive, is a very important tool in the fight against social dumping and the prevention of unfair competition (if not the most important tool). However, the current lack of legal certainty with regard to the application of the posting rules for aircrew has created a legal vacuum in the aviation sector. Air carriers with malicious intentions are able to use this vacuum to circumvent the posting rules, which can lead to social dumping practices.

297. We are well aware that the EU posting rules are a political compromise and thus the application of the rules to aircrew does not guarantee the end of social dumping practices. However, the posting rules certainly can be a major help and therefore the application of the Posting of Workers Directive (when appropriate) will, without a doubt, benefit the fight against social dumping.

298. Nonetheless, we have identified situations which should not fall under the scope of the posting rules. Some of these, like the situation of highly mobile aircrew, are also considered to be precarious situations for aircrew which can be used as a form of social dumping. However, in these cases the Posting of Workers Directive cannot and should not interfere, as it would not be feasible and neither help the legal certainty if we would apply the posting rules to these situations. The situation of highly mobile workers clearly does not fit in the logic of the posting rules. In this case, we have to look to the wider EU legal framework and mostly at the protection awarded by the Rome I regulation (for the applicable employment law) or the Brussels Ibis Regulation (for the competent jurisdiction) and the Social Security Coordination Regulation, in order to avoid the exploitation and abuse of aircrew and social dumping practices. Unfortunately, these legal instruments will not always provide a clear solution for the determination of the applicable law, especially when it is difficult to determine the place of habitual work.

299. Finally, the fight against social dumping certainly cannot be won if the authorities allow air carriers and intermediaries to declare their aircrew 'en masse' as self-employed persons. By using self-employed aircrew, the Posting of Workers Directive is not applicable, and the companies also avoid most other social costs related to employment and social security law while shifting most risks to the aircrew workers themselves. Especially among low cost air carriers, temporary employment agencies and wet leasing companies, it is a common practice to use self-employed persons. Notwithstanding that the concrete situation of these workers should be investigated in order to be able to know whether the self-employed statute is used correctly, it seems very likely, based on the general characteristics of the working conditions of aircrew, that most of them are to be considered as bogus self-employed. Until now, national authorities did not seem eager to control aircrew and air carriers (and intermediaries) on bogus self-employment, leaving the gates open for social fraud and the destruction of a level playing field in the aviation industry. Therefore, the fight against social dumping (i.a. by using the Posting of Workers Directive) cannot succeed if the problem of bogus self-employment is not addressed accordingly.

8.d Conclusions

300. When looking at the three criteria of appropriateness, it is safe to conclude that it is mostly the legal certainty that critically endangers the suitability of the current legal framework for the posting of aircrew. Issues with the other two factors (feasibility and fight against social dumping) are mostly related to or consequences of the lack of legal certainty. It is crystal clear that the current legal framework faces problems and that the status quo is not an option if the EU and the Member States want to improve and protect the actual working conditions of aircrew and if they want to continue the fight against social dumping practices in the aviation sector. Yet again, it is necessary to highlight the close connection with the problem of bogus self-employment of aircrew. If this last problem is not confronted at the same time, most efforts to improve the application of the posting rules will be in vain. In the next and final chapter, we will suggest some recommendations in order to restore the suitability of the legal framework.

CHAPTER 5. RECOMMENDATIONS FOR IMPROVEMENT

1 USING THE FIVE CONDITIONS

301. As mentioned at the end of Chapter 4, the suitability of the legal framework for the posting of aircrew may be questioned. The cause of this unfortunate situation is mostly a lack of legal certainty, caused by a lack of specific provisions (mostly at EU level), a multitude of interpretations and different implementations (by the Member States), and a high level of unawareness amongst air carriers and aircrew.

302. The main factor of legal uncertainty is the fact that it is very difficult to ascertain to which situation of aircrew employment the Posting of Workers Directive should be applied. The Posting of Workers Directive has a general wording and contains no specific rules for aircrew. Further, the provisions on the scope of application of the Directive are rather concise and they are not supported by significant case law of the CJEU.

303. Therefore, i seems to be the lack of specific clarifications at EU level that allowed the Member States to develop different ideas about the application of the posting rules to aircrew and which created confusion and discussion amongst air carriers, aircrew, legal experts and other stakeholders.

304. The lack of legal certainty could be reduced by the EU if it made clear to the Member States and stakeholders when the Posting of Workers Directive should be applied, and when it should not. In the 4th Chapter we have evaluated certain situations to see whether they should fall under the scope of the posting rules or not. This evaluation has led our research to deduct five important cumulative conditions and rules. It could be useful for the EU to use these conditions as guidelines for the application of the Posting of Workers Directive in the case of aircrew:

1. The posted aircrew worker has an employment relationship;
2. The posting falls within the framework of one of the three situations in art. 1.3 Posting of Workers Directive;
3. The aircrew is posted under a temporary assignment;
4. The posted aircrew is assigned to a secondary base in a Member State other than where he/she has his/her home base;
5. The aircrew is supposed to return to the home base at the end of the posting.

2 CREATING A NEW PRACTICAL GUIDE ON THE APPLICATION OF THE POSTING RULES

305. A first possibility would be to clarify these conditions in secondary EU legislation. However, it seems politically impossible to change the text of the Posting of Workers Directive after it just has been revised in 2018 after years of tough negotiations. Furthermore, the

creation of a new directive, containing the specific rules for the posting of aircrew, as is currently more or less the intention for international road transport, is also not very realistic. Even if there would be a political will (of the Commission) and a consensus between the Member States, the process would take a long time and it might open a pandora's box for other sectors and industries asking their own specific posting rules.

306. However, it is not necessary at this stage to reduce the current lack of legal certainty with hard law (secondary EU legislation). We can perfectly continue to work with the current provisions of the Posting of Workers Directive. They do not need to be changed, as the evaluation in the fourth chapter of the situations which fall and do not fall under the scope of the Posting of Workers Directive also did not change any existing rule, but merely used the current provisions to identify the correct situations of application/exclusion. However, we cannot expect air carriers, let alone aircrew or other stakeholders to undertake the same legal reasoning on the basis of the current provisions of the legal framework without any help. What is necessary, are clear EU guidelines on how to interpret the general provisions of the Posting of Workers Directive in the specific case of aircrew. It needs to be clear for the Member States, air carriers, aircrew and for other stakeholders when an employment situation for aircrew is posting and when it is not. This could be done through soft law guidelines, if you think about the EU Commissions' recent Practical Guide on Posting of Workers of 2019 or the Practical Guide on the applicable legislation of 2013.[125] These practical guides are not legally binding instruments. Member States are not obliged to implement them, and they do not have any directly binding legal force vis-à-vis legal subjects.

307. A practical guide should be seen as a helpful interpretation tool of EU legislation. Member States and legal subjects (air carriers, aircrew,...) can use the guidelines to correctly delineate the scope of the Posting of Workers Directive for their own situation. Although not legally binding, the guidelines would have a certain authoritative value as they would be produced by the EU Commission (possibly with the help of the European Labour Authority, see below) and if they are challenged by legal subjects, they could be validated by future case law of the CJEU or by national courts, while adapting to the changing circumstances of the aviation industry in view of their flexibility.

308. The content of such a practical guide should include the 5 cumulative conditions set out in the 4th chapter, supported by a description of the different situations mentioned in the same chapter and an explanation of the reason why they fall under or outside the scope of the posting rules. Possibly, it could be useful to give multiple examples of each situation.

309. When looking at the recent Practical Guide on Posting of Workers, a similar reason for the creation of the guidelines for posting of aircrew can be given as mentioned in this document: "*This document aims at assisting workers [aircrew, red.], employers [air carriers red.] and national authorities in understanding the rules on posting of workers, as they have been revised with the adoption of Directive 2014/67/EU and Directive 2018/957/EU. This understanding is essential to ensure that workers are aware of their rights and that the rules are correctly and consistently applied by national authorities and employers throughout the*

[125] EU COMMISSION, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and Switzerland, 2013; EU COMMISSION, Practical Guide on Posting of Workers, 2019.

EU."[126] However, the recent Practical Guide on Posting of Workers is far too general to be a real practical help for situations of posting of aircrew. A new Practical guide for the posting of aircrew is preferable by far.

3 ENFORCING THE RULES, BY THE EUROPEAN LABOUR AUTHORITY AND THE NATIONAL AUTHORITIES

310. In addition, it is important that the correct application of the Posting of Workers Directive to real posting situations is enforced. This enforcement should not depend solely on the courts but must also be supported by the national authorities (including the national social inspectorates). The national authorities need to see whether air carriers operating on their territory are applying the posting rules when they need to (next to investigating situations of bogus self-employment etc). The enforcement by the national authorities is based on a principle of mutual trust between the EU Member States. Unfortunately, the history of the posting rules and its application and the difficulties with the A1-declarations in social security, learn us that the cooperation between the national administrations and social inspectorates must improve in order to create a strong enforcement mechanism in the struggle against social dumping.

311. An important step in this direction is the establishment of the European Labour Authority (ELA) under the Juncker Commission, which is at the moment setting up its activities. According Article 2 of Regulation (EU) 2019/1149 [127], the objectives of ELA are to:

- facilitate access to information on rights and obligations regarding labour mobility across the Union as well as to relevant services;
- facilitate and enhance cooperation between Member States in the enforcement of relevant Union law across the Union, including facilitating concerted and joint inspections;
- mediate and facilitate a solution in cases of cross-border disputes between Member States; and
- support cooperation between Member States in tackling undeclared work.

312. In light of these objectives, the ELA should promote the knowledge and application of a new Practical Guide on the posting of aircrew among the national social inspectorates and among the air carriers operating in the EU. In addition, it could promote and coordinate common actions of the national social inspectorates to control the application of the posting rules by air carriers, as this does not seem to be a priority of the national authorities at the moment. Therefore, we believe that the ELA can play an important role in the future cooperation between the Member States to tackle the non-application of the posting rules in light of the fight against social dumping. In the same logic, it has an important role to play relating to the problems of bogus self-employment of aircrew (see below) and addressing the precarious situation of highly mobile workers.

[126] EU COMMISSION, Practical Guide on Posting of Workers, 2019, https://ec.europa.eu/social/BlobServlet?docId=21472&langId=en , 2

[127] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

4 CONFRONTING THE ISSUE OF BOGUS SELF-EMPLOYMENT

313. **ELA** should take the lead in setting up a coordinated EU-wide control programme to check the incorrect and sometimes fraudulent use of the self-employed status in the EU aviation industry. Of course, the issue of bogus self-employment is not specific for the aviation sector, but the mobile nature of the activities and the complicated and transnational elements of the structures of the companies or of the employment relationships (e.g. the use of wet leasing or intermediary companies like temporary employment agencies) demand a level of coordination that is only possible for the EU-level. Many national inspectorates would avoid such actions without European backup because of the complexity and Member States might fear that they would lose air carriers willing to operate on their soil if other Member States are less or not willing to take action, which brings us back to one of the main problems related to social dumping.

314. As made clear in the 4th Chapter, bogus self-employment is an important issue in the aviation industry and if it is not confronted, any effort to improve the application of the Posting of Workers Directive will be in vain as air carriers and intermediaries will simply resort to self-employment in order to avoid the posting rules (and other employment legislation and social costs). The EU is known for being a frontrunner as a promotor and guarantor of free competition. In this case there is an opportunity to fight social dumping and to guarantee free competition by creating a level playing field for all air carriers and intermediaries who declare their aircrew as employees and by restricting the use of self-employment to aircrew who truly meet the conditions. The need for creating such a level playing field, i.a. by addressing the bogus self-employment problem, is also highlighted in the Ricardo Study. [128]

315. We are well aware that it is not an easy task, especially when the EU legislation does not provide a legal definition of "bogus self-employment" and the Member States are applying their own criteria to identify the relationship between workers and companies. However, the case law of the CJEU has given some criteria to see whether a person is an employee and the legislation of most Member States will look at the elements of subordination and authority. The ELA, if necessary with the help of e.g. the European Platform against Undeclared work, could translate these common principles, which have a legal source in the case law of the CJEU, into specific criteria or questions for aircrew (just like the Ricardo Study has done), like:

- Extent that self-employed aircrew are free to work for more than one air carrier; and;
- Extent that self-employed pilots (or cabin crew) have complete flexibility to decide when and how many hours they fly.

If, in practice, the extent of the problem and the complexity of the industry make it difficult for the ELA, the national inspectorates and the national courts to effectively control and enforce the rules on the employment relation, it could be an idea to insert a legal assumption that the relation between the aircrew and air carrier (or intermediary) is an employment relationship and that the company has to actively prove otherwise if it disagrees (e.g. Belgium uses such an assumption for high risk sectors like the construction industry, but not for the aviation industry). Of course, such a legal assumption requests a legislative action at EU-level, which might be difficult to undertake.

[128] Ricardo Study 2019, 211.

In conclusion, addressing the posting of workers issue without acting on the problem of bogus self-employment in the aviation industry would only encourage the practice of air carriers and intermediary companies towards declaring more of their aircrew as self-employed workers in order to avoid social costs.

5 DEALING WITH HIGHLY MOBILE AIRCREW

316. Further, for highly mobile workers for whom the Posting of Workers Directive is not applicable, it can be hard to determine the applicable employment law and social security legislation, seen the difficulties in identifying the habitual place of work or a base in a Member State with which the aircrew worker has a closer link. As stated in Chapter 4, it is difficult from a logistical perspective for the air carrier or intermediary company to implement a scheme in which it can employ its aircrew in such a way that it falls outside the scope of the Posting of Workers Directive and avoids the protection offered by the Rome I Regulation. Nevertheless, e.g. with floating pilots, it does seem to be an increasing practice. Therefore, the EU and Member States should make sure that companies do not exploit such a possibility in order to be able to basically chose the applicable employment legislation (e.g. by using the place of hiring). As suggested in Chapter 4, this could be done by introducing (through secondary legislation) a cap on the amount of changes of home base (per year) or a minimum period before one can change a second time from home base during the same year in order to safeguard a high degree of permanence for the home base. This would be logical as the home base is the place where the aircrew normally starts and ends a duty period or a series of duty periods, which implies that a certain level of stability should be inherent to the home base.