



LEGAL ADVICE FOR PROFESSIONALS

private international law and foreign law

Dr. mr. Fieke van Overbeeke – CEO & Legal Counsel IJI



Posting in international road transport

TransFair final conference
31 March/1 April 2022



Topic presentation

- New legal framework of posting in the road transport sector
 - Directive 2020/1057
 - CJEU 1 December 2020, C-815/18, FNV/Van den Bosch
- Focus on labour law; ~~social security and tax law; duty to prior notification~~



Structure presentation

- Example of a transport company
- Problems of the transport company prior to Directive 2020/1057 and CJEU ruling
- Discussion of Directive 2020/1057 and CJEU ruling and whether it helps the transport company
- Final remarks



- Does the Posting of Workers Directive (PWD) apply to road transport?



- Poland and many East EU MS: no, pay just the wages of the country of origin
 - Germany, France, Austria and many West EU MS: yes, pay the wages of the host country if more favourable
- patchwork of legislation, killing the internal market for road transport

A new guide for Jakub: Directive 2020/1057

- Directive 2020/1057
 - Aim: i.a. providing more clarity
 - Scope: 'Type A' postings (subcontracting)
 - PWD applies; yet not to all transport operations
 - ! Automatic ignition of Directive 2018/957 ! Wages (~~minimum wages~~)





The posting rules of Directive 2020/1057 I General

- Main criterion: 'sufficient link' between driver and host state
- Distinction between four transport operations:
 - Transit transport
 - Bilateral transport
 - Crosstrade
 - Cabotage

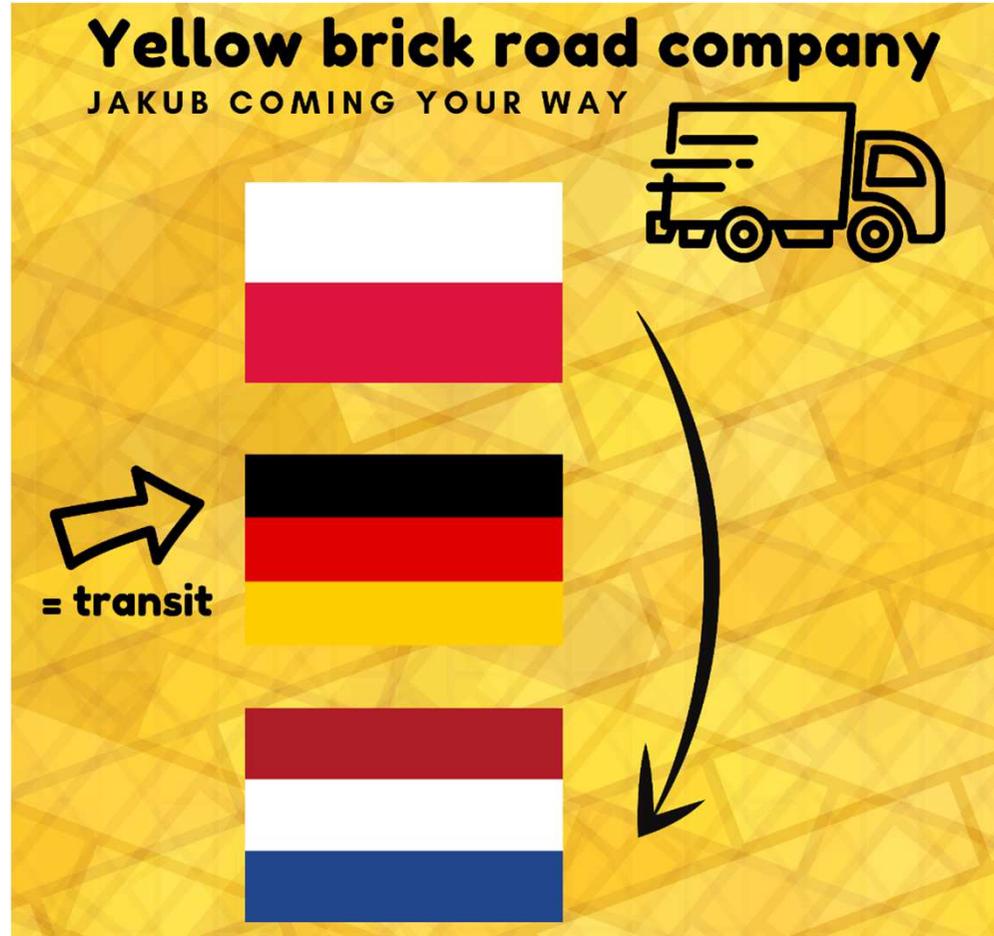


The posting rules of Directive 2020/1057 II Transit transport

- Article 1 Section 5 Directive 2020/1057:

'when the driver transits through the territory of a Member State without loading or unloading freight (...).'

The posting rules of Directive 2020/1057 III Transit transport



- No sufficient link, so no application of PWD



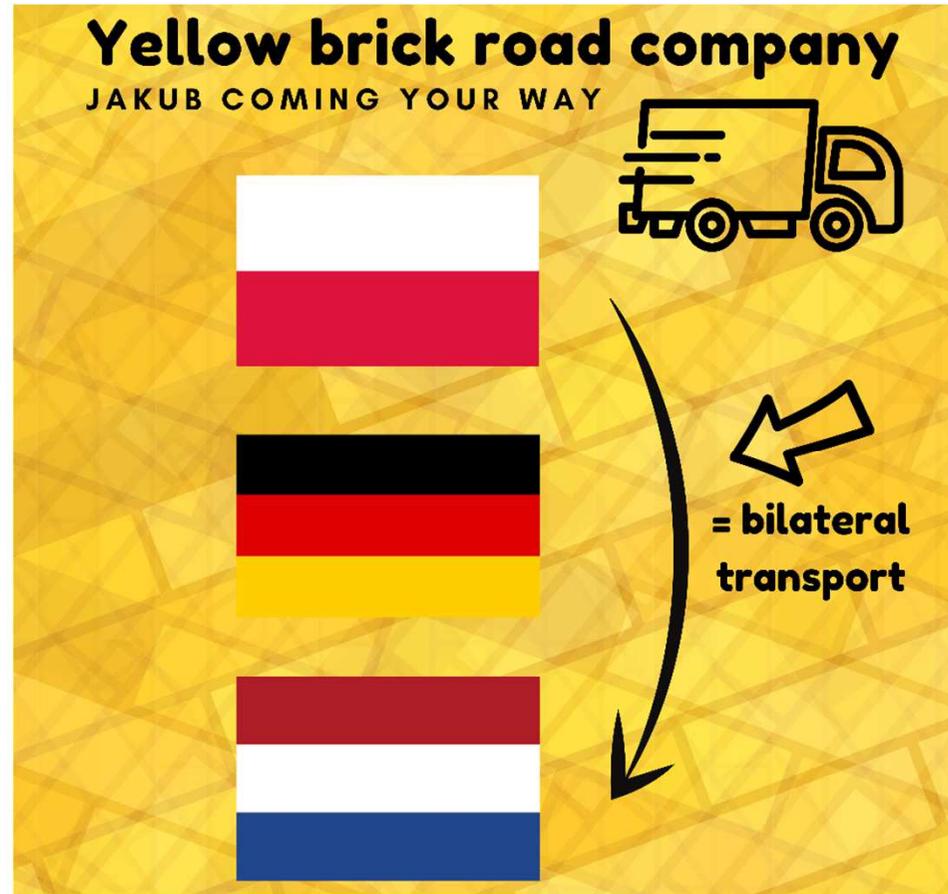
The posting rules of Directive 2020/1057 IV Bilateral transport

- Article 1 Section 3 Directive 2020/1057:

‘For the purpose of this Directive, a bilateral transport operation in respect of goods means the movement of goods, based on a transport contract, from the Member State of establishment, as defined in Article 2(8) of Regulation (EC) No 1071/2009, to another Member State or to a third country, or from another Member State or a third country to the Member State of establishment.’

The posting rules of Directive 2020/1057 V

Bilateral transport



– No sufficient link, so no application of PWD

NB exceptions regarding extra loading and unloading activities
→ see Q&A document of the European Commission!

- No legal definition ...





The posting rules of Directive 2020/1057 VII Crosstrade

- No definition, yet a clear intention of the legislator: sufficient link, so application of PWD
- See recital 13:

'Where a driver performs other types of operations, notably (...) non-bilateral international transport operations, there is a sufficient link to the territory of the host Member State. The link exists in case of cabotage operations as defined by Regulations (EC) No 1072/2009 (6) and (EC) No 1073/2009 (7) of the European Parliament and of the Council since the entire transport operation takes place in a host Member State and the service is thus closely linked to the territory of the host Member State. A non-bilateral international transport operation is characterised by the fact that the driver is engaged in international carriage outside of the Member State of establishment of the undertaking making the posting. The services performed are therefore linked with the host Member States concerned rather than with the Member State of establishment. In those cases, sector-specific rules are only required with regard to the administrative requirements and control measures.'

- Reparation MS legislator necessary



The posting rules of Directive 2020/1057 VIII Cabotage

- Article 1 Section 7 Directive 2020/1057 refers to Article 2 Section 6 Regulation 1072/2009:

“cabotage operations’ means national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with this Regulation’



The posting rules of Directive 2020/1057 IX Cabotage



- Sufficient link, so application of PWD



Implementation by 2.2.2022...

- To date, not many Member States have implemented the 2020 Directive
- From the Western and Southern Member States, only Denmark, Finland, France and Spain

Member State	Implementation
Austria	No
Belgium	No
Denmark	Yes
Finland	Yes
France	Yes
Germany	No
Ireland	No
Italy	No
Luxembourg	No
The Netherlands	No
Portugal	No
Spain	Yes
Sweden	No



CJEU FNV/Van den Bosch I

- Typical Dutch labour model: Dutch transport company Van den Bosch temporarily hires Hungarian drivers from a Hungarian subsidiary to provide cross-border transport operations in and from the Netherlands; drivers get paid Hungarian wages (lower than Dutch wages); trade union FNV disagrees and sues
- Dutch Supreme Court asks preliminary questions: does PWD apply to road transport and if so, exactly to which transport operations?



CJEU FNV/Van den Bosch II

- CJEU: PWD applies to road transport, but there has to be a 'sufficient link'
- Assessment sufficient link:
 - the characteristics of the provision of services
 - the nature of the working activities
 - the degree of connection between working activities of a lorry driver and the territory of each member state
 - the proportion of the activities compared to the entire service provision in question
 - operations involving loading or unloading goods, maintenance or cleaning of the lorries are relevant (provided that they are actually carried out by the driver concerned, not by third parties)



CJEU FNV/Van den Bosch III

- ! The mere fact that a lorry driver, who is posted to work temporarily in and from a Member State, receives his instructions there and starts and finishes the job there is 'not sufficient in itself to consider that that driver is 'posted' to that territory, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.' !
- CJEU makes same distinction between transport operations as Directive 2020/1057 and follows legislator in judgment of sufficient link of these operations



Do the new legal developments deliver?

- Regarding some aspects, the new legal framework provides more clarity

- Cabotage operations:



- Transit & bilateral operations:



- Yet, there are still uncertainties

- Crosstrade?

- Labour models?



- Directive 2020/1057 and CJEU ruling provide several solutions
- Much depends on implementation and codification of Directive 2020/1057 and CJEU ruling; could still lead to a patchwork of legislation
- Enforcement difficulties
 - Broad margin
 - Complex application
- Weak enforcement leads to market distortions and unfair competition



**LEGAL ADVICE FOR
PROFESSIONALS**

private international law and foreign law

Q&A

f.van.overbeeke@iji.nl