The concept of "habitual employment" -an unnecessary restriction to the freedom to provide services

The Directive 96/71/EC as amended by Directive 2018/957/EU (PWD) aims to grant an adequate protection of posted workers by **proportionally** restricting the freedom to provide services and tackling unfair competition.

The concept of « habitual employment » in the meaning of *a specific period of worker's employment in the sending Member State before being posted,* is enforced by certain authorities to disproportionally restrict the freedom to provide services.

The misinterpretation is grounded in Article 2 Directive 96/71/EC, notably the definition of a "posted worker": *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 PWD does not contain the definition of the concept of "*State in which the worker normally works*" (addressed by certain authorities as *State of habitual employment*).

Is the country in which the worker "normally works", the same as the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract in the meaning of Article 8.2 Rome I Regulation?

Article 7(1) of Directive 2019/1152/EU on transparent and predictable working conditions (*Additional information for workers sent to another Member State or to a third country*), contains (in the same context) the wording "habitually works" (*a worker is required to work in a Member State or third country other than the Member State in which he or she habitually works*);

That wording amends the wording used in Article 4(1) of the Written Statement Directive: *Where an employee is required to work in a country or countries other than the Member State whose law and/or practice governs the contract or employment relationship.*

The amendment was introduced to address situations in which workers habitually working in a Member State, are posted to the Member State whose law was chosen by the parties to govern the employment relationship.
Article 4.3 Directive 2014/67/EU on the enforcement of Directive 96/71/EC, lays down criteria 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.

One of the assessment criteria is whether *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*.

Pursuant to Article 4.4: *The failure to satisfy one or more of the factual elements set out in paragraphs 2 and 3 shall not automatically preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation*.

Can we imagine a situation in which a worker is posted from the Member State in which she/he normally works, to the Member State in or from which the worker habitually carries out his or her work in the meaning of Regulation 593/2008 (Rome I)?

The determination of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract in the meaning of Article 8.2 Rome I Regulation, should consider the criteria that stem from relevant ECJ case-law (such as the place of actual employment, the nature of the work, the factors that characterise the activity of the employee, the country in which or from which the employee effectively carries out his/her tasks or the main part of his/her tasks, receives instructions concerning his/her tasks and organises his/her work).

As regards the quantitative criterion, reference should be made to the ECJ ruling in Weber (C-37/00) on the Brussels Convention:

In the case of a contract of employment under which an employee performs for his employer the same activities 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 Article 5(1) (27 February 2002, Herbert Weber, C-37/00, EU:C:2002:122, paragraph 58).

It follows that in certain situations, the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract in the meaning of Article 8.2 Rome I Regulation, is not the country in which the worker works most of the time (i.e., the country determined on grounds of the quantitative criterion).

Having regard to the above considerations, the State in which the worker normally works in the meaning of Article 2 Directive 96/71/EC, might be the country determined on grounds of the quantitative criterion only (ruling out the relevance of any specific period of worker's employment in the sending Member State before being posted).

That country might be different from the country in which or, failing that, from which the worker habitually carries out his work in performance of the contract in the meaning of Article 8.2 Rome I Regulation.

It must be noted that the country in which or, failing that, from which the employee habitually carries out his work might constantly change over the employment period.

According to the ECJ's settled case-law, in interpreting provisions of EU law, it is important to consider not only the terms of those provisions in accordance with their usual meaning in everyday language, but also their context and the objectives pursued by the rules of which they form part (judgment of 17 March 2022, Daimler, C-232/20, EU:C:2022:196, paragraph 29 and the case-law cited).

Interested to further understand about the interpretation of the concept of *State in which the worker normally works* in the meaning of Article 2 Directive 96/71/EC?

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One of the Day 2 hands-on learning workshops will dive into the interpretation and analysis of that concept and provide further guidance to all parties concerned (authorities' representatives, lawyers and other labour mobility experts, representatives of companies posting or making use of posted workers).

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