



# Trace 2

## Efficient and harmonised enforcement of Mobility Package 1

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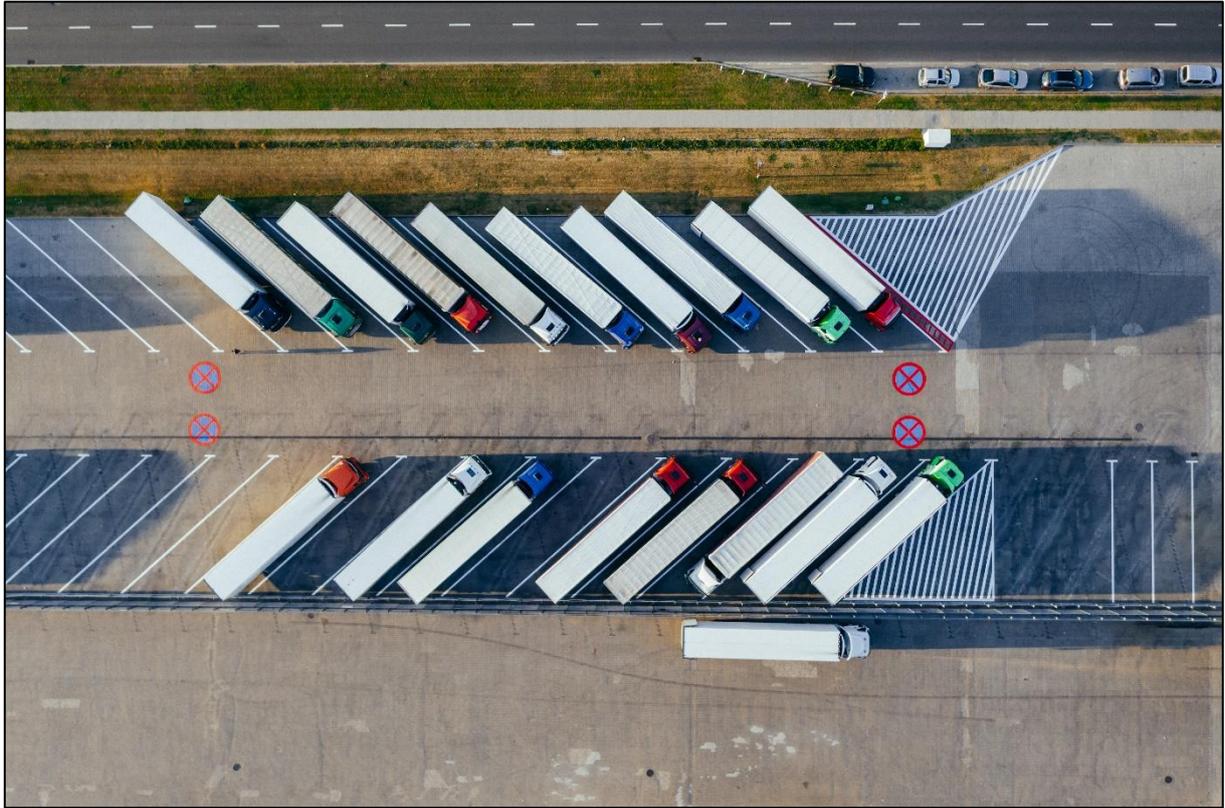
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EUROPEAN COMMISSION**

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# TRACE2 Enforcement Guidance Document on Directive 2020/1057 – Posting of Drivers



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## Abbreviations & Acronyms

CJEU	Court of Justice of the European Union
EU	European Union
DG MOVE	Directorate-General for Mobility and Transport
IMI	Internal Market Information (System)
Q&A	Questions and Answers
RTPD	Road Transport Posting Declaration

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# 1. Introduction

This document addresses the enforcement of posting rules in the road transport sector as modified by the social pillar of Mobility Package I<sup>1</sup>. Successful enforcement<sup>2</sup> will depend very much on a shared and thorough understanding of the applicable rules and on efficient cooperation between all competent authorities within each Member State as well as between all Member States.

New provisions on the application of posting rules to road transport drivers were introduced by Directive (EU) 2020/1057<sup>3</sup> as a *lex specialis* to the general rules on posting of workers laid down in Directive 96/71/EC<sup>4</sup> (hereinafter “Posted Workers Directive”) and to the enforcement Directive 2014/67/EU<sup>5</sup> (hereinafter “Enforcement Directive”).

As a *lex specialis*, Directive 2020/1057 provides specific rules to determine in particular:

- when a driver is to be considered posted, and when the driver is not to be considered posted based on the nature of the transport operation(s) performed by this driver.
- the administrative requirements and control measures applicable before, during and after posting.

EU Member States were required to transpose this Directive into domestic legislation by 2 February 2022.

For all sectors, including road transport, a posting situation is a temporary assignment outside a habitual place of work. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (also known as ‘*Rome I*’)<sup>6</sup> is the EU law that helps in defining which national employment law governs the employment contract, taking into consideration the habitual place of work.

This guidance document zooms in on the *lex specialis* and pursues the following double objective:

- to develop a clear and shared understanding of the new rules introduced by Mobility Package I in relation to posting of drivers, and
- to provide guidance to enforcers on how to control posting rules.

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<sup>1</sup> Mobility Package I is composed of two Regulations (EU) 2020/1054, (EU) 2020/1055, and a Directive (EU) 2020/1057.

<sup>2</sup> For the purpose of this guidance, the term ‘enforcement’ should be understood as control of compliance. The determination of sanctions and their execution are outside the scope of this document. In case of infringements, sanctions are to be applied in accordance with national law, taking into account the EU principles of proportionality, effectiveness and dissuasiveness.

<sup>3</sup> *Directive 2020/1057* laying down specific rules with respect to *Directive 96/71* and *Directive 2014/67* for posting drivers in the road transport sector and amending *Directive 2006/22* as regard enforcement requirements and *Regulation 1024/2012*. (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1057>)

<sup>4</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01996L0071-20200730>

<sup>5</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0067>

<sup>6</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593>

This guidance is the result of discussions with the members of a focus group established under TRACE 2 on posting of drivers. The group included national transport authorities and social partners with enforcement backgrounds.

The first part of this document describes the substantive rules: the *lex specialis* and how it should be read in conjunction with related legal instruments. Based on this understanding, the second part seeks to identify key enforcement challenges and best practices to address them. A detailed explanation of the *lex specialis* in relation to passengers and freight transport can be found in Annexes 1 and 2 respectively. Contextual information on the applicable law to employment contracts is provided in Annex 3.

## 2. Understanding the rules

### 2.1 The interaction between the *lex specialis* and related EU rules

A posted worker is “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”<sup>7</sup>. Thus, a posting situation involves the existence of a stable employment relationship in one Member State to which the worker is expected to return, after the period of posting in another Member State has been completed. Posting declarations under Directive 2020/1057 must include information on the law applicable to the employment contract. Contextual information on how to determine the law applicable to employment contracts having regard to the habitual place of work of drivers can be found in Annex 3 of this guidance.

The Posted Workers Directive lists a series of core terms and conditions of employment contained in law and/ or collective agreements that will apply to the driver during the situation of posting.

As it is described in the following section 2.2 Road transport operations – in or out of posting?, the *lex specialis* defines the types of road transport operations that trigger the application of the Posted Workers Directive and those which do not, depending on the degree of connection that is assumed with the territory of the host Member State. According to Recital 9 of the *lex specialis*, the key principle for determining a situation of posting is the existence of a sufficient link between the driver and the service provided, and the territory of a host Member State.

The Enforcement Directive on posting adopted in 2014 seeks to strengthen the practical application of the posting rules by addressing issues of fraud, circumvention of rules, inspection, and monitoring, subcontracting and exchange of information between Member States. The Enforcement Directive specifies administrative requirements and control measures. Under the Enforcement Directive, Member States are also allowed to impose additional requirements and measures when they are justified and proportionate. This is prohibited under Directive (EU) 2020/1057, which provides for a closed and harmonised list of administrative requirements for controlling compliance with the posting of drivers’ rules. Section 3 of this guidance provides an overall description of these specific enforcement rules.

The *lex specialis* does not address the specific situations of posted workers who are employed by temporary work agencies<sup>8</sup>. Temporary agency drivers are therefore covered by the Posted Workers Directive when carrying cross-border tasks.

Similarly, the *lex specialis* does not address the situation of intra corporate transfers, i.e., drivers that are posted to a subsidiary or establishment owned by the road operator. Again, such arrangements are entirely covered by the Posted Workers Directive.

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<sup>7</sup> Art 2.1 Directive 96/71

<sup>8</sup> Art 1.2 of Directive 2020/1057

### **In Summary**

- Posted worker is a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which s/he normally works.
- **While the Posted Workers Directive and its Enforcement Directive provide the general rules on “posting of workers” in all sectors, including road transport, the *lex specialis* provides special rules for “posting of drivers” in the road transport sector.**

## **2.2 Road transport operations – in or out of posting?**

The *lex specialis* provides a set of specific rules for transport operations in respect of goods and passengers. The following paragraphs provide an overview of applicable rules. Examples of complex operations and related explanations can be found in *Annexes 1* and *2*.

Importantly, self-employed drivers, drivers hired through temporary work agencies and intra corporate transferees are not covered by the *lex specialis*. The rules applicable to these specific categories are described in *Section 2.4 – Specific cases*.

### **2.2.1 Rules applicable to freight transport**

The *lex specialis* establishes a distinction between different types of transport operations in respect of carriage of goods: cabotage, non-bilateral international operations, bilateral international operations, bilateral international operations with limited additional activities, initial/ final road leg of combined transport and transit.

A. Drivers are considered posted when performing the following operations:

#### **2.2.1.1 Cabotage**

Cabotage operations are understood as domestic operations for hire or reward carried out on a temporary basis on a territory of a Member State by an operator established in another Member State. Cabotage refers to non-resident carriers that, rather than returning empty after an international trip, pick up and deliver a further load in the host country before returning to the border.

➤ *Drivers performing cabotage operations are always considered as posted workers.*

#### **2.2.1.2 Non bilateral international transport operations**

These operations are referred to by the *lex specialis* as “*non bilateral international transport operations*”<sup>9</sup> or, in other words, as “*cross-trade operations*”<sup>10</sup>.

Examples of non-bilateral/ cross-trade operations falling within the scope of posting include:

- International carriage between two Member States, none of which is the country of establishment of the road operator.
- Multiple operations of loading and/or unloading are carried in the context of an international carriage (i.e., more than what is permitted under the *1+1* and *0+2* rules).
- *Drivers performing non-bilateral international transport operations are considered as posted workers.*

B. Drivers are considered not posted when performing the following operations:

### **2.2.1.3 International bilateral operations**

An international bilateral operation involves the transport of goods based on a transport contract between the Member State of establishment of the haulier and another country (an EU Member State or a third country).

- *Drivers performing international bilateral operations are not considered as posted workers.*

### **2.2.1.4 Bilateral operations + one activity of loading and/ or unloading in Member States of crossing (1+1)**

The operation referred to as *1+1* operation is understood as a bilateral operation during which one limited additional activity of loading and/ or unloading is taking place. “*And/or*” means that there can either be one loading or one unloading but also one loading and one unloading during a bilateral journey. In case there is one loading and one unloading, these two activities must not occur in the same Member State (this would constitute cabotage).

- *Drivers performing 1+1 operations are not considered as posted workers.*

### **2.2.1.5 Bilateral operations + two activities of loading and/ or unloading during the return journey (0+2)**

A *0+2* operation is understood as a return bilateral operation during which two additional activities of loading and/ or unloading take place. There can only be a *0+2* if no additional activity has been carried during the outgoing journey.

- *Drivers performing 0+2 bilateral operations are not considered as posted workers.*

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<sup>9</sup> Recital 13

<sup>10</sup> European Commission (2022), *Questions & Answers on posting of drivers under Directive 2020/1057 in the context of transport of goods.*

### **2.2.1.6 Transit**

Transit is understood as the movement through the territory of a Member State without any activity of loading or unloading. According to Recital 11 of the *lex specialis*, transit operations do not entail a significant link between the driver's activities and the Member State transited. This would include for instance stops for hygiene reasons.

- *Drivers transiting through Member States are not considered as posted workers.*

### **2.2.1.7 The initial or final road leg of a combined transport operation**

Drivers performing an initial or final road leg which consists on its own of an international bilateral operation are not considered as posted workers.

Conversely, drivers performing an initial or final road leg which consists on its own of a non-bilateral operation are posted drivers.

### **2.2.1.8 Other operations**

Unladen journeys are understood as empty runs, without goods on board of the vehicle, and which are performed in conjunction with a laden journey<sup>11</sup>. The Commission expert group supported by the Commission Legal Service, has produced a Q&A document aiming at clarifying the understanding of the *lex specialis* (see *Annex I*).

According to the Q&As, the rules applicable to a laden journey extend to the connected unladen journey. For instance, an unladen journey following an operation of cabotage or a non-bilateral international journey would constitute a situation of posting. Conversely, an unladen journey following a bilateral operation would not be posting.

### **2.2.1.9 Overview**

Based on the explanation above, the following table provides an overview of the transport operations that are either in or out of scope of posting rules. More detailed explanations, including criteria for the identification of relevant operations and examples, can be found in the annex.

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<sup>11</sup> Art 2.2 of Regulation 1072/2009 on common rules for access to the international road haulage market.

Type of operation	In posting	Out of posting
Cabotage	✓	
Bilateral operation		✓
Bilateral operation + one activity of loading and/ or unloading (1+1)		✓
Bilateral operation + two activities of loading and/ or unloading during the return journey (0+2)		✓
Bilateral operation as part of an initial or final road leg of combined operation		✓
Non bilateral operation as part of an initial or final road leg of combined operation	✓	
Transit		✓
Cross-trade/ Non bilateral operations	✓	

Table 1 - Rules applicable to freight - an overview

### 2.2.2 Rules applicable to the transport of passengers

The *lex specialis* distinguishes between the following transport operations in respect of passengers: cabotage, non-bilateral international operations, bilateral international operations, non-bilateral international operations with limited additional activities, initial/ final road leg of combined transport and transit. A simplified explanation of the rules applying to passenger transport can be found in the annexes.

A. Drivers are considered posted when performing the following operations:

### 2.2.2.1 Cabotage

*Cabotage* is understood as operations carried out on a temporary basis in a Member State by an operator established in another Member State. *Cabotage* can consist of either:

- A national road passenger services for hire and reward, as long as it is carried on a temporary basis; or
- A picking up and setting down of passengers within the same Member State in the course of an international service as long as this is not the principal purpose of the service.

A distinction must be established between cabotage and local excursions. Cabotage entails picking up and setting down different groups of passengers in the host Member State. In contrast, local excursions entail touring with the same group of passengers who will also return to their residence country on the same vehicle or another vehicle from the same carrier.

➤ *Drivers performing cabotage operations are considered as posted workers.*

### 2.2.2.2 Non bilateral international transport operations

These operations are referred to by the *lex specialis* as “*non bilateral international transport operations*”<sup>12</sup> and by the European Commission as “*cross-trade operations*”<sup>13</sup>.

A non-bilateral operation falling within the scope of posting includes:

- Picking up and setting down passengers between two Member States, none of which is the country of establishment of the operator.
- Local excursions of the same group of passengers to the extent that these excursions are not preceded by an international carriage from the Member State of establishment.

➤ *Drivers performing international bilateral operations are considered as posted workers.*

B. Drivers are considered non posted when performing the following operations

### 2.2.2.3 Bilateral transport in international occasional or regular carriage of passengers

Bilateral transport in the carriage of passengers can consist in:

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<sup>12</sup> *Recital 13*

<sup>13</sup> European Commission (2022), *Questions & Answers on posting of drivers under Directive 2020/1057 in the context of transport of passengers.*

- picking up passengers in the Member State of establishment of the operator and setting them down in another country, or vice versa; or
- picking up and setting down passengers in the Member State of establishment of the operator for the purpose of carrying local excursions in another country.

To qualify as bilateral transport, the local excursion must: i) be intended for non-resident passengers; ii) be preceded by an international carriage with the same passengers, iii) in the same vehicle or another vehicle from the same carrier<sup>14</sup>.

- *Drivers performing international bilateral operations are not considered as posted workers.*

#### **2.2.2.4 A bilateral operation + one activity of picking up and/ or setting down passengers in Member States of crossing**

This operation is understood as a bilateral operation during which one additional activity of picking up and/ or setting down passengers is taking place. “*And/or*” means that there can either be one picking up or one setting down but also one picking up and one setting down. In the latter case, these two activities must not occur in the same Member State (this would constitute cabotage).

- *Drivers performing bilateral operations with one additional activity are not considered as posted workers.*

#### **2.2.2.5 Transit**

Transit is understood as the movement through the territory of a Member State without any activity of picking up or unloading of passengers.

- *Drivers transiting through Member States are not posted workers.*

#### **2.2.2.6 The initial or final road leg of a combined transport operation**

Drivers performing an initial or final road leg which consists on its own of an international bilateral operation are not considered as posted workers.

Conversely, drivers performing an initial or final road leg which consists on its own of a non-bilateral operation are posted drivers.

#### **2.2.2.7 Other operations**

Another type of road transport operation is journey without passengers. According to the Q&As<sup>15</sup>, the rules applicable to a journey without passengers extend to the connected journey.

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<sup>14</sup> Art 13 of Regulation 1073/2009 on common rules for access to the international market for coach and bus services and amending Regulation 561/2006.

<sup>15</sup> European Commission (2022), *Questions & Answers on posting of drivers under Directive 2020/1057 in the context of transport of passengers.*

For instance, a journey following an operation of cabotage or a non-bilateral international journey would constitute a situation of posting. Conversely, a journey without passengers following a bilateral operation would not be posting.

### 2.2.2.8 Overview

Type of operation	In posting	Out of posting
Cabotage	✓	
Local excursion without outgoing journey	✓	
Bilateral transport followed or not by local excursion		✓
Bilateral transport + 1 activity of picking up and/ or setting down passengers		✓
Bilateral operation as part of an initial/ final road leg of combined operation		✓
Non bilateral operation as part of an initial/ final road leg of combined operation	✓	
Transit		✓

Table 2 - Overview of the *lex specialis* in respect of transport of passengers

#### In Summary

- In road transport, whether a driver is posted or not depends on the degree of connection with the territory of the host Member State. The *lex specialis* distinguishes between types of transport operations to which rules on posting should apply and those to which posting rules should not apply.
- **For transport of goods** – “Cabotage”, “non bilateral operation as part of an initial or final road leg of combined operation” and “cross-trade/ non bilateral operations” fall in scope of posting.

- **For transport of passengers** – “*Cabotage*”, “*local excursion without outgoing journey*”, and “*non bilateral operation as part of an initial/final road leg of combined operation*” fall in scope of posting.
- Further detailed descriptions of the different transport operations can be found in *Annexes 1* and *2*. *Annex 3* recalls the rules determining the applicable law to an employment relationship.

## 2.3 In or out of posting – applicable terms and condition of employment

The road operations which do not constitute a posting situation are only governed by the labour law applicable to the employment contract. As described in further details in Annex 3 of this guidance, the Rome I Regulation determines which national law is applicable to the employment relationship. As a matter of principle, a choice of law clause in the employment contract will indicate the applicable law. This law is indicated in the posting declaration at line c.7 (see Box 3 - Example of a posting declaration). In the absence of such express choice of law, the habitual place of work of the driver applies to the employment contract. In any case, a choice of law cannot derogate from the mandatory provisions of the habitual place of work of the drivers.

In case the road transport operation does constitute a situation of posting, the host Member State is required to apply a core list of employment rules to posted drivers during the time of their assignment, on top of the law applicable to the specific employment contract.

The nucleus of rules that must be guaranteed by the host Member State covers essential aspects of an employment relationship, including remuneration, working time, health & safety, and allowances (see Box 1 - Posting – applicable terms & conditions under host country standards).

The following paragraphs delve into the notions of remuneration and allowances, which are key elements of the remuneration package of posted workers, and considerations linked to the duration of a posting situation.

- Maximum work periods and minimum rest periods
- Minimum paid annual leave
- Remuneration
- The conditions for hiring out of workers in particular by temporary employment undertakings
- Health & safety
- Protective measures for pregnant women and young mothers
- Equality of treatment between men and women and other provisions on non-discrimination
- The conditions of workers’ accommodation where provided by the employer away from their regular place of work
- Allowances or reimbursement of expenditure for travel, board, and lodging.

*Box 1 - Posting – applicable terms & conditions under host country standards*

### 2.3.1 Remuneration and allowances

The Posted Workers Directive establishes the principle of equal remuneration for posted and local drivers alike. The constituent elements of remuneration are determined exclusively by the host Member State.

When calculating and comparing the amount due to the driver with the amount effectively paid, the total gross amount of remuneration should be taken into account<sup>16</sup>.

In order to ensure transparency, all constituent elements of remuneration should be identified in enough details in the relevant documentation. Allowances “*specific to posting*”<sup>17</sup> can constitute an important element of the amounts due to the posted worker.

#### 2.3.1.1 Calculation of remuneration: allowances which are to be considered as part of remuneration.

Allowances, such as daily allowances for working abroad, the amount of which varies according to the duration of the worker’s posting, or for carrying certain type of cargo, which are **not** paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, should be considered to be part of the remuneration<sup>18</sup>. Such allowances should thus be taken into account for the purpose of comparing the gross amounts of remuneration<sup>19</sup>.

#### 2.3.1.2 Calculation of remuneration: allowances which are not part of remuneration.

Allowances specific to the posting are not to be considered as part of remuneration if they are paid in reimbursement of expenditure actually incurred on account of the posting, such as travel, board, and accommodation expenses. These expenses have to be paid by the employer in addition to the remuneration. Thus, these expenses cannot be deducted from the remuneration paid to the worker<sup>20</sup>. The Posted Workers Directive expresses the principle that those expenses have to be supported by the employer 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<sup>21</sup>.

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<sup>16</sup> Recital 18 of Directive 2018/957 amending Directive 96/71 concerning the posting of workers in the framework of the provision of services.

<sup>17</sup> Recitals 19 and 20 of Directive 2018/957 amending Directive 96/71 concerning the posting of workers in the framework of the provision of services.

<sup>18</sup> C-428/19 Rapidsped of 8 July 2021.

<sup>19</sup> Recital 18 of Directive 2018/957.

<sup>20</sup> Recital 18, 19 and Art 1.2 c) of Directive 2018/957 amending Directive 96/71 concerning the posting of workers in the framework of the provision of services.

<sup>21</sup> Recital 20 and Article 3. 7 of Directive 96/71.

### **2.3.1.3 Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons during the posting assignment in the host Member State**

A posted worker who, during the posting assignment, is required to travel to and from the regular place of work in the host Member State, or is temporarily sent by the employer from that regular place of work to another place of work within that host Member State, is entitled to any allowance or reimbursement of expenses to cover travel, board and lodging expenses for workers away from home for professional reasons where provided for national workers, in the host Member State<sup>22</sup>. This means that this provision applies to posted workers in so far as it exists for national workers in the host Member State. Thus, if such provision exists in the host Member States, then the reimbursement of that expenditure has to come on top of the remuneration, as explained in section 2.3.1.2 above.

*NOTE:* In principle, the allowances specified in section **2.3.1.3** apply to posted drivers falling within the scope of Directive (EU) 2020/1057. However, in most cases situations in which those drivers could benefit from these allowances may only occur exceptionally.

### **2.3.2 Calculation of posting duration**

The *lex specialis* clarifies that for the purpose of calculating the duration of a situation of posting, the posting should be considered as ending when the driver leaves the host Member State in the performance of the international carriage of goods or passengers<sup>23</sup>. However, the *lex specialis* does not specify from which moment a period of posting should be considered to start.

The Commission expert group, supported by the EU Commission Legal Service, has produced a Q&A document providing guidance as to when posting situations start in specific situations. The tables contained in Annexes 1 and 2 (presenting a simplified explanation of the rules, explaining which operations are in and out of scope of the *lex specialis*, as well as when the posting starts and ends) is based on this Q&A.

#### **In Summary**

Applicable employment conditions may not always be ascertained during roadside inspections. However, roadside inspections can be useful in identifying factual discrepancies, which will then provide a basis for further checks.

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<sup>22</sup> European Commission (2019), *Practical guide on posting*, p.24

<sup>23</sup> Article 1.8

## 2.4 Other cases

### 2.4.1 Drivers hired through temporary work agencies

The specific rules on posting of drivers contained in the *lex specialis* exclusively apply to drivers directly employed by a company that posts the drivers to another Member State on its account and under its direction<sup>24</sup>. Drivers hired by temporary work agencies are not covered by the *lex specialis*. Thus, they are as a matter of principle covered by the Posted Workers Directive when carrying any cross-border journey.

Example: a temporary work agency supplies a driver to a Spanish operator for the purpose of delivering a full truck of goods from Spain to Portugal. While the truck belongs to the Spanish operator, the driver is directly employed by the temporary work agency. The *lex specialis* does not apply and the entire journey is governed by the Posted Workers Directive.

### 2.4.2 Intra-corporate transfer

The *lex specialis* does not apply to drivers assigned by their employer to work for an entity located in a different Member State but belonging to the same company group. These situations are solely governed by the Posted Workers Directive.

Example: A Slovakian subsidiary assigns his drivers to the head office based in the Netherlands. The Slovakian employer and the Dutch user company both belong to the same company group. The *lex specialis* does not apply and this situation is governed by the Posted Workers Directive.

### 2.4.3 Operations with third countries

The Posted Workers Directive specifies that non-EU operators must not be given a more favourable treatment than EU companies<sup>25</sup>. National law and/ or a bilateral agreement between an individual Member State and a third country may authorise third country operators to carry operations on the territory of that Member State. Neither the *lex specialis* nor the Posted Workers Directive will apply in such cases. The application of both instruments indeed requires that the operator is established in an EU Member State. The terms and conditions applicable to the third country operator will be governed by the content of the bilateral agreement and/ or by national legislation. National laws may also impose administrative requirements on third country operators (e.g., submitting a posting declaration via national systems).

It may also be that an EU based company recruits third country drivers to perform tasks within the Union. In such cases, the nationality of the worker does not have any impact on the applicable employment terms and conditions. From the moment that the third country driver is legally authorised to perform work in the Union, the rules described in this guidance apply without any discrimination because the driver is employed by a company established in the EU.

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<sup>24</sup> See Art 1.2 of Directive 2020/1057 and Art 1.3a of Directive 96/71.

<sup>25</sup> Art 1.4 of the Posted Workers Directive.

## 2.4.4 Self-employed drivers

The *lex specialis* and the Posted Workers Directive apply to employees only. A self-employed worker should be considered as an independent contractor, falling outside the protection of posting rules and whose freedom to choose applicable legal regimes is paramount.

Operators may rely abusively on fake self-employment to circumvent their responsibilities as employers. Particular attention should therefore be paid to ensuring that the self-employed driver is a genuine independent contractor.

The Enforcement Directive on posting requires public authorities, through the use of IMI, to assess relevant facts beyond the formal arrangement agreed between the parties, including performance of work, subordination, and the remuneration of the worker<sup>26</sup>.

The CJEU also considers that a set of “*objective criteria*” should determine whether a self-employed person under national law can be treated as an employee for the purpose of applying EU law.

According to the Court, an essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration<sup>27</sup>.

It is now well-established practice for the European judge to look at the following characteristics:

- Autonomy, in particular as regards freedom to choose the time, the place and content of his work.
- Whether the worker shares the employer’s commercial risks.
- Whether the worker forms an integral part of the employer’s business or whether he is performing tasks for several principals.

### **In Summary**

- The *lex specialis* exclusively applies to drivers directly employed by a company that posts the drivers to another Member State on its account and under its direction. Drivers hired by temporary work agencies are covered by the Posted Workers Directive. Drivers performing tasks in another Member State as part of intra corporate transfers are also covered by the Posted Workers Directive.
- The terms and conditions applicable to the third (non-EU) country operator will be governed by the content of national law and/ or any bilateral agreement signed with the third (non-EU) country. However, third country operators cannot be given more favourable conditions than EU operators.

<sup>26</sup> Art 4.5 Directive 2014/64

<sup>27</sup> See for instance *FNV Kunst C-413/13 of 4.12.2014, para 34.*

- As far as EU operators are concerned, the nationality of the driver is not relevant. The fact that a third country driver is legally working on EU territory will bring him/her within the purview of EU law.
- *The lex specialis* and the Posted Workers Directive apply to employees only. However, enforcers should pay particular attention when drivers claim that they are self-employed and ascertain if “*self-employment*” is not being used to evade any obligations under the *lex specialis* or the Posted Workers Directive. Some factors that can point to a dependent employment relationship include autonomy available to the driver, whether the driver shares employer’s commercial risks, and whether the driver is performing tasks for several principals.

### 3. Enforcing the rules

This part of the document presents recommendations for roadside inspections and Internal Market Information (IMI) system controls. It is suggested that a continuity should be ensured between roadside inspections and IMI controls so that posting situations and suspicions of abuse detected at a roadside inspection are subsequently investigated in more depth. Suspicions of abuse may take the form of “*red flags*” which roadside enforcers could communicate to colleagues in charge of IMI checks.

IMI controls should also take place in the absence of roadside inspections. Considering the considerable number of posting declarations registered every month on the IMI system, this guidance suggests a similar filtering approach – based on the same red flags – to efficiently target the controls.

#### 3.1 Administrative rules and control measures

The *lex specialis* foresees the following administrative rules and control measures for the enforcement of posting rules during roadside and IMI checks, and checks at premises:

- At the latest at the commencement of the posting, road operators must submit a posting declaration, containing essential information about the driver and the posting. This declaration is submitted via the Road Transport Posting Declaration portal (hereafter the “*RTPD*”)<sup>28</sup>. The RTPD is a multilingual public interface connected to the Internal Market Information system (hereafter “*IMI*”).
- During the posting, roadside inspections may occur. The roadside enforcers can only request three documents for the purpose of checking compliance with posting rules: a copy of the posting declaration submitted on the RTPD; consignment notes or equivalent evidence; and tachograph records. Roadside enforcers have at their disposal a “*scan on the road*” tool allowing them to check the validity of the posting declaration. The following *section 3.2* gives some pointers on how to use this tool and the information contained in these documents.
- After the period of posting, the competent authorities of the host Member State may decide to request additional information. The operator has 8 weeks to comply with these requests for additional documents, which should be submitted via the RTPD. The following *section 3.3* addresses in more detail these IMI inspections. If a roadside inspection has evidenced a situation of posting which the operator has not declared on the RTPD, enforcement authorities should use the general Posting of Workers module to request further information. The road transport module used to assess conditions of establishment may also be relied upon.
- After the 8 weeks period, if the operator fails to comply with the request for more information the host Member State may request assistance from competent authorities of the country of establishment of the operator. To this end, the authorities of that home

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<sup>28</sup> The RTDP is accessible on this website: [Road Transport - Posting Declaration](#).

Member State shall have access to the declaration and other information submitted by the operator on the RTPD. Additional principles for mutual assistance between the host Member State and the Member State of establishment are laid down in the enforcement Directive on posting with a view to facilitate the implementation, application, and enforcement of posting rules<sup>29</sup>. Cooperation between various authorities is described under *Section 3.4*.

### **In summary**

There are three main tools to control posting of drivers in road:

1. A public interface (RTPD portal) – intended for companies
  2. A “*Scan on the road*” application – for the use of authorities at the roadside
  3. The IMI (Internal Market Information System) – for the use of authorities
- Companies must submit standardised posting declarations via the public interface at the latest at the commencement of the posting.
  - Authorities at roadside (in host Member States) check posting declarations by scanning the QR code of the posting declaration. They can also request a limited number of documents.
  - Authorities in charge of IMI control in host Member States can request additional documents directly from the company (including tachograph records, pays slips, employment contracts).
  - Authorities in charge of IMI control in home Member States can receive requests for assistance from authorities in host Member States when the company does not cooperate with the host authorities.
  - Mutual communication channels should be established between all national authorities with a view to ensure targeted and effective enforcement.

Active communication channels between various levels of enforcement help securing more targeted and effective enforcement.

A continuity between roadside inspection and IMI authorities would prove useful to:

- ensure that a suspicion of abuse detected at the roadside is subsequently investigated in more depth through appropriate IMI checks.
- in case a situation of posting is identified during a roadside inspection, follow up the controls to ensure that the driver is adequately protected by the host country standards, including the correct amount of remuneration.

Active cooperation between road transport authorities and authorities in charge of the Posting of Workers module would prove useful to:

<sup>29</sup> Art 6 and 7 of Directive 2014/67 on the enforcement of posting.

- maintain a record of, and where relevant investigate, road transport operators in the absence of posting declarations where there is suspicious the operation is posting;
- verify the law applicable to the employment contract (having regard for instance to habitual place of work and employment status).

Competent IMI authorities may operate at national, regional, or local level. IMI also involves IMI coordinators who may play a coordinating role in relation to IMI workflows<sup>30</sup>.

*Box 2 - The importance of communication channels between enforcement authorities*

## 3.2 Roadside inspections

### 3.2.1 Objective

As far as the *lex specialis* is concerned, the central aspect of a roadside inspection is to ascertain the existence of valid posting declarations with a view to trigger and guide subsequent enforcement measures.

Roadside inspections can also be important early detection instruments. In case a situation of posting is identified during a roadside inspection, subsequent checks via the IMI interface may occur to ensure that the driver is adequately protected by the host country standards and that he receives the correct amount of remuneration.

In case a road transport operation does not constitute a situation of posting, it is possible that the company does not appear in the IMI road transport posting module. This absence of record does not in itself preclude further IMI inspections through the general Posting of Workers and the Conditions of establishment modules (see *section 3.3* below).

### 3.2.2 Documents that should be requested and what to look for

Until 2 February 2022, Member States implemented diverse rules on administrative requirements and control measures. With the implementation of the *lex specialis* into domestic laws, one set of measures apply uniformly across the Union.

During roadside inspections, enforcers can only request three types of documents for the purpose of checking compliance with posting rules:

- a copy of the posting declaration,
- the consignment note(s), and
- tachograph records.

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<sup>30</sup> See *section 2.3* of [The Internal Market Information \(IMI\) System - Userhandbook - Update 2012 \(europa.eu\)](#)

Companies have the obligation to ensure that the drivers have at their disposal the above documents and the driver is obliged to make them available when requested by an enforcement officer.

### **3.2.2.1 Posting declaration**

#### *Description*

For transport operations falling within the scope of posting under the *lex specialis*, road operators must ensure that posted drivers have at their disposal a copy of the posting declaration submitted via the RTPD. The copy can be either in paper version or in electronic format.

All posting declarations submitted via the RTPD are generated with an individual QR code, which the roadside enforcer must scan to check the authenticity and validity of the declaration.

As illustrated in the following *box 3*, a complete declaration contains the following information:

- The identity of the operator, at least in the form of the number of the Community licence where this number is available.
- The contact details of a transport manager or other contact person in the Member State of establishment for the purpose of further communication.
- The identity of the driver, his address of residence and number of driving licence. The RTPD allows operators to fill additional information. While this information is not mandatory, roadside authorities should check this additional data if it is available.
- The start date of the contract of employment and the law applicable to it.
- The envisaged start and end date of the posting.
- The number plates of the motor vehicles.
- Whether the transport services performed are carriage of goods, carriage of passengers, international carriage or cabotage.

## Road Transport - Posting Declaration



### Posting information

a.1 Country of posting Netherlands  
 a.2 Period of posting 07/08/2022 - 11/08/2022  
 a.3 Type of operation(s) International carriage  
 Cabotage operations  
 a.4 Type of carriage(s) Carriage of goods

### Company information

e.1 Name Greenhorse  
 e.2 Email Address pierrivercheval@ec.europa.eu  
 e.4 National company register number GH2022  
 e.6 Country of registration Belgium  
 e.7 Address Grand Place  
 1000  
 bruxelles  
 Belgium

### Declaration Details

b.1 Number of the declaration ae2c7351-dc01-4c05-9784-21e786672c77  
 b.2 Last update 04/08/2022 15:20  
 b.3 Submission date 04/08/2022 15:20

### Driver Information

c.1 Name xx xx  
 c.3 Driving licence xx  
 c.5 Address of residence xx  
 xx  
 xx  
 Belgium  
 c.6 Start date of employment contract 01/08/2022  
 c.7 Applicable law Belgium  
 employment contract

### Transport Manager Information

f.1 Name peter greenhorse  
 f.2 Email Address pierrivercheval@ec.europa.eu  
 f.3 Phone number +32494444444  
 f.4 Professional Address Grand Place  
 1000  
 brussels  
 Belgium

### Driver Identification Document

d.1 Document type ID Card  
 d.2 Number xx  
 d.5 Issuing country Belgium

### Contact Person

g.1 Name peter greenhorse  
 g.2 Email Address pierrivercheval@ec.europa.eu  
 g.3 Phone number +32494444444  
 g.4 Address Grand Place  
 1000  
 brussels  
 Belgium

### Number plate(s) of the motor vehicle(s)

XX

Information about the data can be found here: <https://postingdeclaration-test.eu/help>

Box 3 - Example of a posting declaration

## Purpose

The purpose of a valid posting declaration is to ensure that the company and the driver are duly registered in the host country records, which may trigger subsequent and more in-depth controls. In addition, a quick assessment of the information present on the declaration will help the roadside enforcer form an impression on possible abuse or circumvention of applicable posting and related rules. On this basis, discrepancies and red flags can be communicated to competent IMI authorities for the purpose of further checks. As described in *section 3.2.3* below, the red flags warranting more in-depth inspections cover absent, invalid, or incoherent documents, and an apparent discrepancy between the habitual place of work and the applicable law to the employment contract.

## *Scan on the road*

Posting declarations are generated with an individual QR code, which roadside authorities must check to assess the validity of the document. The control is done through the application “*scan on the road*”. This application is available in all 24 languages. The application does not require authentication. It can be used on any mobile device with an Internet connection and a functioning camera.

Upon scanning the QR code with the “*scan on the road*” application, the mobile device retrieves from the RTPD the posting declaration submitted by the operator. Roadside authorities can then review whether the information on the copy of the declaration handed by the driver is the same as the latest version submitted via the RTPD.

Upon scanning posting declarations, three situations may arise:

- i. All the information displayed on the mobile device is identical to the information appearing on the document handed by the driver. It can therefore be assumed that the posting declaration is valid.
- ii. The information displayed on the mobile device is not identical to the document handed by the driver. That document is most likely outdated. Roadside authorities can see on their device the date of the last update of the posting declaration.
- iii. The application makes it clear that the declaration cannot be found in the IMI. It can therefore be assumed that the document handed by the driver is fraudulent.

**A training module for the intention of roadside enforcers can be watched following this link: <https://www.youtube.com/watch?v=7CQpWt91f1k&t=4105s>.**

### **Scan on the road step by step**

Step 1. Access the application



## Scan on the road

Welcome to the Scan on the Road application. You can verify the validity of a Posting Declaration by scanning the QR Code. This is only working if your device has a camera.

Scan the QR code

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Step 2. Scan the posting declaration



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## Road Transport - Posting Declaration



Posting information		Company information	
Country of posting	Germany	e.1 Name	Transport and co
Period of posting	18/04/2023 - 30/06/2023	e.2 Email Address	contact@transportandco.com
Type of operators(s)	Cabotage operations International carriage	e.3 Community licence number	BE12/58-566/20F
Type of carriage(s)	Carriage of goods	e.4 National company register number	0234.123.123
Declaration Details		e.5 VAT number	234.123.123
Number of the declaration	1:94716e-3ff9-432a-81ff-6a178c048464	e.6 Country of registration	Belgium
Last update	18/04/2023 15:16	e.7 Address	rue Belhard 28 1000 Brussels Belgium
Submission date	18/04/2023 15:16		
Driver Information		Transport Manager Information	
Name	John Truckman	e.1 Name	John O'Smith

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### Step 3. Review the declaration

- Valid declaration (identical information to the posting declaration)

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Declaration number **1c94716e-3f9-432a-81f8-6a978d248464**

Status **SUBMITTED**

Submission date **18/04/2023 17:16**

Last update date **18/04/2023 17:16**

**Posting information**

Posting Country **Germany**

Start date **18/04/2023**

End date **30/04/2023**

Type of operation **International carriage Cabotage operations**

Number plate(s) of the motor vehicle(s) **2ABC681, 2FGD175**

**Driver**

First Name **John**

Last Name **Truckman**

Driver's license number **A321654321**

Driver card number **1234567890123416**

**Identification document**

Document type **ID Card**

Number **ADF644654**

Issue date **02/04/2023**

Expiration date **01/04/2033**

Issuing Country **Belgium**

**Address**

Street and number **rue Belliard 28**

Post code **1000**

City **Brussels**

Country **Belgium**

**Employment contract**

Start date **15/06/2020**

Applicable law **Belgium**

**Company details**

Name **Transport and co**

Community licence number **BE12-68-66-ZDF**

National company register number **0234.123.123**

VAT number **234.123.123**

Country of registration **Belgium**

**Company address**

Street and number **rue Belliard 28**

Post code **1000**

City **Brussels**

Country **BE**

**Transport manager**

First Name **John**

Last Name **O'Smith**

Certificate of professional competence (License number) **BE25847454**

Certificate issuing country **Belgium**

Email address **transportmanager@transportandco.com**

Phone number **+3248121212**

**Professional Address**

Street and number **rue Belliard 28**

Post code **1000**

City **Brussels**

Country **Belgium**

**Contact person**

First Name **John**

Last Name **O'Smith**

Email address **transportmanager@transportandco.com**

Phone number **+3248121212**

**Professional Address**

Street and number **rue Belliard 28**

Post code **1000**

City **Brussels**

Country **Belgium**

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➤ Expired declaration

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Declaration number: **13644813708\_4658-a962-427fad6fccc**  
Status: **EXPIRED**  
Submission date: 16/02/2023 11:48  
Last update date: 01/03/2023 03:00

**Posting information**

Posting Country: Austria 🇦🇹  
Start date: 23/02/2023  
End date: 28/02/2023  
Type of operation: International carriage  
Number plate(s) of the motor vehicle(s): 21345

**Driver**

First Name: Albert  
Last Name: Kosv  
Driver's license number: 12365487  
Driver card number:

**Identification document**

Document type: Passport  
Number: 654666644  
Issue date:  
Expiration date:  
Issuing Country: Bahamas

**Address**

Street and number: Jëbyj  
Post code: 2015  
City: braciļ  
Country: Albania

**Employment contract**

Start date: 06/12/2021  
Applicable law: Kosovo\*

**Company details**

Name: Transport and co  
Community licence number: BE1208-996ZDF  
National company register number: 0234.123.123  
VAT number: 234.123.123  
Country of registration: Belgium 🇧🇪

**Company address**

Street and number: rue Belliard 28 ynuuara  
Post code: 1000  
City: Brussels  
Country: BE

**Transport manager**

First Name: John  
Last Name: O'Smith  
Certificate of professional competence (License number): BE2087464  
Certificate issuing country: Belgium  
Email address: transportmanager@transportandco.com  
Phone number: +32485121212

**Professional Address**

Street and number: rue Belliard 28  
Post code: 1000  
City: Brussels  
Country: Belgium

**Contact person**

First Name: John  
Last Name: O'Smith  
Email address: transportmanager@transportandco.com  
Phone number: +32485121212

**Professional Address**

Street and number: rue Belliard 28  
Post code: 1000  
City: Brussels  
Country: Belgium

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Box 4 Scan on the road step by step

### **3.2.2.2 Consignment notes or equivalent evidence**

#### *Description*

Drivers must have at their disposal evidence of the transport operation taking place in the host Member State. This can include documents such as a paper or an electronic consignment note (hereafter “e-CMR”) or equivalent evidence. This evidence must provide information on the incoming international carriage and each consecutive cabotage operation carried out<sup>31</sup>.

#### *Purpose*

One of the purposes of e-CMR or paper consignment note is to indicate the type of operation taking place (e.g., cabotage) and also indicate that such operation is genuine (e.g., in case of cabotage the consignment note can indicate if it follows an international journey and if it does not exceed the maximum amount of activities authorised in the host Member State).

The consignment note can also greatly speed up the identification of a posting situation during a roadside check. For example, where the consignment note indicates a cabotage operation, it can be safely assumed that the driver is in a posting situation. Where it appears from the consignment note that the cabotage is illegal, a whole series of other consequences and further checks are triggered<sup>32</sup>. However, a driver performing illegal cabotage must also be considered as posted.

For more details on how consignment notes can be relevant for posting see *section 3.2.4* below, which describes a sequence of events on how to use consignment notes to determine posting situations.

Overall, the existence of a cabotage operation justifies a communication to authorities in charge of IMI investigations so that adequate checks are triggered to ensure that the driver is guaranteed the correct level of protection during the time of posting.

### **3.2.2.3 Tachograph records**

#### *Description*

Tachograph records also provide useful evidence to enforcers to check if transport operations fall within or outside the scope of posting. Location data recorded in the tachograph (in the form of country codes of the Member States where operations took place) can be very useful for this purpose. For a full description of the location data recorded with/by the different generations and version of the tachograph, please refer to the TRACE 2 guidance note on the smart tachograph.

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<sup>31</sup> Art 8.3 of Regulation 1072/2009 on common rules for access to the international road haulage market

<sup>32</sup> Such checks are not reflected in this document as this document primarily focuses on Posting of Drivers.

## *Purpose*

While tachograph records are primarily designed to ensure enforcement of driving and resting time rules, they should also be used by the roadside enforcer to help them ascertain whether there is a situation of posting. The following *section 3.2.4* suggests a checklist of questions to identify the nature of a road operation and whether or not the driver should be considered as posted. Questions include, for instance, assessing when and where the operation starts and ends. Tachograph records will provide most answers to this checklist of questions, including the recordings of the position of the vehicle during loading and unloading activities. These should be introduced by the driver during the operation.

### **3.2.3 Red flags**

Roadside enforcers can only check a limited number of documents and data and they need to proceed quickly – especially when controlling passenger transport. They are also required to assess compliance with a range of different regulations and posting rules are an addition to this list.

Effective enforcement often requires that more complete checks are carried after the road transport operation. The information gathered from the three documents listed above (i.e., 1) posting declaration; 2) consignment notes or equivalent evidence; and 3) tachograph records) together with results of interactions with the driver provide key pointers that can help form the basis for subsequent checks with other authorities. In view of this, when relevant, a more in-depth inspection should be carried out after the road transport inspection.

Where roadside checks have identified a situation of posting, IMI investigations are warranted to ensure that the posted driver receives the correct amount of remuneration and that s/he is protected by the applicable host country standards during the time of posting.

Roadside enforcers should also play an active role in triggering more complete IMI inspections whenever they have suspicions of circumvention or abuse. When passing the relevant information gathered during roadside inspections to the competent authorities, roadside enforcers should at the same time flag information that justifies follow-up inspections. These red flags can arise from the absence of a declaration (when a posting situation has been detected), invalid declaration, discrepancies on the documents produced during the roadside inspection but also impressions of the roadside officer following interaction with the driver.

In summary, a continuity between roadside inspections and IMI controls leads to more targeted and effective enforcement. As described in the following *section 3.3*, active cooperation should also be sought between IMI authorities in charge of road transport and those operating the general Posting of Workers module so that the red flags reach the most appropriate authority.

Examples of red flags include:

- Absence of posting declaration for a transport operation that falls in scope of posting: A posting declaration is an indispensable instrument for enforcement purposes. Its

absence should therefore trigger further controls when the enforcer has established that the transport operation is posting.

- Invalid or falsified posting declaration:
  - Absent or invalid QR code.
  - Compulsory information missing on the declaration.
  - Erroneous information recorded on the declaration.
- Discrepancy between the applicable law to the employment contract and the habitual place of work and/ or driver's residence:

A posted worker is a worker who for a limited period carries out tasks outside the country in which he normally works. As described in Annex 3, a habitual place of work can be presumed to be in the Member State from which the driver habitually carries a substantial part of his work.

An apparent discrepancy between, on the one hand, the applicable employment law appearing in line c.7 of the posting declaration and, on the other hand, the habitual place of work of the driver should trigger further investigations through relevant IMI modules. Competent authorities may for instance request the employment contract and/ or other records in order to ascertain whether the information provided in the posting declaration is correct.

- Correspondence between the posting dates and the employment dates  
The roadside officer may observe that the employment contract started around the same date as the situation of posting. This warrants further checks on the applicable employment law and related posting situations<sup>33</sup>.

The start date of an employment contract can be found at line c.6 of the posting declaration. The period of posting is indicated in line a.2. The tachograph records can also point a lack of activity from the driver in the country of establishment of the employer.

- The driver is self-employed or hired through a temporary work agency:  
A self-employed driver is unlikely to be in possession of a posting declaration. A red flag communicated to IMI competent authorities having access to the module on posting would usefully trigger subsequent controls so as to ensure that the self-employed driver is indeed a genuine independent contractor.
- Discrepancy between consignment note (e.g., e-CMR) and tachograph data.  
Such discrepancy would arise if, for instance, the country code showing the position of the vehicle indicates a different country than the country mentioned in the consignment note.

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<sup>33</sup> See for instance *Art 4 of the enforcement Directive 2014/67*.

Another discrepancy may arise if the tachograph indicates more operations than documented by the consignment note. This may be an indication of a circumvention of applicable posting rules.

- Violations of driving and rest times:  
The intelligence collected as regards the compliance with driving and resting times may be used to target companies for the checking of posting rules. Companies having high risk rating scores may be checked more often and more comprehensively.

### **3.2.4 Possible ways to proceed with roadside inspections: Sequence and checklist of questions.**

The following Figure 1 A step by step approach to roadside controls and accompanying checklists of questions (Box 5 and Box 6) provide a step-by-step approach for roadside inspections. Road side enforcers should first verify the nature of the operation in particular by cross-checking the information contained in the consignment note with tachograph data. They should then understand if the operation falls within the scope of posting or not. To do so, Boxes 5 (for freight) and 6 (for passengers) suggest a checklist of questions to quickly identify whether or not the operation constitutes posting. If the operation constitutes posting, roadside authorities should look for the existence of a posting declaration and verify if the information contained in there aligns with the posting situation. For all operations, red flags should be collected where relevant and communicated to the competent authority for further checks.

Figure 2 and Figure 3 provide an illustration of sequential steps for road transport authorities starting their controls with a cabotage check. The first step consists in identifying a situation of cabotage, mostly based on the e-CMR or paper consignment note. If cabotage is confirmed, and therefore posting rules apply, the roadside enforcer should proceed to check the validity of posting documents and where relevant, collect red flags and communicate the information to the competent authority for subsequent checks.

If it is not cabotage, the roadside enforcer will proceed step-by-step to determine whether the operation is rightly exempted from posting or not. Where relevant, red flags should always be collected and communicated along with other relevant information to the competent authorities.

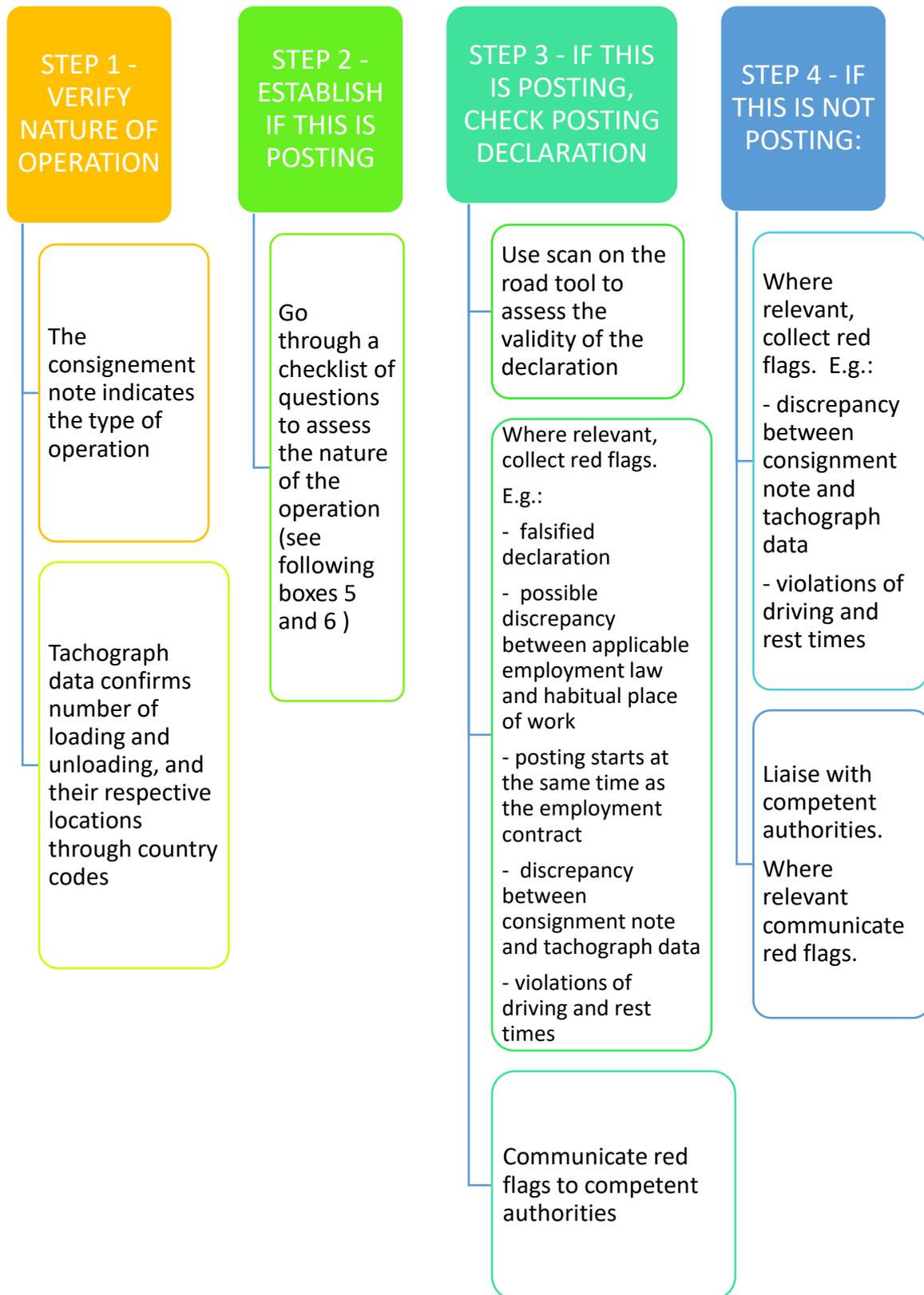


Figure 1 A step by step approach to roadside controls

This checklist of questions is designed to assist the roadside officer in identifying whether posting rules apply based on the nature of the road transport operation. It is suggested to follow the questions in the order they are presented. When all boxes under a specific step are ticked, the operation is identified and there is no need to proceed to the rest of the questions.

**Step 1: is it a situation of cabotage?**

- Does the consignment note and tachograph evidence cabotage?

(If there are more operations than the legal maximum, the driver should still be considered as posted)

**Step 1a: is it transit?**

- Is the driver driving through without loading or unloading?

**Step 1c: is it a simple bilateral operation?**

- Is the driver driving to or from the Member State of establishment of the road operator on the basis of a transport contract?
- Is it clear that the driver has not or will not carry activity of loading or unloading during this journey?

**NB:** a simple bilateral operation may also consist in an initial or final road leg of a combined transport operation.

**Step 1d: is it 1+1?**

- Is the driver driving to or from the Member State of establishment of the road operator?
- Does this international journey involve:
  - One activity of loading or unloading; OR
  - One activity of loading and one activity of unloading?
- Is it clear that the driver has not or will not carry 2 activities in the same Member State?

**Step 1d: is 0+2?**

- Is the driver performing a return journey to or from the Member State of establishment of the road operator?
- Is it clear that the driver has not or will not carry activity of loading or unloading during one of the journeys (return or outgoing)?
- Does the other journey (return or outgoing) involve:
  - Two activities of loading or unloading; OR
  - Two activities of loading and two activities of unloading?
- Is it clear that the driver has not or will not carry more than one activity of loading or unloading in the same Member State?

*Box 5 - Checklist of questions for roadside checks in transport of goods*

**Step 1: is it a situation of cabotage?**

- Is the authorization form (for regular passenger transport) or journey form (for occasional passenger transport) evidencing cabotage?

**Step 1a: is it transit?**

- Is the driver driving through without picking up or setting down passengers?

**Step 1c: is it a simple bilateral operation?**

- Is the driver performing one of the following operations?
  - picking up passengers in the Member State of establishment and setting them down in the country of destination?
  - picking up passengers in the country of destination and setting them down in the country of establishment?
  - carrying local excursions, with the same group of non-resident passengers, following an in-going international carriage with the same passengers in the same vehicle or in a vehicle owned by the same company?

**Step 1d: is a bilateral operation with one additional activity?**

- Is the driver driving to or from the Member State of establishment of the road operator?
- Does this international journey involve:
  - One activity of picking up passengers or one activity of setting down passengers; OR
  - One activity of picking up passengers and one activity of setting down passengers?
- Is it clear that the driver has not or will not carry two activities in the same Member State?

*Box 6 - Checklist of questions for roadside checks of transport of passengers*

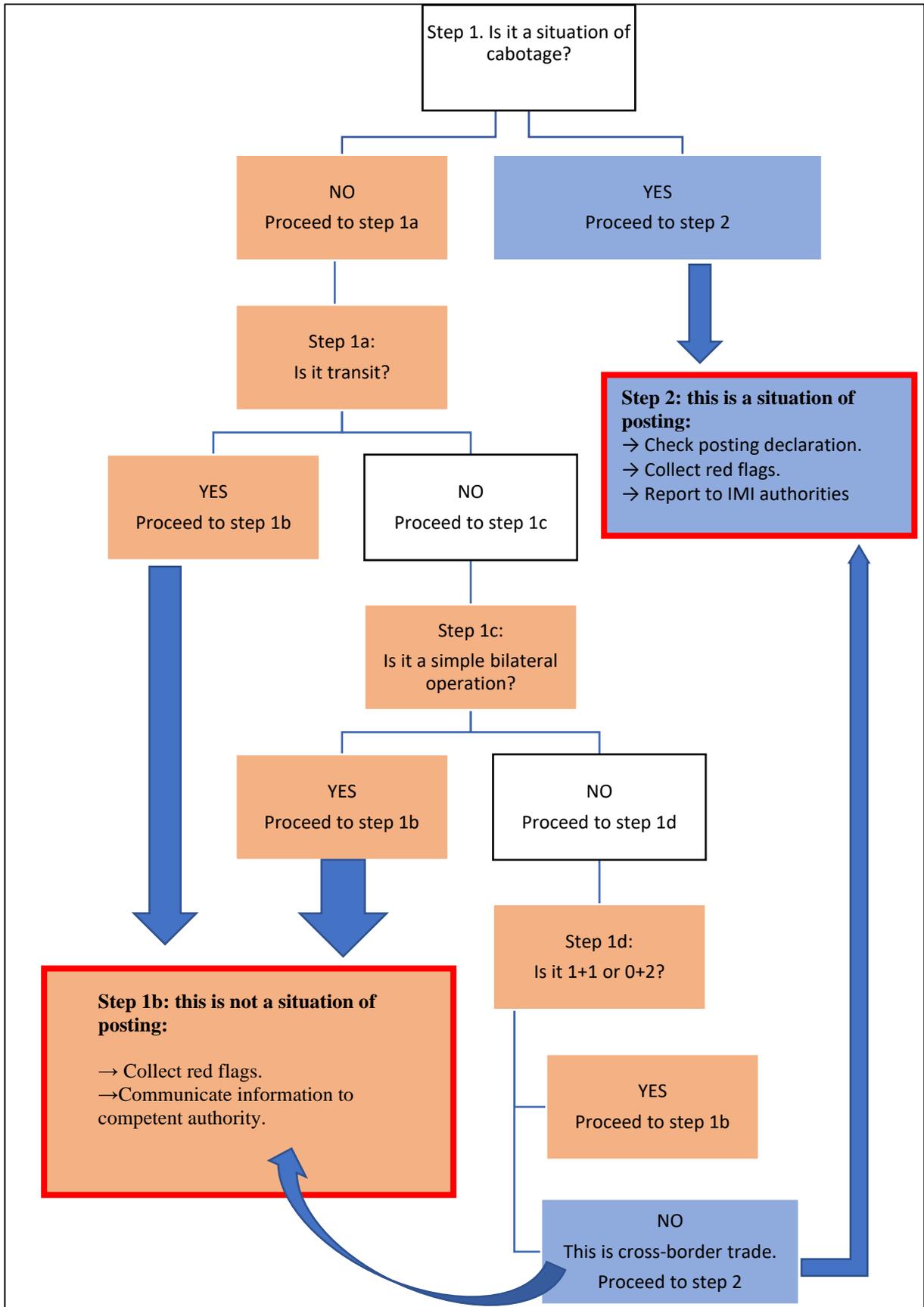


Figure 2 - Step-by-step approach for transport of goods

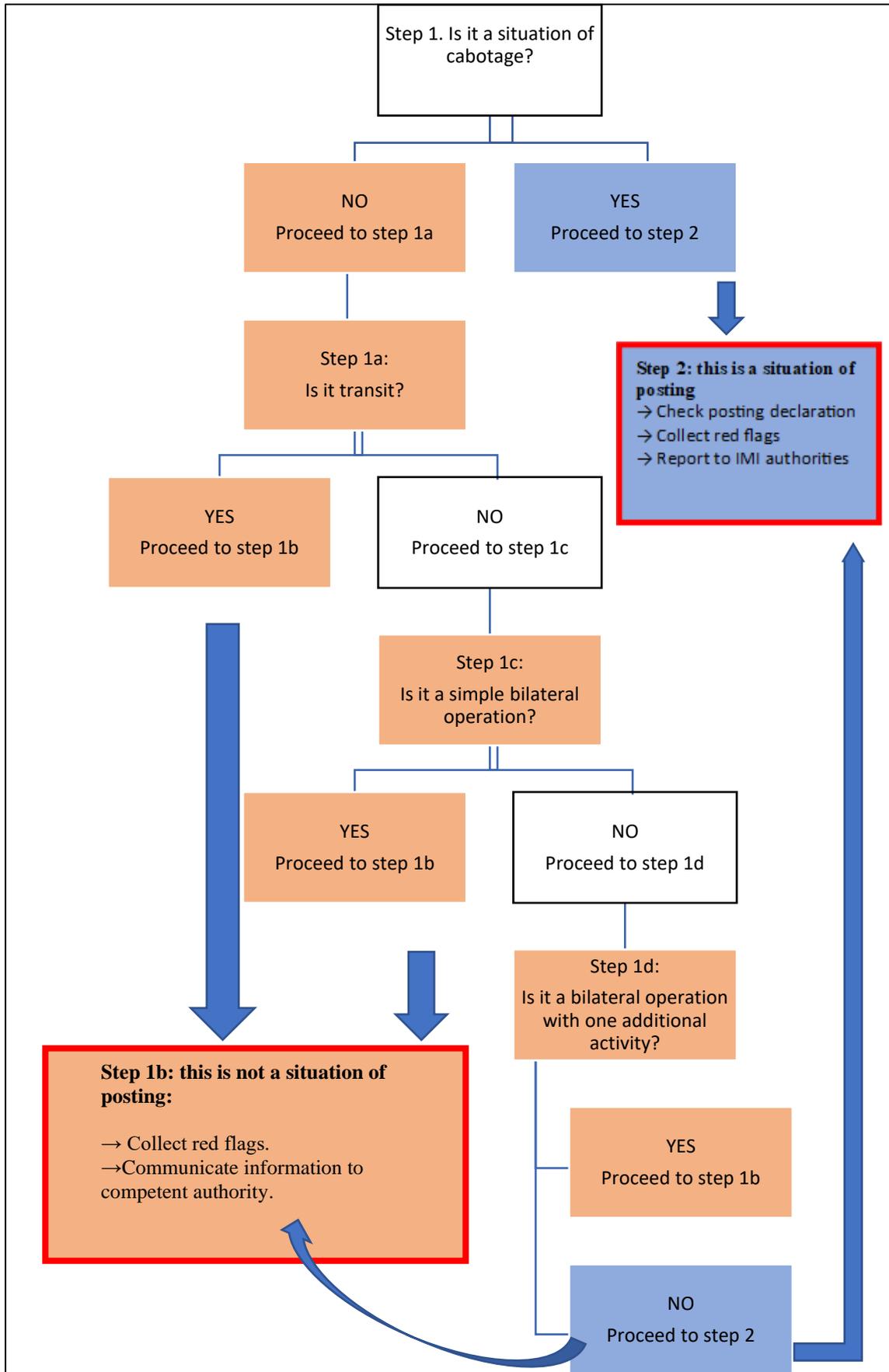


Figure 3 - Step by step approach for transport of passengers

### 3.3 IMI inspections

Independently or to complement roadside inspections, further controls can take place through the IMI interface and in good intelligence with the competent authorities of the Member State of establishment of the company.

This guidance suggests that the exchange of information between the Member States via IMI may occur in three circumstances:

- As a follow-up to roadside inspections where a posting situation has been identified.
- As a follow-up to roadside inspections where red flags have been communicated by the roadside officer.
- Independently from roadside inspections, for instance on a risk-assessment basis. The red flags outlined in the above *section 3.2.3* may also be relied upon by IMI authorities when establishing priorities in such controls.

#### 3.3.1 Overview of IMI modules

The IMI is a multilingual online tool that seeks to facilitate exchange of information between the enforcement authorities of the host Member State (“*host authorities*”) and of the Member State of establishment of the company (“*home authorities*”). Currently, IMI supports cooperation procedures in 17 different policy areas.

Three IMI modules are relevant for the specific enforcement of road transport rules:

- The “*Road Transport – Conditions of establishment*” module seeks to facilitate exchange of information to check the existence of effective and stable establishment of the company.
- The “*Road Transport – Social rules*” module seeks to facilitate exchange of information to control the effective application of driving times, breaks and rest periods.
- The “*Road Transport – Posting declarations*” module to which the public interface RTPD is connected in order to allow road operators to submit posting declarations.
- The enforcement of the provisions of the *lex specialis* largely takes place through IMI connected to the RTPD. Host authorities use this module to review all posting declarations. They also have the possibility to send requests for further documents to the operator (see *section 3.3.3* below). If the operator does not reply within an 8-week deadline, the host authorities can request information from the home authorities within a 25-days deadline (see *section 3.4* below).

When responding to requests for information, the operator has the option to engage in a communication with the host authorities directly on the portal. All competent authorities may also exchange free text messages between themselves. Any information provided as free text can be automatically translated by a service connected to IMI (eTranslation)<sup>34</sup>.

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<sup>34</sup> A user guide to the RTPD can be found on this link: [https://ec.europa.eu/internal\\_market/imi-net/docs/library/road-transport/posting-declarations\\_en.pdf](https://ec.europa.eu/internal_market/imi-net/docs/library/road-transport/posting-declarations_en.pdf).

The Road Transport – Posting Declarations module can only be used to the extent that a posting declaration has been submitted by the operator. Transport operations which do not constitute posting may not appear on this interface. Importantly, transport operations which may constitute posting but for which the operator does not submit a posting declaration will not appear either on the Road Transport – Posting Declarations module.

Even if a posting declaration is submitted on the RPTD, the Road Transport – Posting Declarations module alone does not allow the host authorities to check all elements in relation to posting, such as for instance letterbox practices or the existence of a genuine employment relationship in the Member State of establishment.

For all these cases, additional IMI investigation must be carried via another interface: the “*Road Transport – Conditions of establishment*” module and/ or the general “*Posting of Workers*” module. The use of the latter module was formalized by the Directive 2014/67 on the enforcement of posting. Standardised information requests can be sent by the host authorities with a view to assess the existence of genuine posting, to prevent abuse and circumvention and to assess the respect of applicable working conditions, including remuneration<sup>35</sup>.

Authorities in charge of the Posting of Workers module are often not the same as those relying on the Road Transport – Posting Declarations module. An effective communication between all host authorities is therefore essential, failing which road transport operations may escape any form of IMI enforcement when they are not documented by operators. Cooperation between host authorities is also indispensable to control the respect of applicable terms and conditions to posted drivers.

**In summary:**

The control of compliance of the *lex specialis* largely takes place through the IMI in accordance with the following procedure:

- **Step 1:** The host authorities make an IMI direct request to the company. The request arrives automatically to the company that receives a notification.
- **Step 2:** The company receives the request via the RTPD and has 8 weeks to submit the requested documents.
- **Step 3:** If the company fails to submit the documents within 8 weeks, the IMI informs the host authorities that they may now request assistance from the authorities of the home authorities.
- **Step 4:** Upon IMI request from the host authorities, the home authorities contact the company (including through checks at premises) to obtain the requested documents within 25 working days. To this end, home authorities have access to all exchanges and documents that the host authorities receive from the company.

In parallel to the RPTD, transport authorities must be able to make an effective use of the general Posting of Workers module in order to prevent abuse and circumvention especially in cases where there is no posting declaration.

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<sup>35</sup> A user guide to the general *Posting of Workers* module can be found on this link: [https://ec.europa.eu/internal\\_market/imi-net/docs/library/pow-user-guide\\_en.pdf](https://ec.europa.eu/internal_market/imi-net/docs/library/pow-user-guide_en.pdf).

Different authorities within the same Member State may be in charge of different IMI modules. An effective enforcement requires that communication channels are in place between these authorities.

### 3.3.2 Objectives

IMI controls are an essential aspect of efficient enforcement of posting and related rules. Considering the limited time and means available at roadside, in-depth inspections can only happen outside of roadside inspections and the IMI interface can serve as a tool to trigger these more thorough inspections.

IMI inspections carried through the road transport modules may pursue one or several of the following objectives:

- to ascertain a situation of posting.
- to assess abusive reliance on a posting status through the circumvention of the applicable law to an individual employment contract.
- in case a genuine situation of posting is identified, to control the respect of the applicable terms and conditions of employment of the host Member State.

If during their IMI investigations, transport authorities have suspicions of fake self-employment or letterbox practices in the Member State of establishment further checks must be conducted through the relevant modules, including the general module on posting as well as the module on conditions of establishment.

### 3.3.3 Documents that can be requested

According to the *lex specialis*, competent authorities can request that the operator sends, within eight weeks and via the RPTD, copies of the:

- tachographs records;
- consignment notes (e.g., e-CMRs);
- documentation relating to the remuneration of the driver in respect of the period of posting;
- the employment contract;
- timesheets relating to the driver's work;
- proof of payments.

IMI inspections can cover up to one year of posting from the date of the request for documents and may concern one specific driver or all the drivers in a company.

#### 3.3.3.1 The posting declaration

The information from posting declarations is saved on the IMI for a period of 24 months. In the absence of posting declarations, a company will not appear on the Road Transport – Posting

Declarations module and thus potentially escape any form of in-depth control. The role of the roadside enforcer is therefore essential to signal to the competent authorities the existence of these companies when relevant. In particular, where a situation of posting has been established by the roadside enforcer, and in the absence of a valid declaration further investigations could be carried through the general IMI module on Posting of Workers.

### **3.3.3.2 Consignment notes and tachograph records**

Consignment notes contain information about the transport operation. Tachograph records contain important data on driving and resting times, as well as data on the location of a vehicle.

The consignment notes and the tachograph records will assist in determining situations of posting— including the start and end time. As an illustration, if a consignment note evidences a situation of cabotage, the driver should be considered as posted in the host Member State.

The portal accepts the following supporting document formats: .bmp, .clp, .dcx, .doc, .docx, .gif, .htm, .html, .img, .jif, .jpeg, .jpg, .mac, .msg, .msp, .odt, .pct, .pcx, .pdf, .png, .ppm, .ppt, .pptx, .psp, .raw, .rtf, .tif, .tiff, .txt, .wpg, .wps, .xls, .xlsx, .xml, .zip.

The portal is also compatible with all tachograph software.

### **3.3.3.3 Documentation relating to remuneration, proof of payments and time sheets**

In case a genuine situation of posting is identified, the driver should receive remuneration and perform working time in line with host country standards.

The hours on the timesheets should correspond to the hours calculated from the consignment note and tachograph data. Hours on the payslips should match the timesheets. Payslips should then be compared with bank transfers to ensure that the remuneration has been paid in full.

### **3.3.3.4 Employment contract**

The employment contract contains essential information to determine the habitual place of work and situations of posting. For instance, since 1 August 2022 employment contracts should contain written information on the place or places of work, the remuneration, the work patterns, and the identity of the social security institution receiving the employer's contribution<sup>36</sup>.

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<sup>36</sup> See *Directive 2019/1152*.

## **3.4 Cooperation between authorities**

### **3.4.1 Mutual assistance with the Member State of establishment**

Host authorities may seek cooperation through IMI with the Member State of establishment in the following circumstances:

- The company has not replied or replied only partially to the request for information within the required period.
- The company claims that it has not been performing any operation in the territory during the investigated period contrary to what has been established by the roadside enforcer.
- Host authorities want to control the respect of terms and conditions of employment applicable to the posted driver.
- The transport manager claims that the driver is self-employed.

Depending on the nature of the request, exchange of information may be requested through various IMI modules including the RTPD and the general *Posting of Workers* module.

Whenever a request for assistance is made through the IMI system, the competent authorities of the Member State of establishment must ensure that they provide the requested information within 25 working days.

### **3.4.2 The role of social partners**

Depending on national traditions, social partners may take an active role in the enforcement of the *lex specialis* and related rules. In Sweden for instance, the terms and conditions of employment applicable to posted drivers are largely found in collective agreements and social partners undertake the entire responsibility for the control of the respect of these collective agreements. For such situations, a good practice would be to ensure that social partners have access to the posting declarations submitted in the RTPD. Such communication is indeed an essential prerequisite for social partners to carry targeted controls.

## **Annex 1: When is a driver in or out of scope of posting rules: explanation for freight transport.**

### **Posting of drivers under Directive (EU) 2020/1057: Explanation and in/out of scope in relation to operations**

#### **Introduction**

This document answers the need to have a full explanation of the basic posting rules concepts for the purpose of enforcing them. It is a step-by-step approach explaining the posting rules: first the basic concepts (section 1), then a simplified explanation leading expert to a first understanding of the rules (section 2), then a full explanation with all conditions & criteria (section 3).

The understanding of the specific posting rules applying to drivers in the road transport sector (cfr. *lex specialis*, Directive (EU) 2020/1057) has been discussed in the Commission Expert Group on Posting of Drivers where all Member States and interested parties were represented. The Commission services prepared explanation documents that were reviewed and validated by the Commission's legal service. It has to be noted however that the interpretation of EU law remains the competence of the European Court of Justice.

## 1. Main concepts

	DEFINITION	LEGAL BASIS
POSTING	<p>A road haulage operator posts drivers to the territory of another country on their account and under their direction, under a contract concluded between the road haulage operator making the posting and the party for whom the transport services are intended. The driver operates in the territory of that country, provided that there is an employment relationship between the road haulage operator making the posting and the driver during the period of posting.</p> <p>In short:</p> <ul style="list-style-type: none"> <li>• A driver has an employment relationship with a road haulage undertaking/ operator;</li> <li>• The operator asks this driver to provide transport services in another Member State (a MS different from the one of establishment of this undertaking)</li> </ul>	Article 1.3.a of the general Posted Workers Directive 96/71/EC
MEMBER STATE OF ESTABLISHMENT	Where an undertaking is established, regardless of whether its transport manager originates from another country.	Article 2.8 of Regulation (EC) No 1071/2009
HOST MEMBER STATE	Country wherein the transport operation is performed (and is not the country of establishment of the undertaking).	

	DEFINITION	LEGAL BASIS
<b>INTERNATIONAL BILATERAL OPERATION</b>	The movement of goods between the Member State of establishment and another country (Member State or third country). The operation involves two countries one of which is the country of establishment (at start or end).	Recital (10) and Article 1.3 of Directive (EU) 2020/1057
<b>INTERNATIONAL NON-BILATERAL OPERATION / CROSS-TRADE OPERATIONS</b>	The operation involves two countries, none of which is the country of establishment of the operator carrying out the operation (loading in one and unloading in another).	Recital 13 of the Directive 2020/1057
<b>CABOTAGE</b>	National carriage for hire or reward carried out on a temporary basis on the territory of a host Member State (by an operator established in another Member State).	Article 2.6 of Regulation (EC) No 1072/2009
<b>UNLADEN JOURNEY</b>	An empty run (no more goods on board the vehicle) undertaken in conjunction with another, laden, journey.	Article 2.2 of Regulation (EC) No 1072/2009
<b>TRANSIT</b>	The movement through the territory of a country without carrying out any activity of loading or unloading. There is no link between the driver's activities and the Member State transited.	Recital (11) and Article 1.5 of Directive (EU) 2020/1057
<b>ADDITIONAL ACTIVITY</b>	An additional activity is an operation of loading and/or unloading, performed in the context of a bilateral operation, in the Member States or third countries that the driver crosses, provided that the driver does not load and unload the goods in the same Member State (this would constitute cabotage).	Article 1.3, third sub-paragraph of Directive (EU) 2020/1057  Note: cross-trade operations never involve the country of establishment whereas an

	DEFINITION	LEGAL BASIS
		additional activity may involve the country of establishment.

**2. In scope & out of scope of posting: simplified explanation**

<p><b>Basic rule</b></p>	<p><b>Look at whether the country of establishment is either where the specific transport operation starts or ends. If this is the case, posting rules do not apply. When the link with the country of establishment is preserved, posting rules do NOT apply.</b></p> <p>The <i>Lex Specialis</i> on the posting of drivers refers to the type of operation to determine whether posting rules apply. Three main types of transport operations are mentioned in the text: bilateral, cabotage and cross-trade. Accordingly:</p> <ol style="list-style-type: none"> <li>1. A bilateral is never in scope.</li> <li>2. Cabotage is always in scope.</li> <li>3. Cross-trade operations are in scope but there are certain exceptions to this basic rule.</li> </ol>	<p>Example:</p> <ul style="list-style-type: none"> <li>• The link with the country of establishment is preserved (bilateral operation): if the transport operation involves the country of establishment at start and / or end, the driver is not considered as posted.</li> <li>• The link with the country of establishment is lost (cabotage and cross-trade): posting rules apply.</li> </ul>
<p><b>Exceptions to the basic rule</b></p>	<p>The posting rules do NOT apply / the driver is NOT considered as posted</p>	
<p><b>1.</b></p>	<p>A limited number of additional activities, if performed during a bilateral operation, are not in scope of posting (cfr 1 + 1 and 0+2 exemptions). An additional activity may be in or out of scope depending on whether it benefits from the 1+1 or the 0+2 exemptions.</p>	<p>Example: during a bilateral operation, if the driver loads in one country and unloads in another country, none of which is the country of establishment, this additional activity is NOT in scope.</p>
<p><b>2.</b></p>	<p>In combined transport, when the initial or final road leg consists, on its own, of an international bilateral transport operation</p>	<p>Recital (12) and Article 1, paragraph 6 of Directive (EU) 2020/1057</p>

3.	Transit	The driver crosses a country without performing any activity of loading/unloading (stops are permitted).
Unladen journey (empty run)	An unladen journey is either in or out of scope depending on whether the operation that actuates / triggers this unladen journey is itself in or out of scope.	The unladen journey is NOT in scope if it is carried out in connection with a bilateral operation (exempted). The unladen journey is IN scope when it is carried out in connection with cabotage or international non-bilateral operation / cross-trade.

### 3. In scope & out of scope of posting: assessment per transport operation

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
Cabotage	<p>The entire operation from loading to unloading takes place WITHIN the territory of a country where the operator is not established.</p> <p>Posting rules ALWAYS apply during cabotage.</p>	X		<p><u>Start of the posting situation:</u></p> <p>The posting situation only starts when the driver commences the unladen journey towards the location where she/he will load the goods to be carried under cabotage.</p> <p><u>End of the posting situation:</u></p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>To qualify for cabotage operations, an international bilateral operation needs to be completed first. It is only after the goods attached to the international incoming journey have been fully unloaded that cabotage operations may be carried (Reg1072/2009).</p> <p>References: Art 8.2 Reg 1072/2009, Article 1 point 7 Directive 2020/1057</p>			<p>The posting continues through the carrying out of the cabotage operation and ends when the goods are unloaded and the cabotage operation is finalized.</p> <p><u>Followed by a return to the country of establishment</u></p> <p>If the driver then returns to the country of establishment after the end of the cabotage operation, either with an empty truck or with new goods uploaded as part of a new bilateral operation, the driver is not considered as posted from the end the unloading of the cabotage goods.</p>
<p>Cross-trade operations outside the country of establishment:</p> <p>loading &amp; unloading (in a non-bilateral transport operation)</p>	<p>Transport operations carried out BETWEEN two countries none of which is the country of establishment of the operator.</p> <p>Posting rules apply.</p>	X		<p><u>Start of the posting situation:</u></p> <p>The posting situation starts not immediately after the end of an international bilateral operation, but only when a driver starts an unladen journey towards the loading point in that Member State to load goods to be carried under cross-trade.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>References: Recitals 12 and 13 of the Directive 2020/1057 refer to cross-trade operations as ‘non-bilateral transport operations.</p>			<p>As long as the goods are not unloaded, the driver is considered as posted in the country from where he started the unladen journey to load until he exits that country, and he is next posted in the country where the goods are unloaded from the border-crossing in that country until he has completed the unloading.</p> <p><u>End of the posting situation:</u></p> <p>The driver remains posted until the goods are unloaded.</p> <p><u>Followed by an unladen journey or a new bilateral operation</u></p> <p>The unladen return journey through the territory of the country where the goods were unloaded and back to the country of establishment does not fall under posting rules.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
				The same is true in case the driver starts a new bilateral journey (with the country of establishment as the country of destination / unloading): from the moment of unloading the goods linked with a cross-trade operation until reaching the final destination in the country of establishment, the driver is not considered as posted.
Initial & final road leg of a combined transport operation	<p>When a driver is engaged in a combined transport operation, the nature of the service provided during the initial or final road leg is closely linked with the Member State of establishment if the road leg on its own is a bilateral transport operation.</p> <p>Note: for an exhaustive explanation of combined transport and enforcement, please refer to the guidance note produced in the TRACE 2 Access to market focus group.</p>		<b>X</b>	In combined transport, when the initial or final road leg consists on its own of an international bilateral transport operation, the driver is not considered as posted.

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>A combined transport operation means a transport of goods between different countries where part of the transport is by rail, inland navigation or by sea. A combined transport operation is considered international when at least one of the modal legs crosses a border.</p> <p>Combined transport, as covered by EU rules, is the transport of goods between Member States where the road goods vehicle (trailer, semi-trailer, with or without tractor unit) swap body or container of 20 feet or more uses the <u>road on the initial or final leg of the journey</u> and, on the other leg, rail or inland waterway or maritime services where this section exceeds 100 km (as the crow flies) and make the initial or final road transport leg of the journey.</p>			

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>The road leg of a combined transport operation can be within the territory of a single Member State or involving several Member States.</p> <p>Recital (12) and Article 1, paragraph 6 of Directive (EU) 2020/1057</p> <p>Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States</p>			

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
International bilateral operation	<p>Transport operation carried between 2 countries, one of which is the country of establishment of the operator.</p> <p>Posting rules do not apply.</p> <p>Reference: Article 1 point 3, second paragraph of Directive 2020/1057</p>		<b>X</b>	<p><u>Duration:</u></p> <p>For the full duration of bilateral operations (involving the country of establishment at start or end of the operation), the driver is not subject to posting rules.</p> <p><u>The case of multiple bilateral operations</u></p> <p>Several bilateral transport operations, each covered by a separate consignment note, may be carried out during one journey involving the country of establishment (at start or end of the journey) and are not in scope of posting rules.</p> <p>Recital 10 of Directive (EU) 2020/1057</p> <p>Examples:</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
				<p>-FROM the country of establishment: goods loaded in country of establishment getting partially unloaded in three different countries based on three different consignment notes.</p> <p>- TO the country of establishment: goods loaded in country that is not the country of establishment, get partially unloaded in two other countries based on two consignment notes, before a final unload in the country of establishment (based on a third consignment note).</p>
<p>Bilateral operation  + one loading and/or unloading in the country that the driver crosses (1+1)</p>	<p>One operation of loading and/or unloading in the country that the driver crosses is considered to be out of scope of posting rules even though the operation is not part of an operation involving the country of establishment.</p>		<p><b>X</b></p>	<p>For the full duration of the 1+1 operation, the driver cannot be considered as a posted worker.</p> <p><u>Start &amp; end:</u></p> <p>Under this 1+1 rule, where multiple additional activities are carried out in the context of an ongoing bilateral operation, the first activity is exempted from posting rules.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>In order to benefit from this exemption, two cumulative conditions are to be met:</p> <ul style="list-style-type: none"> <li>• a bilateral operation (out of scope of posting rules) started before the operation of loading-unloading is performed;</li> <li>• A loading and an unloading of goods cannot be performed in the same country (as this would be considered as cabotage and therefore in scope).</li> </ul> <p><u>One additional activity can be made- up of:</u></p> <ul style="list-style-type: none"> <li>• one loading or one unloading on its own; OR</li> <li>• one loading of the goods in country A and one unloading of the same goods in country B within the bilateral operation.</li> </ul>			<p>The following ones are in scope of posting rules because the driver has already used the possibility of one exempt additional activity of loading and/or unloading. In case there are more than 1 additional activity, posting applies from the loading of goods until the end of the additional activity at unloading*: the driver then resumes the bilateral operation and the exemption re-applies.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p><u>1+1 rule:</u></p> <p>If the driver performs two bilateral operations, the driver has the possibility to add 1 operation per bilateral operation.</p> <p>When two bilateral operations are carried from and to the Member State of establishment, during each of the two operations an exempt additional cross-trade operation may be carried. This is a so called 1+1 rule.</p> <p>One single exempted additional activity may include <u>both</u> a loading and an unloading action.</p>			

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>One single exempted additional activity may include:</p> <ul style="list-style-type: none"> <li>• a loading action;</li> <li>• an unloading action;</li> <li>• a loading and unloading action.</li> </ul>			
<p>Bilateral operation  + two loading / unloading during the following bilateral operation</p>	<p><u>0+2 rule:</u>  When the driver has not used the possibility of performing one exempt additional activity of loading and/or unloading during the bilateral transport operation from the Member State of establishment, and this operation is followed by a return bilateral operation to the Member State of establishment, two exempt additional activities of loading and/or unloading may be performed during that return bilateral operation. This is a so called 0+2 rule.</p>		<b>X</b>	<p>For the full duration of the 0+2 operation, the driver cannot be considered as a posted worker.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>Cumulative conditions to be met to benefit from the exemption:</p> <ul style="list-style-type: none"> <li>• existence of an ongoing bilateral operation during which the driver has not used the possibility of performing one exempt additional activity of loading and/or unloading;</li> <li>• this operation is followed by a return bilateral operation to the country of establishment;</li> <li>• two exempt additional activities of loading and/or unloading may be performed as long as they are not performed in the same country.</li> </ul>			
Initial or final leg of a combined transport Operation	<p>In case the road leg on its own consists of an international bilateral transport operation.</p> <p>Recital 12</p>		<b>X</b>	

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>Art.1.6. 6</p> <p>Combined transport: Council Directive 92/106/EEC</p>			
Transit	<p>A transit situation is always exempt from posting rules. The driver is not considered posted in a country where she/he only “transits”: travelling through the territory of a Member State without carrying out any activity of loading or unloading goods.</p> <p>The driver can take her/his daily or weekly rest: the fact of taking a daily or weekly rest, while in transit, does not trigger a posting situation.</p>		X	<p>Ex: in case of a (in-scope) cross-trade operation between country A (where goods are loaded) and country C (where goods are unloaded), the driver will be considered as posted in country A (until exiting the country at border crossing) and as posted in country C, but will not be considered as posted in country B that the driver crosses on her/his way to country C.</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
Empty runs / unladen journeys	<p>An unladen journey is either in or out of scope depending on whether the operation that actuates / triggers this unladen journey is itself in or out of scope.</p> <p>Exempted:</p> <ul style="list-style-type: none"> <li>• unladen journey connected with a bilateral journey (ex: ‘going back home to the country of establishment’);</li> <li>• unladen journey carried out between two consecutive bilateral operations.</li> </ul>	<b>X</b>	<b>X</b>	<p>In principle, posting ends with unloading goods carried within the operation falling under posting rules (e.g., in the context of cabotage or cross trade). The classification of the subsequent unladen journey as posting or as exempt from posting depends on whether the new operation, which actuates that unladen journey, is covered by posting rules or not.</p> <p>When the driver enters the territory of a host country with an empty truck in order to load goods for operation under posting rules, then the driver starts being posted to that MS from the entry to the territory of that MS.</p> <p>In case of two consecutive bilateral operations (one from country A of establishment to country B, followed by one</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
	<p>Not exempted: unladen journey performed to carry out a cabotage or a cross-trade operation (international non-bilateral operation).</p>			<p>from country C to country A), the empty run from country B (after unloading) to country C (to loading) is not in scope of posting rules.</p> <p>IN scope (example from Commission Q&amp;A):</p> <p>The driver performs two distinct unladen journeys and one cross-trade operation between them.</p> <p>Sequence of journeys between countries A, B and C</p> <ol style="list-style-type: none"> <li>1. Unladen from A to B</li> <li>2. Cross-trade from B to C</li> <li>3. Unladen from C to A</li> </ol> <p>The unladen journey from country A to country B is carried out in conjunction with the cross-trade operation starting in country B. In other words, the driver travels to country B in order to load goods in country B for a cross-trade operation (between B and C). Therefore, the driver</p>

OPERATIONS	DECIDING ELEMENTS	IN SCOPE	OUT OF SCOPE	Start and end of posting
				<p>is considered posted to country B from the moment of entering this country until leaving this country. This period covers driving with an empty truck to the loading point in country B, loading goods in country B and carrying them through the territory of this country.</p> <p>Then the driver is considered posted to country C from the moment of entering this country until leaving this country.</p> <p>The driver is not considered posted in countries that she/he transits through (no loading / unloading) for the purpose of performing cross-trade operation between two other countries.</p>

## **Annex 2: When is a driver in or out of scope of posting rules: explanations for passenger transport**

The following table and explanations are based on the Questions & Answers document produced by the Commission services. Given the specificities of passenger transport, this document aims at identifying the differences in application of posting rules between freight and passenger transport and clarifying whether certain types of journeys in passenger transport are in or out of scope.

Reminder: as it is the case for the carriage of goods, Directive (EU) 2020/1057 uses the criteria of the transport operation to determine whether the driver engaged in the transport operation (s) is in or out of scope of posting. The following table follows therefore this logic: it distinguishes between the different transport operations to determine whether the driver is in or out of scope of posting.

Note: in the examples below, country A is always the place where the company is established and from which the journey begins.

### **1. SIMPLIFIED EXPLANATION**

The explanation given to the application of posting rules in freight transport as explained above are valid for passenger transport except in a few cases. These cases are the following:

#### **1.1 Pre-constituted group of passengers**

##### Setting down passengers from the pre-constituted group in different locations in occasional transport

In the context of a bilateral from A to B/C/D/..., with a pre-constituted group of passengers, the fact of setting down passengers in different locations in country B/C/D/... does not alter the nature of the operation. It is still a bilateral operation out of scope of posting rules regardless of the fact that passengers are set down in different locations (on the condition that new passengers are not picked up in countries B/C/D/...).

In regular transport, in the context of a bilateral from country A to country C, going through country B, the same applies (out of scope of posting rules) even when the driver picks up new passengers in country B. The same applies when the driver sets down passengers in different countries before arriving in country C.

##### Local excursions with a pre-constituted group of passengers in occasional transport

In the context of a bilateral from A to B with a pre-constituted group of passengers, local excursions in country B with the same group are not in scope of posting rules if:

1. it is the same pre-constituted group (of non-residents to country B);
2. the local excursions are performed using the same vehicle or another vehicle from the same carrier or group of carriers, which carried out the international service;
3. the whole operation is carried out with one journey form.

### 1.2 Two exempt additional activities

It is not possible for the driver to undertake two exempt additional activities during a return bilateral transport operation to the Member State of establishment, if no additional activity was performed during the bilateral operation from the Member State of establishment. This possibility exists for freight transport but not for passenger transport (Article 1(4) third subparagraph of Directive 2020/1057).

## 2. IN & OUT OF SCOPE OF POSTING

OPERATIONS	IN or OUT of scope: explanation
<b>BILATERAL JOURNEYS</b>	
Occasional transport	
Two bilateral operations  Carriage of a pre-constituted group of passengers from country A to country B and back from B to A with another pre-constituted group of passengers	The whole journey is not in scope of posting rules because these are two international bilateral journeys, on the condition that each bilateral operation is covered by a distinct journey form. *
Bilateral operation with two or more setting down locations within a host country  Carriage of a pre-constituted group of passengers from country A to country B and sets down the passengers in different locations in country B	The whole journey is not in scope of posting rules because the number of setting down locations in the same country of destination (B) does not alter the bilateral character of the operation. The whole operation is performed under cover of one journey form.
Bilateral operations with several setting down points in more than one host country	The whole journey is not in scope of posting rules because it is considered that the journey from

OPERATIONS	IN or OUT of scope: explanation
<p>Carriage of a pre-constituted group of passengers from country A; some are set down in country B and some others in country C.</p>	<p>country A to country B and then to country C are two bilateral journeys originating from country A (first bilateral is A to B and second is A to C), if they are covered by the same journey form.</p>
<p>Bilateral operations with local excursions in one host country, for one pre-constituted group of passengers, and back to country A of establishment</p> <p>Carriage of a pre-constituted group of passengers from country A to B. In country B the group is transported for different local excursions in different cities. The group is driven back to country A.</p>	<p>The bilateral operations from country A to B as well as the local excursion in country B are all out of scope of posting rules on the condition that:</p> <ol style="list-style-type: none"> <li>1. it is the same pre-constituted group</li> <li>2. the local excursions must be carried out <ul style="list-style-type: none"> <li>- in the framework of an international occasional service</li> <li>- for the non-resident passengers from the group previously carried by the carrier which performed the international service</li> <li>- with the same vehicle or another vehicle from the same carrier or group of carriers, which carried out the international service</li> </ul> </li> <li>3. the whole operation is carried out under cover of one journey form.</li> </ol>
<p>The same as above but the driver goes back to country without any passengers</p> <p>The same but the driver and passengers go back to country A by plane.</p>	<p>The whole journey including the local excursion and the trip back to country A without any passengers is not in scope of posting rules.</p> <p>Although the driver does not drive the pre-constituted group of passengers back to country A, the nature of the service is not substantially different from the previous case (driving back to country with the group), as long as the carrier is not offering services on the local market in</p>

OPERATIONS	IN or OUT of scope: explanation
	country B. The whole operation has to be covered by one journey form.
<p>Bilateral operations with local excursions in more than one host country, for one pre-constituted group of passengers, and back</p> <p>Carries of a pre-constituted group of passengers from country A to B/C/D and back to A. In country B/C/D the group is transported for different local excursions in different cities. The group is driven back to country A.</p>	<p>The whole journey including local excursions in more than one host country is not in scope of posting rules on the conditions that:</p> <ol style="list-style-type: none"> <li>1. the group is always the same; it is a pre-constituted group.</li> <li>2. The service was sold to customers from the market of country A and remains closely linked with it, regardless the fact that part of the service is offered abroad in one or in more countries.</li> </ol> <p>The whole operation is performed under cover of a journey form.</p>
<p>Occasional round trip starting and ending in host Member State</p> <p>A driver employed by a company established in country A drives empty to country B. In country B the driver starts a trip for a pre-constituted group of tourists bringing them to different countries, and then bringing them back to country B. The driver then goes back to country A empty.</p>	<p>The criteria of non-bilateral journeys (in principle in scope of posting rules) and unladen journeys need to be used.</p> <p>From the crossing of border into country B, the journey is in scope of posting rules (because these are non-bilateral international journeys). The posting rules apply until the driver sets down the passengers in country B. The trip back by the driver without passengers to country A (unladen journey) is not in scope of posting rules.</p>
<b>COMBINED OCCASIONAL TRANSPORT</b>	
<p>Fly &amp; drive round trip</p> <p>A driver employed by a company established in country A makes a fly-and-drive round trip with a</p>	<p>The driver is subject to the posting rules from the moment he/she start driving to pick up the passengers in country B and ends when he/she stops working in the performance of this trip. A case where the group would be pre-constituted by</p>

OPERATIONS	IN or OUT of scope: explanation
<p>pre-constituted group starting from and ending in country A. The group takes a plane to country B where it makes a round trip with a coach registered in country A and a driver employed by the same country A operator, which organised the flight. At the end of the coach tour country B, the driver and the group fly back to country with the same operator.</p>	<p>a travel agent, who is different from the country A coach company/operator picking up and setting down the passengers in country B, would not change the nature of the scenario. The entire road transport operation is performed under cover of a journey form. Another mean of transport (e.g., a flight) has no relevance regarding posting situation since Directive (EU) 2020/1057 only applies to road transport operations.</p>
Regular transport	
<p>Two bilateral operations</p> <p>A driver employed by a company established in country A performs a passenger transport service on a regular line countries A-B-C, with no intermediate stops. The driver picks up passengers in country A, set them down in country B where the driver then picks up passengers to bring them in country A.</p>	<p>The whole journey (both bilateral operations) is out of scope of posting rules.</p> <p>The key transport document allowing roadside inspector to ascertain a type of transport operation is authorization, which specifies, among others, the type of service, the route, the stops and the timetable: Article 6 of Regulation (EC) No 1073/2009 specifies that regular services are subject to authorisation and provides what type of information should be contained in such authorisation.</p>
<p>Bilateral operations with three setting down locations</p> <p>A driver employed by a company established in country A performs a transport service on a regular line from country A to country B, with intermediate stops in countries C &amp; D meant for the setting down of passengers only.</p>	<p>Recital 10 of Directive (EU) 2020/1057: “When a driver engages in bilateral transport operations from the Member State where the undertaking is established (the ‘Member State of establishment’) to the territory of another Member State or a third country or back to the Member State of establishment, the nature of the service is closely linked with the Member State of establishment. It is possible that a driver undertakes several bilateral transport operations during one journey.”</p>

OPERATIONS	IN or OUT of scope: explanation
	<p>Since several exempt bilateral transport operations may be carried out during one journey, the driver was not subject to posting rules for the entire journey.</p> <p>The driver has set down passengers (who embarked in country A) in three different countries.</p>
<p>Bilateral operations with three picking up locations</p> <p>After carrying out the operations described in the previous case, the driver performs a transport service on a regular line from country B to country A, with intermediate stops in countries E &amp; F meant for the picking up of passengers only. The driver sets down all passengers in country B.</p>	<p>The driver performed three bilateral operations during one return journey to country B (Member State of establishment). Since several exempt bilateral operations may be carried out during one journey, the driver was not subject to posting rules for the entire journey.</p>
<p>NON-BILATERAL                      INTERNATIONAL TRANSPORT</p>	
<p>Regular transport</p>	
<p>Bilateral operation and multiple non-bilateral international transport operations</p> <p>A driver employed by a company established in country A drives a regular coach line service with passengers to country B. Along the road to country B, the driver picks up and sets down passengers in more than one country (C, D, E).</p>	<p>Two principles are to be used to decide when is the driver in and out of scope of posting rules:</p> <ol style="list-style-type: none"> <li>1. international bilateral operations are exempt of posting rules;</li> <li>2. one additional activity / international non-bilateral operation attached to this international bilateral can be exempted**.</li> </ol> <p>Consequently, in this case:</p> <ul style="list-style-type: none"> <li>- posting rules do not apply from the start of the international bilateral;</li> </ul>

OPERATIONS	IN or OUT of scope: explanation
	<ul style="list-style-type: none"> <li>- the first additional activity (picking up or setting down passengers in country C) is exempted as well;</li> <li>- posting rules start applying from the pick-up / setting downs of the passenger, which starts the second additional activity / international non-bilateral activity (because the driver has already used the possibility for one exempt additional activity);</li> <li>- the driver remains posted in the country where the second additional activity has started until she/he leaves the territory of this country and start being posted in neighboring countries from the crossing of their borders;</li> <li>- the posting situation stops when the driver sets down the last passengers (this ends the last additional activity) and starts the journey back to country A. On the way back to country A, if one additional activity is performed, this +1 additional activity is exempt of posting rules.</li> </ul>
<p>Bilateral operation with one non-bilateral international transport (1+1)</p> <p>A driver employed by a company established in country A carries out a transport service on a regular line from country A to B to C, picking up passengers in country A, one stop in country B and all the passengers are set down in country C.</p>	<p>The driver performed one bilateral transport operation (A to C) with one additional activity in B. The additional activity of picking-up/setting down passengers in country B is an additional activity attached to the exempt international bilateral operation (A to C) and is exempt of posting rules. The driver was not subject to posting rules for the entire journey.</p> <p>Note 1: only one additional activity performed in the context of an international bilateral operation can be exempted from posting rules (1+1 rule).</p> <p>Note 2: It is not possible for the driver to undertake two exempt additional activities during</p>

OPERATIONS	IN or OUT of scope: explanation
	a return bilateral transport operation to the Member State of establishment, if no additional activity was performed during the bilateral operation from the Member State of establishment. This possibility exists for freight transport but not for passenger transport (Article 1(4) third subparagraph of Directive 2020/1057).
<b>CABOTAGE</b>	
<p>One bilateral operation &amp; cabotage</p> <p>A driver carries out a bilateral operation from country A to country B and, after setting down passengers in B, performs cabotage operations in B.</p>	Posting rules apply from the start of the cabotage operation in country B to its end: from the place of picking-up passengers to their setting down.
<p>One bilateral operation with one cabotage + non-bilateral international transport</p> <p>Drivers carries out a bilateral operation from country A to C, going through country B. In country B, the driver picks up and sets down passengers, and the drives to C where all passengers are set down.</p>	<p>Posting rules apply:</p> <ul style="list-style-type: none"> <li>- cabotage: from the picking up of passengers in country B to their setting down in Country B;</li> <li>- international non-bilateral: from the end of the cabotage operation to the setting down of passengers in country C.</li> </ul>
<b>TRANSIT</b>	The same rules as for freight transport apply: transit is out of scope of posting rules.
<b>UNLADEN JOURNEYS</b>	
Bilateral operation followed by a return to country of establishment journey	The same rules as for freight transport apply: the unladen journey returning to the country of establishment is out of scope of posting rules.

OPERATIONS	IN or OUT of scope: explanation
<p>A bilateral operation, followed by an unladen journey, followed by a non-bilateral international transport operation, and ending with a bilateral operation (going back to the country of establishment)</p>	<p>The same rules as for freight transport apply: unladen journeys are either in or out of scope depending on whether the operation to which they are attached are in or out of scope. In this case:</p> <ul style="list-style-type: none"> <li>- the first bilateral operation: is out of scope of posting rules (from leaving the country A of establishment to the setting down of passengers in country B);</li> <li>- unladen journey: posting rules apply when the driver starts to move towards the location where the driver will pick up passengers to bring them to country C (because the latter is an international non-bilateral operation out of scope of posting rules; subsequently the unladen journey is performed because of this in-scope operation);</li> <li>- the driver is posted in country B until he leaves the country at border crossing and is posted in country C until the driver sets down the passengers;</li> <li>- the driver is not posted from the moment the driver picks up the passengers in country C and brings them to country A of establishment.</li> </ul> <p>Question: what about the period of time between the setting down of passengers in country C and the moment the driver starts to go pick up passengers to be brought to country A?</p>

\* Article 12 of Regulation (EC) No 1073/2009 specifies that occasional service shall be carried out under cover of a journey form which shall be filled out before each journey. The journey form shall contain at least the information on the type of service, the main itinerary and the carrier(s) involved.

\*\* The driver is exempt from posting rules where, in the context of an ongoing bilateral transport operation, he/she also performs one non-bilateral international transport activity of picking up passengers and/or setting them down in the Member State or third country that the driver crosses, provided that the driver does not offer passenger transport services between two locations within the Member State crossed. The same applies to the return journey.

This is possible, for example, when the driver performs a bilateral operation without a full bus/coach, and stops to pick up and/or set down additional passengers along the way. The driver may perform one exempt non-bilateral international transport operation (that is, an additional picking up and/or setting down activity) during a bilateral operation from the Member State of establishment to the host Member State. When two consecutive bilateral operations are carried from and to the Member State of establishment, during each of the two operations an exempt additional non-bilateral international transport operation may be performed. This is a so-called 1+1 rule.

## **Annex 3: Determining the applicable labour law – the *Rome I Regulation***

According to the Posted Workers Directive, a posted worker is “*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*”<sup>37</sup>. Thus, a posting situation involves the existence of a stable employment relationship in one Member State to which the worker is expected to return after the period of posting.

The place of establishment of the employer does not necessarily entail the existence of a place of work in that same Member State. The Rome I Regulation defines which national employment law governs the employment contract, taking into consideration a habitual place of work. These objective rules were agreed in view of the need to protect the employee as the weaker party to an employment relationship.

In order to determine the law applicable to an employment relationship, *Rome I* introduces a several tier system:

1. The employment contract is governed by the law chosen by the parties.

A choice of law clause is the first step to determine the applicable law. The Regulation specifies that this choice of law cannot exclude the application of certain provisions of the national law that would have been applicable in the absence of choice (i.e., the law determined according to the following points 2 and 3). These provisions are those that cannot be negotiated away in a civil contract.

This is in line with the principle that the employee, as the weaker party to an employment relationship, should be protected in case the contract contains a disadvantageous choice of law clause.

2. In the absence of express choice by the parties, the applicable law is the law of the country in which or from which the employee habitually carries his work.

Determining the country from which the employee habitually carries his tasks is particularly relevant for drivers who routinely carry tasks in different countries but regularly start and end their journey in the same Member State. In case there are multiple places of work, the place from which the employee performs the greater part of his obligations will be considered as the habitual place of work.

3. If no habitual place of work can be determined following the above point 2, the applicable law will be the place of business through which the employee was hired.

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<sup>37</sup> Art 2.1 Directive 96/71

This provision is particularly relevant for employees hopping from one Member State to another, without a regular base.

4. In order to avoid an excessively rigid system, a judge may decide to apply another law where it appears from the circumstances of the case that the contract of employment is manifestly more closely connected with another country.

In determining the applicable law, the Court of Justice of the European Union (“*the CJEU*”) puts a lot of emphasis on the notion of habitual place of work, to which it gives a broad interpretation. Other criteria, including in particular country of recruitment of the worker should be considered as subsidiary<sup>38</sup>. Furthermore, the Court has recalled that the employee is the weaker party to an employment contract and must as result be protected by the most favourable conflict of law rules<sup>39</sup>.

To determine the habitual place of work, all the factors that characterize the activities of the employee should be taken into account, including: the place from which the employee carries out his tasks, receives instructions and organizes his work, the place where the work tools are situated, places where transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks<sup>40</sup>.

Where a quantitative assessment is required in order to assess from which country the worker habitually performs his tasks (as opposed to occasional or punctual tasks), inspiration could also be found in the current practices in social security checks where it is considered that working time is the most appropriate criterion to assess where a substantial part of the activity is taking place<sup>41</sup>.

It is only if it is not possible to determine a habitual place of work, for instance if the driver performs an equal number of tasks in several Member States, that the country where the employment contract was concluded will become a relevant factor. The CJEU insists that the place of engagement is only a subsidiary factor, which becomes relevant in circumstances where a habitual place of work cannot be identified. Considering that the Court has a large interpretation of elements constituting a habitual place of work<sup>42</sup>, relying on place of engagement should only be rarely necessary.

The closer connection clause described at the above point 4 is to be applied by a judge, depending on the specific circumstances of each case. The CJEU has for instance ruled that the habitual place of work can be set aside considering other elements such as where the employee

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<sup>38</sup> *Voogsgeerd C-384/10*.

<sup>39</sup> *Koelzsch C-29/10* of 15.03.2011, paragraph 46.

<sup>40</sup> *Koelzsch, para 49* and *Voogsgeerd C-384/10*.

<sup>41</sup> See Administrative Commission for the Coordination of Social Security Systems (December 2013), *Practical guide on the applicable legislation*, at p.29 and 30.

<sup>42</sup> *Koelzsch C29/10*.

pays income tax, where he is covered by social security, pension, sickness and invalidity schemes<sup>43</sup>.

The habitual place of work does not change if the employee is temporarily employed in another country. In other words, the law of the habitual place of the worker continues to govern the employment contract throughout his temporary assignment in another Member State. Rome I specifies that an assignment is temporary if the worker is expected to resume working in the country of origin after carrying out the tasks abroad<sup>44</sup>. This point is mirrored in the posted workers *Directive*: if the links with the habitual place of work are severed, the temporary assignment should in fact be considered as a change of habitual place of work. The driver should then be employed under the law of that new Member State. For example, upon hiring a driver habitually carried his tasks in Member State A. Subsequently, the driver moves to Member State B in order to carry on a permanent basis a new set of tasks in or from that territory, and with no or little link with Member State A. In such situation, the habitual place of work has changed from Member State A to Member State B.

1. The place from which the employee carries out his tasks.
2. The place where the employee receives instructions concerning his tasks and organizes his work.
3. The place where his work tools are situated.
4. The place where the transport is principally carried out.
5. The place where the goods are unloaded.
6. The place to which the employee returns after the completion of his tasks.

*Box 7 - Indicia to determine habitual place of work of drivers*

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<sup>43</sup> Para 41 *Schlecker C-64/12*.

<sup>44</sup> Recital 36 of Regulation 593/2008