

THE THIRD FORMULA CONFERENCE  
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**Regime shopping across  
blurring boundaries**

by Mijke Houwerzijl

# Under which regimes can **EU nationals** move for work?



45 Free movement  
workers

49 Freedom of  
establishment

56 Free  
movement  
of services

## In the good old days: strict boundaries

- See recital 5 Reg 492/2011, see Conclusion A-G Van Gerven in case Rush:
- *All workers*, whether permanently or temporarily *moving to another Member State, are covered by Art. 45 TFEU*
- Directives to abolish restrictions on freedom of establishment and freedom to provide services:
- the position of paid employees accompanying a person providing services or acting on his behalf *will be governed by the provisions laid down in pursuance of the free movement of workers*

## Distinction between Art. 49 and Art. 56?

- **Self-employed** who wish to take up and pursue economic activities through a fixed establishment in another MS for **an indefinite period** (Factortame) are governed by **Art. 49 TFEU**
- Self-employed who wish to provide services in another MS are governed by **Art. 56 TFEU**. The **temporary nature** of the activities must be determined in the light of not only **the duration of the provision of services but also of its regularity, periodicity or continuity**. (Gebhard criteria)

**Regime shopping is  
facilitated by  
(case) law**

# Two main problems re posting

## **Duration of a service/ of period of posting: how temporary is temporary?**

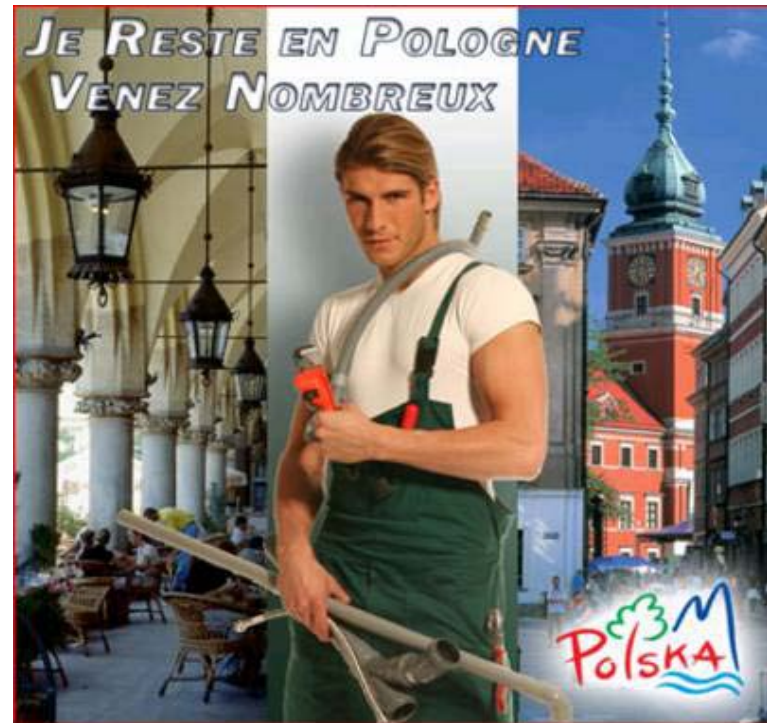
- This is still 'an open notion'
- what constitutes a 'limited period' of posting abroad as opposed to the habitual place of work?
- Some MS traditionally relate it to soc.sec/immigration or tax law thresholds in time

## **Access to the labour market or not?**

- Are TCN posted workers covered by transitional regime? NL (and Lux, perhaps AU) approach to only acknowledge 'genuine' posting

# Postponing right of access for workers from new Member States..

- transitional period of max 7 years for free movement of workers enshrined in **Art. 45 TFEU**.
- so for EU-8: max. 1.5.2011
- for EU-2: max. 1.1. 2014



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...led not only to regime shopping but also to a switch! Since Rush, posted workers are deemed to be governed (exclusively?) by Art. 56

- Portuguese workers *posted for a short time* to perform services in France should not be subject to ordinary work permit requirements, because such a *worker* returns after the completion of the service and **does not at any time gain access to the labour market** of the host state (para 15 Rush Portuguesa).



## 7 Categories of worker mobility

### **ACCESS**> 'Migrant worker (Vo 492/2011 > 45 TFEU):

- Permanent worker
- Seasonal worker
- Frontier worker
- Worker simultaneously in two or more MS
- <NB! Worker who pursues activities for the purposes of providing services

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### **NO ACCESS**> Posted worker (Dir 96/71 > 56 TFEU):

- 'posted in the framework of subcontracting
- 'intra concern posting
- posted through temp work agencies

# Vicoplus: agency workers fall under 2 regimes

- Confirms para 16 of *Rush Portuguesa*: **an undertaking engaged in the making available of labour**, although a supplier of services within the meaning of the FEU Treaty, carries on activities which are specifically intended to enable workers to gain **access to the labour market of the host Member State**
- **the hiring-out of workers**, within the meaning of Article 1(3)(c) of Directive 96/71 is a service characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking

## Is all labour-only posting covered by Art. 45?

- As the Advocate General stated at point 51 of his Opinion, it seems **artificial to draw a distinction** with regard to the influx of workers on the labour market of a Member State **according to whether they gain access to it by means of the making available of labour or directly and independently** because in both cases that potentially large movement of workers is capable of disturbing that labour market.

**If posted TWA workers have (equal) access, than also right to the same working conditions as national TWA workers? **Art. 3(9) PWD** ‘facilitates’ this..**

## Definition of a posted worker

### Art. 2 (1) PWD:

- 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**

### Art. 1 (3) PWD:

- there must be **an employment relationship** between the posting undertaking and the worker **during the period of posting**

## Blurring boundaries

- What is a **limited period** in the meaning of the PWD?
- How to relate the reference to a country where posted worker **normally works**, with the statement that there should be an employment relationship (only) **during** the posting?

## Can private international law be of any help?

- Recital 36 Rome I:
- Work carried out in another country should be regarded as temporary **if the employee is expected to resume working in the country of origin** after carrying out his tasks abroad. **This seems to narrow the concept \* case by case assessment**
- The conclusion of a new contract of employment with the original employer or employer within the group can still mean that the employee is temporarily carrying out his work in another country. **This expands the notion of posting \* different interests high/low skilled workers**

# Can anyone still see the wood for the trees?





**Need for an  
enforceable  
definition: a  
(rebuttable) time limit**



ārzemēs. Mūsu iespējas izmanto jau vairāk kā 800 cilvēku. Pievienojies arī Tu!

\* Iemācies angļu valodu 1 mēneša laikā! **Īsumā**



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