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ETF Road Transport

The European Commission road initiative

What it needs to include to effectively combat social dumping and unfair competition in the EU haulage market

An ETF set of concrete proposals on cabotage rules and access to occupation

The ETF represents more than 3.5 million transport workers from more than 230 transport unions and 41 European countries, in the following sectors: road transport, railways, maritime transport, inland waterways, civil aviation, ports, tourism and fisheries. The ETF is the recognised social partner in seven European Sectoral Social Dialogue Committees including the one for Road Transport.

Introducing the topic

In the first semester of 2017 the European Commission plans to launch a so called road initiative aimed to address among others social and market access problems of the sector.

The European Transport Workers' Federation (ETF) is of the opinion that measures to combat social dumping, to create a climate of fair competition among hauliers and step up enforcement in road transport must stay at the core of the EC initiative. The sector urgently needs to modernise, to improve its compliance record, to be able to attract professional drivers into the profession and offer them a fair, non-discriminatory treatment in terms of pay and working conditions, no matter in which Member State they exercise their activity.

The ETF is also of the opinion that to achieve the above objectives, the legislator will only need to make a few changes in the EU legal framework applicable to road transport, a substantial bundle of regulations and directive whose level of enforcement however seriously lags behind. Hence, the amendments proposed hereafter must be considered by the policy maker in close connection to the ETF proposals on enforcement solutions¹. Furthermore, to gain the necessary credibility before the social partners, Member States and other parties with an interest in road transport, the future European Commission road initiative proposal will have to be accompanied by an assessment of its enforceability and effectiveness in addressing the problems of the sector.

¹ "The extra-mile towards a full-fledged enforcement scenario in the EU road transport sector. An ETF proposal to policy makers": <http://www.etf-europe.org/etf-4002.cfm>



ETF concrete proposals on Cabotage rules (Regulation (EC) No 1072/2009)

Regulation (EC) No 1072/2009 regulates the access of non-resident hauliers to domestic haulage markets of Member States with the objective to prevent distortions on these markets, in the context where across the EU differences in terms of wage levels, tax/labour regimes etc. persist. The regulation stipulates that cabotage activity must be of temporary nature and with this in view it sets the limit to 3 operations within a maximum period of 7 days for a non-resident haulier wishing to operate on the territory of a Member State other than the one of its establishment. However, since its adoption, several Member States have introduced additional measures meant to redress the negative impact of illegal cabotage on their labour and haulage domestic environments. This is a sign that rules are unclear and difficult to enforce. It is thus urgent and necessary to make a few, targeted adjustments to the EU cabotage regulatory framework in order for the rules to effectively meet their objective.

Problem

- **The regulation is not enforceable**

Checking compliance with the cabotage rules is hugely problematic

- 1) Art. 8.4 of the regulation prohibits enforces to demand any additional documents when checking compliance with the cabotage rules. Roadside inspectors for instance will then have to determine whether the haulier subject to checks is engaged in legal or illegal cabotage by comparing and cross-checking disparate documents and data such as tachograph data, the haulier's Community licence, CMRs (paper-based consignor notes). An evaluation study ran by the European Commission on the effectiveness of Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 ² shows that enforcement agencies consider CMRs as insufficient for the enforcement of cabotage rules in terms of 'verifying the start of cabotage operations, its link to international carriage, the calculation of the 7-day period and the identification of the number of journeys carried out within the period.' Other problems with the CMR note – the study points out – are that it is easy to falsify or easy to deny access to during roadside checks. All these make controls cumbersome, time consuming and inconclusive.
- 2) Art. 8.3 of the regulation does make it mandatory for the haulier to produce clear evidence of the cabotage and incoming international operations. However, it fails to clearly request that this evidence is kept on board of vehicle.

Loopholes such as the above-mentioned render roadside checks totally ineffective in detecting infringements against the cabotage regulation. Why are roadside checks so important in this context? Simply because take place in the Member States hosting the cabotage activity, the one thus more likely to be affected by illegal cabotage and consequently more interested by far in checking on haulier compliance with these rules. By contrast, company checks will be performed in the Member State of establishment, for whom control of cabotage activity (control of operations conducted on a territory of another Member State) may not be a priority.

- **The cabotage definition contains ambiguous elements**

This is the case of the term 'cabotage operation', whose interpretation varies considerably among Member States (i.e. one loading – multiple unloadings, multiple loadings – one unloading or combinations thereof). These variations in interpretation impact negatively on the enforceability of the rules, lead to abuse against the temporary character of cabotage

² Ex-post evaluation of Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009, final report, Ricardo, December 2015



and create distortions on domestic road haulage markets, hence the various responses and measures taken by those Member States most exposed to cabotage activity. Indeed, as long as an operation is interpreted as including multiple loadings and unloadings, the limit of 3 within 7 days becomes idle, restrictions become artificial and the full opening of domestic road freight markets becomes a fact, against the declared intention of the legislator.

- **The regulation fails to sustain the temporary character of cabotage**

At the core of the cabotage rules stays its temporary character (maximum 3 operations within a maximum period of time of 7 days on the territory of any single Member State other than the one of the haulier's establishment). More importantly, cabotage may only be performed subsequent to an incoming international journey, once the goods carried in the course of this journey have been delivered. Many hauliers however engage in repetitive international journeys, with loads such as pallets, etc., to then qualify for as many sets of 3 operations as possible within a 7-day period. This is one other way to circumvent the rules and transform cabotage in a permanent activity.

- **Operators in breach of the cabotage rules do not risk losing their good repute and thus continue to stay in business**

According to EU regulation on access to occupation of road transport operator (Regulation (EC) No 1071/2009), a haulier found in systematic breach of the Community rules applicable to road transport is subject to an administrative procedure which may result in the loss of its good repute and subsequently in the withdrawal of the Community licence (the right to operate within the Internal Market). This information will be available to all Member States, to the effect that the company in breach is barred from obtaining a licence from elsewhere in the EU. The good repute of a haulier is tested against a list of about 130 infringements, classified by their gravity. Cabotage is not part of this list. In other words, operators in breach of the cabotage rules do not risk losing their good repute and thus they continue to stay in business.

- **Combined transport is exempt from the scope of cabotage regulation**

Combined transport covers the transport of goods in load units, by rail, maritime or inland waterway, whereby road transport represents the initial and/or final leg of the journey, on a distance that must not exceed 150 kms between the loading and unloading point. Combined transport is governed by an EU directive adopted in 1992 (Directive 92/106/EC), at a time when the EU included only 11 Member States, a group presenting a certain degree of harmonisation of markets, economic and social conditions. One of the aims of the combined transport directive was to boost operations through liberalisation of road cabotage. Indeed, combined transport was regarded as a forerunner of the liberalisation of cabotage. The road leg of combined transport is exempt from the scope of the today's cabotage rules because allegedly this road leg is considered part of an international rather than a domestic journey. The last attempt by the European Commission to lift the cabotage restrictions for the EU road haulage market is dated 2013. Since and around then, a number of studies showed that differences between Member States – in terms of wage levels, social costs, tax regimes, labour provisions, etc. – are so significant and persisting, that the EU is not yet ready for the removal of cabotage restrictions. In the context of the above recent developments, it is thus hard to understand how a directive adopted in 1992 can still foster 'free cabotage zones', impacting on jobs and working conditions in the sector, affecting domestic operators some of which perceive the exemption as against their interest³, pushing fair competition and compliance with labour and social rules into grey areas, and aggressively distorting domestic markets.

³ European Commission final ex-post evaluation report on Combined transport directive SWD(2016) 140 final



Concrete ETF proposals for a better cabotage regulation

Clarify provisions of Regulation (EC) No 1072/2009 on documenting cabotage by amending Art. 8.3 of Regulation (EC) No 1072/2009 to clearly stipulate that the haulier must keep on board vehicle clear evidence of the cabotage operations as well as of the relating incoming international journey. Failure to produce this type of evidence during roadside and company checks will lead to sanctions applied to the haulier.

Introduce a mandatory pre-notifications for cabotage operations, to be kept on board vehicle

This would consist in a simple declaration to the responsible national competent authorities at the latest at the start of the international journey to which cabotage is linked, and would include information necessary in order to allow adequate control of cabotage. The cabotage pre-notification must be kept on board vehicle as clear evidence of cabotage operations as well as of the relating incoming international journey. Failure to present the pre-notification during controls will lead to sanctions applied to the haulier.

Clarify certain elements of the cabotage definition by amending Art. 8 or Art. 2 of Regulation (EC) No 1072/2009. These would include a clear definition of a 'cabotage operation' as a single-loading / single-unloading, as the only possible definition in line with the spirit of the 'temporary' nature of cabotage, as required by the above regulation.

Amend the definition of cabotage to better sustain its temporary nature by introducing a waiting period for the vehicles engaged in cabotage activity. This in effect would mean that a vehicle will be prevented to enter the Member State most recently subject to cabotage for a minimum period of one week following the last cabotage operation on its respective territory. Furthermore, the number of allowed cabotage operations should be reduced to 1, in a maximum period of 7 days, and the cabotage operation should be strictly linked to the incoming international journey. This would require an amendment of Art. 8 of Regulation (EC) No 1072/2009.

The ETF does not support the removal of the limit of 3 cabotage operations combined with the shortening of the 7-day period. Given: 1) the considerable differences in labour and social conditions between Member States and 2) the problems with the enforcement of cabotage rules, this measure would have a negative impact on the domestic labour and haulage markets of EU Member States. In effect, this would be a step ahead towards a complete liberalisation of the EU road haulage market. It would be enough for a vehicle to simulate an international journey by just crossing the border of the Member State subject to cabotage once every 3 or 4 days, to then qualify for another period of 3 - 4 days of unlimited cabotage activity. As mentioned above, today, the real problem with the cabotage rules is that they are not clear, and they are difficult to enforce. None of these problems will be addressed by lifting the maximum number of permitted cabotage operations and shortening the 7-day limit.

Introduce cabotage in the classification of serious infringements leading to the loss of good repute either by amending Regulation (EC) No 1071/2009 or by simply amending the European Commission Regulation (EU) 2016/403 on the classification of serious infringements of the Union rules, which may lead to the loss of good repute by the road transport operator.

Bring forward the deadline for the implementation of the 'smart' tachograph by means of derogation to Regulation (EU) No 165/2014, to cover all vehicles engaged in international, cross-trade and cabotage. One of the functions of the next-in-line digital tachograph generation – the so called 'smart' tachograph - will be the mandatory



automatic recording of the exact position of vehicle and driver at the start and the end of the driver's working day, as well as at every three hours of cumulated driving time. This function will for the first time ever provide secure data on the exact period of time spent by vehicle and driver on a territory of any given Member State. Naturally, the tachograph will also provide recordings on the incoming international journey to which cabotage is linked, as well as data on combined transport activities. With the 'smart tachograph' the cabotage rules will be fully controllable, no matter how these rules will be amended in the future. The chief benefits of using the 'smart' tachograph to enforce cabotage consist in the fact that the data on the exact geo-positioning of the vehicle:

- Will be secured;
- Will allow detection of illegal cabotage in real time, during roadside checks;
- Will allow control on the haulier's past compliance with cabotage rules during company checks, as according to the new EU tachograph rules, hauliers have the obligation to store tachograph data on the exact geo-positioning of the vehicle at the company site for one year.

Include combined transport within the scope of cabotage regulation

This measure will ensure that the cabotage regulation fully meets its objectives in as much as, in terms of access to the market, it will contribute to achieving a level playing field between all hauliers, no matter which Member State they are established in. Combined transport will be effectively controlled via the digital tachograph - hence the importance of an early mandatory introduction of the 'smart' tachograph to cover all vehicles engaged in international, cross-trade and cabotage operations (see above for more details). Once included within the scope of the cabotage regulation, combined transport will also be controllable via the cabotage pre-notification (see above for more details).



ETF concrete proposals on Access to occupation (Regulation (EC) No 1071/2009)

Regulation (EC) No 1071/2009 aims to set common rules for access to the occupation of road transport undertakings with the objective to ensure a level-playing field between resident and non-resident hauliers when operating within the EU. Hauliers willing to operate outside their country of registration must be in possession of a Community licence issued by the Member State of their establishment. In order to be granted the licence, and to keep it, they have to comply with four criteria (requirements): a) have an effective and stable establishment in a Member State; b) be of good repute; c) have appropriate financial standing; d) have the requisite professional competence (requirements concerning the transport manager).

The regulation also lays down provisions for cross-border enforcement and for exchange of information between EU Member States, to ensure that for instance once the licence withdrawn in a Member State, the respective operator will not be able to re-apply for another in a different Member State. The exchange of information is done via the national electronic registers (NERs) for road operators, which must be interconnected at the EU level into a European Register for Road Transport Undertakings (ERRU).

Although Regulation (EC) No 1071/2009 attempts to regulate key aspects of access to occupation in road transport sector, it has proven to be ineffective mainly due to: 1) the weak and unclear criteria for access to occupation; 2) the incomplete or weak cross-border enforcement mechanisms on which it heavily depends. As a result, the regulation failed to meet its objectives and among others to tackle the phenomenon of letterbox companies. On the contrary, the latter seem to be expanding, generating a climate of unfair competition through the social dumping practices used on a large scale. This is also the conclusion of the 2015 European Commission ex-post evaluation report on Regulation (EC) No 1071/2009 and of Regulation (EC) No 1072/2009⁴.

Problem

- **The criteria for access to occupation are weak and unclear hence the failure of Regulation (EC) No 1071/2009 to meet its objectives and to prevent the establishment of letterbox companies.** The ambiguous criteria for access to occupation have given hauliers the opportunity to bypass the EU rules and has reduced the possibilities of Member States to take action against fraud. Additionally, the way they are currently formulated, these criteria have given room to different interpretations across the EU, allowing Member States to apply enforcement policies which vary in stringency, depending on whether or not they are affected by practices related to letterbox-type companies. The above-quoted ex-post evaluation report⁵ names three causes for the failure of Regulation (EC) No 1071/2009 to ensure a level-playing field between resident and non-resident hauliers. These are: “The continuing existence of letterbox companies, which distort the market by undercutting legitimate operators”; “Differences in interpretation of the provisions in the Regulations, leading to fragmentary national rules” and “Uneven approaches to monitoring and enforcement, in terms of penalties and organisation of checks.” Indeed, seven years into its adoption, the regulation still allows hauliers to pick and choose the Member State of establishment not by a genuine interest to operate within or from that domestic market, but rather by incentives related to low

⁴ Ex-post evaluation of Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009, final report, Ricardo, December 2015

⁵ Idem



taxation levels, low levels of enforcement and controls, low labour cost and workers' protection, low levels of social contributions.

- 1) The regulation fails to provide a **clear definition of an operating centre** ("an effective and stable establishment in a Member State").
 Art. 5 of Regulation (EC) No 1071/2009 requires hauliers to have an establishment with premises where they keep their core business documents, to have one or more vehicles at their disposal – whether or not registered in the Member State of establishment – and to dispose of the administrative means necessary to conduct their operation in the Member State of establishment. In practice, the vagueness of these legal requirements allow hauliers to establish a simple office in Member State A, while operating fleets registered elsewhere in the EU, and to use Member State A solely to recruit labour while carrying out no (substantial) activity on its territory. Some Member States have imposed additional establishment criteria i.e. mandatory requirements for hauliers to have enough parking lots to serve their fleet or to register some or part of the fleet on their territory. Yet, these measures lack effectiveness too, and have only led to a diversification of the letterbox 'business model'. It is indeed worth mentioning that the letterbox 'business model' includes more than the typical small company operating a letterbox. An ETUC report⁶ published in June 2016 gives a complete picture of this type of company, to also include road transport subsidiaries which "can afford to fulfil a limited amount of substance criteria" such as having parking facilities or even running some transport activities in the country of establishment. But as long as their substantial 'activity' is to provide drivers to the parent company, and as long as the drivers fail to work in the Member State of establishment, these subsidiaries will remain fake and fraudulent.

- 2) **The criterion of 'good repute' is unevenly applied across Member States, some of them being more stringent than others**
 The above quoted ex-post evaluation report⁷ on cabotage rules and on access to occupation points out that the number of sanctions related to the "good repute" is a clear indicator of the stringency of enforcement for the Member States. The report also shows that so far in 8 Member States there were no withdrawals of authorisation on basis of loss of good repute. Overtime, the more 'tolerant' Member States have attracted and currently host a considerable number of letterbox companies. A laxer enforcement of the 'good repute' criterion will a) reduce the effectiveness of the regulation as a whole by reducing effectiveness of cross-border enforcement mechanisms; b) create and maintain havens for fraudulent companies and encourage them to continue breaching a number of EU regulations and directives without fearing controls and sanctions; c) create distortions within the EU road haulage market by feeding into a climate of unfair competition in the sector; d) foster social dumping practices and reduce the attractiveness of the sector.
 It is worth mentioning that the 'good repute' is currently tested against an EU list containing a large number of infringements, classified by their gravity. No matter in which Member State these infringements are detected, investigating the good repute against these infringements – as well as the application of sanctions – falls under the competence of the Member State of establishment.

- 3) The criterion of **"appropriate financial standing"** is meant to ensure that the haulier is able at all times to meet its financial obligations. However, this criterion is

⁶ ETUC report on "The impact of letterbox-type practices on labour rights and public revenue", June 2016

⁷ Ex-post evaluation of Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009, final report, Ricardo, December 2015



solely related to the number of vehicles declared by the haulier in the Member State of establishment while nothing is envisaged in relation to the number of drivers recruited on its territory. This loophole in Regulation (EC) No 1071/2009 has allowed hauliers to establish fictive subsidiaries in some Member States for the sole purpose of recruiting cheap labour. They take advantage of the fact that, for instance, there is no EU requirement to provide data on drivers employed by a haulier. The above-quoted ETUC letterbox company report⁸ talks about ‘obscuring liability’ as one of the key advantages of the letterbox ‘business model’. The report points out among others that “These companies can easily go bankrupt, leaving behind workers with unpaid wages and legal confusion as to who is responsible.” It is a proven fact that letterbox companies prejudice both drivers and Member States by circumventing legal obligations related to minimum wages and social security contributions.

- **The cross-border enforcement mechanisms and the administrative cooperation between Member States fail to be effective**

1) **There are uneven efforts across Member States to monitor and enforce the regulation on access to occupation**

The above quoted ex-post evaluation report⁹ points at the uneven monitoring and enforcement of the access to occupation rules among Member States as one of the main failures that render Regulation (EC) No 1071/2009 ineffective, and links this with the persisting presence of the letterbox companies in the EU. The report basically shows that “control of letterbox companies often involves cross-border situations that make investigations and enforcement more difficult, since the Member State of establishment is not necessarily the one that is affected by the activities of the letterbox company.” Indeed, cross-border cooperation between Member States is considerably hindered by their diverse interests when it comes to checking the genuineness of hauliers operating within the EU. This interest is high among Member States impacted by unfair competition and social dumping practices, and lower among the ones hosting fraudulent road operators. But the first category can do too little about companies established outside their jurisdiction. Similarly, inquiries by the Member States of the first category are many times ignored by the Member States of the second one. It is worth mentioning that no matter where in the EU infringements are detected, the Member State of establishment is the sole responsible in encoding the detected infringements in the haulier’s records and in running subsequent investigations on the respective haulier.

2) **Incomplete haulier data in national electronic registers as well as no access of enforcers to this data make enforcement of access to occupation rules burdensome and ineffective**

Firstly, the genuineness of a haulier will remain difficult to determine as long as there are no means to control the connection between the haulier and its human capital and assets - drivers and fleet. Indeed, the minimum data to be registered in the national electronic registers on hauliers holding a Community licence include no requirements on information about the vehicles in use (i.e. vehicle number plates) and the drivers employed (i.e. country of origin, country of employment, country where social contributions are paid, etc.).

Secondly, enforcers do not have access to the national electronic registers anyway, and thus they have no overview of the hauliers’ data and compliance record. This reduces substantially the possibilities for targeted checks. Targeted checks stay at

⁸ ETUC report on “The impact of letterbox-type practices on labour rights and public revenue”, June 2016

⁹ Ex-post evaluation of Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009, final report, Ricardo, December 2015



the core of 'smart' enforcement, and are meant to enable enforcers to concentrate control efforts - at roadside and company premises - on hauliers with a bad record.

Concrete ETF proposals to eliminate the letterbox type companies

Amendments to Regulation (EC) No 1071/2009 on access to occupation

Add a 5th mandatory criterion for access to occupation, notably 'to have the substantial part of road transport activity on the territory of the Member State of establishment, with the international transport operations starting from the territory of, and with vehicles returning regularly to that respective Member State', This will entail amending Art. 3.1 of Regulation EC (No) 1071/2009. The proposed criterion will ensure that the choice of Member State of establishment will be driven by the haulier's genuine economic interest to operate within and from its respective domestic market, rather than by interests such as recruitment of low-cost labour, access to low taxes and circumvention of social security obligations.

As part of the criterion on 'effective and stable establishment', require sufficient parking spaces for regular use of the haulier's vehicle fleet, by amending Art. 5 of Regulation EC (No) 1071/2009. One of the main objectives of the EU rules on access to the occupation of road transport operator is to prevent the establishment of letterbox companies. The requirement proposed by the ETF will give a true and genuine meaning to the notion of 'operating centre'. This will no longer be an office meant to keep the haulier's documents, but rather a base from where the haulier runs the substantial part of its road transport activity.

As part of the "financial standing" criterion, include the requirement for a mandatory social guarantee fund proportional with the number of drivers recruited in the Member State of establishment. This will be done by amending Art. 7 of Regulation (EC) No 1071/2009. The fund will be a pre-condition to obtaining - and preserving - the Community licence, and will mirror the current provisions of the regulation on vehicle-based proof of capital and reserves. The proposed requirement would ensure that hauliers are able to meet at all times their obligations relating to wages and social contributions. It will also end current practices whereby hauliers declare bankrupt and close down subsidiaries found in breach of unpaid salaries and social contributions, to escape sanctions and/or court proceedings. Often in these cases, the parent companies open new subsidiaries, obtain a new Community licence and continue to operate resorting to same fraudulent practices as before.

Strengthening requirements related to the procedure for the suspension or withdrawal of authorisation by amending Art. 13.1(c) of Regulation (EC) No 1071/2009. This article gives 6 months for an undertaking to rectify its failure to meet the "financial standing" requirement, and to prove that this requirement "will again be satisfied". The article should be amended by the replacement of "*will again be satisfied*" with "*is again satisfied...*". In other words, the undertaking would be allowed to operate further only when and if it acquired the legally required capital and reserves.



ETF enforcement proposals requiring no amendments to Regulation (EC) No 1071/2009

A complete text of these proposals can be found in the ETF set of enforcement solutions “The extra-mile towards a full-fledged enforcement scenario in the EU road transport sector”, launched in September 2015. They consist in five actions meant to substantially improve enforcement of Regulation (EC) No 1071/2009 and of other key EU legal acts applicable to road transport:

- **Action 1 / Pooling enforcement intelligence and technology - i.e. the digital tachograph - to develop complete and accurate *electronic compliance records for each haulier***

This action will ensure that roadside checks will act as an early detector of the bona-fide character of the haulier, as during these checks inspectors will collect information in real time about haulier, vehicle and driver, and transfer it to a national back-office unit in order to be compared with data declared by the haulier in national electronic registers (NERs). This would also imply that enforcement agencies are given access to the NERs, which currently is not the case.

- **Action 2 / Setting up ‘integrated operator files’ by shifting the focus from a fragmented control approach - of vehicle, driver, operator - as separate elements, to an integrated one, where vehicle and driver are intrinsically linked to the operator as the main organiser of the transport activity and user of resources**

This action will entail the consolidation of mandatory data to be declared by hauliers in the national electronic register of the Member State of establishment, with the following elements:

- a) information about the drivers employed by the haulier i.e. driver’s name, nationality, country of residence, Member State of registration of labour contract, Member State where the social contribution is paid, social insurance number, etc.
- b) information about the vehicle i.e. the number plates of all vehicles in use;
- c) information about the transport manager i.e. names of all road transport undertakings previously and currently managed by the respective manager.

This will improve enforcement and controls on haulier’s compliance with social rules and obligations, and will substantially reduce the number of letterbox companies.

- **Action 3 / Setting up electronic ‘integrated compliance records’ for each licensed operator by introducing data conflicts, ‘clear’ checks and risk scores in the operator’s compliance history**

This action will ensure that the outcome of all checks - be they conducted at the roadside or at company premises - are encoded in a so-called complete compliance record of every haulier. These would be accessible to enforcement agencies of all Member States with the purpose to develop more efficient targeted, cross-border controls. Risk rating systems will be a key contributor to the complete haulier’s compliance record.

- **Action 4 / Allowing Member State enforcement agencies real-time access to national electronic registers (NERs) and the ERRU, to risk scores and other relevant Member State databases**

The NERs and the ERRU already contain enforcement-critical information about operators, such as committed infringements. However, access to these registers is currently restricted to licence issuing authorities only. Allowing access of enforcement agencies to these registers will enable them to make a better



assessment on the haulier overall compliance record and relate it to the results of the on-the-spot checks. It will equally allow enforcers to carry out checks targeting non-compliant hauliers. It will increase the potential to determine whether the haulier is genuine or a letterbox type company, in as much as it allow enforcers to compare data from multiple sources i.e. data momentarily obtained during roadside or company checks against information declared by the operator in the NERs.

- **Action 5 / Moving from paper-format to e-documents and enabling on-board vehicle and company site storage of all data relating to the integrated *vehicle-driver-operator file***



ETF preliminary considerations on The applicable labour law to professional drivers in road transport / Regulation (EC) No 593/2008 (Rome I), Directive 96/71/EC on posting of workers and its enforcement act, Directive 2014/67/EC

The EU road specific legislation is centred on the haulier, the vehicle and the usage of vehicle to perform international, cabotage and cross-border transport operations. However, the question of professional drivers and the law governing their rights, benefits and conditions in the context of their high mobility has been hugely overlooked, to the point that for example the posting of workers directive was never enforced or controlled until very recently in road transport. Only a couple of Member States adopted measures to correct this problem, in an attempt to respond to the extensive social fraud and its impact on their labour and haulage domestic markets. Their initiatives are prompted by the lack of EU-wide effective solutions to combat social dumping in road transport.

In road transport, as in any other sector, the so-called 'applicable law' is determined according to the criteria set by the Rome I Regulation (Regulation (EC) No 593/2008) with its jurisprudence for road transport (the ECJ ruling on the Koelzsch case of 15 March 2011), and in relation to the posting of workers directive (Directive 96/71/EC). These EU legal acts help determine the habitual workplace of the driver, and ensure that the driver benefits by the labour and social rights of the Member State hosting their activity. The 'applicable law' will govern aspects such as pay, working conditions, as well as social security.

Concrete ETF proposals to enforce the principle of 'habitual workplace' in road transport

In the ETF view, in road transport, an accurate identification of the social and labour law applicable to the drivers, as well as a correct assessment on whether operators comply with it, will be possible by:

Bringing forward the deadline for the implementation of the 'smart' tachograph by means of a derogation to Regulation (EU) No 165/2014, to cover all vehicles engaged in international, cross-trade and cabotage.

One of the functions of the future digital tachograph generation – the so called 'smart' tachograph - will be the mandatory automatic recording of the exact position of vehicle and driver at the start and the end of the driver's working day, as well as every three hours of cumulated driving time. This particular tachograph function will be essential in determining the period of time spent by the driver in a given Member State, and thus in establishing the habitual workplace of the driver. In addition, as per the requirements of the EU tachograph rules, the data on the exact positioning of the driver:

- Will be secured;
- Will allow, during company checks, to detect past compliance or infringements against the applicable law, as hauliers have the obligation to store tachograph data on the geo-positioning of the driver at the company site for one full year.

Introducing the collective application of the habitual workplace principle, as stipulated by Art. 8.2 of Regulation (EC) No 593/2008 and its jurisprudence specific to road transport (the ECJ ruling on the Koelzsch case of 15 March 2011)

In road transport, the overwhelming majority of drivers subject to social dumping are not posted simply because they work abroad on permanent basis and carry out no activity in their country of origin, recruitment and/or the country of establishment of the company employing them. Hence, their labour and social rights are governed by the Rome I Regulation (Art 8). However, the provisions of the regulation apply individually. While the posting of workers directive requires the Member States to transpose the directive, to



establish national arrangements for its implementation, as well as to establish the control modalities applicable to all posted workers, the Rome I Regulation stipulates that any person considering him/herself prejudiced by their individual labour contract may resort to courts in order to ask for the pay and conditions of the country hosting his/her activity. In other words, comparing the two legal acts, posting applies collectively and thus can be enforced and controlled collectively, while compliance with Art 8.2 of the Rome I Regulation cannot be controlled and sanctioned as long as the individual drivers failed to claim the 'host' country conditions via a court.

Introducing the collective application of the habitual workplace principle in road transport will allow the enforcement of this principle via company and possibly roadside checks too, as well as the application of sanctions in case of non-compliance. As mentioned above, the enforcement of this principle would be possible via the 'smart' tachograph.

Include the applicable labour law in the classification of serious infringements leading to the loss of good repute either by amending Regulation (EC) No 1071/2009 or by simply amending the European Commission Regulation (EU) 2016/403¹⁰ on the classification of serious infringements. This will ensure that a haulier found in systematic breach of Regulation (EC) No 593/2008 (Rome I), Directive 96/71/EC on posting of workers and its enforcement act, Directive 2014/67/EC will be subject to an administrative procedure which may result in the loss of good repute and subsequently the withdrawal of the Community licence. This information will be available to all Member States, so that the company in breach is barred from obtaining a licence from elsewhere.

Concrete ETF enforcement proposals relating to the applicable labour law, which require no change in the current EU legislation

The introduction of mandatory pre-notifications for each posted driver, as required by Art. 9 of Directive 2014/67/EC

Article 9 of the recently adopted directive on the enforcement of the Posting of workers (Directive 2014/67/EU) sets requirements on the effective registration and monitoring of posting among which the pre-notification of posting. This consists in "a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision [...] containing the relevant information necessary in order to allow factual controls at the workplace", and includes the identity of the service provider, the anticipated number of clearly identifiable posted workers, the anticipated duration envisaged beginning and end date of the posting, the workplace address, the nature of the services justifying the posting. It is unquestionable that implementing Art. 9 of the directive in question is an obligation for all Member States. Road transport falls within the scope of these requirements and some Member States such as Belgium and France already apply them in road transport. Part of the ETF proposal, the posting pre-notification is one of the main data sources to consult when assessing compliance of the operator with the social and labour law applicable to the professional driver. For this purpose, the pre-notifications should be accessible in real time to all enforcement agencies responsible for road transport.

Mandatory declaration of data about drivers employed by hauliers in the national electronic register of the Member State of establishment

The ETF proposes that prior to obtaining a Community licence, a haulier will have to provide data on the drivers it employs. This data will be kept in the national electronic register of the Member State of establishment granting the licence – i.e. the driver's name, nationality, country of residence, Member State of registration of labour contract, Member

¹⁰ Commission Regulation (EU) 2016/403 on the classification of serious infringements of the Union rules, which may lead to the loss of good repute by the road transport operator



State where the social contribution is paid, social insurance number, etc. It goes without saying that the haulier will be responsible to update this information as and when changes occur. This measure will ensure transparency over the drivers' employment situation, will hold the haulier liable with regard to the labour and social rights the drivers are entitled to and will facilitate controls and correct assessments on the haulier compliance with the applicable labour law.

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