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ETF explanatory note on the application of national minimum wage to the road transport sector: a measure imposed by the EU legislation

On 1st of January 2015 Germany introduced a minimum wage at national level, covering road transport as well.

On the 21st of January, the European Commission launched an EU pilot procedure to clarify in particular the issue of the application of the German minimum wage to purely transit road transport operations.

On the 26th of January the ETF published a statement concerning the legitimacy of the application of the German minimum wage to the road transport sector. The statement briefly shows that this is fully in line with Community rules, namely with the Posting of Workers Directive (Directive 96/71/EC) and the Rome I Regulation (Regulation (EC) No 593/2008).

The current ETF explanatory note justifies with legal arguments fully based on EU legislation and jurisprudence that, as a general rule, minimum pay and conditions of any given Member State apply to any professional driver performing his work in and from that particular Member State if the conditions set forth by the Posting of Workers Directive or by the Rome I Regulation are met. This, irrespective of the nationality of the driver and of the type of transport operation he executes - cabotage¹, cross-border², combined transport³, international transport. Thus, there is no doubt that the application of the German wage - or of minimum national arrangements in terms of pay and conditions of any given Member State - to the road transport sector is fully in line with the Community rules.

The ETF explanatory note is based on the above-quoted Posting of Workers Directive (Directive 96/71/EC) and the Rome I Regulation (Regulation (EC) No 593/2008), as well as the European Court of Justice ruling on the Koelzsch case (15 March 2011).

With regard to the application of the minimum wage to road transit operation, the ETF supports the decision of the German government for the reasons explained in the ETF statement dated 26 January 2015 (see in Annex).

¹ Cabotage refers to a national haulage operation where the places of loading and unloading are in the same Member State and which is performed by a haulier based in another Member State. The 2009 Community rules (Regulation (EC) No 1072/2009) limit the number of **successive** cabotage operations a haulier can perform with the same vehicle, though not the number of cabotage operations in general. Using the same vehicle, a haulier may carry out up to **three successive** cabotage operations in the host country **following an international carriage**. The vehicle must then leave the host Member State. The last unloading in the course of a cabotage operation before leaving the host Member State must take place within 7 days of the last unloading in the host Member State in the course of the incoming international carriage. The initial cabotage operation may only be commenced after full unloading of the international carriage. The limit of three cabotage operations is always checked with regard to the motor vehicle (the tractor unit principle).

² Cross-trade transport refers to haulage operations performed by a vehicle registered in country A carrying goods from country B to country C.

³ Combined transport means the transport of goods between Member States where the lorry, trailer, semi-trailer with or without the tractor unit, swap body or container of 20 foot or more uses the road on the initial or final leg of the journey 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 (see Art. 1, Directive 92/106/EEC):

- between the point where the goods are loaded and the nearest suitable rail loading station for the initial leg and between the nearest suitable rail unloading stations and the point where the goods are unloaded for the final leg, or
- within a radius not exceeding 150 km as the crow flies from the inland waterway port or seaport of loading or unloading.



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1. The road haulage sector is included in the scope of Directive 96/71/EC on Posting of Workers (hereafter referred to as PWD)

- 1.1. The PWD solely excludes “merchant navy undertakings as regards seagoing personnel” (Article 1.2). There is no provision excluding road haulage operations from the scope of the PWD as defined in its Articles 1 and 2 concerning the posting of workers in the framework of the provision of services. Thus, the PWD is clearly applicable to road haulage workers.
- 1.2. One should also note that the scope of the PWD does not a priori exclude any specific forms of haulage contract, insofar as all the conditions set forth in the Directive are met. Thus, the PWD applies to international transport contracts, to cabotage, combined and cross-border transport coming under the transnational provision of services. The PWD criteria do not limit its scope to professional drivers performing cabotage only.
- 1.3. However, the PWD applies only for a temporary execution of the labour contract outside of the country where the driver habitually works. In other words, when the country in which the driver performs the cabotage operation is the country in which he habitually works, the PWD no longer applies but rather the Rome I Regulation (Regulation (EC) No 593/2008) does, when its requirements are met (details following below).

2. Applicable labour law in the context of the road haulage market

- 2.1. Transport legislation allows hauliers to use their vehicles to perform international carriage, cabotage, cross-border and intermodal transport operations. However, the fundamental issue for the haulage market is the driver, more precisely the labour legislation applicable to the drivers of these vehicles.
- 2.2. The response of European labour legislation is based on the distinction between the country in which the driver habitually works and that in which he may be temporarily posted.
- 2.3. The European Court of Justice prompts national courts to explicitly examine the execution conditions of an international freight driver's employment contract in order to establish the country in which he habitually works.

2.4. Posting of workers

For the PWD to be applicable in road haulage, the driver needs to execute his employment contract for a limited period in a Member State other than the one in which he habitually works. In the specific context of road transport, and in line with the PWD, this means that:

- 2.4.1. either the driver is posted within the company/group - i.e. the driver is assigned to a company branch located in another Member State or to another company within the group;
- 2.4.2. or the driver is put at the disposal of a haulier by a temporary employment agency;
- 2.4.3. or the driver performs a transnational provision of services which, in the specific context of **the road transport sector**, implies:
 - a. The existence of a provision of service: transporting on behalf of a third-party - i.e. the haulage company is not the owner of the goods;
 - b. The provision of service to be transnational: this refers to the nationality of the contracting parties, of which at least three are listed in the haulage



contract: the expeditor, the haulier and the recipient⁴. All that is needed is for two of these three contracting parties to be based in two different Member States for the service provision to be transnational.

In this respect, Article 1.3 (a) of Directive 96/71/EC will read as follows:

“post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting [i.e. in the specific case of the road transport sector this is the company situated in the country where the driver habitually works] and the party for whom the services are intended [i.e. in the specific case of the road transport sector, this will be the country where, by contrast, the driver will only work temporarily] operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting”.

Example: a Romanian driver, habitually working in Romania, receives a transport order consisting in transporting a load from Antwerp to Paris (cross-border transport operation) or to transport a container from Antwerp to Brussels Port (combined transport), or to transport a load between Brussels and Liege (cabotage: operation entirely carried out on the Belgium territory). In these examples, the ‘workplace’ as defined by the PWD is Belgium. The Romanian driver must therefore be remunerated the Belgium pay level, in line with the provisions of the PWD, which stipulates that the employee has to be paid in accordance with the pay scales applicable in the country to which he is posted when these are better than in the country in which he habitually works.

2.5. Rome I Regulation

For all the cases in which the professional driver carries out his activity either in or from the country of his habitual workplace, or outside the country of his habitual workplace but without fulfilling the conditions of posting, he will be covered by the provisions of the Rome I Regulation (Regulation (EC) No 593/2008). His individual work contract will be governed by the law of the country in which, or from which he habitually carries out his work during the execution of his contract. According to the afore-mentioned regulation, the following principles will apply to his situation:

2.5.1. **The overarching principle of the weaker party to a contract** (see Recital 23 and Article 8.1) / if the terms of his employment contract are less favourable than the conditions (pay, working conditions, etc.) of the host country, the host-country conditions must be applied. Indeed, while the Regulation stipulates by way of principle that the individual employment contract is governed by the law chosen by the parties, this provision will be subject to the conditions laid down in:

- a. Article 8.1 of the same regulation: *“Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.”*;
- b. Recital 23 of Regulation (EC) No 593/2008: *“As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules”.*

⁴ The term ‘recipient’ must be understood as recipient of the service, and not as recipient of the freight.



- 2.5.2. **The criteria of the country of the habitual workplace** (see Article 8 of Regulation (EC) No 593/2008 and, for the road transport, see the ECJ ruling on the Koelzsch case of 15 March 2011) / the choice of applicable law by the two parties to an individual work contract cannot deprive them of the legal requirements of the country where the worker habitually carries out his work, if the latter are more favourable for the concerned worker. In this respect, the ECJ ruling on the Koelzsch case (15 March 2011) clarifies the notion of habitual workplace taking into account the specific circumstances of road transport. Thus, the habitual workplace is defined as the country where the driver performs the greater part of his obligations towards the employer, more specifically:
- a. Either the place in which or from which the employee carries out the professional activities;
 - b. Or the place from which the employee receives instructions concerning his tasks and organises his work;
 - c. Or the place in which his work tools are situated (e.g. the lorry, etc.);
 - d. Or the place where the transport is principally carried out, where the goods are unloaded;
 - e. Or the place to which the employee returns after completion of his work.

The European Transport Workers' Federation (ETF) represents more than 3.5 million transport workers from 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.



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ETF Statement on the application to road transport of the minimum wage adopted by Germany

From 1st of January 2015 a minimum wage rate entered into force in Germany. The rate equally applies to all road transport operations, including the transit through the German territory. A number of concerns have been raised by the industry and some Member States with regard to the application of the minimum wage to road transport transit operations and thus the European Commission is currently looking into these concerns.

The European Transport Workers' Federation (ETF) would like to stress on the point that pay and conditions of individual Member States apply to all transport operations which fall under the scope of Directive 96/71/EC (Posting of Workers) and Regulation (EC) No 593/2008 (Rome I), be they cabotage, international transport or combined transport.

With regard to the application of the minimum wage to transit road transport operations, the ETF would like to flag once again that this is part of a set of measures taken by the German government in order to address the massive phenomenon of social dumping that stigmatises the road transport sector. As long as the European Commission fails to take measures and substantially improve the critical social and labour situation in the sector, Member States will continue to seek national solutions to address social fraud in road transport, as well as solutions to enforce Community rules such as the Posting of Workers Directive and Rome I Regulation for road activities.

To this end, in the absence of effective Europe-wide solutions, the ETF fully supports all measures taken by the Member States similar to the ones adopted by France, Belgium and – most recently – by Germany.

Brussels, 26 January 2015

