

Attempts to protect the internal market for road transport in specific European Union countries

Piotr Lewandowski

Maritime University in Szczecin, Faculty of Economics and Transport Engineering
Institute of Transport Management
11 H. Pobożnego St., 70-507 Szczecin, Poland, e-mail: p.lewandowski@am.szczecin.pl

Key words: liberalisation, protectionism, minimum wage, European Union regulations, restrictions, limitations

Abstract

The seven-year period to adapt internal law to EU regulations was given to new Member States on 1 May 2004 and ended in 2011. The highly-developed western states, fearing that their internal markets in fields such as transport services may be threatened, adopted a number of new regulations. Regulation (EC) No. 1072/2009 of the European Parliament is on common rules for access to the international road-haulage market, and despite introducing numerous restrictions, was to regulate cabotage operations in all Member States. However, the protection of each State's own interests proved more important than the integrity of the Community and therefore some of the states, including Germany, have introduced severe limitations for foreign carriers, forcing them to observe the Minimum Wage Act (MiLoG).

Introduction

The creation of a common transport policy within the European Union involves abolishing all limitations for service providers that arise from their nationality or if they have their seat in a different member state than where the service is provided. Such action was forced by the introduction of the Four Freedoms, adopted by the community in the Treaty of Rome and implemented by the Schengen Agreement. The establishment of the common transport policy involved, inter alia, the determination of common principles governing the access to the international transport market in the territory of the Community that would contribute to efficient functioning of their internal transport market. The gradual implementation of the European Single Market should be aimed at abolishing all limitations in the access to internal markets of Member States, including cabotage (cabotage is a type of carriage of goods performed with a vehicle registered abroad or by a foreign company between places located in the territory of the native country).

Liberalisation

In order to ensure a coherent framework for international road haulage throughout the EU, the Community has adopted Regulation (EC) No. 1072/2009 on common rules for access to the international road-haulage market in the EU territory (Regulation, 2009). Prior to the implementation of Regulation (EC) No. 1072/2009, carriage was regulated by the following EU acts of legislation: Council Regulation (EEC) No. 881/92 and (EEC) No. 3118/93, and Directive 2006/94/EC. Those regulations did not, however, give hauliers as many rights as they have now, mostly because of the time limitations in cabotage operations. Now hauliers may perform such operations all the time.

Carriage from Member States to third countries is still largely covered by bilateral agreements between the Member States and those third countries. Therefore, that Regulation should not apply to that part of the journey within the territory of the Member State of loading or unloading, as long as the necessary agreements between the Community and the

third countries concerned have not been concluded. It should, however, apply to the territory of a Member State that is crossed in transit. Transit is the movement, by means of transport, of persons, cargo, energy, and/or information from one country to another via the territory of a third country that is neither the country of origin nor the country of destination.

Regulation (EC) No. 1072/2009 applies to the international carriage of goods by road, for hire or reward, for journeys carried out within the territory of the Community. The Regulation also applies to the national carriage of goods by road undertaken on a temporary basis by a non-resident haulier. The Regulation also defines who is entitled to carry out cabotage operations: it is any haulier for hire or reward who is a holder of a Community licence and whose driver, if the driver is a national of a third country, holds a driver attestation.

The Community licence is issued by a Member State, in accordance with the Regulation, to any haulier carrying goods by road for hire or reward who:

- is established in that Member State in accordance with Community legislation and the national legislation of that Member State;
- is entitled in the Member State of establishment, in accordance with Community legislation and the national legislation of that Member State concerning admission to the occupation of road haulage operator, to carry out the international carriage of goods by road.

The Community licence will be issued by the competent authorities of the Member State of establishment for renewable periods of up to 10 years. The Member State of establishment will issue the holder with the original version of the Community licence, which must be kept by the haulier, and the number of certified-true copies corresponding to the number of vehicles at the disposal of the holder of the Community licence, whether those vehicles are wholly owned or, for example, held under a hire purchase, hire or leasing contract. These requirements, according to EU regulations, concern the issuing of the Community licence entitling to carry goods by road for hire or reward in the territory of the EU Member States.

The effectiveness of implementation of the European Single Market should be aimed at abolishing all limitations in access to the internal markets of the Member States. The European Council plays a significant role in this, as one of its tasks is the scrutiny of the market situation and the course of harmonization of Community rules in the fields of, *inter alia*,

enforcement and road user charges, and social and safety legislation. The implemented rules will lead to the further opening of domestic road-transport markets, including cabotage.

New rules concerning cabotage have been applicable since 14 May 2010. The European Parliament enforced the liberalisation of the existing rules by implementing the Regulation of the European Parliament and the Council regarding common rules for access to the international road-haulage market. It defines cabotage operations as “national carriage for hire or reward carried out on a temporary basis in a host Member State”.

In accordance with said rules, once the goods carried in the course of an incoming international carriage have been delivered, hauliers are permitted to carry out, with the same vehicle, up to three cabotage operations following the international carriage from another Member State or from a third country to 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 from the last unloading in the host Member State, in the course of the incoming international carriage (Kochanowski, 2010). Hauliers may carry out some or all of the permitted cabotage operations in any Member State under the condition that they are limited to one cabotage operation per Member State within 3 days of the unladen entry into the territory of that Member State.

National road haulage services carried out in the host Member State by a non-resident haulier are only deemed to conform to the Regulation if the haulier can produce clear evidence of the incoming international carriage and of each consecutive cabotage operation carried out.

What does the three day period mean? The haulier may, within seven days, carry out a cabotage operation in one or more Member States. The maximum number of operations is three. The haulier may decide to perform one, two, or all three operations not only in the host Member State in the course of the incoming international carriage, but also in other Member States. In that case, the haulier may perform only one cabotage operation in a given Member State and this operation must be performed within three days of the unladen entry into the territory of that Member State.

The period of seven days, referred to in the Regulation, concerns calendar days and begins at 0:00 of the day following the last unloading that took place during the incoming international carriage. The last unloading during the final cabotage operation should

end at the latest on the seventh day at midnight (Regulation, 2009).

The term “cabotage operation” (the term is interpreted based on common practices in road transport) refers to carrying goods from the moment of taking the goods to the moment they are delivered to the consignee, according to the consignment letter. Such an operation may include a few (or even several) loading points and as many delivery points, depending on the circumstances. The first cabotage operation may happen only when the transboundary carriage has ended and it is only then that the seven-day period for cabotage operations starts.

Freeing up the transport market of Member States has also introduced new perspectives for Polish hauliers. Poland has also been obliged, as a Member State, to regulate the matter of cabotage operations in its territory. Polish hauliers have specialised in keeping very high standards while providing international transport services. It is a relatively young business, using state-of-the-art means of transport. According to Polskie Forum (Polskie Forum HR, 2016), Polish companies currently have around 100,000 lease agreements for tractors and trailers, with a total value of around 10,000,000,000 PLN. The employment in the transport sector may be as high as one million people. The significant scale of activity means that Polish transport companies operate using a relatively-low profit margin and therefore are really competitive in the international transport market.

Protectionism

Each Member State, in order to protect its own internal and international market, tries to enforce the policy of protectionism so that the interests of their internal hauliers are protected. It mostly concerns states whose own costs are high (i.e. wealthy EU countries). The enforcement authorities in these countries watch other hauliers performing cabotage operations very closely and introduce their own internal regulations, the breach of which results in heavy penalties.

The state that makes it particularly difficult to perform cabotage operations in its territory is Germany; they introduced obligatory cabotage insurance. By virtue of paragraph 7a, items 1 and 2 of the German Road Haulage Act (Güterkraftverkehrsgesetz), transport companies performing carriage in the territory of Germany are obliged to have a valid, carrier, third-party liability insurance (Waldendorfer, 2010). The minimum amount of cover for all

events amounts to 1,200,000 EUR with the limit of 600,000 EUR for an individual event. The cabotage insurance is obligatory only for those hauliers who perform the carriage of goods by road as part of their business activity, using the vehicle with the maximum permissible laden mass, including the trailer, when it exceeds 3.5 tonnes. Despite this, it is often bought by companies that have smaller vehicles.

In order to meet the requirements of the appropriate insurance, the sufficiently-high amount of cover is a necessary condition but it is not a sufficient condition. The insurance must also meet one other criterion, concerning the exclusion of liability. Therefore, only the following may be excluded from liability:

- intentional guilt of transport operators or their representatives. It is therefore gross negligence of both operators themselves and their representatives that is subject to insurance. Also, the intentional guilt of persons for whom the operator is responsible but who are not their representatives is subject to insurance. It is usually the driver employed by an employment contract or by mandate contract;
- damages caused by natural disasters, nuclear energy, war, war-like events, civil war, civil unrest, strikes, terrorist acts of violence, orders of higher authority, or taking or seizure ordered by a state-recognised authority;
- in view of the nature of the goods, the following claims from the contract of carriage may be excluded from the insurance: the transport of precious metals and stones, jewels, means of payment, assets, securities, stamps, documents, and certificates.

Furthermore, in order to meet the requirements of the insurance obligation, the insurer must authenticate the presence of the insurance policy that meets said requirements by having an appropriate certificate in German and notify the Federal Office for Goods Transport (Bundesamt für Güterverkehr) that such insurance has been concluded and/or terminated. The driver must have this certificate while performing cabotage operations in the territory of Germany and present it immediately upon the request of authorised bodies. The lack of said certificate alone may result in a fine in the amount of 5,000 EUR.

German Act on the Regulation of a Minimum Wage (MiLoG)

The seven-year period, which is just coming to an end, for adapting internal law of new EU members to the EU law, has aroused anxiety about migration.

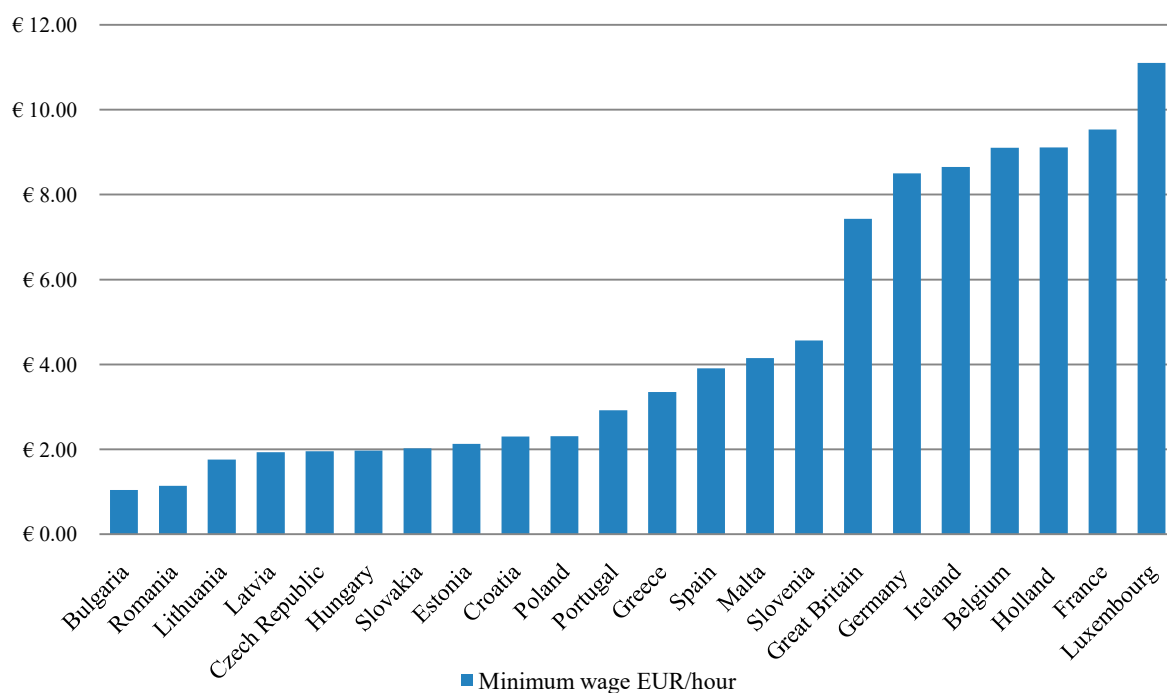


Figure 1. Minimum wages in EU Member States (WSI-Mindestlohndatenbank, 2014)

The discussion on the minimum wage resulted mostly from the fear of opening the borders for foreign workers on 1 May 2011. As early as 2010, German politicians and trade union leaders motioned to establish a minimum wage at 7.50 EUR per hour. This amount was to ensure the support of the family and prevent the state from the necessity to pay additional benefits for old-age pensioners. 1 May 2011 marked the end of the 7-year period (so-called transitional period) that countries that entered the EU structures on 1 May 2004 had been given to adapt their internal law to the EU law. This date was also the day on which the internal markets of EU countries were opened to new members.

Trade-union leaders were afraid that home companies would want to employ workers from Poland or the Czech Republic, ready to work for 4.00 EUR per hour, and not Germans who were guaranteed by collective agreements a rate of pay higher by 2.00 EUR. Figure 1 shows the minimum wages for various EU Member States.

The currently-applicable Minimum Wage Act is of much higher significance. It settles the minimum wage rate at 8.50 EUR for each hour of work and rest in the territory of Germany during the performance of international transport (via German territory) (Polskie Forum HR, 2016).

The German minimum wage also applies to foreign employers with their seat outside the borders of Germany. It results from the specific definition of

a driver's workplace. In this case, the interpretation and argumentation of German authorities is as follows: "a driver's workplace is simply the vehicle. Therefore, the employer must pay the German minimum wage as the vehicle is used on German roads". This law also applies to railway transport, sea shipping, and inland navigation.

In this case, the provisions of German administration do not take into consideration the peculiar structure of income of drivers from other countries (Federal Office for Goods Transport, 2009). For instance, Polish drivers receive from their employers, apart from regular remuneration, additional assets for business expenses or an allowance for accommodation (about 49.00 EUR per day). A German employer in the same situation is obliged only to pay the minimum wage and does not need to worry about neither business expenses nor accommodation costs.

The German administration, apart from the MiLoG act, also cites the provisions of Directive 96/71/EC, which obliges international entities that post workers to provide services in the territory of Germany to observe the conditions of minimum wage and others.

An explanation should also be provided for the interpretation of item 17 of the preamble to Regulation (EC) No. 1072/2009, which regulates the common rules for access to the international road haulage market, which allows in certain situations to qualify cabotage as posting workers. What, therefore, is the

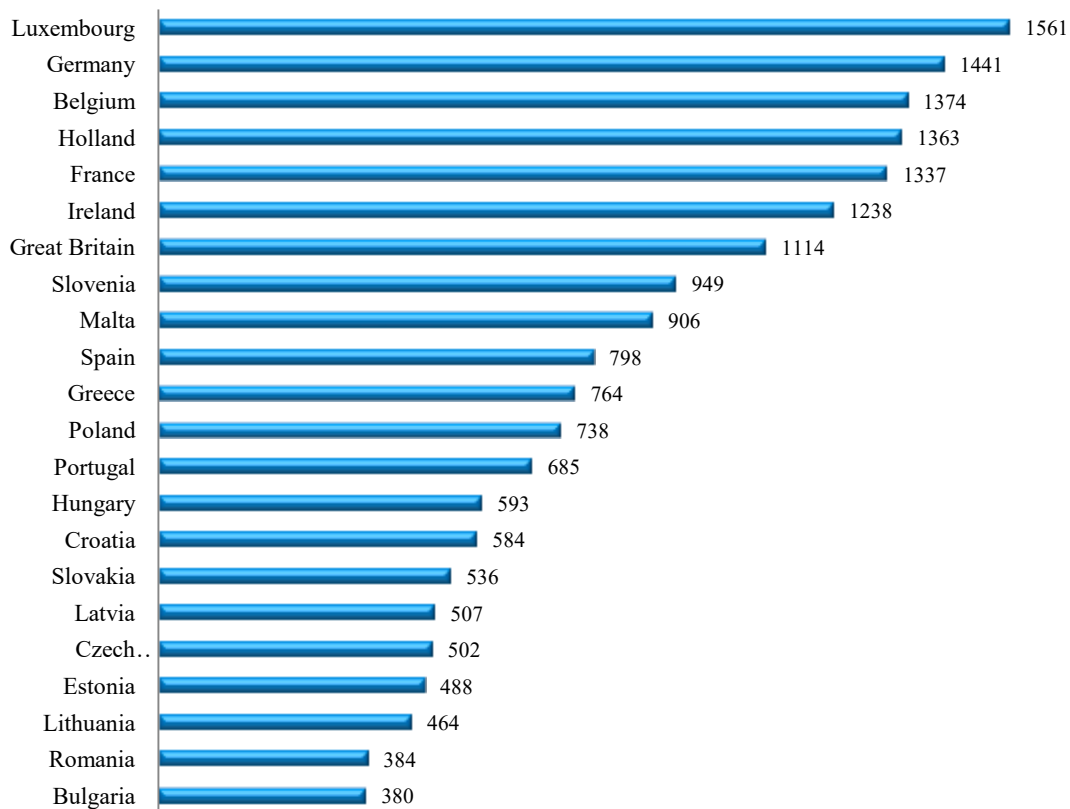


Figure 2. Minimum wage in EU Member States as of January 2015 (PPS)

argumentation of the Polish law? Performing transport operations by a driver falls into the definition of travel by staff members on duty (Article 775 of Polish Labour Code). The Supreme Court, in its judgement No. II UK 204/13, confirmed that travel by staff members on duty is brief and incidental and does not cause the change of an established workplace. What is important to drivers in international transport is that even if they are abroad for several weeks, they do not perform one trip but rather tasks constituting multiple business trips. Another significant fact is that Polish drivers working in the territory of Germany, performing carriages with Polish vehicles, based on the licence issued in Poland, are not workers posted to provide services in the territory of Germany, and therefore under no circumstances are bound by the amendment to the MiLoG act concerning minimum wage (WSI-Mindestlohn-datenbank, 2014).

When interpreting EU regulations concerning the definition of workers posted in the framework of the provision of services, one can conclude that it is a worker sent to another Member State in order to provide, in a defined time and place, a specific service for the commissioner from the host country. In the case of transport, it would be the carriage of goods with the use of means of transport belonging

to the haulier, under the direction and supervision of this haulier solely. The rules governing the method of performing the transport operation are established with the Polish company, with its registered seat in Poland. Even when the carriage is performed in the territory of Germany, it still is not the posting of workers, since that must have been connected with changing a given workplace and submitting to German direction and supervision. As long as the driver provides carriage services based on a licence issued by Polish administration, with the use of a vehicle registered in Poland, this driver is on a business trip and is not a posted worker. However, if a Polish carrier puts its drivers at the disposal of a German entity and the driver will provide services based on a licence issued by German authorities, then it will be a posted worker and this worker will work according to the conditions set forth in the MiLoG act but will not be reimbursed for business expenses or accommodation costs.

According to foreign carriers, adopting the Minimum Wage Act imposes additional difficulties on them. The new regulations oblige foreign transport companies to notify German customs authorities about the date of entering and leaving the territory of Germany. Such notification must be sent via fax message (it is impossible to make the notification

via electronic mail) and all data must be presented in German. Such action causes additional bureaucratic problems and real costs.

Conclusions

German regulations concerning the minimum wage, according to Polish entrepreneurs, infringes the freedom to provide services, as defined in Article 56 of the Treaty on the European Union. The amended German MiLoG act may also be in breach of several EU regulations concerning access to carriage services. The European Council has analysed the legality and proportionality of the enforced duties and considers whether or not it is aimed at restricting access to the German market. In case such a conclusion is reached, the Council promises to initiate proceedings in the matter of an infringement of the EU law. The European Council is preparing to initiate proceedings against Germany for infringing the EU law concerning transit. In the preparation of a motion concerning cabotage, the decision to file the motion has been postponed, should the matter be resolved amicably.

The provisions on the minimum wage passed by German authorities have struck Polish transport companies in particular. The geographical location results in us being somewhat cut off from Western Europe. The new minimum wage may increase costs up to 9%, which will significantly affect the

competitiveness of Polish carriers. The change in legislation also concerns employed drivers, and their opinion is ambiguous as they want their remuneration to rise. The matter concerns the whole business, hence the unequivocal action of Polish government in order to maintain Polish carriers' share in the European market and to preserve workplaces.

References

1. Federal Office for Goods Transport (2009) Information issued by Federal Office for Goods Transport (BAG) in Köln. Interpretation of questions relating to the regulation of cabotage operations according to Article 8 of Regulation (EC) No. 1072/2009.
2. KOCHANOWSKI, R. (2010) *Przewozy kabotażowe w państwach członkowskich UE – zasady wykonywania*. [Online] October 16, 2010. Available from: <http://www.gitd.pl/przewozy-kabotazowe-w-panstwach-czlonkowskich-ue-zasady-wykonywania> [Accessed: July 05, 2016]
3. Polskie Forum HR (2016) *Konsekwencje wprowadzenia płacy minimalnej w Niemczech dla polskiego transportu*. [Online] Available from: <http://www.polskieforumhr.pl/blog/wiadomosci-ze-swiata/konsekwencje-wprowadzenia-placy-minimalnej-w-Niemczech-dla-polskiego-transportu> [Accessed: July 05, 2016]
4. Regulation (2009) Regulation (EC) No. 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market.
5. WALDENDORFER, CH. (2010) *Kabotaż ubezpieczony*. [Online] May 10, 2010. Available from: <http://www.log24.pl/artykuly/kabotaz-ubezpieczony,268> [Accessed: July 05, 2016]
6. WSI-Mindestlohn datenbank (2014) Hans-Böckler Stiftung. Stand: January 01, 2014.