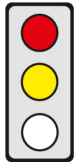


KEY ISSUES

Objective of the Directive: The Commission wants to improve the working conditions of drivers, ensure “fair” competition between haulage companies and reduce their administrative burden.

Affected parties: Drivers and hauliers in the passenger and freight transport sectors, users of transport services.



Pro: The Directive conclusively regulates the monitoring powers of Member States.

Contra: (1) The Directive restricts price competition in the EU and is in breach of the freedom of haulage companies to provide services (Art. 56 TFEU).

(2) The Directive means that prices for haulage services will increase significantly. This reduces the efficiency of the internal market.

(3) The Directive should expressly stipulate that cabotage constitutes posting.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2017) 278 of 31 May 2017 for a **Directive** of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for **posting drivers in the road transport sector**

Brief Summary

Note: Unless otherwise indicated, references to Articles and page numbers refer to the Proposal for a Directive COM(2017) 278.

► Context and objectives

- The proposed Directive should inter alia
 - improve drivers’ working conditions,
 - lead to “fair” competition between haulage companies and reduce their administrative burden [p. 2 et seq.].
- The Posting of Workers Directive [96/71/EC] regulates the posting of workers, including drivers, within the EU. The Enforcement Directive [2014/67/EU] to the Posting of Workers Directive regulates, inter alia, what checks the Member States may implement in order to enforce the Posting of Workers Directive.
- The Working Time Directive for drivers [2002/15/EC] regulates the daily and weekly minimum rest periods for drivers.
- According to the Commission, implementation of the Posting of Workers Directive and the Working Time Directive for drivers must be improved [p. 4-5].
- The proposed Directive
 - contains special provisions on the posting of drivers which differ from the Posting of Workers Directive and the Enforcement Directive, [this cepPolicyBrief],
 - extends the monitoring duties of Member States regarding the Working Time Directive for drivers [cepPolicyBrief to follow].
- In parallel, the cabotage rules under the Market Access Regulation for Hauliers [(EC) 1072/2009] will be amended.
 - Cabotage refers to carriage within another Member State (“host Member State”) following carriage across a border [Art. 8 (2) Market Access Regulation].
 - Currently no more than three cabotage operations may be carried out within seven days [Art. 8 (2) Market Access Regulation].
 - In future, any number of cabotage operations may be carried out within five days [COM(2017) 281, p. 9 and 21].

► Posting Drivers

- Posting occurs when a freight or passenger transport company based in the EU [Art. 2 in conjunction with Art. 1 (3) Posting of Workers Directive]
 - deploys a driver for cross-border carriage, possibly followed by cabotage,
 - instructs a driver to work temporarily for an establishment of the same transport company in the host Member State, or
 - temporarily provides another transport company in the host Member State with a driver as a posted worker.

- Trips through a Member State in which no loading or unloading takes place [“transit trips”] are not expressly regulated in the Directive but, according to information from the Commission, will not constitute posting to that Member State.
- Transport companies that are not based in the EU but whose drivers work in the EU, do not fall under the Directive. Member States are not, however, permitted to treat these transport companies more favourably than transport companies that are based in the EU [Art. 2 (1) in conjunction with Art. 1 (4) Posting of Workers Directive].
- ▶ **How the provisions of the Posting of Workers Directive will apply to drivers**
 - The Posting of Workers Directive currently applies to all posted employees, i.e. also to posted drivers, as from the first day of the posting [Art. 3 (1) Posting of Workers Directive].
 - In future, the Posting of Workers Directive will only apply to drivers insofar as the proposed Directive does not contain any diverging provisions [Art. 2 Abs. 1].
 - In principle, therefore, inter alia the wage provisions in the Posting of Workers Directive, as amended, will also continue to apply to drivers [Art. 2 (1) in conjunction with Art. 3 Posting of Workers Directive].
 - Currently, inter alia the minimum wage regulations of the host Member State apply to posted workers [Art. 3 (1) (c) Posting of Workers Directive].
 - In future, following the Trilogue agreement of 1 March 2018 on the amendment of the Posting of Workers Directive [COM(2016) 128, p. 6 et seq., see cepPolicyBrief 35/2016], all the wage provisions of the host Member State, under legal and administrative law as well as universally applicable collective agreements, will apply to posted workers.
- ▶ **Special features in the application of the Posting of Workers Directive regarding wages and holiday**
 - In the case of cross-border carriage,
 - the provisions of the Posting of Workers Directive regarding wages and paid minimum annual holiday only apply where the duration of the cross-border carriage in the relevant host country is more than three days during one calendar month [Art. 2 (2)],
 - the other provisions of the Posting of Workers Directive apply from the first day.
 - In the case of cabotage, all provisions of the Posting of Workers Directive apply as from the start of cabotage [Art. 2 (1), p. 10].
- ▶ **Monitoring powers of the Member States**
 - Until now, the host Member State may carry out all checks necessary to enforce the Posting of Workers Directive [Art. 9 Enforcement Directive].
 - In the case of posted drivers, the host Member State will in future only be permitted to carry out those checks specified in the proposed Directive [Art. 2 (4)].
 - In future, the host Member State will inter alia be able to require that
 - transport companies notify it of the posting by no later than the start of the posting, by way of a posting declaration in English and in electronic form [Art. 2 (4) (a) and (5)],
 - for the purposes of roadside checks, drivers carry with them [Art. 2 (4) (b) et seq.]
 - the tachograph records, and
 - the posting declaration, employment contract and payslips for the last two months, at least in electronic form,
 - at the end of the posting, transport companies deliver within a reasonable period and at least in electronic form [Art. 2 (4) (f)]
 - the tachograph records,
 - the posting declaration and
 - the driver’s payslips for the last two months.

Main Changes to the Status Quo

- ▶ In future, wage provisions under the Posting of Workers Directive will only apply to posted drivers, in the case of cross-border carriage, after three days.
- ▶ The monitoring powers of Member States under the Posting of Workers Directive are conclusively regulated for drivers.

Statement on Subsidiarity by the Commission

In the road transport sector, the Posting of Workers Directive is implemented in different ways by the Member States. Union-wide standard implementation and enforcement of the Posting of Workers Directive cannot be achieved solely by way of guidelines or self-regulation carried out by the Member States. Measures at EU level are therefore necessary.

Policy Context

The Directive is part of the road transport package “Europe on the Move” of May 2017 which comprises several legislative proposals, including an Amending Directive on driving times and rest periods for drivers [COM(2017) 277, see [cepPolicyBrief 2017-31](#)]. The package will contribute to a “socially fair and competitive internal market for road transport services” [Communication COM(2017) 283, p. 11].

Legislative Procedure

31 May 2017	Adoption by the Commission
5 November 2017	Debated by the Council
Open	1st Reading in European Parliament
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Mobility and Transport (leading)
Committees of the European Parliament:	Transport and Tourism (leading), Rapporteur: Merja Kyllönen (GUE/NG Group); Transport and Tourism
Federal Ministries:	Transport and Digital Infrastructure (leading)
Committees of the German Bundestag:	Labour and Social Affairs, Transport and Digital Infrastructure (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Legal competence:	Art. 91 (1) TFEU (Transport)
Type of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Directive restricts price competition in the EU and is in breach of the freedom of haulage companies to provide services by declaring that the wage provisions under the Posting of Workers Directive apply, reform of which has just been unanimously agreed. **In future, therefore, all wage provisions of the host country, under legal and administrative provisions and universally applicable collective agreements, will apply to cross-border carriage as from the fourth day and to cabotage as from the first day.**

Most western European Member States - with the exception of Germany - have declared collective agreements in the road transport sector to be universally applicable [CNR (2016) Employment and pay conditions of international lorry drivers in Europe, p. 8]. In Member States in which this is not yet the case, domestic transport companies, who compete with transport companies from Member States with a lower wage level, will be pushing for this to change as a result of the Directive.

The Directive means that the posting of drivers, from Member States with a lower wage level, to higher wage countries will become much more expensive. Consequently, **the prices for the transport services** of corresponding transport companies **will increase significantly** because labour costs represent the key cost factor in the market for haulage services [EPRS (2017), Road transport: Enforcement and special provisions for posted workers, p. 3]. **This reduces the efficiency of the internal market** in two ways: Firstly, directly because higher transport costs make the transported goods more expensive, both for consumers and for businesses. Secondly, indirectly because higher transport prices reduce the potential for division of labour and thus make goods more expensive. The effects are somewhat mitigated by the fact that, in future, the wage provisions under the Posting of Workers Directive will only apply to cross-border trips as from the fourth day.

The application of the wage provisions of the host country as from the first day in the case of cabotage balances out – and this is presumably the intention – **the effects in the high-wage countries** of the accompanying proposal **liberalising the rules on cabotage** under which, in future, an unlimited number of cabotage operations may be carried out within five days.

Application of the statutory minimum wage is sufficient to cover the higher cost of living of the posted drivers in high-wage countries.

Legal Assessment

Legislative Competency

The EU can adopt all appropriate provisions to implement a common road transport policy [Art. 91 in conjunction with Art. 100 TFEU]. As a special power in the transport sector, Art. 91 TFEU also permits the adoption of provisions on working conditions for drivers, including posted drivers, as this power takes priority over the general competences in the area of the freedom to provide services [Art. 53 in conjunction with Art. 62 TFEU] and in the area of social policy [Art 153 TFEU].

Subsidiarity.

Due to the cross-border nature of transport, and since the subject matter of the Directive is already regulated under EU law, action by the EU to achieve the envisaged aims is appropriate.

Compatibility with EU Law in other respects

The Directive is in breach of the freedom to provide services [Art. 56 TFEU] insofar as it provides that the wage provisions of the Posting of Workers Directive apply to posted drivers, i.e. in future all wage provisions of the host Member State under legal and administrative law as well as universally applicable collective agreements.

In principle, a restriction of the freedom to provide services may be justified by the aim of employee protection [CJEU, Case C-115/14]. Application of the wage provisions of the host Member State - including universally applicable collective agreements - as stipulated in the Directive, does not, however, serve the protection of all - i.e. domestic and posted - drivers, but only the protection of domestic drivers. This is because, applying the wage provisions of the host Member State makes it much more expensive for transport companies from low-wage Member States to post drivers. This has the result that there will be significantly less demand for the services of these transport companies in Member States with a high wage level than previously. Transport companies from Member States with a low wage level will therefore be pushed out of the markets in Member States with a high wage level. The drivers in these transport companies will not therefore benefit from application of the wage provisions of the host Member State, but may even lose their jobs [see [cepPolicyBrief 2016-35](#)]. EU provisions in the transport sector are not supposed to have a detrimental effect on the employment situation in certain regions of the EU, however [Art. 91 Abs. 2 AEUV]. In order to minimise this discrimination against hauliers and drivers from low-wage Member States, the Directive should not therefore refer to the wage provisions of the Posting of Workers Directive but expressly stipulate that only the relevant statutory minimum wage should apply to posted drivers.

The Directive should be more precisely worded in order to ensure its uniform implementation and application and in order thereby to guarantee legal certainty. In particular, not only in the recitals but also in the text of the Directive itself, it should expressly stipulate that cabotage constitutes posting. The provisions of the Directive should expressly indicate which provisions of the Posting of Workers Directive and of the Enforcement Directive it deviates from. In addition, clarification is required as to the point at which a posting exists in combined transport, i.e. when part of the cross-border carriage takes place by rail or ship [see [cepPolicyBrief 2018-05](#)].

Conclusive regulation of the monitoring powers of the Member States prevents barriers to posting drivers arising from disproportionate administrative requirements.

Conclusion

The Directive restricts price competition and the hauliers' freedom to provide services in the EU because in future, all wage provisions in the host country will apply to cross-border carriage and to cabotage. The Directive means that prices for haulage services will increase significantly. This reduces the efficiency of the internal market. The application of the wage provisions of the host country balances out the effects in the high-wage countries of liberalising the cabotage rules. The Directive is in breach of the freedom to provide services. The Directive should be more precisely worded in order to guarantee legal certainty. In particular, the wording of the Directive should expressly stipulate that cabotage constitutes posting. Conclusive regulation of the monitoring powers of the Member States prevents barriers to posting arising from disproportionate administrative requirements.