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AK Position Paper

Mobility Package „Europe on the Move“ Occupation and Market Access

COM (2017) 281 - 1071/2009/EC; 1072/2009/EC
COM (2017) 282 - 2006/1/EC

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Christoph Klein
Director

The AK's position in detail

Regulation of the European Parliament and of the Council amending Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 with a view to adapting them to developments in the sector and Directive of the European Parliament and of the Council amending Directive 2006/1/EC on the use of vehicles hired without drivers for the carriage of goods by road

On 31 May 2017, the European Commission (EC) published what is referred to as the "mobility package", which, in one part, contains extensive proposals for the amendment of the two above-mentioned EC Regulations and the above-mentioned EC Directive in the fields of "admission to the occupation of road transport operator", "access to the international road haulage market" and "use of vehicles hired without drivers for the carriage of goods by road". Through these proposals, the EC intends to achieve balanced conditions for competition between resident and non-resident hauliers as well as to reduce costs for businesses and ensure efficient enforcement of the rules.

In recent years, the Federal Chamber of Labour (BAK) has repeatedly pointed out the need for clearer rules in this context in order to achieve uniform interpretations, efficient control, an increase in correlation with social legislation relating to road transport (Regulation 561/2006/EC, Regulation 165/2014/EU, Directive 2006/22/EC) and with the provisions on the posting of workers (Directive 96/71/EC), clear and verifiable cabotage rules without further liberali-

zation, a revision of the list of serious infringements to generate a greater general prevention effect and the adding of violations of cabotage and remuneration rules to the list, the use of the new smart tachograph ahead of the date currently provided for in the applicable provisions and the application of the same rules on competition for the entire commercial transport sector – irrespective of whether vehicles of less or more than 3.5 tonnes are involved.

BAK therefore welcomes those new provisions of the EC's proposal for amendment which, by means of the clarifications contained therein, may result in the prevention of social dumping and distortion of competition. However, BAK continues to criticize and oppose the steps taken towards the liberalization of cabotage rules, the fact that the EC may enact binding provisions without a separate resolution by the European Parliament or the Council being required ("delegated acts") as well as the provisions that fail to improve the working conditions of drivers. In the following, we will comment on the respective individual provisions of the amending proposal:

Regulation amending Regulation (EC) No 1071/2009 (admission to the occupation of road transport operator) and Regulation (EC) No 1072/2009 (access to the international road haulage market):

Regarding Article 1(1) (with respect to Article 1(4)(a) and (6) Regulation 1071/2009/EC)

It is proposed to expand the scope of the Regulation to also include vehicles with a permissible laden mass of less than 3.5 tonnes. However, the new Article 1(6) excludes undertakings engaged in the occupation of road haulage operator “solely” by means of vehicles with a permissible laden mass not exceeding 3.5 tonnes from the mandatory requirements of “good repute” and “professional competence”, thus leaving them subject only to the new requirement of “financial standing”.

From the point of view of BAK, the expansion of the scope of application to include light commercial vehicles (LCVs) is, in principle, a step in the right direction in order to prevent distortion of competition. For quite some time now, we have observed the trend that hauliers change to LCVs in order to be exempt from numerous EU rules (e.g. regarding driving time and rest periods, initial qualification and periodic training or the requirement of a medical opinion for the renewal of driving licenses).

BAK cannot accept the new exemption from the requirements of good repute, professional competence and from the rules on the transport manager. Hauliers providing transport services using LCVs with a laden mass of up to 3.5 tonnes continue to be disproportionately advantaged as regards the prerequisites for admission to the occupation compared to hauliers using heavy-duty

vehicles and the objective “to ensure a minimum level of professionalization of the LCV sector by way of common rules”, as mentioned by the EC in the explanations, still cannot be accomplished. On top of that, it is incomprehensible, for competitive reasons, why hauliers using LCVs should not be subject to the same risk rating system for the assessment of the undertaking’s reputability as hauliers using vehicles with a permissible laden mass exceeding 3.5 tonnes.

For this reason, BAK calls for the entire Regulation (EC) 1071/2009 to also be applied to vehicles with a permissible laden mass of less than 3.5 tonnes if they are used for commercial purposes. (The same is required for the Regulations (EC) 1072/2009 “market access”, 561/2006 “driving time and rest periods” and 165/2014 “tachographs” or Directive (EC) 2003/59 “initial qualification and periodic training” etc.).

Regarding Article 1(2) (with respect to Article 3(2) Regulation 1071/2009/EC)

BAK does not approve of the deletion of the provision resulting in the Member States no longer being entitled to impose additional requirements for granting licenses. Stricter provisions in individual Member States, which better guarantee equal competitive conditions for road transport operators, would no longer be an option. For instance, the exemplary national requirement under Austrian law to prove that there are parking spaces for the vehicles used available on the business premises – intended to prevent the existence of letterbox companies – would no longer be covered.

Regarding Article 1(3) (with respect to Article 5 Regulation 1071/2009/EC)

According to the proposed amendment, henceforth commercial and labour contracts, among other documents, have to be kept on the business premises as well. It is stated that the place of establishment of the transport undertaking is the place where it effectively conducts its activities (measures against letterbox companies); the undertaking also has to hold assets and employ qualified staff at the place of establishment. We welcome this attempt to prevent the existence of establishments without staff and infrastructure, i.e. "letterbox companies".

In the view of BAK, in addition to records on driving time and rest periods, the proposed amendment of Article 5(a) of Regulation (EC) 1071/2009 should provide for the obligation to keep work records on the premises in order to facilitate a complete company audit in line with the provisions of Directive (EC) 2006/22 on minimum conditions for the implementation of checks.

Moreover, BAK takes the view that the wording of the proposed new Article 5(e) Regulation (EC) 1071/2009, according to which undertakings are required to "hold assets and employ staff proportionate to the activity of the establishment" is not sufficiently precise. In this context, BAK calls for a precise provision stating that all staff members have to be registered at the undertaking's establishment in accordance with social security and payroll law.

Regarding Article 1(4) (with respect to Article 6 Regulation 1071/2009/EC)

In principle, BAK regards the proposed amendment to Article 6(1) second subparagraph of Regulation (EC) 1071/2009, according to which, in addi-

tion to the undertaking and the transport manager, additional persons ("... executive directors, general partners in the case of partnerships, other legal representatives...") are to be held liable for compliance with the provisions, as positive. However, BAK calls for clarification, which is missing so far, that the main responsibility always remains with the undertaking itself.

BAK also welcomes the proposed additions to the conditions relating to the requirement of good repute; in the future, compliance with tax rules, rules on the posting of workers including the registration of the posted workers and information as to the law applicable to contractual obligations will have to be taken into consideration when assessing the criterion of good repute.

Regarding Article 1(4)(c), (6) and (14) (with respect to Article 6(2a), Article 8(9) and Article (24a) Regulation 1071/2009/EC)

These proposals are an attempt on the part of the EC to subsequently introduce a legal basis for Regulation (EU) 2016/403, enacted by the EC itself. According to said Regulation, the EC alone is responsible for issuing the rules regarding the classification of "serious infringements of the Union rules, which may lead to the loss of good repute by the road transport operator" and determining a common formula for the risk rating system of undertakings.

BAK has repeatedly expressed general criticism of the fact that Regulation (EU) 2016/403 was enacted by the EC by delegated act because this is tantamount to a de facto circumvention of democratically legitimized institutions. Moreover, BAK has also called for a revision of the content of this list of "serious infringements". Even though the EC even promised to meet some of these

requests (e.g. adding infringements of cabotage rules to the list) prior to the entry into force of the Regulation, it has not done so to date. As already mentioned in the opinion on the EC's mobility package on social legislation relating to road transport, BAK disapproves of the enactment by the EC by delegated act, also with regard to the change in provisions on admission to the occupation and on access to the international road haulage market, and continues to demand validation by the European Parliament and the Council.

Regarding Article 1(11)(a)(i) (with respect to Article 16(2)(j) Regulation 1071/2009/EC)

According to the draft, the "risk rating of the undertaking pursuant to Article 9 of Directive 2006/22/EC" is to be added to the list of minimum entries to be made in the "national electronic registers".

The fact that it is proposed to limit these data exclusively to infringements of social legislation, even though, according to the existing Regulation (EC) 1071/2009, the national risk rating systems of the Member States already had to be extended to cover all infringements specified in Article 6 (e.g. infringements regarding "dimensions and weights", "initial qualification and continuous training", the "roadworthiness of commercial vehicles", secure road transport of dangerous goods or admission to the occupation etc.) (see Article 12(1) Regulation (EC) 1071/2009), is, in the opinion of BAK, a step backwards as concerns the efficiency of the provisions, with the obvious objective of sparing the transport industry's bad apples. Therefore, BAK demands that the provisions of Article 12(1) Regulation (EC) 1071/2009 have to be complied with and that the entries in the national electronic registers of the Member States regarding the risk rating system have

to refer to all infringements pursuant to Article 6 Regulation (EC) 1071/2009 (see also Regulation (EU) 2016/403) and not only to those pursuant to Article 9 Directive (EC) 2006/22.

Regarding Article 1(12) (with respect to Article 18(5) Regulation 1071/2009/EC)

The draft introduces a new provision on administrative cooperation between Member States. In particular, it is proposed to require the Member States to conduct inspections concerning non-compliance with the criteria on establishment on the basis of evidence provided by other Member States.

However, administrative cooperation between Member States reaches its limits when, according to the proposal, it becomes "difficult or impossible" "to comply with a request for information or to carry out checks, inspections or investigations". That means that the discretion the EC Regulation gives to the Member States whether to actually and diligently comply with requests for information is too ample. For this reason, BAK advocates the cancellation of Article 18(5).

Regarding Article 1(16) (with respect to Article 26 Regulation 1071/2009/EC)

The aim of this proposal is to require the Member States to draw up, every year, a report on the use of LCVs (with a permissible laden mass not exceeding 3.5 tonnes). In addition, according to the proposal, the EC has to present a report to the European Parliament and the Council, by the end of 2024, on the role of LCV operators engaged in national and international road transport.

In general, the aim pursued by this provision is regarded as positive by BAK. However, according to the proposed paragraph (3)(d), the Member States

have to report the “estimated share” of vehicles with a permissible laden mass not exceeding 3.5 tonnes in the overall road transport activity, and, what is even more striking, do so “broken down by national, international and cabotage operations”. Apart from the fact that the time horizon granted to the EC for reporting is much too long, this provision contains such a great number of undefined and indefinable parameters that, in the view of BAK, no serious conclusions may be drawn from such a vague data base. In this context, BAK requests another revision with the aim of obtaining valid data bases.

Regarding Article 1(17) (with respect to Annex IV paragraph 1(b) Regulation 1071/2009/EC)

In the list of the most serious infringements, the violation “exceeding, during a daily working period, the maximum daily driving time limit by a margin of 50%” no longer includes the passage regarding “infringements of breaks and rest periods”. Even though the percentage remains very high, BAK nevertheless regards the proposed amendment as a positive strengthening of this provision.

As concerns Annex IV regarding the most serious infringements, BAK, in principle, maintains its view that the percentages by which driving time must not be exceeded are much too high in order to form the basis for sanctions for general prevention and, moreover, that numerous categories of infringements, for instance violations of rest periods, are missing. This is also a problem because the EC has erroneously declared this Annex as the basis for the enactment of Regulation (EU) 2016/403 with regard to the classification of “serious infringements of the Union rules, which may lead to the loss of good repute by

the road transport operator”. The classification of levels of seriousness made by the EC in the cited EU Regulation does not make sense: according to this Annex, violations of rest periods or breaks never qualify as infringements of the most serious category. Only if the daily driving time is exceeded by 50%, i.e. if the driver recorded a driving time of more than 13.5 hours instead of 9 hours, is an infringement of the most serious category assumed. This categorization allows for a certain degree of tolerance when it comes to infringements of the rules on driving time and rest periods. BAK has repeatedly expressed its clear disapproval of such tolerance and calls for a full revision of Regulation (EU) 2016/403 by the EC. What is also required is the express clarification that Annex IV to Regulation (EC) 1071/2009 only contains a non-exhaustive list of infringements (see the wording “in particular” in Article 6(1) (b) and “in addition to” in Article 6(2)(b) Regulation (EC) 1071/2009).

Regarding Article 2(1) (with respect to Article 1(1) subparagraph 2 Regulation 1072/2009/EC)

The draft Regulation provides for a new subparagraph to be added to Article 1(1) in order to clarify that the carriage of empty containers or pallets is to be considered as a carriage for hire and reward only if it is subject to a transport contract between a consignee and a consignor.

BAK rejects this change and calls for the deletion of said subparagraph because empty pallets are hardly ever transported for private purposes and checks are made substantially more difficult if no accompanying documentation in the form of a transport contract is available.

Regarding Article 2(3), (4) and (8) (with respect to Article 4(2) and (4), Article 5(4) and Article 14b Regulation 1072/2009/EC)

These proposals referring to the determination of the maximum period of validity of the Community licence, the adaptation of the Annexes to Regulation (EC) 1072/2009 and, in general, the conferral of the power to adopt delegated acts to the EC for an indeterminate period of time are rejected by BAK because they are tantamount to a de facto circumvention of democratically legitimized institutions. As noted in the above comments regarding the amendments of Regulation (EC) 1071/2009 and in the opinion on the EC mobility package regarding social legislation in road transport, BAK reiterates its call for the involvement of and validation by the European Parliament and the Council.

Regarding Article 2(5) (with respect to Article 1(2) Regulation 1072/2009/EC)

The removal of the maximum number of cabotage operations permitted is absolutely unacceptable to BAK. Until now, rules allowed for a maximum of three cabotage operations within the seven days following an international carriage. Arguing that compliance with this provision is difficult to check in practice, the EC now proposes that, in the future, an unlimited number of operations should be allowed within the five days following an international carriage. BAK rejects this proposal on the grounds that, due to the lower costs involved, cabotage operations, i.e. national carriage carried out by non-resident hauliers, exert considerable pressure on the national transport industry in some EU countries. According to a study conducted by the transport and service union *vida* and the Austrian Economic Chamber, cabotage – in contrast to the

previous estimates made by the EC, which were much too low – accounts for approx. 22% of Austria's national transport operations. It is also noteworthy that 15% of these cabotage operations are illegal. In 2016, they caused EUR 500 million of total economic damage and a total loss of 14,000 jobs in the Austrian transport sector.

The EC's proposal, rather than combating illegal cabotage, simply legalizes it; as the current regulation is hardly enforceable, the loopholes are being enlarged.

Moreover, according to the new definition, cabotage operations would no longer be permitted in a single Member State only, but also in contiguous Member States. In order to enter a contiguous country, one has to perform a cross-border operation. Even though the EC argues that "cabotage" is defined as "national carriage", this can no longer be verified during subsequent checks, in particular because according to the proposed amendments to Regulation (EU) 165/2014 tachographs are to automatically record any crossing of borders. According to the proposed amendments to Directive (EC) 96/71 and Directive (EU) 2014/67 for posting drivers in the road transport sector, the posting rules will apply to international operations only after three days. BAK strictly rejects this change: these proposals will not prevent social dumping from happening and cannot be verified. It must be feared that businesses from Eastern Europe will be able to perform transport operations for an unlimited time period in Member States which are non-contiguous to their home countries.

Regarding Article 2(8) (with respect to Article 14a Regulation 1072/2009/EC)

BAK welcomes the proposal regarding “liability”, according to which consignors, freight forwarders, contractors and subcontractors are also liable for compliance with the provisions of the Regulation.

Regarding Article 2(10) and Article 3 (with respect to Article 17 Regulation 1072/2009/EC)

The amended provisions on reporting and on the verification of the implementation of the Regulation are clearer and more detailed. For instance, the annual reports now have to include the number of hauliers possessing Community licenses, the number of driver attestations issued, the number of cabotage checks performed and the number of vehicles checked.

BAK approves of these changes.

Directive amending Directive 2006/1/EC on the use of vehicles hired without drivers for the carriage of goods by road:

Regarding Article 1(1) (with respect to Article 2(1) Directive 2006/1/EC)

So far, the use of vehicles hired without drivers has been restricted to “traffic between Member States”. The purpose of the proposed deletion of this restricting passage from the scope of this Directive is to facilitate the use of hired vehicles for transport within a Member State. That means that the EC creates an additional hurdle for the supervisory bodies when it comes to implementing the cabotage provisions and verifying their compliance. Instead of taking steps towards tax harmonization for competitive reasons, the EC remains calm in the face of the existing inequalities in competition and, in its explanations to this

proposal, even puts forward the differences in vehicle taxation rates in the different Member States as an argument. In the view of BAK, the expansion of the use of hired vehicles for national transport therefore must be clearly rejected.

Regarding Article 1(1) (with respect to Article 2(1a) Directive 2006/1/EC)

BAK can, under no circumstances, accept the proposal that hired vehicles may be used where “the vehicle is not registered or put into circulation in compliance with the laws of the Member State” and, even less so, that a minimum hire period of four months per year is provided for. This provision facilitates the avoidance of the strict rules regarding the road safety and operational reliability of vehicles in Austria (e.g. regular technical checks, environmental friendliness, etc.). Again, the EC uses the differences in vehicle taxation rates as an argument.

Regarding Article 1(3) (with respect to Article 5a Directive 2006/1/EC)

Even though BAK welcomes the idea of a transition period for the EC’s reporting to the European Parliament and the Council, it regards the period of five years as too long. The report should be presented after three years.

Regarding Article 2(1)

In the view of BAK, the transition period of 18 months granted to the Member States for the transposition of the Directive also seems too long; six months should be quite sufficient for transposing the Directive.

BAK's requests for amendments to the existing Directive 2006/1/EC:

Regarding Article 2(2)(b) Directive 2006/1/EC

According to the existing Article 2(2)(b), the driver's employment contract must be on board the vehicle only if the driver is not the person hiring the vehicle. This is a clear incentive for circumvention and/or promotes pseudo self-employment.

BAK requests the deletion, without substitution, of the half sentence "where the driver is not the person hiring the vehicle". This is to entail two changes, according to which, on the one hand, employed drivers are not able to enter into hire contracts and, on the other hand, self-employed drivers are required to have an excerpt from the register of companies on board.

Regarding Article 4 Directive 2006/1/EC

According to the existing Article 4, the Directive does not have to be applied in a Member State if that Member State has laid down "less restrictive conditions" than the ones listed in the rules for application of the Directive.

BAK requests the deletion, without substitution, of the existing Article 4 because it qualifies the stricter rules of the Directive, thereby cancelling them out.

Should you have any further questions
please do not hesitate to contact

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