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THE CONSTRUCTION AND OPERATION OF THE ROAD FREIGHT TRANSPORT MARKET IN EUROPE

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REPORT ON THE CONSTRUCTION AND OPERATION OF THE ROAD FREIGHT
TRANSPORT MARKET IN EUROPE

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The International Transport Forum is a global platform and meeting place at the highest level for transport, logistics and mobility. Key figures from government and politics, business and industry, research and civil society will meet in Leipzig each year to debate a transport topic of worldwide strategic importance.

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As of the 1970s, the European Economic Community and the European Conference of Transport Ministers (ECMT) proposed to promote the construction of a European road transport market. A market, that is to say, an area open to competition, where hauliers from different countries would be able to develop their business in the broader context of trade liberalisation.

There is probably no need to go into the arguments justifying this objective. It may suffice simply to point out that the scientific basis of such a policy dates back to Ricardo, or to cite the report by the High Level Group chaired by Mr. Wim Kok (1), who states that the Lisbon strategy is aimed chiefly at « removing obstacles to the free movement of services » inside the European Union. Under the heading « An area without internal frontiers », he goes on to say:

« Facilitating free movement of persons, goods, services and capital in an area without internal frontiers is a crucial mechanism that generates economic growth. The internal market permits those companies and sectors that have relative competitive strengths to build on their specialist advantages and grow. This becomes a self-reinforcing trend. Resources are used by those most capable of using them, who in turn can build up economies of scale so lowering costs and prices. There is a general uplift in real incomes, profits and innovation. Sustainable economic growth has always been associated with market opening and strong growth in trade. »

Mr. Kok concludes:

« Continuing to open Europe's markets in goods and services, and conversely resisting protectionist pressures, is thus fundamental to Europe's growth prospects. »

This conclusion makes it clear that there were protectionist pressures opposed to the move towards the liberalisation of trade, despite the fact that only a few years ago liberalisation seemed inevitable to everyone.

Transport was part of this broad movement. The liberalisation of international transport is the logical corollary to the liberalisation of trade and, at the same time, one of its instruments. It is also justified in itself: competition forces incumbent transport undertakings to improve their quality of service and to reduce their costs to the benefit of their customers.

However, transport liberalisation has also been faced with opposition, for although the competitive model generates positive effects in the long term, it produces « losers » in the shorter. The road transport industry was even more sensitive on this issue since road haulage firms are often small, but account for a significant number of jobs. Defending jobs and the national flag carrier were and still are arguments that the industry organisations of « rich » countries use to hinder liberalisation.

The adverse consequences of globalisation and market liberalisation within the EU framework are felt more keenly in times of crisis and it is to be feared, in the light of the current economic situation, that a return to protectionism may be the rule. Transport and especially road transport, given its scale, is one of the instruments of trade liberalisation. As such, it could become a tempting target for protectionists and be used by them as a means of indirectly opposing the liberalisation of trade.

1. The liberalisation of international road transport

1.1 Belated progress on liberalisation

After the Second World War, international transport was heavily limited by restrictive provisions. Hauliers were only permitted to provide carriage between two countries if they held a bilateral

¹ Facing the challenge – The Lisbon Strategy for Growth and Employment. Report from the High Level Group chaired by Wim Kok, November 2004, 61 pages, http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf

authorisation. The number of authorisations, subject to negotiation between the two countries concerned, was very limited.

In Europe, liberalisation began with the creation of the European Economic Community and more specifically with the Treaty of Rome, Title V, Article 71 of which explicitly provides for the freedom to supply international inland transport services (by road, rail and inland waterway) and for the obligation to establish the conditions of access for non-resident hauliers to domestic road freight haulage in a Member State, i.e., the rules that would govern cabotage. However, it took much longer than expected to achieve this objective. In the normal course of events, liberalisation should have been achieved by the end of the transition period instituted by the Treaty of Rome, i.e. December 1969. In fact, the Council did approve the creation of multilateral licences, on the proposal of the Commission, in 1969. These were to be phased in to replace bilateral licences, but when it came to increasing the number of licences the Council proved very reluctant. It took the Court of Justice ruling 22 May 1985 -- which found against the Council for failure to act -- and the Single European Act -- which set 1 January 1993 as the target date for establishing the internal market -- for the number of Community licences to increase substantially over the years that followed, until quota restrictions were abandoned on 1 January 1993 ⁽²⁾ and for cabotage to be authorised, first subject to licence under a quota system, and later under a Community licence without quantitative restrictions, from 1 July 1998 ⁽³⁾.

Outside the European Economic Community, the European Area took the first steps towards liberalisation in 1970 following a decision by the Council of Ministers of the ECMT introducing multilateral licences under a quota system, which entered into effect in 1973.

Since then, both the European Union and the ECMT have gradually enlarged their membership. Most notably, the Central and Eastern Europe Countries (the CEECs) -- several of which have since become members of the European Union -- and certain countries of the Commonwealth of Independent States (CIS) joined the ECMT. The enlargement of the European Union reduced the scope of application of ECMT licences to links between EU Member States and non-Member States and links between the latter states themselves, which account for only a small percentage of flows by road between EU countries. This should not be taken to imply that we should now consider liberalisation complete, still less that a single European market for road freight transport exists.

1.2 Liberalisation not complete or regressing

Granted, international transport between EU Member States is fully liberalised; the cabotage issue is not so straightforward; when all is said and done, in the area outside of the EU, liberalisation is still limited.

1.2.1 International transport in the European Union

Within the EU, simply holding a Community licence, issued under the authority of the country of establishment, is sufficient to authorise the holder to carry out transport between any two Member States: there is therefore free access to the market. This freedom is widely used and the statistics on market share for the various national carriers in the international transport sector show that creating competition between carriers is effective, since these shares have developed substantially.

However, that does not mean that in practice there are no barriers designed to protect national markets from foreign carriers. No serious study -- true, it would be difficult -- has inventoried these barriers and one

² Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States.

³ Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State.

has to make do with statements by hauliers and industry organisations. Both have a tendency to generalise and present what are simply anecdotes – sometimes disputable -- as incontrovertible fact. Generally, what these statements call into question are the practices of inspection officers whose attitudes are said to be clearly discriminatory against foreign vehicles, either because foreign vehicles are subject to a proportionately greater number of inspections than national vehicles or because less leniency is shown to foreigners. The fear of falling victim to such practices, we hear, makes hauliers abandon trips to this or that country.

It is hard to say just how true these claims are. The fact that every country says the same thing neither proves nor disproves them: hauliers from country A claim that they are victims of discrimination in country B; hauliers from country B say the same thing about country A and both claims may be right or wrong.

1.2.2 Cabotage in the European Union

In the European Union, the cabotage situation is more complex. Cabotage has been authorised there subject to a Community licence since 1 July 1998. However, when the European Union was enlarged to include new Member States transitional arrangements were adopted reciprocally deferring the possibilities of cabotage for new entrants, with the exception of Slovenia, Malta and Cyprus. The period during which new entrants are closed to cabotage (and their firms, in turn, are not authorised to perform cabotage in other EU countries) is to come to an end on 1 May 2009 and, so, in a few weeks time, cabotage will be authorised throughout the European Union, with the exception of two countries, Bulgaria and Romania. The latter two countries joined in 2007 and will be closed to cabotage until at least 1 January 2010 and probably to 1 January 2012.

Does that mean that the liberalisation of cabotage will be complete then?

The 1993 text makes cabotage subject to certain conditions since the cabotage provider is subject to the legislation of the country in which the operations are carried out in the following areas:

- the prices and conditions governing the transport contract;
- standards relating to weight and dimensions;
- requirements relating to the carriage of certain categories of goods;
- driving and rest time for drivers;
- VAT on transport services.

However, the Regulation contains no reference to a further condition that makes cabotage subject to an international transport operation. Before the adoption of this Regulation, there was lively debate between advocates of « consecutive » cabotage (cabotage must be consecutive to an international transport operation) and supporters of « general » cabotage. The 1993 Regulation does not make cabotage subject to a prior international transport operation: the « general » cabotage formula was the one adopted.

While this « liberal » option came in for heavy criticism in several European countries, it had scarcely any impact as long as cabotage accounted for only a tiny share of national transport, even in the states in which it was most widespread. However, the rapid increase in this share lent more credibility to the opponents of general cabotage and resulted in the institution of new restrictive measures.

The debate then centred on the provision of Article 1 of Regulation (EEC) No 3118/93 which specified: « 1. Any road haulage carrier for hire or reward who is a holder of the Community authorization (...) shall be entitled, under the conditions laid down in this Regulation, to operate on a temporary basis national road haulage services for hire and reward in another Member State (...) ». How was « on a temporary basis » to be interpreted? This wording quite clearly meant that European legislators did not intend to dispense hauliers from the obligation to have, technically, an establishment in the country in which they habitually carry on their business, as was clearly confirmed by the Commission in the Interpretive

Communication it issued on this subject in 2005 at the request of the Member States (4) : « Obviously, a clear distinction needs to be drawn between an activity associated with the freedom to provide a service, because it is exercised on a temporary basis, and an activity associated with the right of establishment when it is exercised on a permanent basis. »

However, the Communication does not give a precise definition of what “a temporary basis” does and does not mean. Instead, taking a number of findings by the Court of Justice as its basis, it confines itself to indicating the criteria (of which there are four) that may be taken into account in defining the temporary nature of a cabotage service: duration, frequency, periodicity and continuity. It adds that the criteria cannot be applied automatically and that « at all events, each specific situation will need to be examined specifically ... » with reference to these criteria and points out that the following « types of activity by a haulier who is not established in the host State on the territory of that State (...) » cannot be considered as temporary:

- « -- any activity that is permanent, exercised continually and regularly; or
- Any activity that is carried out systematically and not just on an ad hoc basis; or
- any activity that involves a vehicle belonging to a non-resident haulier, where the vehicle in question never leaves the territory of the host State. »

A number of Member States, under pressure from their hauliers, went ahead and implemented restrictive measures without waiting for the Communication by the Commission. In its Interpretive Communication, the Commission mentioned four such cases: Greece, the United Kingdom, Italy and France.

As of 1998, Greece imposed a time limit on cabotage operations, a maximum of two months per year. However, it abandoned this restriction under pressure from the Commission. In 2002, the United Kingdom required the haulier’s vehicle to leave the country at least once per month. In 2004, Italy restricted cabotage operations to 15 days a month for a maximum of five consecutive days and required hauliers to carry a book of record sheets for cabotage operations on board the vehicle.

As for France – the European country where the most cabotage operations are conducted -- it tried several times to restrict cabotage. In 2002, a Circular (5) restricted the duration of a foreign vehicle’s stay to one week, but the Council of State suspended this provision: the Commission intervened to condemn it as unreasonable, and the Council of State ultimately annulled the circular. In 2004, a decree (6) defined cabotage as transport operations « which do not give rise to the presence on the national territory of one and the same vehicle for more than 10 consecutive days, nor more than 15 days in any 60 day period », a provision that was also sanctioned by the Council of State, which considered, as it had for the 2002 Circular, that adding rules to those applicable under Community regulation lay outside the remit of a Transport Minister.

Lastly, in 2005, the French government made another attempt to restrict cabotage, this time by passing a law (7) tackling the problem from two different angles. Firstly, as with the previous attempts, by trying to clarify the meaning of the expression « on a temporary basis », Article 93 provided that « a vehicle used

4 52005XC0126(01) The Commission adopted an interpretative communication on the temporary nature of road cabotage – Text with EEA relevance, Official Journal C 021 of 26/01/2005 p. 0002 - 0007

5 Circular of 22 January 2002. A circular is an instruction issued by a Minister to the civil servants accountable to him/her. This circular requested road transport inspectors to consider vehicles of a foreign haulier which had been on the national territory for more than one week to be in breach and, more specifically, guilty of « illegal exercise of the profession of public road haulier».

6 Decree no. 2004-1080 of 11 October 2004 concerning road freight cabotage.

7 Law n° 2005-882 of 2 August 2005 supporting small and medium-sized firms.

by a non-resident freight haulier [...] to provide cabotage services in the territory of France [...] may not remain in that territory for more than 30 consecutive days, or for more than 45 days in any 12 month period. »

The same law addressed the problem from a second angle: the regulations applicable to the transnational posting of workers. Given that the development of cabotage in France could essentially be attributed to the difference in labour costs for French and foreign drivers, Parliament decided to apply the provisions of legislation on the posting of workers to cabotage. New Article 342-3 of the French Labour Code, introduced by the new law, stipulates: « Employers [established in a country other than France] shall be subject to the statutory, regulatory and collectively agreed provisions applicable to workers employed by firms in the same sector established in France with respect to labour legislation», followed by a list of areas to which national legislation applies. The same article stipulates: « these provisions shall apply to employees of transport firms established in countries other than France who, on the request of their employer, carry out their work for a limited period on French soil in the framework of cabotage operations conducted in accordance with the conditions stipulated by Council Regulation[s] (EEC) No 3921/91 of 16 December 1991... ».

This amounts to saying that the drivers of firms carrying out cabotage in France are subject to the same rules on salary as the drivers of French firms, whether these derive from legal provisions or collective bargaining arrangements, and to the same social security rules.

The Commission was consulted regarding the compatibility of these provisions with European regulations and issued no objection. Yet, it is perfectly clear that their implementation would purely and simply preclude cabotage in France. However, as was the case with the law mentioned above, the French Government has not adopted an implementing decree. France's abortive attempts to restrict cabotage may be interpreted chiefly as aimed at responding to pressure from industry organisations, but as a token gesture, since successive governments have never followed through on the implementing decrees necessary to bring the restrictive provisions adopted into force. However, they are also indicative of real concern about the rapid increase in cabotage.

This is not an exclusively a French concern, although only three countries have actually adopted national regulations to curb this increase. Actually it was under pressure from Member States and transport industry organisations that the Commission commissioned a study ⁽⁸⁾ published in March 2006 to take stock of the cabotage situation. The study stressed the demand for a clearer definition (i.e. for the introduction of new regulatory conditions) of cabotage and raised the issue of the social rules applicable to drivers in line with the «Posting of Workers» Directive. It is behind the proposal contained in the “road transport package” currently under discussion.

The proposal dates from May 2007 ⁽⁹⁾ and contains three basic amendments to the legislation in force.

- Cabotage operations may only be conducted consecutive to international carriage made to the host country.
- The last cabotage operation before the vehicle leaves the host Member State must take place within seven days of the last unloading in the course of the incoming international transport operation.

⁸ http://ec.europa.eu/transport/road/studies/road_en.htm: Study on Road Cabotage in the freight transport market

⁹ Proposal for a Regulation of the European Parliament and of the Council on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States {SEC(2007)635} {SEC(2007)636}/* COM/2007/0265 final - COD 2007/0099 */.

- Non-resident hauliers must be able to « produce clear evidence of the international carriage in the course of which he has arrived in the host Member State and of each consecutive cabotage operation carried out there ».

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On 6 January 2009, the Commission issued a Common Position on this proposal incorporating some of Parliament's proposed amendments, but rejecting others. Some of these amendments are moving towards greater liberalisation. For instance, cabotage could be authorised between transit countries: one operation per Member State crossed in transit, within three days of unladen entry into the territory of that Member State. However, the overall number of authorised operations would still be limited to three within a period of seven days. Others seem more hesitant about greater liberalisation: the Council rejected Parliament's proposal to liberalise cabotage completely as of January 2014, but requires the Commission to produce a report assessing « whether the progress in the harmonisation of certain rules (for instance, enforcement and road user charges) allows further opening of the domestic transport markets, including cabotage » by the end of 2013. It also allows Member States to introduce safeguard measures in the event of serious disruption to the market due to cabotage.

The Commission's opinion is that the Common Position «reflects the main objectives of its proposal and can therefore support it. »

In March and April 2009, Parliament is to review the common position at a first and possibly second reading; it seems likely that the text approved by the Council of Ministers will also be approved by Parliament.

The new Regulation should therefore put an end to the uncertainties raised by the wording of the 1993 Regulation; it drops the notion of general cabotage in favour of the consecutive cabotage formula and, from this standpoint, it is unquestionably a backwards step in terms of market liberalisation.

To conclude, it should be noted that some States (Germany and Spain) have anticipated the adoption of this Regulation and have transposed the rule restricting cabotage to three operations in seven days in their domestic legislation. France is preparing to do the same: on 17 February 2009 the government put forward to the Senate an amendment (largely inspired by an industry organisation) to the bill « concerning the organisation and regulation of rail transport and guided transport systems including various provisions relating to transport » which would adopt this very rule.

1.2.3. International transport within the area covered by ECMT licences

The decision of the Council of Ministers of the ECMT to commit to « the gradual liberalisation of road freight transport »⁽¹⁰⁾ dates back to 1973 and came into force on 1 January 1974 and shows the will to open up the international transport market to a wider area than the European Community through multilateral licences subject to quotas but not permitting cabotage.

In 2009, the basic quota for ECMT licences came to a total of 6 090 licences allocated to Member countries which determine the number of licences for different vehicle types and their duration. The percentage allocation by vehicle type in line with environmental standards is 49 per cent for Euro III vehicles, 40 per cent for Euro IV vehicles and 11 per cent for Euro V vehicles; annual licences account for 97 per cent of the total quota and monthly licences (or more accurately 30-day licences) for the remaining 3 per cent.

Over time, changes were made to this licence system (chiefly to accommodate environmental standards for eligible vehicles) and the number of licences has increased, though only slightly, over the last few

¹⁰ Resolution no. 22 of the ECMT Council of Ministers, Florence, 11 June 1970

years⁽¹¹⁾. However, the main change, from a quantitative standpoint, has been an indirect one subsequent to the enlargement of the European Union to include new Member States. ECMT licences are not applicable to transport between EU Member States. Their scope of application has now been reduced to transport between old or new EU Member States and non-Member States and to transport between non-Member States themselves⁽¹²⁾.

Licence allocations not consistent with countries' needs

One might think that with this reduction in licence scope, no increase in quota would be necessary to meet needs in the area where the licences are still applicable. Yet that is not the case. In fact, licences were only partially reallocated and EU Member States did not agree to reduce the number of licences in line with their needs. This means that the quotas allocated to major countries of Western Europe, chief among them Germany, France and the Netherlands, are surplus to requirements and that not all of their licences are used, while non-Member States of the European Union are clamouring for an increase in their quotas. Therefore, licence allocation is scarcely in line with the principle of distribution in accordance with real needs and efficient use, although this was the principle established by the Council of Ministers of the ECMT. Consequently, a large share of trade, and probably most trade, in Eastern Europe continues to be based on bilateral agreements.

The imbalance in the distribution of licences, which is widely acknowledged, is the indirect result of enlargement of the European Union and the liberalisation that this entails. Liberalisation brings the hauliers of the long-standing Member States of Western Europe into competition with hauliers from new Member States, where the standard of living, and therefore level of earnings, is much lower. Despite the comparative advantage that long-standing Member States still benefit from, the difference in wage costs is working to the advantage of the countries of Eastern Europe, as is clear from the rapid growth of their market share in bilateral trade and in cabotage. Under pressure from haulage industry organisations, which condemn the « social dumping » of which they are victims⁽¹³⁾, some governments have adopted a clearly protectionist attitude as regards the ECMT's multilateral licence system and consequently are refusing any increase the quota or its redistribution among other countries and are requesting stricter regulation of the conditions of use for licences.

Restrictions on licence use

Since 1 January 2006, ECMT licences can only be used for transport operations after a laden trip between the country of registration and another ECMT member country; vehicles can only make three laden trips before they must return to the country of registration, either laden or unladen¹⁴. It is easy to understand the reasons for this restrictive regulation, which is aimed at preventing a vehicle roaming throughout Europe and exploiting the international haulage market and thereby subverting, by practising intra-European

¹¹ In 2005, the quota, which had been negotiated every year, was set for a period of three years (2006-2009).

¹² It is difficult to measure the scale of transport performed by ECMT licences, based on the availability and quality of existing statistics. The ProgTrans report ("Report on European Road Freight Transport Markets and ECMT Multilateral Quota Perspectives"), which was written early this year for the International Transport Forum, presents the following information, with seemingly reliable orders of magnitude (as percentages of tonne-kilometres):

- Share of transport performed by hauliers operating with ECMT licences in total international transport between ECMT Member countries: maximum 5%
- Share of transport performed by hauliers operating with ECMT licences from non-EU Member countries in international transport between EU Members: 0.33%
- Share of transport performed by hauliers operating with ECMT licences from EU Member countries in international transport between non-EU Members: 0.9%.

¹³ The expression « social dumping » does not seem to be apt in this case since dumping means selling goods or services at less than its cost price.

¹⁴ The solution adopted is therefore similar to the one towards which the European Union is moving in the regulation of cabotage: the holder of an ECMT licence can only use it between countries other than the country of registration after a laden international trip (see so-called consecutive cabotage) and the number of trips the holder can make outside the country of registration is limited to 3.

“cabotage”¹⁵, the initial vocation of ECMT licences. Other solutions in the same vein have been envisaged and indeed temporarily adopted, such as the obligation that a vehicle return to its country of registration within a period of 6 weeks.

It does not seem possible to measure precisely the impacts of this restriction on the use of ECMT licences. However, it is clear that it cannot but add to the number of empty return trips.¹⁶

However, the stagnation or even reversal of liberalisation does not manifest itself solely in terms of the rules regarding the use of licences. Other problems warrant mention.

Border crossing difficulties

Although the issue of border crossings between European Union Member States has now been resolved, the same cannot be said of crossings at the borders of the European Union or between non-Member States. In February of this year, the IRU, which reports waiting times at the main border crossings in real time, published a summary of waiting times based on the figures for 2008 (¹⁷). Diagrams illustrating these waiting times are presented in this summary. Given that waiting times can vary substantially, with both slack and peak periods, there would be little point in calculating an average, however, the degree to which border crossing times can vary is highly significant. At some border crossing locations, the situation is frankly dire, notably at border crossings with Russia: between Estonia (Narva) and the Russian Federation (Ivangorod, the crossing time is rarely under 50 hours; this time rises to 130 hours during peak periods at the end of April and the end of September; between Lithuania (Kybartai) and the Russian Federation (Chernyshevko), the waiting time frequently amounts to 6 to 10 hours and, at certain locations, can rise to as high as 20 hours; the situation is more the less the same between Panemune (Lithuania) and Sovesk (Russian Federation) and between Latvia (Terehovo) and the Russian Federation (Burachki). Other border crossing locations on other borders could also be mentioned: for example, between Poland (Kuznitsa Belostokskaya) and Belarus (Bruzgi), crossing time vary between 2 and 30 hours and in most cases are between 10 and 15 hours, at the border crossings between Finland and Russia around 2 days of the total transport time (6 days to Moscow and back) is spent on waiting¹⁸.

As can be seen, these problems are mainly encountered on the borders of the Russian Federation which, in 2005, approved a strategic programme for transport which included, among other objectives, the “Modernisation of road border crossing points, increasing efficiency of customs procedures and checks and harmonisation of these procedures with international practices” (¹⁹).

The IRU report analyses the causes of this situation and recommends ways to reduce border crossing times: increase the number of hours during the day border crossing services are open, increase the capacity of such services, improve the training of officials and increase their awareness of the importance of their responsibilities, reduce the number of border policing authorities in place and improve the coordination of their activities on either side of borders; move customs checkpoints further inland, etc.

¹⁵ The word is not used here in the sense given to it in European Union Regulations since we are not talking about domestic haulage carried out by a vehicle registered in another EU Member State (cabotage in this sense of the word is not permitted under ECMT licences), but of international haulage between ECMT member countries other than the country in which the vehicle is registered.

¹⁶ Statistical monitoring of the use of the ECMT licences during 2004-2008 shows that the share of empty trips in the total number of trips during this period has increased from 21.5 percent to 28.8 percent (*Note from the Secretariat – cf. ITF/TMB/TR(20091)*)

¹⁷ Reduce Border Waiting Times!, IRU, February 2009.

¹⁸ See also: ITF/UNECE/WB Seminar on Overcoming Border Crossing Obstacles, 5-6 March, 2009, Paris, <http://www.internationaltransportforum.org/Proceedings/Border2009/index.html>

¹⁹ Background Paper, “Problems of international road haulage market development in the Russian Federation”, CEMT/TMB/TR(2007)20, 13 September 2007.

Increased taxation of international haulage activities

On 26 February 2008, the Russian Federation notified the International Transport Forum that from 1 February 2009 onwards, and in accordance with a Decree of 24 December 2008 issued in application of the Act of November 2007, vehicles weighing over 3.5 tonnes registered abroad and using the road system of the Russian Federation would be liable to a tax based on the length of time spent on the territory of the Russian Federation and varying between 385 roubles (approximately €8.4) for one day, 5 000 roubles (€108.6) for a month and 60 000 roubles (€1 304) for a year. The notification referred to Directive 2006/38/CE of 17 May 2006 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures and pointed out that EU Member States were gradually introducing new charges on hauliers, including Russian hauliers. The new tax on foreign vehicles was therefore presented as a measure to redress the balance or indeed as a reprisal. However, it cannot be claimed that this measure is simply the application by Russia of the principles of Directive 2006/38/CE since the latter stresses the need to ensure that the charging for the use of infrastructure that it authorises does not discriminate against foreign vehicles, which is not the case for the tax introduced by the Russian Federation, and the Directive only authorises the introduction of tolls or road use charges for vehicles whose total maximum gross weight is at least 12 tonnes.

The spirit of this measure is therefore very different. Nevertheless, it can be argued that, despite their non-discriminatory nature, the new tolls authorised by Directive 2006/38/CE, like the LKW Maut and in all probability the future French “eco-tax”, clearly make or are designed to make haulage operations by foreign-registered vehicles both harder and more expensive and thereby to restrict competition in the international haulage and cabotage sectors.

We have thus mentioned a number of recent events which show that there are protectionist leanings both in the EU area and in the ECMT area, and there is reason to fear that, as the crisis persists or grows even deeper, the move towards protectionism will gather pace in coming months.

We have also discussed the reasons for which road hauliers and, under pressure from the latter, governments were adopting an increasingly reticent stance towards liberalisation of the road haulage sector. However, there are other reasons which explain why achieving the goal of a single European road haulage market seems to be no closer in that liberalisation does not (or could not) create a single market. Harmonising the rules on the operation of such a market is also necessary, and this lack of harmonisation is also one of the reasons for reticence over liberalisation.

2. Harmonising market rules

The policy towards the road haulage sector pursued within the European Economic Community has for many years been built around the liberalisation versus harmonisation issue. While these two objectives were generally seen as necessary, the question was whether or not they were independent issues and therefore whether or not they should be linked over time. For many years the discussions pitted those who felt that harmonisation was a prerequisite for liberalisation against those who through that harmonisation and liberalisation should proceed “hand in hand” as well as those who wanted liberalisation before harmonisation. History tells us that it was the latter who prevailed, but for a different set of reasons.

The proponents of liberalisation before harmonisation advanced an excellent argument: if policymakers had to wait until progress had been made on harmonisation before liberalising the market, then, given the problems involved in harmonising systems based on different principles and with different historical roots, liberalisation would be postponed until the far distant future. They thereby called on a determining argument, namely that the Treaty of Rome obliged Member States to take all the necessary steps to ensure freedom of supply of road haulage services and to set out the conditions for the admission of non-resident hauliers to domestic haulage services on the territory of Member States (cabotage); the Treaty set out no objectives and made no demands with regard to harmonisation. Lastly, they argued that liberalisation

would necessarily, either “spontaneously” or forced by its consequences, lead to the harmonisation of the market operating rules.

This choice of liberalisation without harmonisation (or with minimum harmonisation) has profoundly marked the history of EU policy and has had a substantial impact in that there has been no harmonisation, or to be more precise only a small amount of harmonisation, contrary to the claims of those who believed that it would follow liberalisation. And yet it was necessary.

2.1 The need for harmonisation

While the need to harmonise the conditions of competition is frequently justified on the grounds of fairness, it seems to us that it is needed more fundamentally for reasons of efficiency and more precisely so that the competition sought through liberalisation functions efficiently. It is therefore complementary to liberalisation.

The virtues of the market economy and competition only become apparent if the most efficient firms develop and the “marginal” firms which cannot escape from their predicament are gradually edged out of the market. If the regulatory, social and fiscal conditions on which hauliers’ activities are based and which determine their productivity are too unfair, then firms acquiring market share will not necessarily be the most efficient in terms of the way they combine their production factors, but those which enjoy the most advantageous conditions. What should have been “fair” competition within the framework of common rules then becomes competition between the rules themselves in that States facing pressure from their hauliers may be tempted to adopt less constraining rules in order to align themselves with States that have adopted less costly conditions. Firms subject to the most expensive constraints, for their part, will be tempted to develop perverse behaviours outside the scope of regulations.

Naturally the need for harmonisation does not concern the costs of production factors, but rather the conditions under which they are used. It is normal that factor costs, and notably labour costs, between countries at different levels of development should differ. In such cases competition encourages increased specialisation which penalises hauliers in countries at the highest level of development, and to a convergence in levels of remuneration through wage increases in “poor” countries. It would appear (if we disregard the impacts of the current economic crisis which might well disrupt previous trends) that these differences were decreasing and undoubtedly at a far faster pace than most experts had thought possible.

2.2 Progress with harmonisation

It has to be said that progress with harmonisation has lagged far behind the progress made with liberalisation. While the aims of such a policy and the contention that all types of diversity must be eradicated are open to challenge, it is nonetheless a fact that in major areas that have a significant impact on the relative competitiveness of hauliers in different countries there are substantial differences that it would seem to be very difficult to reduce.

There are very many areas in which harmonisation would be at least desirable if not necessary. We shall therefore leave some of these out of our discussion, notably the issue of tax harmonisation. And yet the latter is a key area, whether in terms of the relative taxation of fuels or charges for infrastructure use. The measures taken at the level of the European Union, however, are limited to setting minimum or maximum taxation thresholds, which leave governments considerable room for manoeuvre, or principles which authorise very different types of practice. The fact that a Directive or Regulation in this area must be adopted unanimously by Member States undoubtedly explains the limited progress made with harmonisation.

The issues we shall address are those of access to the profession, vehicle standards and the working conditions of driving personnel.

Access to the profession

One of the first areas in which the European Economic Community introduced rules tending towards harmonisation was that of access to the profession. The liberalisation of access to the market presupposed the introduction of, if not more stringent, then at least uniform provisions regarding access to the profession which would replace quantitative restrictions with qualitative criteria. It was only later (through a Resolution in May 2000) that the ECMT recommended its member countries to make access to the profession, for international road haulage, subject to a licence to exercise the profession, itself subject to conditions largely inspired by those adopted in the European Union since both sets of rules mention professional competence, good repute and financial standing.

This ECMT recommendation was acted upon in most countries, with regard to both international and domestic haulage operations although the rules adopted and the conditions for their implementation can vary substantially from one country to another.

The same is true, although undoubtedly to a lesser extent, within the European Union. The Commission, after organising a consultation of Member States in 2006 in order to examine the provisions they had made in application of EU directive 96/26/CE governing access to the profession, made a scathing assessment of the situation: “Member States had had difficulty in transposing the Directive and were applying it in a very disparate manner” and noted the many drawbacks that had resulted from this: “... the risk of distortion of competition between, on the one hand, transport operators with a real establishment that is accessible to the authorities responsible for checking their compliance with the minimum standards for admission to the occupation and, on the other, "letter-box" companies which can avoid proper monitoring”.

In consequence, the Commission proposed that the Directive in force be replaced with a Regulation “establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator” that no longer spoke in terms of access to the profession but rather the exercise of the profession and that, in addition to the traditional conditions, which were specified in detail and made more stringent, the requirement that the haulier authorised to exercise the profession by a State have an establishment on the territory of that State. The Council adopted a common position on this regulation on 9 January 2009 and it has been submitted for a second reading by Parliament

It is therefore to be hoped that as this Regulation is gradually implemented significant progress will be made on harmonising the exercise of the profession of road haulier.

Vehicle standards

These standards cover a very large number of technical aspects, but in particular address the weight and size of vehicles and greenhouse gas emissions.

In terms of weight and size, the European Union has adopted limit values such that Member States cannot deny vehicles meeting those values entry to their territory. However, all Member States are free to set different limit values that are either more or less stringent than those specified in European standards, for vehicles engaged in domestic haulage operations. The contention that national standards might be more stringent than European standards is clearly absurd since Member States would penalise their hauliers who would find themselves competing against foreign-registered vehicles subject to less stringent standards. In contrast, the standards introduced by Member States for domestic haulage are often more “generous” than European standards. There are therefore no standards on vehicle weight and size that are applicable throughout the European Union area.

This situation cannot fail to pose problems since hauliers are tempted to apply the standards applicable in their country to international haulage operations, even when the limit values in domestic standards are higher than those adopted by the European Union. However, it is clearly impossible to check all vehicles

crossing borders and to verify that they are fully compliant with the domestic standards in force in the country into which they are entering.

The provisions adopted by the ECMT in a Resolution issued in 1991 follow the same logic and therefore pose the same problems.

In terms of environmental standards, on the other hand, the effort to reduce emissions by introducing manufacturing standards (from EURO 1 to EURO V) has allowed considerable progress to be made. There are many incentives to use vehicles that comply with the most recent standards, such as the way in which ECMT licences are distributed or the level of the charges for infrastructure use (LKW Maut) in Germany.

Drivers' working conditions

This issue is both “sensitive” and problematic. Sensitive because drivers' working conditions have an enormous impact on the cost of supplying services, and the resulting difference in costs is perceived by hauliers as the main factor distorting competition. Problematic in that it is very difficult to draw up the rules that drivers must respect, as shown by the tortuous process of drawing up regulations aimed at specifying the length of driving, rest and working times.

And yet the European Community acted in this area at a fairly early stage, at least in terms of driving and rest times and after much delay adopted an instrument, the digital tachograph, which was reputed to be tamper-proof and which made it possible to check whether drivers were complying with the established rules ⁽²⁰⁾. With regard to working time, Transport Ministries eventually managed to agree on the maximum number of working hours for salaried drivers ⁽²¹⁾ but not for self-employed workers ⁽²²⁾.

It might therefore be thought that despite the inherent difficulties with such issues, and with the one exception of self-employed drivers, harmonisation has been achieved. However, this would fail to take account of the fact that the legislation is subject to interpretation, which might not necessarily be the same in all countries. Consequently, in the recitals of Regulation No 561/2006 of the European Parliament and of the Council of 15 March on the harmonisation of certain social legislation relating to road transport, it is stated, in reference to Regulation 3820/85 which it replaced, that: “Difficulties have been experienced in interpreting, applying, enforcing and monitoring certain provisions of Regulation (EEC) No 3820/85 relating to driving time, break and rest period rules for drivers engaged in national and international road transport within the Community in a uniform manner in all Member States, because of the broad terms in which they are drafted”. While the drafting of the new Regulation is both clearer and more precise, this does not mean to say that there are no more differences in interpretation.

Moreover, there are sometimes substantial differences between the legislation and what happens in practice. The way in which the tachograph selector is used by drivers can result in major differences in the times recorded. It would therefore seem that in some countries drivers only use two selector positions, namely work and rest, with the result that time spent waiting is not counted as work time ...

²⁰ Regulation (EC) No 561/2006 of the European Parliament and of the Council of 11 March 2002 on the harmonisation of certain social legislation relating to road transport.

²¹ Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities.

²² The 2002 directive provided that self-employed drivers would be subject to limitations on their working time from 23 March 2009 onwards. However, the Commission was due to submit a report on this subject two years before that date, as well as a proposal that might be to “define the modalities for the inclusion or exclusion of self-employed drivers from the scope of the directive”. The Council of Transport Ministers approved the Commission's proposal whereby “self-employed workers are to be excluded from the scope of the directive. However, this should be without prejudice to the right of Member States to include those drivers and apply the provisions of directive 2002/15/EC.”

This example means that we should relativise what we have called advances, undoubtedly insufficient but real, in the harmonisation of regulatory texts. This harmonisation is of limited effect as the checks and sanctions in the event of non-compliance with regulatory texts are not effective.

2.3 Checks and sanctions

The lack of harmonisation is without doubt one of the reasons for the reluctance of professional hauliers associations in many countries, prompting similar reluctance on the part of their governments, regarding liberalisation. However, there is another reason, probably equally valid, which is the lack of confidence in the ability or the will of States to enforce compliance with the rules once they have been harmonised. This comment applies to both the EU and the ECMT areas. The report by the special advisory group issued in April 2005⁽²³⁾ stated that: “The lack of faith in how compliance is enforced by the States of carriers that use multilateral licences is a major obstacle to the system’s extension “.

In recognition of this problem the European Union introduced standards regarding the minimum percentage of drivers’ working days to be checked both at the roadside and at the premises of undertakings⁽²⁴⁾. The reports summarising the statistics provided by Member States issued by the Commission show that this minimum percentage is respected, or in many cases even exceeded, by Member States, and the planned increase in the percentage of total vehicles checked is undoubtedly a move in the right direction. The same is true of the co-ordination efforts pursued under the aegis of Euro Contrôle Route, a group of European road control services which collaborate “to improve safety on the roads and the observance of the road transport regulations and to promote fair competition. The general objective of the collaboration is, via consultation, cooperation and common initiatives, to harmonise inspection practices with one another as much as possible in the participating countries - and ideally throughout Europe.”

However, checks are simply one stage in a procedure that starts with the detection of an infringement and ends with a sanction, and there is no evidence that the level of tolerance shown by control services is the same in all countries. Moreover, national rules vary widely with regard to both the procedures that follow detection of an infringement to the level of punishment, if the infringement is in fact punished. As a result, for example, failure to comply with driving and rest time regulations are not sanctioned with the same severity from one country to another. To take a very practical example, a continuous driving time of 9 hours (i.e. 5½ hours more than the regulations permit) is subject to an administrative sanction in the form of a fine of 4 600 euros in Spain, 840 euros in Germany but merely 550 euros in the Netherlands. And yet this is an area where regulations have been harmonised for many years. However, can we claim that the regulations are the same when the corresponding sanctions for failing to comply with them can vary so widely?

Having become aware of this problem, at the beginning of this year the Commission adopted a Directive⁽²⁵⁾ amending annex III of Regulation (EC) No 561/2006 of 15 March 2006 regarding driving times, rest times and the digital tachograph, annex which listed the infringements to this Regulation. The new annex

²³ International Road Freight Transport in Europe - Market Access and the Future of the Licence System, CEMT/CM(2005)16, 27 April 2005

²⁴ Directive 2006/22/EC of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC. The minimum percentage number of checks was set, as from 1 May 2006, at 1% of days worked by drivers of vehicles falling within the scope of Regulations (EEC) No 3820/85 and (EEC) No 3821/85; this percentage was increased to at least 2% from 1 January 2008 and to at least 3% from 1 January 2010 and could be increased by the Commission to 4% as from 1 January 2012.

²⁵ Commission Directive 2009/5/CE of 30 January 2009 “amending Annex III to Directive 2006/22/EC of the European Parliament and of the Council on minimum conditions for the implementation of Council Regulations (EEC) Nos 3820/85 and 3821/85 concerning social legislation relating to road transport activities”.

proposes that infringements be classified into three categories according to their degree of seriousness, namely minor, serious and very serious infringements, and specifies reference thresholds for infringements relating to quantitative variables (for example, for a period of continuous driving greater than 4½ hours and less than 5 hours, the infringement is minor; from 5 hours to 6 hours, the infringement is serious; and above 6 hours the infringement is very serious). However, the Directive does not put a value, not even an indicative value, on the sanctions that might be associated with this classification. It simply makes it mandatory for States to issue a classification of minor, serious and very serious infringements by the end of 2009.

While this Directive is certainly a step in the right direction, it is only the first step towards what would once again appear to be a necessary harmonisation.

It would therefore be fair to say that hitherto, given the substantial differences that exist in most countries between the regulations and practices, the European transport sector has failed to define, and even more notably failed to create, a single market, that is to say a space in which the rules of the game, on the one hand, and the essential determinants of costs, on the other, are the same for all competitors.

In this report the author has endeavoured to present as objective an overview as possible of the construction and functioning of the road haulage sector in Europe. However, this effort to remain objective cannot override his convictions, which it would therefore be preferable to spell out explicitly.

Removing the barriers to competition and liberalisation of the road haulage market are objectives which, both in themselves and through their contribution to the liberalisation of trade, are eminently desirable. However, realising these objectives challenges the status quo and will necessarily meet with opposition. Liberalisation must not be brutal; it requires transitions that will allow actors to adapt to the new rules of the game. The slowness of the liberalisation of the road haulage market in Europe might seem in this respect to be a positive factor. In point of fact, however, it has not been able to prevent growth in tensions relating primarily to the fact that it has not been accompanied by sufficient harmonisation of the rules determining cost formation. Once harmonisation lags far behind liberalisation, the latter is seen as unfair and inefficient.

The current economic crisis, however, may well jeopardise the advances that have been made in Europe by increasing the lure of protectionism. The only way to withstand that temptation is to step up efforts to harmonise rules, the checking of compliance with those rules and the sanctioning of infringements in different Member States.