THE GERMAN MINIMUM WAGE ACT (MILOG) AND INTERNATIONAL TRANSPORT IN THE LIGHT OF EU LAW

Jan Barcz

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LIST OF ACRONYMS

AEntG	*Das Arbeitnehmer-Entsendegesetz* (German Act on Posted Employees)
BAG	*Bundesarbeitsgericht* (German Federal Labour Court)
BDSG	*Das Bundesdatenschutzgesetz* (German Federal Act on Data Protection)
MiLoG	*Das Mindestlohngesetz* (German Minimum Wage Act)
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
TS	Court of Justice of the European Union
TEC	Treaty Establishing the European Community
EU	European Union
BL	Basic Law (German Constitution)
CTP	EU Common Transport Policy
EC	European Community

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SUMMARY

1. The German Minimum Wage Act (MiLoG – *Mindestlohngesetz*) came into force on 1 January 2015. On the basis of this Act, a minimum rate of EUR 8.50 per one hour of work was set. The Act applies to all the employees in the Federal Republic of Germany, including the employees employed by the undertakings based in other EU Member States. Therefore, MiLoG interferes in the operation of the European internal market as it affects the freedom of providing services and the free movement of goods. Transport undertakings, based in other EU Member States (including Poland), employing specially mobile workers who perform transport services in various Member States, have been particularly affected by MiLoG (in accordance with MiLoG's provisions, it applies to all international transport operations – transit, cabotage and other forms of international transport). This is even more important as the German legislator failed to use the possibility, provided under Directive 96/71/EC concerning the posting of workers, to exclude the above transport operations from the scope of its application because of the short-term nature of the provision of the service in the Federal Republic of Germany and its small scale. This resulted in transport undertakings and a number of the EU Member States raising serious accusations that MiLoG was contrary to the EU internal market freedoms and detailed regulations contained in the EU secondary law statutes.

2. The European Commission shared the accusations by first instituting (on 21 January 2015) informal PILOT action against Germany, and thereafter (on 19 May 2015) the action pursuant to Article 258 of the TFEU regarding the failure to fulfil the obligations of the EU Member State. At this stage of the proceedings, the documentation (the Commission's charges and the explanations of the German government) is confidential, but in the notice dated 19 May 2015 the Commission decided that the application of minimum wages pursuant to MiLoGw was unjustified with respect to transit shipments and "certain international transport operations" because "it created disproportionate administrative barriers that prevent the proper functioning of the internal market." The German government suspended the application of MiLoG for the duration of the dispute resolution, but only with respect to transit transport operations.

3. MiLoG significantly interferes in the freedom of providing services and the free movement of goods, especially with respect to international transport operations that are covered by the EU Common Transport Policy. This means that national measures taken to that extent by the Member States (including statutory measures such as MiLoG) are subject to a review as to their compliance with EU law. The provisions of the Treaty on the Functioning of the European Union (Articles 94-96) confirm the general conditions upon which the compliance of such national measures with the EU law is declared, namely: the need to take into account "economic circumstances of carriers," compliance with the non-discrimination principle and the prohibition, on principle, on Member States imposing "conditions" with respect to transport that involve economic protectionism. Notwithstanding such specific conditions set out under the Common Transport Policy, national measures taken by the Member States (such as MiLoG) that affect international transport on the European internal market, are subject to a review as to their

compliance with EU law with respect to: the regulation contained in the EU secondary law statutes (a number of such statutes were adopted in the area of the Common Transport Policy), and where national measures go beyond the application of the European secondary law statutes they are reviewed in terms of their compliance with EU law on the basis of general checks, specified in the decisions of the Court of Justice of the European Union.

4. Statutes of the European secondary law (in particular Directive 96/71/EC concerning the posting of workers and Regulation 1072/2009 and Regulation 1073/2009) point to a specific status of specially mobile employees of the transport sector that should justify the exclusion of the minimum wage requirement with respect to them (because of the short term of the service and its small scale in a State other than the home State of the undertaking where they are employed), which is foreseen by Directive 96/71/EC. In addition, general checks of the review of compliance of national measures (such as MiLoG) with the European law, specified in the judgments of the Court of Justice of the European Union, show that the "overriding requirements of the general interest," which may justify the restriction of freedoms of the European internal market, also include employee rights (in this minimum wage guarantees), though the possibility of referring to the "overriding requirements of the general interest", among other things, has to take into account the principle of proportionality. According to this principle, in the case of specially mobile employees (in the transport sector), the degree to which they are linked with the "standard of living" in the country where transport operation is performed and in the "home base" (registered office of the undertaking in which workers are employed) should be taken into account.

5. Notwithstanding the above, national measures (such as MiLoG) will be contrary to EU law if they are economically dominant and their consequences are protectionist. The provisions of MiLoG that are currently in force unambiguously make it difficult for transport undertakings to benefit from freedoms on the internal market and trigger far-reaching protectionist consequences resulting not only in creating barriers to the entry to the German market, but even in creating the risk of bankruptcy by smaller transport undertakings in other Member States.

6. In light of the assessment criteria of the compliance of MiLoG with the European law, the conclusions regarding specific types of international transport operations are the following.

7. The application of MiLoG to *sensu stricto* transit (the requirement of a minimum wage, administrative requirements, control measures and fines) is contrary to EU law.

8. The justification of the application of MiLoG to cabotage (mentioning the reference in the regulations on road and passenger transport to Directive 96/71/EC) should be considered and reviewed: on the one hand, one may refer to the Directive only subject to the requirement of the limitation of its application because of short-term service or its "small scale", on the other hand, as cabotage usually constitutes an integral element of international transport operations, the criteria detailing the exclusion of the application of Directive 96/71/EC with respect to such operations

should be applied (compare the next section). The present scope of application of MiLoG (to cabotage transport) raises significant doubts as to its compliance with European law.

9. The application of MiLoG to other forms of international transport operations (unloading or loading takes place in Germany in the course of a transport operation that covers more than two States) is contrary to European law. The European Commission shares this opinion and is looking for a precise criterion that would enable the exclusion of certain transport operations from the application of Directive 96/71/EC (and, therefore, from MiLoG application) because of their short-term nature and small scale. For the Commission, a level of 10% of "transport operations" carried out in Germany, as part of a single transport operation covering more than two States, would constitute the criterion; and the "operations" would be calculated as the employee's working time, for which a reference point would be the number of kilometres driven (from the place of departure to the destination where the last unloading/loading operation is performed). The European Commission's proposal is aimed at establishing an unambiguous criterion that enables one to conclude in which cases international transport operation will be excluded from the scope of Directive 96/71/EC (therefore, no minimum wage requirement will apply), however, without any doubt this proposal requires some discussions and a review in light of the interpretation rules applicable to the proportionality principle (in the context of the national measure setting a minimum wage), the specific nature of the transport sector (specially mobile employees) and relevant statistical tests as well as economic consequences.

10. A specific problem here is cross-border bilateral transport (entering Germany to unload/load cargo and driving back). The application of MiLoG in that case clearly violates the proportionality principle (the employee's connection with the State where the service is provided is minor) and therefore it is contrary to EU law.

11. The scope of administrative requirements and control measures specified in MiLoG, is significantly contrary to EU law. With respect to international transport operations, that are covered by Directive 96/71/EC (including Directive 2014/67/EU), the scope of administrative requirements and control measures violates the proportionality principle because it discourages (and often even prevents) transport undertakings from other Member States from using the freedoms of the European internal market – the freedom of providing services and the free movement of goods. It applies all the more to international transport operations that are not covered by the scope of Directive 96/71/EC.

12. The sanctions (fines) provided under MiLoG are drastically high and violate the proportionality principle: first, the fines are significantly higher than relevant fines provided for similar violations under German national law; second, the use of such drastic fines may lead to the bankruptcy of transport undertakings based in other Member States (in Poland), in particular small and medium enterprises. Therefore, we may conclude that the fines established under MiLoG violate the proportionality principle, discourage companies from using the freedoms of internal market and most of all are economically protectionist.

1. Introduction

The German Minimum Wage Act (MiLoG – *Mindestlohngesetz*) came into force on 1 January 2015. On the basis of this Act, a minimum rate of EUR 8.50 per one hour of work was set. The Act applies to all employees in the Federal Republic of Germany, including the employees employed by undertakings based in other EU Member States. Therefore, MiLoG interferes in the operation of the European internal market as it affects the freedom of providing services and the free movement of goods. Transport undertakings based in other EU Member States (including Poland), employing specially mobile workers who perform transport services in various Member States are particularly affected by MiLoG. **This resulted in transport companies and a number of the EU Member States raising serious accusations that MiLoG is contrary to the EU internal market freedoms and detailed regulations contained in the EU secondary law statutes**.

The European Commission shared the accusations by first instituting (on 21 January 2015) informal PILOT action [1] against Germany. The explanations presented by the German government on 2 March 2015 about the compliance of MiLoG with European law must have left the European Commission dissatisfied, as on 19 May 2015 it made the decision to **institute proceedings against Germany regarding the failure to perform its obligations under the Treaties constituting the foundations of the EU** (pursuant to Article 258 of TFEU)[2] and sent a letter of formal notice to the German government, specifying the objections regarding MiLoG from the perspective of its compliance with European law.

If follows from the Commission's press release[3] that, whilst fully supporting the introduction of a minimum wage in the EU Member States in principle, which is in line with the EU social policy commitment, as "the Guardian of the Treaties" the Commission must also ensure that the application of national measures is fully compatible with EU law. From this perspective, the **European Commission stated with respect to MiLoG** that "the application of the Minimum Wage Act to all transport operations that touch German territory restricts the freedom to provide services and the free movement of goods in a disproportionate manner." In particular, the Commission stated: "the application of German measures to transit and certain international transport operations … cannot be justified as it creates disproportionate administrative barriers that prevent the internal market from functioning properly." In the European Commission's view, it is possible to apply "more proportionate measures to safeguard the social protection of workers and to ensure fair competition, whilst allowing for free movement of services and goods."

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[1] http://ec.europa.eu/community_law/infringements/application_monitoring_en.htm

[2] European Commission. Press release. Strasbourg, 10 May 2015. Transport: Commission launches infringement case on the application of the German Minimum Wage law to the transport sector.

[3] Ibid.

On 20 July 2015, the German authorities, as requested, presented their position,[4] taking a stance on the problems raised in the European Commission's letter. **The details of the European Commission's letter and the stance of the German government are not known because at this stage of the proceedings the documents are confidential**.

Additionally, it has to be emphasised that, because of the weight of the raised charges as to the inconsistency of MiLoG with the EU law, **the German government decided,** together with its consent to institute PILOT procedure, to **suspend the application of some of MiLoG's provisions**. The suspension covers the application of administrative requirements and anticipated fines for the breach of MiLoG with respect to transport companies based outside of Germany. **However, the decision on the suspension applies *sensu stricto* to transit only; it does not extend to other forms of international transport and cabotage**. **The term of the suspension was defined flexibly, it will last until "the problems related with the European Law are clarified."**[5]

However, because of **drastic instability of trading**, caused by MiLoG (eliminated only a little by the temporary suspension of its application with respect to *sensu stricto* transit), in particular with respect to international transport operations, **the task of this expert opinion is to define the main areas of inconsistency of MiLoG's provisions with European law**.

The first part of the opinion identifies MiLoG's regulations that create doubts as to the consistency with EU law (while the objective of this part was not to provide a detailed analysis of MiLoG's provisions),[6] **the second part** of the expert opinion defines the criteria of assessing the compliance of MiLoG's provisions with European law, **and the third part** assesses the problematic provisions of MiLoG in light of European law.

Finally, it has to be stated that the controversies around the compliance of MiLoG with EU law constitute an **element of a fundamental problem related with the operation of the EU internal market**, as part of which the balancing of efficient operation of the market freedoms with the implementation of social policy, at the EU level, aimed at improving living and employment conditions, appropriate social protection and a dialogue between social partners, is sought. A debate concerning this issue was started by well-known judgments of the Court of Justice of the

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[4] PAP, 22 July 2015 .

[5] Aussetzung der Kontrolle und Ahndung von Verstößen nach dem Mindestlohngesetz bei Personen- und Güterbeförderung aus EU- oder Drittstaaten im reinen Transitverkehr. BMAM website (downloaded on 15 April 2015).

[6]Detailed explanation of MiLoG's provisions in Polish compare for example: *Świadczenie usług w Niemczech po wprowadzeniu płacy minimalnej od 1.01.2015 r.,* Wendler Tremml Rechtsanwälte, Düsseldorf-München-Berlin-Brüssel-Warschau-Krakau, Berlin 2014. Two parts of the presentation available on WPHI website of the Polish Embassy in Berlin (hereinafter: Wendler, Tremml, *Świadczenie usług w Niemczech).* Also compare: Th. Lakies: *Mindestlohngesetz-Basiskommentar zum MiLoG.* 1. Auflage. Bund Verlag, 2015.

European Union from December 2007 in the following cases: C-438/05 Viking-Line and C-341/05 Laval.

2. German Minimum Wage Act[7] (MiLoG)

2.1. General Information

The German Minimum Wage Act (MiLoG) was passed on 11 August 2014, enacted on 16 August 2014, and its application commenced on 1 January 2015. It establishes (§1 (2)) a minimum hourly rate of EUR 8.50 euro and guarantees (§1 (1)) each employee to have a claim against the employer for the payment of at least this rate. Germany became the 22nd EU Member State that introduced a general minimum wage rate.[8]

MiLoG's regulations to the extent considered hereunder should be interpreted in combination with other German laws,[9] in particular with:

- **Act on Posted Employees**[10] *(Arbeitnehmer-Entsendegesetz*-AEntG) dated 20 April 2009 (last amended on 11 August 2014 pursuant to MiLoG);

[7] *Gesetz zur Regelung eines allgemeinen Mindestlohns* (Mindestlohngesetz - MiLoG), Bundesgesetzblatt (dalej: BGBl). I, p. 1348.

[8] Exceptions are: Denmark, Finland, Italy, Austria, Sweden, Cyprus

[9] Among other things, the following secondary regulations were adopted in connection with MiLoG:

1) Regulation of the Federal Ministry of Finance dated 26 November 2014 on the Obligation to Report Minimum Wage (adopted in consultation with the Federal Ministry of Labour and Social Affairs), *Verordnung über Meldepflichten nach dem Mindestlohngesetz, dem Arbeitnehmer-Entsendegestz und dem Arbeitnehmerüberlassungsgesetz (Mindestlohnmeldeverordnung),* BGBl. 2014, I, p. 1825),

2) Regulation of the Federal Ministry of Finance dated 24 November 2014 on Identifying the Competent Office *(Verordnung zur Bestimmung der zuständigen Behörde nach § 16 Absatz 6 des Mindestlohngesetzes (MiLoGMeldStellV),* BGBl. 2014, I, p. 1823);

3) Regulation of the Federal Ministry of Finance dated 26 November 2014 on the Obligation to Record and Store Documentation (adopted in consultation with the Federal Ministry of Labour and Social Affairs) *(Verordnung zur Abwandlung der Pflicht zur Arbeitsaufzeichnung nach dem Mindestlohngesetz und dem Arbeitnehmer-Entsendegestz (Mindestlohnaufzeichnungsverordnung),* BGBl. 2014, I, p. 1824),

4) Regulation of the Federal Minister of Labour and Social Affairs Regarding Documentary Obligations Pursuant to § 16 and § 17 of MiLoG *(Verordnungzu den Dokumentationspflichten nach den § § 1 6 und 17 des Mindestlohngesetzes in Bezug auf bestimmte Arbeitnehmergruppen* (Mindestlohndokumentationspflichten-Verordnung-MiLoDokV), (BAnz. AT 29.12.2014 V1).

[10] *Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen* (Arbeitnehmer-Entsendegesetz - AEntG), BGBl. I, p. 779.

- **Act on Temporary Work** *(Arbeitnehmerüberlassungsgesetz*- AUG) dated 7 August 1972 in a version from 3 February 1995 (last amended on 11 August 2014 pursuant to MiLoG);

- **Act on Combatting Illegal Work** *(Schwarzarbeitsbekämpfungsgesetz* - SchwarzArbG) dated 23 July 2004 (last amended on 11 August 2014 pursuant to MiLoG).

2.2. Territorial Scope of MiLoG's Application

When discussing the issues related with the territorial scope of MiLoG, §20 of MiLoG is of key importance, which **imposes an obligation on employers with "their registered office in Germany and abroad" to pay the wage to the employees employed in the territory of Germany** (im *Inland)* **that guarantees at least the above mentioned minimum rate**.

More detailed clarification of the above provisions can be found in the Act on Posted Employees *(Arbeitnehmer-Entsendegesetz*- AEntG), which, in the last paragraph of §2, stipulates that, among other things, **minimum wages must be "mandatorily applied" with respect to the "employment relationships" between the employer with its registered office abroad and its employee employed in Germany** (im *Inland)*. In §2 of AEntG there is a material explanation of the objective of this Act, namely to ensure appropriate working conditions for employees who are posted transnationally and to guarantee fair and effective conditions of competition. What is more important, the **Act on Posted Employees (AEntG) does not introduce any restrictions as to the length of the "employment relationship" even though the Directive 96/71/EC concerning the posting of workers** [11] **provides for this possibility** (Article 3 (2) and (3) of Directive 96/71/EC).

Therefore, the German legislator made a conscious decision about covering all "employment relationships" of this kind, regardless of their length, by the minimum wage requirement.[12]

The justification of the application of MiLoG to the "employment relationships" established on the basis of national law of other EU Member States refers mostly to Directive 96/71/EC concerning the positing of workers and, to the extent going beyond the Directive, to Regulation (EC) No 593/2008 of 17 June 2008 on the law

[11] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the positing of workers in the framework of the provision of services, O. J. of the EC 1997 L 18/1.

[12] It has to be noted that in other areas German law provides for exceptions with respect to transit. For example, German Federal Act on Data Protection *(das Bundesdatenschutzgesetz*- BDSG) stipulates in §1 (5), fourth sentence, that its provisions do not apply when the "data carrier" is located in the German territory *(im Inland)* only "in transit".

applicable to contractual obligations (Rome I), especially its Article 8 and Article 9.[13]

2.3. Personal Scope of MiLoG Application

In accordance with §22 (1), first sentence, **MiLoG applies to "workers"**. Pursuant to §1 (1) MiLoG, each worker has a claim against the employer for the payment of at least the minimum rate of EUR 8.50 per hour, and the employer is obliged to pay not less than this rate (§20 of MiLoG).

Within the meaning of the German law, a "worker" is any person who is obliged to perform work in favour of other person in return for compensation, and in order to determine the existence of the "employment relationship" it is sufficient for the person to be obliged, on the basis of the concluded contract (regardless of its name), to perform work in compliance with the superior's instructions, and therefore to recognise the employer's right to dispose of his/her labour force.[14] At this point, it has to be recalled that, in light of the provisions of Directive 96/71/EC, in order to define the notion of the "posted worker", the definition of a "worker" under the national law of the Member State to whose territory the worker was posted will be used (Article 2 (2) of Directive 96/71/EC).

Therefore, the scope of MiLoG also applies to workers employed by undertakings based outside of Germany, as long as they work in Germany.

2.4. Minimum Wage Definition

To that extent, EU law has also not provided full harmonisation of national regulations. Directive 96/71/EC concerning the posting of workers introduced an obligation to ensure minimum wages for workers, **but the setting of a minimum wage and its definition were left to the national legislator and the practice of a given State**. Directive 96/71/EC in its Article 3 (1) g) stipulates only that "(…) the concept of minimum rates of pay is defined by the national law and/or practice of the Member State to whose territory the worker is posted." The Court of Justice expressed its unambiguous opinion following this spirit, in its judgement dated 12 February 2015 in the case C- 396/13 Sähköalojenammattiliittory / Elektrobudowa Spółka Akcyjna.

[13]Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 in the law applicable to contractual obligations (Rome I), O.J. of the EU 2008 L 177/6.

[14] In more detail in: Wendler, Tremml, *Świadczenie usług w Niemczech* part II, slide 10.

The sole fact of Germany passing MiLoG and setting the hourly minimum wage under it at EUR 8.50 does not raise any doubts in light of the European law.

It is also nothing special that MiLoG and AEntG, in addition to the statement that with the hourly rate of EUR 8.50 **a gross wage is meant, do not define precisely any elements of the compensation** that make up the minimum wage. **Such elements arise from national practice** (in this case, mainly from the judicial decisions of German *Bundesarbeitsgericht* - BAG) **that has to take into account the guidelines contained in Directive 96/71/WE and the judgments of the Court of Justice of the European Union**.

With respect to the guidelines contained in Directive 96/71/EC, its Article 3 (7), second sentence, stipulates that "Allowances specific to the posting will be considered to be a part of the minimum wage unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging."

Similarly, **the Court of Justice of the European Union** in its judgement dated 7 November 2013 in C-522/13 Isbir, stated that "only the elements of the wages that do not modify the relationship between the performance of the employee, on the one hand, and the mutual performance, that is obtained therefor, on the other hand, may be taken into account for the purposes of setting minimum wage.[15]

Also, the **German *Bundesarbeitsgericht*** expressed its views following a similar spirit, emphasising that there may be certain components involved that, in line with their purpose, are to remunerate for the performance of the work by the worker, for which he should be paid a minimum wage (remuneration for "ordinary" work performance).[16]

When defining the essence of the minimum wage elements and leaving the setting of the wage to the legislator and national practice, **the Court of Justice of the European Union made a material reservation that the national definition of a minimum wage cannot lead to the "obstruction of the free provision of the services between the Member States"** (the above mentioned judgment dated 12 February 2015 in C-396/13). Therefore, the interpretation of the scope of the components making up a minimum wage in the EU Member States must take into account this material guideline (it cannot obstruct the operation of internal market freedoms).

The practice of the first months when MiLoG was applied indicates that the lack of harmonisation of the concepts and the components of a minimum wage in a country that requires a specific minimum wage (Germany) with the law of the State where a worker who performs work in Germany is employed, **leads to the lack of certainty in the law** (with respect to undertakings that employ the workers) **and,**

[15]Item 40 of the judgment justification (it was about the interpretation of Directive 96/71/EC).

[16]In detail: Wendler, Tremml, *Świadczenieusług w Niemczech*, part II, Slide No 49.

as a result, to uncertainty in trading, which constitutes a material barrier to the use of the EU internal market freedoms.

2.5. Administrative Requirements and Control Measures

Very **severe administrative requirements and control measures** with respect to employers based outside of Germany were set pursuant to MiLoG, and they also apply to the undertakings in transport sector.

Pursuant to §16 of MiLoG, an employer with its registered office outside of Germany, is obliged to make numerous filings if its worker performs work on the territory of Germany.

Mostly, it involves the obligation to report the workers on a form in German that contains detailed information, then the employer's obligation to comply with MiLoG with respect to the delivery of documentation (in German), stored outside of Germany, at the request of a relevant German authority, finally, an obligation to submit an operating schedule that may cover the employment period of up to six months.[17]

Pursuant to §17 (2) of MiLoG, an employer with its registered office outside of Germany must store (in Germany), for at least two years, all records (in German) related to the requirements set out in MiLoG, in particular detailed information about the time of employment in Germany and the remuneration payment[18] (with certain simplifications for the transport companies employing mobile workers).

It has to be noted that the employer will be released from the obligations to make filings and store documentation if the worker receives a monthly remuneration in excess of EUR 2,958[19] (according to the most recent information this threshold was reduced down to EUR 2000, if (gross) remuneration was regularly paid within the last 12 months).[20]

The assessment of the compliance of the administrative requirements and control measures established pursuant to MiLoG with the European law is presented in Section 8 hereof.

2.6. Sanctions if MiLoG's Requirements Are Not Complied With

[17]In more detail: ibid, slides 66 through 75.

[18]In more detail: ibid, slide 76.

[19] And the employer must have the relevant documentation, demonstrating that the above conditions were met, available in Germany, in German. §1 Mindestlohndokumentationspflichten-Verordnung - MiLoDokV.

[20]Der Tagesspiegel of 30 June 2015.

§21 of MiLoG provides for **significant penalties** for a failure to comply with the obligations thereunder:

- **up to EUR 500,000** if due wages are not paid or if they are paid with delay;
- **up to EUR 30,000** in any other case specified in the Act (breach of the obligations with respect to various filings, obligation to co-operate during the audit, confirmations of working time, obligation to store documentation regarding working time and providing access to the documentation).

The violations of MiLoG are classified as (administrative) offences (*Ordnungswidrigkeiten*). A "competent authority" is *Bundesfinanzdirektion West*, appointed in accordance with §16 (6) of MiLoG pursuant to the Regulation of the Federal Ministry of Finance dated 24 November 2014 on Identifying the Competent Office[21]. The course of the proceedings is defined by the Federal Code of Offences (*Gesetz über Ordnungswidrigkeiten*).[22]

The assessment of the compliance of the sanctions (fines) established pursuant to MiLoG with EU law is contained in Section 9 hereof.

3. Review of MiLoG Compliance with the European Law

The Minimum Wage Act (MiLoG) triggered a number of problems in light of German law, including the German constitution, the Basic Law (BL), in particular references were made to Article 9 (3) of the BL (freedom to enter into collective labour agreements), the scope of the exclusions from MiLoG, too short *vacatio legis* and the impact on public procurement law.[23]

In addition, MiLoG has a significant cross-border impact and influences the freedoms of the EU internal market, as it affects businesses incorporated in other European Member States and conducting business activities in the German territory. In particular, the problems focus around the EU freedom to provide services and the free movement of goods, and in particular the forwarding, transport and logistics sectors are affected by MiLoG.

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[21] *Verordnung zur Bestimmung der zuständigen Behörde nach § 16 Absatz 6 des Mindestlohngesetzes (MiLoGMeldStellV),* BGBl. 2014, I, p. 1823.

[22] Of 1 October 1969, as amended.

[23]Por. P. Zeising, D.-R. Weigert: *Verfassungsmäßigkeit des Mindestlohngesetzes,* Neue Zeitschrift für Arbeitsrecht 2015, No 1, p. S. 15 et seq.; *Die Verfassungsmäßigkeit des allgemeinen gesetzlichen Mindestlohns.* Rechtsgutachten auf Ersuchen der Hans-BöcklerStiftung vorgelegt von Professor Dr. Dr. h. c. Ulrich Preis Geschäftsführender Direktor Institut für Deutsches und Europäisches Arbeits- und Sozialrecht der Universität zu Köln und Dr. Daniel Ulber Akademischer Rat a.Z. Institut für Deutsches und Europäisches Arbeits- und Sozialrecht der Universität zu Köln, Köln, im Mai 2014.

Additionally, one cannot forget about the important impact of MiLoG on the public procurement procedure,[24] as well as other areas of business activities in which a business entity incorporated in other Member States undertakes business activities in Germany as part of the freedom of providing services.[25]

Therefore, the German MiLoG must be subject to review in light of EU law. As the Act creates significant controversies from the perspective of the European law (in particular in the area of transport), as were raised by a number of other Member States[26] (including Poland)[27] and by the hauliers' associations from such states,[28] the European Commission is currently assessing its compliance with EU law (compare introduction).

4. Review Criteria for MiLoG Compliance with EU Law

International transport within the EU is covered by the EU Common Transport Policy (Articles 90 through Article 100 TFEU, in particular Article 100 (1) of the TFEU), i.e. it is covered by the EU competencies (Article 4 (2) g) of the TFEU). **It means that national measures taken to that extent by the Member States (including statutory measures like MiLoG) are subject to the review as to their compliance with the European law**.

The provisions of the TFEU confirm general grounds on which the compliance of such national measures with EU law is declared, including, but not limited to:

- the need to take into account the "economic circumstances of carriers" (Article 94 of the TFEU);
- specifying more precisely the principle of non-discrimination (Article 95 of the TFEU);

[24]Compare, for example: M. Ott, *Mindestlöhne können gegen EU-Recht verstoßen,* Staatsanzeiger Medien aus Baden-Württenberg (downloaded on 17 May 2015).

[25] In the case of the freedom of entrepreneurship, i.e. conducting "permanent" business activities in the German territory, the business entity is still bound by all national regulations applicable to a given sector in the Member State where business activities are conducted.

[26]Joint letter (2015) of the Republic of Bulgaria, the Republic of Croatia, the Czech Republic, the Republic of Estonia, the Hellenic Republic, Hungary, the Republic of Lithuania, the Republic of Poland, Romania, the Slovak Republic, the Republic of Slovenia to Ms Andrea Nahles, Federal Minister of Labour and Social Affairs Mr Alexander Dobrindt, Federal Minister of Transport and Digital Infrastructure concerning the impact on the EU transport sector of the Minimum Wage Act adopted by the Federal Republic of Germany.

[27] Compare, for example: a letter of the Minister of Infrastructure and Development, Maria Wasiak, dated 23 December 2014 to the Commissioners: E. Bieńkowska, V. Bulc and M. Thyssen. Actions of the Polish government with respect to MiLoG are described, for example, on the website of the Ministry of Infrastructure and Development.

[28] A presentation of the positions to that extent, for example, website -Protestprzewoznikow.pl

- prohibition, as to the principle, on Member States "imposing conditions" in respect of transport operations involving any element of economic protectionism (Article 96 of the TFEU).

Notwithstanding the above specific grounds set out in the Common Transport Policy, national measures taken by the Member States (such as MiLoG), affecting international transport on the EU internal market, are subject to review as to their compliance with EU law with respect to:

- the regulation contained in the **statutes of EU secondary law** (a number of such statutes were adopted in the area of the Common Transport Policy);

- where the national measures go beyond the application of the EU secondary law statutes, they are subject to review as to their compliance with the EU law **based on general checks,** specified in more detail in the judgments of the Court of Justice of the European Union.

The above order of priority is material because general checks for the review of the compliance of national measures (such as MiLoG) with the EU law (compare Section 6) are applied when no detailed regulations, contained in the secondary law statutes (EU Regulations, Directives and Decisions), were passed in a given sphere of the European internal market.

First, one has to discuss the EU secondary law statutes that are relevant for the review of MiLoG's provisions as to the compliance with EU law, and thereafter the general checks for the review of national measures in light of EU law (expressed specifically in the case law of the Court of Justice of the European Union.

5. EU Secondary Law Relevant for an Assessment of MiLoG

As mentioned above, the assessment of the compliance of MiLoG with EU law should be made primarily with reference to the relevant EU secondary law statutes**.** First, we have two Directives regarding posted workers, relevant in the context of the freedom of providing services, including transnational transport services:

- **Directive 96/71/EC** concerning the posting of workers;[29]

- **Directive 2014/67/EU** on the enforcement of Directive 96/71/EC.

The first of these (Directive 96/71/EC), applies to the setting of minimum wages by the Member States (as part of the freedom of providing services), and the other (Directive 2014/67/EU) specifies more precisely the scope of administrative requirements and control measures that the States may establish to that extent.

[29]Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, O.J. of the EU 1997 L 18/1.

As also mentioned above, a number of material EU secondary law statutes were passed as part of the EU Common Transport Policy. Two of them are of key importance for an assessment of MiLoG in light of European law:

- **Regulation No 1072/2009** on road transport;[30]
- **Regulation No 1073/2009** on passenger transport.

The above regulations are material, as they refer to Directive 96/71/EC with respect to cabotage, which could constitute the justification of applying MiLoG to that extent. However, as we are going to see further, in this case

- neither the scope of the application of Directive 96/71/EC,
- nor the scope of cabotage services to which it would apply,

are precisely presented.

Finally, one has to consider the relevance of **Regulation No 593/2008** on the law applicable to contractual obligations (Rome I), which is mentioned in the context of MiLoG as a justification of applying minimum wages in MiLoG set in a manner that goes beyond the area of the application of Directive 96/71/EC.

5.1. Significance of Directive 96/71/EC with Relation to Transport Services

The scope of the Directive 96/71/EC application is of particular importance because to that extent, in principle, the State where the service is provided may require the employer who has a registered office in other Member State guarantee a minimum wage to a posted worker (as the minimum wage set out in MiLoG).

Three issues governed by Directive 96/71/EC are of key importance in this context:

First: specification of the **scope of** posted workers' **rights** that, in compliance with Article 3 (1) 3) of the Directive, applies to guaranteeing "employment conditions" to posted workers that, **among other things, include "minimum wage rates"**;

Second: definition of the **notion of the "posted worker"** (even in a flexible manner); in accordance with Article 2 (1) of Directive 96/71WCE the "**posted worker**" **means a worker who, "for a limited period, performs his work in the territory of a Member State other than the State in which he normally works,"** and (Article 2 (2) of Directive 96/72/EC) in this case **the definition of a worker is that which "applies in the law of the Member States to whose territory the**

[30] Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market, O. J. of the EU 2014 L 300/72.

worker is posted" will be reliable (therefore, in the case of MiLoG – a definition of the worker set out under German law);

Third: specification of the **scope of the undertakings covered by Directive 96/71/EC**:

- in accordance with Article 1 (1) of the Directive, it applies to undertakings established in a Member State **that, "in the framework of the transnational provision of services" post workers to the territory of another Member State**;

- in accordance with Article 1 (3), Directive applies then, "to the extent that such undertakings:

  a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the positing and the worker during the period of posting; or

  b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided that there is an employment relationship between the undertaking making the positing and the worker during the period of posting; or

  c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State provided that there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting."

With respect to transport services, Directive 96/71/EC does not apply only to "merchant navy undertakings" (Article 1 (2) of the Directive). The remaining cross-border transport services may be covered by Directive 96/71/EC. In other words, in the case under discussion, the application of MiLoG also to international transport services may be justified as long as it is found that with respect to a given area of transport operations Directive 96/71/EC will apply.

However, the application of Directive 96/71/EC is not unconditional and must take into account both its key objective aimed at completing the EU internal market as well as the requirement of flexible interpretation related with short duration of the service or its "small scale". In particular, this applies to specially mobile workers of transport sector.

(1) While interpreting Directive 96/71/EC, its **basic objective aimed at "completing the internal market"** (Item three of the Preamble to Directive) and **promoting in this context "the transnational provision of services", subject to "a climate of fair competition and measures guaranteeing respect for the rights of workers"** (Item five of the Preamble to Directive) has to be taken into account.

Therefore, the objective of Directive 96/71/EC is to "balance" the freedom of the provision of services, on the one hand, and fair competition and respect for the rights of workers, on the other hand.

(2) Additionally, interpretation guidelines arising from other Items of the Preamble to Directive 96/71/EC focus on **demonstrating "certain flexibility" in the course of the interpretation,** in particular consisting in the following:

- the Directive harmonises national laws of the Member States only to the extent that they lay down "**a nucleus of mandatory rules for minimum protection**" (including with respect to minimum wages) (Item thirteen of the Preamble to the Directive);

- Member States should demonstrate "some flexibility" (Item sixteen of the Preamble to Directive) also by **excluding business activities (provision of services) from the application of the Directive because of the short length of the service or its "small scale"** (Article 3 (3) and (4) of Directive).

As demonstrated above, only "merchant navy undertakings" (Article 1 (2) of Directive 96/71/EC) are explicitly excluded from the application of the Directive, therefore, potentially it may be applied to other types of international transport operations. **Reference to "flexibility" with respect to Directive 96/71/EC interpretation is particularly important with respect to cross-border transport services, mostly because of special mobility of the workers in this sector. It unambiguously follows from the circumstances surrounding the passing of the Directive, indirectly from the Items of its Preamble referred to above and the provisions of Directive 2014/67/EU (for example, Article 9 (1) b)**.

In this context, **the European Commission's services report from 2006 on the implementation of Directive 96/71/EC** contains material interpretation guidelines. The report makes a reference to the **statement of the Council and the Commission** made when the Directive was passed and enclosed with the report from the Council meeting *[Council document No 10048/96 SOC 264* COMMISSION STAFF WORKING DOCUMENT. Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2006) 159 final}; Brussels, 4.4.2006 SEC(2006) 439.*CODEC 550, statement No* 3)] with respect to transport. **It is stated in the statement that the application of Article 1 (3) a) of Directive 96/71/EC to transport undertakings assumes**:

first – transnational provision of services by an undertaking on its own account and under its direction, under a contract concluded between the undertaking providing the services and the party for whom the services are intended;

second – posting as an element of such provision of services.[31]

[31]"... Article 1(3)(a) of the Directive presupposes

It is further stated in the statement: *"Accordingly, where the aforementioned conditions are not met, workers who are normally employed in the territory of two or more Member States and who form part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water do not fall within the scope of Article 1(3)(a)."*[32] (Directive 96/71/EC).

The European Commission's report contains the following commentary: "*This situation is justified by the fact that it would be difficult to manage the practical consequences of applying different national laws to the existing relationship between the international transport undertaking (operating on its own account or on behalf for hire or reward) and its mobile staff, depending on the country to which the passengers/goods were being transported."*[33]

Therefore, the European Commission's commentary points out to a material fact that **the application of Directive 96/71/EC fully, in particular to mobile workers of international transport, would create such an administrative burden that, as a result, would make it difficult to benefit from the internal market freedoms**. It is not without reason that Directive 96/71/EC provides for the possibility of applying exceptions by the Member States and excluding some services from its application because of the short length of the service or "small scale"(Article 3 (3) and (4) of Directive) (but the German legislator did not use that opportunity in the case of MiLoG).

The statement of the Council and the Commission, that constitutes a certain authentic interpretation of Directive 96/71/EC, also clearly points out to the fact that one could speak about its application with respect to international transport operation on the EU internal market only when **the service is provided in the territory of the State (other than the home State of the undertaking** (clearly a strict interpretation of Directive 96/71/EC).

5.2. Significance of Directive 2014/67/EU with Relation to Transport Services

Directive 2014/67/EE may be of material importance for the issues under review. If it is found that Directive 96/71/EC (compare above) applies to a given type of international transport services, **then it has to be assumed that also Directive 2014/67/EU**, containing regulations aimed at ensuring efficient performance of Directive 96/71/EC, will be applied as appropriate.

- the transnational provision of services by an undertaking on its own account and under its direction, under a contract concluded between the undertaking providing the services and the party for whom the services are intended and

- posting as a part of such provision of services." ibid, p. 12.

[32] ibid.

[33] ibid, p. 13.

Directive 2014/67/EU specifies in detail in particular **administrative requirements, control measures and fines** that might be imposed by the Member States to that extent (Article 1 of Directive 2014/67/EE).

- **Article 9 (1) of Directive 2014/67/EU** specifies a list of administrative requirements and control measures that may be applied by the Member States in order to ensure the effective character of the Directive and Directive 96/71/EC; additionally, it is emphasised that the requirements and measures will be "justified and proportionate in accordance with Union law";

- **Article 9 (2) of Directive 2014/67/EU** provides that "other administrative requirements and control measures" may be imposed only in the event that "situations or new developments arise", provided that the new requirements and measures will be "justified and proportionate";

- **Article 20 of Directive 2014/67/EU** obliges the Member States to set out rules on penalties (that are effective, proportionate and dissuasive), applicable in the event of infringements of national provisions "adopted pursuant to this Directive".

Therefore, the provisions of the Directive are of material importance in the process of reviewing the compliance of administrative requirements, control measures and penalties arising from MiLoG with the Community law as long as a given type of international transport operations would be covered by the application of Directive 96/71/EC.

At this point, it has to be emphasised that also Directive 2014/67/EU points out to the necessity to interpret its provisions in the transposition process (i.e. implementation into national law) **"flexibly"**.

- In particular, it was stipulated that, "All measures introduced by this Directive **should be justified and proportionate as not to create administrative burdens or to limit the potential that undertakings, in particular small and medium-sized enterprises (SMEs), have to create new jobs, while protecting posted workers**." (Item four of the Preamble to Directive).

- Additionally, it was stipulated that ensuring the efficiency of Directive 96/71/EC **should not involve placing "unnecessary administrative burden" on the services providers**; for that purposes "factual elements" referred to in Directive 2014/67/EU (on the identification of genuine posting and preventing abuse and circumvention of the regulations) are considered to be "indicative" only and "non-exhaustive", in particular, there should be no requirement that each element is to be satisfied in every posting case (Item five of the Preamble to Directive).

5.3. Significance of the Regulation Rome I in Relation to MiLoG

To the extent that goes beyond the application of Directive 96/71/EC, the reference to **Regulation No 593/2008 on the law applicable to contractual obligations (Rome I)** in order to justify the application of MiLoG to mobile workers of transport undertakings based in other EU Member States **is not justified**.

Article 8 of the Regulation Rome I applies to the choice of law that individual employment contract would be governed by.[34] Usually this will be the law of the State where the transport undertaking is based. Only if no such choice was made, will the law of the State where the employee habitually carries out his work be applied, and work performed on temporary basis does not change this relationship. However, even in such case, as was pointed out by the Court of Justice in its judgment in the case: C-29/10 Heiko Koelzsch in the context of mobile workers or transnational transport,[35] it has to be determined "in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated, […] and the place to which the employee returns after completion of his tasks."[36] **Therefore, the State where the employee's life is concentrated will be the key reference point.**[37]

Similarly, Article 9 of the Regulation Rome I,[38] enabling the "forcing" to apply national provisions by the Member State that are regarded as "crucial for safeguarding public interests, such as political, social or economic organisations" (in particular if the performance of the contract would be contrary to law, in this case MiLoG) **does not operate automatically but should be interpreted strictly and must be subject to review in light of EU law** (to be discussed further below).

Therefore, the problem of the scope of application of Directive 96/71/EC and related Directive 2014/67/EU remains relevant in the context of the deliberations regarding minimum wages and the related administrative requirements, control measures to the extent they would have been applied to international transport operations. However, in the remaining scope MiLoG is subject to the review in the light of general checks of the compliance with EU law.

6. General Checks of MiLoG Review as to its Compliance with the EU Law in the Areas that Go Beyond the EU Secondary Law Statutes

[34] In detail: A. J. Belohlavek, *Rozporządzenie Rzym I – Konwencja Rzymska. Komentarz*, [*Regulation Rome 1 – Rome Convention. Commentary*]; Volume 1, Warsaw 2010, p. 1277 and the following.

[35]Judgment of the Court of Justice of the European Union dated 15 March 2010 in C-29/10 HeikoKoelzsch.

[36] Item 49 of the judgment justification.

[37]Also compare Item 50 of the judgment justification.

[38] In detail: A. J. Belohlavek, *Rozporządzenie Rzym I – Konwencja Rzymska. Komentarz*, Volume 2 …, p. 1 and the following.

First, it has to be noted that the regulation of the freedom of providing services in transport is excluded, in principle, from the provisions of the TFEU regarding the freedom of providing services (Article 58 (1) of the TFEU) and from the scope of the application of Directive 2006/123/EC regarding services on internal market (Article 2 (1) d) of the Directive).[39] However, detailed regulations, the provisions of Regulation No 1072/2009 and Regulation No 1073/2009 (and others issued under the CTP) **unambiguously confirm that the principle of the freedom of providing services as well as other freedoms of the internal market within the framework of the Common Transport Policy applies** (in particular: Items two and four of the Preamble to Regulation No 1072/2009, Item four to the Preamble to Regulation No 1073/2009).

Therefore, to the extent going beyond the framework admissible under the EU secondary law regulations, if the provisions of MiLoG interfere in the freedom of providing services and the free movement of goods, they constitute (national) measure that restricts the freedoms.

According to the checks of the review of the national measures in light of European law, established in the judgments of the Court of Justice of the European Union, **in order to demonstrate the consistency of the (national) measure with EU law**:

- (restrictive) measures **cannot violate the principle of discrimination** because of origin (nationality or the place of the undertaking's anchoring);

- (restrictive) measures may be justified by the "**overriding requirements of the general interest",** i.e. the imperative requirement (also the protection of the workers' rights is deemed to be the "overriding requirements of the general interest");

- in that case (the reference to the "overriding requirements of the general interest"), **national measures must fulfil the requirements of the proportionality principle** (have to lead to the achievement of the objective that it serves and cannot go beyond what is necessary to achieve it;

- measures **cannot be motivated by a business objective only.**

The Court of Justice, in its judgments, also referred to ensuring fair wages to the workers as an important element of the "overriding requirements of the general interest", justifying the restriction of freedom to provide services, while for **the relevant national measure (in this case, specifying minimum wages and related administrative requirements, control measures and fines) to comply with EU law, it has to pass the above mentioned checks**.

[39] O. J of the EU 2006 L 376/36.

The Court of Justice, in its existing decisions, formulated a **proportionality principle** with respect to the **minimum wage requirement (as an important element of the "overriding requirements of the general interest"):**[40]

- it unambiguously confirmed that the Community law (at present EU law) **does not prohibit Member States from establishing a minimum wage in their national law**, and the protection of the employee's rights, including ensuring the minimum wage, **may constitute the "overriding requirements of the general interest",** justifying the restriction of the internal market freedoms;[41]

- however, the Court of Justice emphasised that, **depending on specific circumstances** (which in each case should be analysed from the perspective of the proportionality principle) the objective pursued (namely the protection of the workers concerned, including the setting of the minimum wages) **might be "neither desired, nor proportional**";[42]

- in particular, what should be taken into account is, among other things, **the duration of the provision of services** (in the host country), the extent of **its pre-planning and the extent to which the worker is actually "transferred" to the host country, and the degree to which he will continue to be attached to the operational base of the employer in the State in which it is established;**[43]

- establishing the minimum wage requirement with respect to the workers of undertakings based in other Member State **may turn out to be disproportionate in particular because of work "on a part-time basis and for brief periods" that (the employee) carries out in the territory of one, or even several, Member States;**[44]

- in this context, it is also important whether establishing (national) requirements **significantly contributes in an obvious manner to the protection of the workers' rights** (brings actual benefit to the workers).

In a judgment dated 18 September 2014 in the case C-549/12 *Bundesdruckerei,* The Court of Justice formulated the requirements of the proportionality principle in a similar context, finding that:

"… **the requirement of a fair wage in the State where the services are provided is related with the costs of living in that Member State. If the service supplier does not have this relationship, then requiring it to ensure a minimum wage as**

[40] Judgment of the Court of Justice dated 15 March 2001in the case C-165/98 Mazzoleni.

[41] ibid, in particular Item 25 of the judgment justification (with a reference to the established case law of the CJ).

[42] ibid, Item 30 of the judgment justification.

[43] ibid, Item 38 of the judgment justification.

[44] ibid, Item 41 of the judgment justification.

in the State where the service is provided, would deprive it of gaining a competitive advantage from the differences between relevant wage rates."

Most of all, it follows from the above argumentation, contained in the Court of Justice's judgments, (for the type of transport services under discussion), that **proportionality principle requires that the following be taken into account**:

- **scope of the services (in terms of duration)** – whether the service was provided at all, and if so, whether it was not related with such a short working time that the application of the minimum wage requirement is not justified;
- the related criterion of the **extent to which the worker who is providing the service is "linked" with the "costs of living in that Member State" (i.e. where the service is provided)**.

Also, it has to be taken into account that national measures, interfering in the operation of the EU internal market (such as MiLoG), according to the established judgments of the Court of Justice, **cannot lead to a situation where the fact of benefitting from the freedoms becomes illusory for the undertaking and less attractive.**[45]

National measures (such as minimum wage requirement and the related administrative requirements, control measures and fines), barriers to transnational transport, may restrict the free movement of goods, constituting, measures equivalent to the prohibited quantitative restrictions under Article 34 of the TFEU.[46] The mechanism of verifying the national measures as to their compliance with European law is similar to that described above, i.e. the measures may be justified by the "overriding requirements of the general interest" while complying with the proportionality principle.

7. Regulations of MiLoG Regarding Individual Types of International Transport in Light of EU Law

7.1. *Sensu stricto* Transit

This means transport operations that involve passing through the German territory to other EU Member States or third countries, without any loading or unloading operations.

[45]ibid: for example Item 22 of the judgment justification (and CJ's judgments referred to therein TS).

[46]Compare: *Free Movement of Goods. Guide to the application of Treaty provisions governing Free Movement of Goods.* European Commission, Luxembourg 2010.

In this case, **no services are provided in the territory of Germany at all,** which constitutes a key condition of the application of Directive 96/71/EC. **Therefore, the Directive cannot be effectively referred to as the grounds of requiring minimum wages pursuant to MiLoG**. Further, as a result, also Directive 2014/67/EU, which would have justified administrative requirements, control measures and penalties, does not apply.

The application of MiLoG with respect to *sensu stricto* transport may then be justified in light of general checks for verifying the compliance of national measures with EU law. However, the "overriding requirements of the general interest" (protection of the employee rights), justifying the restriction of the freedom to provide services, must be interpreted in the light of proportionality principle. **In that case a "connection with Germany" (as a "point of life" for the worker) is minimum**.

Therefore, in light of general checks, it is not possible to justify that the restrictions arising from MiLoG with respect to the EU freedom of the provision of services are consistent with EU law.

Similarly, one has to assess the interpretation of the restrictions in light of the free movement of goods: they make up restrictions equivalent to the prohibited quantitative restrictions (Article 34 of the TFEU) that in the cases of *sensu stricto* transit cannot be justified by the "overriding requirements of the general interest" because of the breach of the proportionality principle.

Conclusion: the application of MiLoG with respect to *sensu stricto* transit (requirement of minimum wage, administrative requirements, control measures and fines) is contrary to EU law.

7.2. Cabotage

In this case, a transport undertaking based in other Member State makes a temporary haulage of goods or persons in the territory of the host country (loading and unloading, taking and transporting passengers). The conditions of cabotage operations are closely defined with respect to road haulage services (general duration and number of operations) (Article 8 and Article 9 of the Regulation No 1072/2009) and to passenger transport (types and conditions of cabotage operations) (Articles 14, 15 and Article 16 of the Regulation No 1073/2009).

In the context of the problem under consideration, most of all it has to be indicated that **both regulations (Regulation No 1072/2009 in Item 17 of the Preamble and Regulation No 1073/2009 in Item 11 of the Preamble) provide that "The provisions of Directive 96/71/EC apply to transport undertakings performing cabotage operations.**[47]

[47] "*On the other hand, 'cabotage transport operations', in which the various parts of the journey take place within the borders of the same Member State, fall within the scope of Article 1(3)(a) of the Directive 3.8.* COMMISSION STAFF WORKING DOCUMENT. Commission's services

The above reference may be used to justify the application of Directive 96/71/EC (including the minimum wage pursuant to MiLoG) with respect to cabotage in the territory of Germany.

However, this conclusion should be considered and adjusted in light of a number of material circumstances:

- Cabotage, in principle, is not an individual operation but it is usually carried out in the framework of international transport; **cabotage operations are carried out only in the framework of incoming international haulage and after international haulage**; therefore, **legal arrangements applicable to international road transport** (e.g. principles applicable to transit through one or more Member States or third parties) **should be taken into account with respect to cabotage operations** (that constitute their integral part);

- A reference to Directive 96/71/EC in the regulations on road and passenger transport means that the **Directive could be applied with respect to cabotage (but) in compliance with the interpretation rules, set out thereunder, taking into account the necessity to make interpretation that is focused at narrowing down the scope of its application and maintaining flexibility, especially with respect to specially mobile workers of the transport sector** (that is pointed to by the regulations); it means that **it would be justified to exclude the application of Directive 96/71/EC to that extent because of the short length of the service delivery or its "small scale"** (the discussion on formulating the criteria with respect to international transport operation more precisely is ongoing, to the extent known (compare next section) in the proceedings launched by the European Commission with respect to Germany; the resolution to be found should be applicable also to cabotage, as appropriate);

- The justification of this approach generally arises from **the internal market freedoms** that are in place under the Common Transport Policy, and the above mentioned regulations are directed at strengthening the EU internal market operation; **the limitations and the removal of barriers in cabotage operations constitute the only way to achieve efficiency in the transport and infrastructure system within the EU**; the adoption of direct or indirect barriers to cabotage operations by individual Member States (including social regulations affecting international transport) **raises a question mark over achieving the objectives of the regulations aimed at creating uniform European transport area**;

- This is confirmed by important European Commission's documents: **cabotage operations are directly related with the key objectives set out**

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report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2006) 159 final}; Brussels, 4.4.2006 SEC(2006) 439, p. 13.

in the European Commission's White Paper – *Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system* (COM (2011) 141 final version); cabotage operations constitute a part of the objectives necessary to develop the new and durable fuels and drive systems, as well as for optimising the combined logistic chain capacity, including the use of more energy efficient modes of implementation.

Conclusion: the justification of the application of MiLoG to cabotage (mentioning the reference to Directive 96/71/EC in the regulations on road transport and passenger transport) has to be considered and reviewed: on the one hand, it is possible to refer to the Directive only subject to the requirement to limit the scope of its application because of the short term of the service provision or its "small scale", on the other hand, as cabotage usually constitutes an integral element of international transport operations, in this area the criteria specifying in detail the exclusion of the application of Directive 97/71/EC with respect to such operations should be applied (compare section below). The current scope of the MiLoG application (to cabotage operations) raises certain doubts as to its compliance with EU law.

7.3. Other Forms of International Transport

In this case, we mean international transport operations, during which – in the course of performing transport services in a number of countries – there are unloading or loading operations in the territory of Germany.

The application of MiLoG to that extent is justified by the reference to Directive 96/71/EC (service is provided in the German territory). **However, this position creates material doubts as it fails to take into account both the requirement of the "flexible" interpretation of Directive 96/71/EC, in particular the possibility to withdraw from its application because of its short-term nature or the "small scale" of the provided services, as well as the judgments of the Court of Justice with respect to the assessment of national measure (such as MiLoG) in the light of the proportionality principle: the position orders one to take into account the duration of the service delivery and the "connection" of the worker who provides the service with the "costs of living in that Member State" (i.e. where the service is provided)**.

From what we know, the **European Commission, when instituting the proceedings against Germany for the breach of the Treaties, shared the same assessment**. It follows from the press announcements [48] that the **European Commission, while looking for the criterion that allows the abandoning of the application of Directive 96/71/EC (with respect to such international transport operations), proposed to adopt a criterion whereby if one transport**

[48] For example, M. Pfnür, *MiLoG niegroźny dla większości przewoźników [MiLoG Not Dangerous to Most Carriers]*, Transport Manager 2015 (15), No 3, pp. 20 and 21.

operation includes more than two countries and the "transport operations" in the German territory are less than 10%, then this situation would not be covered by MiLoG, in other words, such "transport activities" would be excluded from the application of Directive 96/71/EC. The "transport activity" would be calculated as the working time of the employee for whom a reference point would be the distance of travelled kilometres (from the place of departure to the destination where the last unloading/loading takes place).

This proposal is subject to criticism (while the criticism arises in particular from the fact that there are no details with respect to the calculation of the said 10%), however, it is mostly pointed out that the proposal would not be of significant importance for transport companies based in Poland as the majority of such operations (including loading or unloading in the German territory) exceeds the threshold being considered by the European Commission.[49]

The proposal is aimed at establishing an unambiguous criterion that allows the identification in which cases an international transport operation will be excluded from the application of Directive 96/71/EC (and therefore, the minimum wage requirement will not apply), however, without any doubt, the proposal requires discussion and a review in light of the abovementioned interpretation rules concerning the proportionality principle (in the context of the national measure that establishes minimum wages) and the specific nature of transport sector (specially mobile workers).

The main reference point for establishing the **unambiguous criterion** should be **both the length of the service provision as well as its small scale, and also the degree of the "connection" of the employee with the "costs of living" in the country where the service is provided and also with his "centre of life" in the state where the undertaking is based** (which had an impact on the Court of Justice stating that establishing minimum wages would not be always "desirable and proportionate").

The specific nature of transnational transport operations is manifested by the fact that the major "life centre" of the employee remains connected with the Member State, home state of the transport undertaking in which he is employed, and in majority of cases the provision of the services by him in a different Member State is short enough that the "connection" with the "costs of living" in that State is minimum or minor.

The main "reference point" used by the European Commission, referring to travelled distance, does not fully take into account the above factors. It should be adjusted in light of relevant statistical checks and the economic consequences of MiLoG (for example, one could consider increasing the percentage threshold proposed by the Commission, calculating the threshold of the binding minimum wage with reference to the GDP of individual countries or purchasing power in individual countries).

[49] ibid.

Bilateral transnational transport (entry into Germany in order to make unloading/loading and travel back) remains a specific problem here. The application of **MiLoG to that case clearly violates the proportionality principle** (the above mentioned factors, connection between the worker and the State where the service is provided is minor) and, as a result, **EU law**.

8. Administrative Requirements and Control Measures under MiLoG

In Light of EU Law

If international transport were covered by the application of Directive 96/71/EC, national administrative requirements and control measures (MiLoG) might be authorised in connection with Article 9 of Directive 2014/67/EU. However, to that extent, as confirmed by the provisions of Directive 2014/67/EU, **administrative requirements and control measures, defined at national level** (here: in MiLoG) **should be "justified and proportional in compliance with EU law"** (Article 9 (1) of Directive 2014/67/EU), and if they go beyond the list set out in Article 9 (1) of Directive 2014/67/EU they must refer to the "new situations" and be additionally justified, in addition to the compliance with proportionality principle.

The application of administrative requirements and control measures (set out in MiLoG) with respect to transport operations going beyond the scope of Directive 96/71/EC (especially if no "service is provided" in Germany or the scope of the service is minor) **constitutes a clear breach of proportionality principle**. Also, it has a **protectionist economic impact** because, by imposing disproportional administrative burdens (and the related expenses) on transport undertakings, **it discourages them from using internal market freedoms**, it is focused on the **protection of the own transport service market** and even creates a risk that **undertakings from other Member States (in particular small and medium enterprises) will be completely excluded from the operations in Germany**.

Conclusion: the scope of administrative requirements and control measures set out in MiLoG is significantly contrary to EU law. With respect to international transport operations covered by the application of Directive 96/71/EC (and therefore Directive 2014/67/UE), the scope of administrative requirements and control measures violates the proportionality principle because it discourages transport undertakings from other Member States (and often it even makes it impossible) to benefit from the freedoms of the EU internal market – the freedom of provision of services and the free movement of goods. It even more applies to international transport operations that are not covered by the scope of the application of Directive 96/71/EC.

9. Fines Established Under MiLoG in Light of EU Law

A number of principles arise from EU law[50] that apply to the sanctions imposed under national law, aimed at ensuring the enforcement of EU law in the Member States, leading to the limitation of the EU internal market freedoms. **The selection of the sanctions is mostly left to the Member States, and the sanctions** (also with respect to the ensuring the Directive's effectiveness) **must be: effective, proportional and deterrent in nature.**[51]

Proportionality principle means in this case that the sanctions:

- should be comparable to the sanctions applied in the case of **comparable breach of national law** in a given State;[52]

- must not go beyond "what is strictly necessary to achieve the intended objective, in particular the selected control measures cannot involve a **penalty that is so disproportionate to the seriousness of the offence that it becomes an obstacle to the freedoms intended in the Treaty**";[53] it means that the **national sanctions, interfering in the operation of the EU internal market, should not discourage one from using internal market freedoms, and in particular they cannot result in protectionist economic consequences, consisting in the violation of fair competition, and even creating a risk of the bankruptcy of competitive undertakings that are based in other Member States**.

With respect to the fines provided under MiLoG, they will be subject to the review as to their compliance with the above mentioned principles (therefore, as to their compliance with European law) both with respect to the application of Directive 96/71/EC (Article 20 of Directive 2014/67/EU obliges the Member States to impose, among other things, such penalties, but without specifying either the type of penalties or the amount of the fines), and beyond the scope of the application of Directive 96/71/EC.

Conclusion: the sanctions (fines) provided under MiLoG are drastically high and they breach both above mentioned conditions of proportionality principle: first, the penalties are significantly higher than relevant penalties provided for similar breaches of German national law;[54] **second, the application of such**

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[50] *Wytyczne polityki legislacyjnej i techniki prawodawczej. Zapewnienie skuteczności prawa Unii Europejskiej w polskim prawie krajowym [Guidelines of Legislative Policy and Legislative Technique. Ensuring Efficiency of the EU Law in Polish National Law]* (developed by j. Barcz, A. Grzelak, M. Kapko, A. Siwek), UKIE, Warsaw 2009, p. 72 et seq. (side numbers: 99 - 108).

[51] Judgment of the Court of Justice dated 12 September 1996 in the case C-58/95 Gallotti and others, Zb. Orz. 1996, p. I-4345.

[52] For example: judgment of the Court of Justice dated 26 October 1995 in the case C-36/94 Siesse, Zb. Orz. 1995, p. I-3573.

[53] Judgment of the Court of Justice dated 16 December 1992 in the case C-210/91 the Commission vs. Hellenic Republic, Zb. Orz. 1992, p. I-6735.

[54] It is true that the failure to pay wages for work to national workers is also subject to a fine of up to EUR 500,000; however, the degree of threat to the social work of the workers is much lower with respect to posted employees. The violation of proportionality principle is even more unambiguous in the case of fines related with the breach of the obligations to make various filings,

drastic fines may lead to the bankruptcy of transport undertakings based in other Member States (in Poland), in particular small and medium enterprises.

In view of the above, it may be concluded that the fines established under MiLoG violate the proportionality principle, discourage one from benefitting from internal market freedoms and most of all they are economically protectionist in nature.

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the obligation to co-operate during audit, provide confirmations of working time, obligation to store documentation regarding working time and providing the access to the documentation. In such cases, fines with respect to the relevant default under "national obligations" do not exceed EUR 15,000, and in the vast majority of cases they range around EUR 50 and EUR 7500 (risk foreseen under MILoG – EUR 30,000). Compare, for example: The Commission of European Communities. *Report from the Commission Analysing the penalties for serious infringements against social rules in road transport, as provided for in the legislation of the Member States*. Brussels, 15 May 2009. COM (2009) 225 final.