

Preliminary analysis of the German minimum wage law (MiLoG)

This analysis was developed by the “Transport i Logistyka Polska” (TLP – Transport and Logistics Poland) Employer Association as a deliberation on the conclusions from the Road Transport Forum with the Minister of Infrastructure and Development Ms. Maria Wasiak, which took place on January 27th 2015. Within it we included the economic and legal aspects associated with the notion of minimum wage in Germany.

The document does not in any way aspire to the title of a full report, as due to the very short time of its execution we were neither able to undertake comprehensive works in this regard, nor carry out the essential consultations with all legal firms cooperating with TLP. For that reason, we reserve the possibility to verify the contents included in the following deliberation at a later date.

Preamble

The transport trade is one of the few which, while bearing a multitude of charges towards the State budget, has not received any kind of support from it. It has dynamically developed in a natural way, through the strength and involvement of individual entrepreneurs, often despite of and not thanks to formal regulations and the existing infrastructure. We have achieved the leading position in European international transport by conducting effective operations and guaranteeing the highest quality of services. In the current world, in which no information is classified and, in fact, is distributed in the span of a fraction of a second, there are no significant differences in the cost of access to resources, as they are balanced by the free flow market. This, as a matter of fact, is one of the fundamentals of the EU common economy. For that reason, in light of a publicly rising deficit of drivers in Germany, the especially significant migration of Polish drivers was unnoticed. This is a result of the fact that, even though the salary components are shaped differently within individual systems, the final total salary of Employees is at a similar level, taking into consideration the local purchasing power.

The enormous investment contribution of Polish transport companies deserves particular attention. The creation of one job posting is an expense of approximately 400.000 zlotys, which is most often financed by way of lease or rental for a period of 3 to 5 years. Making investment decisions and creating new jobs, entrepreneurs assume stability of regulations, which is a fundamental guarantee of such long term obligations. Contract commitments, within which entrepreneurs guarantee fixed rates, are established for slightly shorter periods, but still no less than 1-2 years. Usually, the only mechanism which secures a contract against cost fluctuations are fuel calculators. The introduction of such radical changes on the part of Germany faces Polish entrepreneurs with the necessity of continuing employment, investment and contract commitments in extremely different conditions and a resulting inability to fulfill them.

I. Compensation of increased upkeep costs during business travel undertaken by a Polish employee in the territory of Germany – Polish national law regulations

A driver carrying out an official task involving road carriage beyond the domicile town of the employer or another place in which the employer conducts their business – according to art. 2 item 7 of the 16th of April 2004 act on the working time of drivers – undertakes a business trip.

Drivers, as employees undertaking business trips – according to the provisions of art. 77⁵ item 1 of the Labor Code – are paid out amounts to cover costs associated with said business trip.

Based on art. 77⁵ item 4 of the Labor Code and provisions contained in the 29th of January 2013 Resolution by the Minister of Labor and Social Policy on payables attributable to an employee hired in a state or self-governing entity of the public sector in relation to business trips, these additional amounts consist of:

- daily allowance, and
- *overnight subsistence allowance*¹.

Due to the fairly complicated rules of calculation, daily allowances in the event of foreign business travel depend on the time of stay in the territory of individual countries and varied allowance rates; in order to simplify calculation, we assumed that the stay of a driver undertaking a business trip in Germany involves daily work and leisure. As the work time we assumed the 8-hour work day applicable in a 4-month clearance period.

Based on the above considerations it should be assumed, that the components of obligatory receivables² are:

- **from 7,1³ euro to 49 euro⁴** - amount of allowance per day of stay in Germany
- **from 37,5 euro⁵** (minimum flat rate for accommodation) **up to 150 euro⁶** (amount of compensation for accommodation costs confirmed by a receipt).

The total amount of de facto paid out receivables is, therefore, **from 44,6 euro to 199 euro**. Dividing the minimum obligatory receivable value by 8 working hours we receive an addition of **5,57 euro** to every working hour, which is to compensate the increased costs of upkeep during business travel.

Taking into consideration the hourly rate resulting from the Polish minimum wage in 2015 which is approximately **2,40 euro**, a driver undertaking a business trip has at their disposal, together with the receivables, an amount of **7,97 euro**, which is not significantly different from the German minimum hourly rate of **8,5 euro**, which according to the German legislators is to secure the employee's costs of upkeep in Germany.

¹ according to the controversial interpretation of the law made by SN in the 12th of June 2014 resolution, reg. no. II PZP 1/14, which not entirely correctly reflects the actual legal status; however, it has a *de facto* influence on the current employer - employee relations

² the issue of the obligatory nature of overnight subsistence allowance results from the interpretation mentioned in annotation 1; it should be pointed out, that the *provisions of the 29th of January 2013 resolution by the Minister of Labor and Social Policy on the payables attributable to employees hired at a state or self-governed entity of the public sector in relation to business trips* which are the basis of SN interpretation were issued – in our opinion – with omission of statutory delegation and we will submit a motion in this matter with the Constitutional Tribunal; however, the mentioned SN interpretation, as was stated earlier, *de facto* shapes the current employer - employee relations.

³ the minimum allowance amount as per art. 77⁵ § 4 of the Labor Code, whereby the value of 7,1 euro is a result of calculating the rate of 30 zlotys, as established in § 7 item 1 of *the 29th of January 2013 resolution by the Minister of Labor and Social Policy on the payables attributable to employees hired at a state or self-governed entity of the public sector in relation to business trips*, converted into euro based on the average exchange rate of the Polish National Bank at the 26th of January 2015.

⁴ the allowance amount specified in pos. 72 of the appendix to the resolution mentioned in annotation no. 3

⁵ flat rate amount calculated using the method specified in § 16 item 2 of the resolution mentioned in annotation no. 3, according to the interpretation specified in annotation no. 1.

⁶ limit amount for overnight accommodation specified in pos. 72 of the appendix to the resolution mentioned in annotation no. 3.

It is worth noting that in extreme instances a Polish employer may, apart from the basic salary, also pay out receivables for a business trip to Germany in the amount of **199 euro**, which considering an 8-hour working day constitutes an additional payment of **24,87 euro** per each hour.

II. The consequences of the concurrence of German minimum wage regulations and Polish laws regulating payment of business travel allowances

German minimum wage regulations provide for payment of a basic salary at a gross rate of **8,50 euro** per working hour. At the same time based on Polish regulations, the employer is obliged to pay out an employee undertaking a business trip a minimum amount of 44,6 euro per day which, assuming an 8-hour working day in a 4-month clearance period gives an additional payment of **5,57 euro** per hour.

Therefore, as a result of the concurrence of German and Polish regulations intended to compensate for the increased upkeep costs, a Polish employee will receive a total minimum amount of **14,07 euro** for every working hour.

Thereby, the Polish employer compared to a German one will be faced with an increase in the minimum labor costs of at least **65%!!!**

The increase of the total salary and allowance payment up to the above amount of 14,70 euro translates to a cost increase of 40-70 euro per single commissioned transport, whose average value on a route from central Poland to Germany equals approximately 800 euro. Thereby, the cost increase will amount to approximately 9% of the order value⁷. **In order to compensate for the higher costs, the increase of freight rates should equal the same, i.e. 9%.**

The market's current condition is characterized by:

- over-supply of transport services,
- the risk of losing financial liquidity for most transport companies caused by the necessity to pay off incurred liabilities, whose total value only due to leasing amounts to approx. 10 billion zlotys⁸.

This – in our assessment – makes it impossible to raise freight rates. Additionally, the 2-3 year long contracts provide for a fixed price without a possibility of its revaluation.

Considering the very low profitability of transport oscillating the level of 2%, the execution of every freight commission valued at 800 euro would cause a loss of approximately 48 euro. For a company with 100 vehicles this means an annual loss of approx. **4 million zlotys**⁹! In practice this would mean a necessity to cease transport operations carried out to, from and through the territory of Germany. It is worth to not at this point, that the value of road transport carried out by polish entrepreneurs in 2013 including travel through the territory of Germany is calculated based on the value of services rendered in the area of motor transport equaled **16,08 billion zlotys**¹⁰. Such transport constitutes approximately 70% of all road freight carried out by Polish transport companies.

However, if we assume an increase in freight rates by the aforementioned 8%, it should be mentioned that in 2013 the value of Polish export to Germany and other countries requiring the

⁷ calculations carried out by TLP

⁸ according to Lewiatan Confederation information given on the 26th of January 2015 at the meeting with Minister M Wasiak

⁹ TLP calculations

¹⁰ according to EBOPS classification

transit of goods through the German territory equaled **74.494 billion euro**¹¹. 80% of such export is carried out using road vehicles. Thereby, the possible increase in road transport cost by as much as 8% could cause a significant reduction in the competitiveness of Polish goods and seriously threaten the entire Polish national economy.

An additional consequence can be a serious risk to the Polish automotive industry which supplies and services the fleet for Polish transport companies, as well as the banking sector, in which the indebtedness of transport companies is valued at several billion zlotys¹².

Paradoxically, the results of Germany's introduction of a minimum wage will also affect the beneficiaries of German legal regulations, such as drivers. Approximately 70% of jobs at companies providing international road transport are at risk. Thereby, about 70 thousand drivers may end up losing jobs.

III. Other conditions

To clarify the competitiveness of Polish entrepreneurs in the German market, on the margin of all considerations taken into account in this study, we may also indicate that the German transport companies are entitled to a subsidy, which compensates a burden borne by highway fees. The annual subsidy shall not exceed 2,500 € / vehicle and inclusively for the enterprise no more than 32,000€ per year. Received subsidy are earmarked funds and should cover activities related to safety improvement and environmental protection. In addition, the employer can obtain funding for employee training. Such subsidies are not provided by the Polish legislation for Polish entrepreneurs carrying road transport, which puts us at a worse position in terms of competitiveness in the European transport market as compared to German carriers.

IV. The problematic correspondence of the German minimum wage law with *acquis communautaire*

The German legal regulations effective until the 1st of January 2015 provided a necessity to ensure minimum German standards in relation to employees delegated for work in the territory of Germany. This is a rule applicable in European Union countries – in the national legislation of individual member states. The issue of delegation was established in directive 96/71 EC of the European Parliament and Council dated 16th of December 1996 regarding the delegation of employees as part of rendering of services. The directive applies when an employer from one member state delegates and employee – as part of transnational rendering of services – to the territory of another member state, as long as there is a contract of employment between the delegating enterprise and the employee during the delegation period. Delegation means, that the employee for a limited time carries out their work in the territory of a member state other, than the one they work in daily. **This involves a change of the employee's domicile, as well as the place of work, which is moved to another country.**

Since the 1st of January 2015 German regulations are binding for all employees from European Union countries who temporarily – for several hours – stay within the territory of Germany and are not delegated to work in Germany. This encompasses a group of mobile workers, whose work is characterized by being in transit. This professional group includes international drivers, who are in transit crossing through the territory of Germany, or deliver goods to specific locations, providing services. **There is no change of a place of work, nor the employee's domicile.** The employee's work,

¹¹ according to the Foreign Trade Statistical Yearbook (GUS – Central Statistical Office - 2014 r.)

¹² according to Lewiatan Confederation information given on the 26th of January 2015 at the meeting with Minister M Wasiak

as well as their place of residence remain associated with the country of origin. This is also where they are ensured. MiLoG enforces a change in the internal regulations of employers outside of Germany and leads to the existence of unacceptable differences in salary at one workplace solely due to the fact of transit of goods through the territory of Germany.

Given the above, it is fully reasonable to assume that a potential argument about the need to protect a foreign driver by the German national regulations due to the higher cost of living in Germany is at least insubstantial. Therefore, it can also be assumed that the German legislature adopted the measure in the form of MiLoG law, which is not in this case justified by an aim of protecting workers, that is, to ensure that employees were paid a decent wage.

In this situation, the obligation to pay a minimum wage for foreign drivers crossing the territory of Germany is only an additional economic burden, which may result in halt, blocking or reducing the attractiveness of a performance of their transport services “to”, “from”, “in” and “through” the territory of the Federal Republic of Germany. Alleged strengthening social protection of workers in Germany is the goal of the apparent MiLoG-u. The actual function of these regulations is to protect the German market, which tends to eliminate the cross-border provision of services by operators from Polish, replacing these services, carriers analogy services in Germany.

The German authorities, introducing MiLoG to all workers of foreign employers staying in the territory, regardless of industry, did not explain the legal basis for the application to carriers in international transport.

In the opinion of Polish entrepreneurs MiLoG provisions infringe the principle of the primacy of EU law by failing in the German legislative process the rules of art. 56 and 57 TFEU and Regulation 1072/2006. Art. 56 and 57 TFEU describe fundamental liberties the Treaty, which create a common European economic market. These are the rules of rank higher than domestic law. The MiLoG law does not take into account distinctiveness of EU rules of road transport sector. It is an attempt to exempt Germany from the principles of the internal market rules.

The above-mentioned articles provide to the general principle of freedom to provide services. According to Article 56 of the Treaty on the functioning of the EU restrictions on "freedom to provide services" within the Union are prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended. "Freedom to provide services" is characterized by a lack of stable and continuous participation in the economic life of the host Member State (as business activity). Under Article 57 of the TFEU (ex Article 50 TEC), services shall be considered as such where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. This Article specifies, however, that the provisions on the free movement of services cover all activities of an a) industrial or b) commercial character or of c) craftsmen and d) the activities of the professions.

Freedom to provide services is elaborated in the so-called Services Directive - 2006/123/EC of the European Parliament and of the Council of 12 December 2006. on services in the internal market. This Directive shall not apply to services in the field of transport.

Transport services are governed by Regulations (EC) 1071/2009, (EC) 1072/2009 and (EC) 1073/2009 on the rules for access to the occupation of road transport operator and the rules for access to the

international road haulage. In relation to the carriage of goods in international road haulage market Regulation (EC) 1072/2009 applies.

One of its objectives is the principle that the conditions for obtaining a Community license (for freight) are the following items¹³:

- carrier is established in that Member State in accordance with Community legislation and the national legislation of that Member State, and
- is entitled in the Member State of establishment to carry out international road transport of goods in accordance with Community and national legislation of that Member State concerning admission to an occupation of road transport of goods.

The Regulation (EC) 1072/2009 does not formulate other requirements, including an issue of harmonization of pay policies.

Another principle of the Regulation is that as long as the Community rules provide otherwise, cabotage operations are subject to laws, regulations and administrative provisions of the host Member State in the following areas¹⁴:

- rules relating to the contract of carriage;
- weights and dimensions of road vehicles;
- the requirements relating to the carriage of certain categories of goods, in particular dangerous goods, perishable foodstuffs and live animals;
- driving time and rest periods for drivers;
- value-added tax (VAT) on transport services.

The catalog of these common requirements does not provide an issue of the minimum wage. This question, however, was not explained by any authorized for that authority.

In an attempt by the German side to prove that the inclusion of cabotage operations by the German minimum wage law is due to the regulations of Directive 96/71 EC in accordance with paragraph 17 of the preamble to Regulation (EC) 1072/2009, it should be noted that solutions adopted in the German law MiLoG are not adequate and proportionate means, as they make it impossible to achieve one of the objectives of this Regulation, namely the elimination of "empty runs". Thereby it threatens to achieve specific objectives, such as:

- reduction of environmental pollution,
- improvement of road safety
- reducing congestion.

It also should be considered that if the standards of Regulation (EC) 1072/2009 is lex posterior in relation to the provisions of Directive 96/71 EC, adopting the principle of rationality of the EU legislator, consent to take cabotage operations under national laws governing a remuneration would be reflected in the directory specified in art. 9 (1) of the Regulation. Instead, there were only a reference to the national legislation on driving time and rest periods for drivers.

¹³ Art. 4 (1) of Regulation (EC) 1072/2009 of 21 October 2009. concerning common rules for access to the international road haulage market

¹⁴ Art. 9 (1) of Regulation (EC) 1072/2009 of 21 October 2009. concerning common rules for access to the international road haulage market

Social conditions in the road transport sector are governed by Regulation No 561/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006. on the harmonization of certain social legislation relating to road transport and amending Council Regulation (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85. **The Regulation does not provide the requirement as to remuneration.**

German MiLoG law can also be considered as a restriction within the meaning of Art. 92 and 96 TFEU. In accordance with Art. 96 TFEU **the imposition by a Member State**, in respect of transport operations carried out within the Union, of rates and **conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited**, unless authorised by the Commission.

to appeal against the decision imposing the fine;

In the case of imposition of a penalty on the carrier on the basis of the new MiLoG law, which should include a possibility of judicial redress against a decision imposing a fine, it should be noted that all national courts are to protect the rights which individuals derive from Community law. All authorities in the Member States have a clear obligation to ensure proper effectiveness of the EU law (the principle of loyalty), in particular judicial authorities, which are obliged to use for this purpose mechanisms developed in the case-law of the ECJ. cannot be excluded

In our opinion, a **liability for damages arising from the German legislative illegality** against injured individuals also **cannot be excluded**.

The German minimum wage law may be considered incompatible with the Regulation of the European Parliament and the Council Regulation (EC) No 593/2008 of 17 June 2008. on the law applicable to contractual obligations, to the extent in which it allows the German customs administration and the German courts to test for compliance with German law obligations under the contract of employment in Poland between Polish employer and employee¹⁵.

A separate issue is an assessment of the compatibility of the German MiLoG law and implementing measures and Zollamt instructions. In accordance with § 16 MiLoG, this law applies to workers who are employed in Germany or seconded to work. According to the German social policy, we are talking about employment when a person performs services for a fee and is subject to compulsory social insurance, and also according to German labor law is characterized by the principle of subordination employment service relationship, an employer who instructs and supervises the work. Thus, subordination to the law is determined by the elements characteristic to the employment relationship, and not the principle of territoriality imposed by the German implementing law, which is not taking into account the actual legal situation. This issue will be further examined by the TLP, yet, already at this stage of the analysis it raises serious doubts.

¹⁵ Art. 8 paragraph. 1 and 2 of Regulation (EC) No 593/2008 of 17 June 2008. On the law applicable to contractual obligations.