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To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 with a view to adapting them to developments in the sector [doc. 9668/17 TRANS 212 CODEC 923 - COM(2017) 281 final] – Opinion of the European Economic and Social Committee

Delegations will find attached a copy of the above-mentioned opinion.

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European Economic and Social Committee

TEN/636

**Access to the international road haulage market and
the occupation of road transport operator (revision)**

OPINION

European Economic and Social Committee

**Proposal for a Regulation of the European Parliament and of the Council amending
Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 with a view to
adapting them to developments in the sector
[COM(2017) 281 final – 2017/0123 (COD)]**

Rapporteurs: **Stefan BACK** and **Pasi MOISIO**

Consultation	European Parliament, 15/06/2017 Council of the European Union, 20/06/2017
Legal basis	Article 91 of the TFEU
Section responsible	Section for Transport, Energy, Infrastructure and the Information Society
Adopted in section	04/01/2018
Adopted at plenary	18/01/2018
Plenary session No	531
Outcome of vote (for/against/abstentions)	220/3/2

1. Conclusions and recommendations

- 1.1 The EESC reiterates its support for the objective of the Proposal and the entire Mobility Package to strengthen the competitiveness of the European mobility sector, including by ensuring a socially fair and competitive internal market for road transport services¹.
- 1.2 The EESC welcomes the Communication's emphasis on clean, cooperative and connected mobility which enables sustainable and efficient multimodal choices, and its recognition of the vital role of road transport.
- 1.3 The EESC therefore welcomes the aims of the Proposal to ensure a level playing field in an unfragmented internal road transport market, avoid excessive administrative burdens on businesses, improve the clarity and enforcement of the regulatory framework and address abuse, such as the use of letterbox companies, non-transparent business models and illegal cabotage.
- 1.4 The EESC supports the objectives of the Proposal to introduce into Regulation (EC) No 1071/2009 establishment requirements that will prevent the use of letterbox companies for road transport operations and strengthen compliance monitoring, including by improving cross-border cooperation between authorities and implementing the European Electronic Register of Transport Undertakings (ERRU).

The EESC also supports the improved rules on infringement procedures and on the assessment of sanctions involving the risk of loss of good repute, both of which improve legal certainty. The EESC underlines the importance of harmonised application of the threshold requirements set out in Article 6 paragraph 1, third subparagraph (a) and (b), for infringements to have an effect on good repute.

With respect to letterbox companies, the EESC concludes that efficient enforcement will remain dependent on the efficiency of national authorities, efficient cross-border cooperation and uniform interpretation of establishment criteria. Account should also be taken of progress in the digital domain.

The EESC welcomes the improvement of information available in national registers and the introduction of time limits for answering requests for information. The EESC would welcome real time access for control authorities to electronically available information in national registers.

The EESC considers that the data to be entered in national electronic registers should also include information regarding the drivers employed by an undertaking, which is relevant in determining the level of compliance with social and labour laws, and asks the Commission to consider such a measure.

¹ [OJ C 13, 15.1.2016, p. 176.](#)

- 1.5 The EESC questions the incomplete way in which light commercial vehicles (LCVs) have been brought within the ambit of Regulation (EC) No 1071/2009 on admission to the profession and questions the added value of this measure, bearing in mind that those vehicles remain outside the scope of Regulation (EC) No 1072/2009. The EESC therefore considers that LCVs should be fully covered by Regulations (EC) No 1071/2009 and 1072/2009, albeit possibly in an alleviated form.
- 1.6 The EESC welcomes the main thrust of the amendments proposed to Regulation (EC) No 1072/2009 to simplify and clarify rules on cabotage and strengthen compliance monitoring. The EESC takes note of the potential of the digital tachograph as an efficient means of compliance control and supports its early installation, including on existing vehicles.

However, the EESC strongly stresses that the proposed amendments regarding cabotage can only be successfully and fairly introduced if provisions are introduced to make clear when provision of cabotage services ceases to be temporary and an obligation of establishment arises, and if the complete set of posting of workers rules applies to every cabotage operation without any exemptions.

- 1.7 The EESC regrets that the occasion was not used to clarify a number of further points regarding cabotage rules, which have been the subject of different interpretations. An essential prerequisite for efficient compliance monitoring, in particular at roadside checks, is clear and simple rules that enable an immediate and certain compliance assessment on the basis of readily available facts. The EESC regrets that, although the Proposal is a step forward, the legislation remains unclear and open to different interpretation on a number of points.
- 1.8 The EESC regrets that Directive 92/106/EEC on combined transport, which in practice provides a parallel market access, is not addressed at the same time as Regulations (EC) No 1071 and No 1072/2009. In order to have effective legislation, cabotage in all forms should be subject to similar rules.
- 1.9 The EESC supports the creation of a European Road Transport Agency as an efficient means to improve cross-border enforcement in the sector.

2. Background

- 2.1 The proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 with a view to adapting them to developments in the sector ("the Proposal") is part of the Mobility Package presented by the European Commission on 31 May 2017.
- 2.2 The main aims of the Proposal are:
to create conditions for competitive and fair mobility, eliminate letterbox companies, simplify and clarify cabotage rules, and enable efficient monitoring through improved cooperation between authorities, including through the European Register of Road Undertakings (ERRU).

- 2.3 The overarching aims of the package as a whole, on top of the aims set out in points 2.1 and 2.2 above, are set out in the Commission Communication "Europe on the Move – An agenda for a socially fair transition towards clean, competitive and connected mobility for all" [COM(2017) 283] ("the Communication").
- 2.4 The Communication sets out a strategy for Europe to maintain its role as a leader in clean competitive, cooperative and connected mobility which enables sustainable and efficient multimodal choices. This is necessary due to the vital role of mobility in the functioning of a Europe without frontiers, and requires a modern mobility system, which is key to the transition to a low carbon economy.
- 2.5 The Communication recognises the key role of road transport and is accompanied by a set of proposals focusing on this sector, including a framework for a strong internal market, improved working conditions in road haulage, digitalised transport and revised rules on road charging.

3. General comments

- 3.1 The EESC supports the mobility strategy outlined in the Communication with its emphasis on optimal multimodality and recognition of the vital role of road transport.
- 3.2 The main aims of the Proposal to eliminate letterbox companies and simplify the rules on road haulage cabotage to make them easier to understand and enforce conform with the aim of ensuring a fair and competitive internal market in road transport set out in the Communication and are fully supported by the EESC.
- 3.3 The EESC refers to its earlier opinions TEN/566 "Roadmap to a single European transport area – progress and challenges" and TEN/575 "Internal market of road freight: social dumping and cabotage" where the need to complete the internal market in road transport was highlighted, as was the need to prevent fraudulent activity, circumvention and abuse, including by operation through letterbox companies and circumvention of cabotage rules. The EESC welcomes the fact that the Proposal addresses some of the very urgent problems raised in these opinions. However, the EESC regrets the fact that the opportunity is not used to expressly address social dumping, consensually defined by the EESC in the opinions cited² as fraudulent action, circumvention and abuse (see also the European Parliament's Resolution on social dumping in the European Union of 14 September 2016, section I, para. 1 (2015/2255 (INI))).
- 3.4 There remains, however, the question of whether the means chosen to address these problems are adequate, if other or further measures should have been taken and if the proposed measures are disproportionate in view of the aims sought.
- 3.5 The EESC is of the opinion that the establishment of a European Road Transport Agency will be of key importance in stepping up cross-border enforcement in road transport.

² [OJ C 13, 15.1.2016, p. 176.](#)

4. Regulation (EC) No 1071/2009 – access to the profession

- 4.1 The EESC supports the amendments to Article 1 in as far as they make the text clearer or otherwise bring added value by improving the functioning of the internal market in road transport. The EESC doubts the added value of quoting one of many possible cases of non-commercial activity in the proposed addition to Article 1 paragraph 4(b), without addressing the question of the burden of proof which in principle should fall on those exercising an activity. The proposal on this point could create more problems than it resolves. It adds no legal certainty and entails the risk of increasing distortions of competition and creating a "grey market".
- 4.2 The new paragraph 6 first subparagraph of Article 1 includes undertakings operating LCVs under 3.5 tonnes in the scope of the Regulation but dispenses them from the requirements of good repute and professional competence as well as the requirement for a transport manager.

The EESC considers that such exemptions would send a very unfortunate signal. The EESC recommends including LCVs fully in both Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009, albeit possibly in an alleviated form. Only this would ensure the common level of professionalisation of the sector and a level playing field.

The EESC underscores that adequate resources must be provided to deal with the increased work volumes needed to ensure compliance with the widened scope of Regulations (EC) No 1071/2009 and No 1072/2009.

The EESC also questions the possibility given to Member States to apply, entirely or in part, the provisions on good repute, professional competence and transport manager to LCVs. This option threatens to disturb the coherence of the internal market. It is furthermore not coherent with the proposal to delete the option under the current Article 3.2 allowing Member States to add further requirements for admission to the profession.

- 4.3 The EESC supports deleting the possibility under Article 3.2 for Member States to impose additional requirements for admission to the profession, beyond those stipulated in Article 3.
- 4.4 The amendments proposed to the establishment criteria in Article 5 are directed against letterbox companies. The proposed requirements are more developed than the current provisions. The Proposal puts more emphasis on the actual exercise of commercial and administrative activities at the premises of the undertaking in the Member State of establishment, where also core business documents are to be kept, for instance by adding that the administrative and commercial activities should be continually and effectively conducted in that Member State while maintaining the requirement for management of transport operations of the vehicles at the disposal of the undertaking. On top of this, the requirement is added that the undertaking should hold assets and employ staff proportionate to the activity of the establishment. The EESC supports these amendments and stresses the importance of uniform interpretation to ensure foreseeability. The EESC assumes that core business documents may also be kept in electronic form, wherever legally possible.

- 4.5 Nevertheless, the EESC believes that it will remain difficult to prove that an activity is carried out in the form of a letterbox company. The proposed texts leave a large margin of appreciation which entails a risk of diverging discretionary practices. Decisions based on such texts can easily be challenged. Particular problems may arise with undertakings that are part of an international group or that outsource, for instance, certain administrative activities. There is an obvious risk that national practices may evolve very differently due to diverging national interpretations.
- 4.6 In the EESC's opinion a clearer picture of the status of an undertaking could be obtained through an obligation to provide information on the ownership picture³.
- 4.7 The EESC therefore draws attention to the implementation difficulties and underscores the importance of efficient cross-border cooperation and exchange of best practice between enforcement authorities.
- 4.8 The EESC takes note that in spite of the further details added in Article 6 paragraph 1 second subparagraph on the circle of persons whose behaviour may influence the good repute assessment, Member States will still retain freedom to add further "relevant persons". Therefore, the circle of persons concerned may still vary between Member States.

The EESC supports the addition of "tax law" as grounds for doubting good repute proposed in the same paragraph third subparagraph (a) which reflects the increasing importance attached to tax law compliance, as well as the importance attached to compliance with the rules on the posting of workers, reflected in Article 6 paragraph 1 third subparagraph (b) xi.

In both cases, legal certainty is ensured by thresholds providing that only acts that have resulted in convictions or penalties for serious breach of national or EU rules are to be taken into account.

- 4.9 The EESC questions the inclusion of penalties for serious infringements of EU law concerning the law applicable to contractual obligation since it takes issue with rules on choice of applicable law, and not substantive problems. If a breach of mandatory choice of applicable legal rules is aimed at, this should be clearly stated. A more pertinent measure might be to address adverse findings in civil proceedings based on misconduct, fraud or mismanagement.
- 4.10 The EESC approves the amendments to the procedural provisions in Article 6(2). Considering the potential effects of serious infringements of EU rules with respect to the possibilities of an undertaking or a transport manager to exercise an activity, the EESC questions the appropriateness of having a list of such acts by the Commission through delegated acts as proposed in the new paragraph 2(a) of Article 6.
- 4.11 The EESC questions the proportionality of the one-year bar to the rehabilitation of a transport manager from the date of loss of good repute. Timing and appropriateness of restitution of good repute should be made on a case-by-case basis by the competent national authorities.

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[OJ L 140, 30.5.2012, p. 32.](#)

4.11.1 Regarding the conditions concerning financial standing, the EESC questions the proposal for a provision in the new paragraph 2 of Article 7 stipulating that the competent authority shall recognise "another binding document" as sufficient proof of financial standing. The proposed provision is not satisfactory because the character of the document in question is too vague.

4.12 The EESC approves the proposal to include additional information in the national electronic registers under Article 16, and to have all infringements entered in the register. In particular, the EESC welcomes the five-day time limit for answering a request for information and points out that control authorities should be given real-time access, during roadside and/or company checks, to all information available in electronic form in relevant registers.

The EESC is also of the opinion that the data to be entered in national electronic registers should also include information regarding the drivers employed by an undertaking, which is relevant in determining the level of compliance with social and labour laws. This would have a particular impact in reducing the fraudulent practices referred to in point 3.3. The EESC asks the Commission to consider such a measure (see the European Parliament's Resolution of 18 May 2017 on road transport in the European Union (2017/2545 (RSP)), para. 33).

4.13 The EESC welcomes the improvement of administrative cooperation in the new Article 18 including the introduction of clear procedures and time limits for complying with a request for information. Nevertheless, the EESC would suggest the following improvements:

In paragraph 3, the EESC suggests that checks should always be carried out when requested by competent authorities of other Member States. It is further suggested that the credibility requirement in the last sentence of paragraph 3 should be taken out as the issue of substantiation of the request for information is adequately addressed in paragraph 4.

The EESC considers that the time limit in paragraph 5 for informing a requesting Member State about problems in obtaining information should be shortened to five days.

4.14 The EESC appreciates the yearly reporting duty regarding requests made under Article 18 paragraphs 3 and 4 and the way they were followed up. Efficient cooperation between Member States is key to efficient enforcement and compliance monitoring is therefore essential.

5. **Regulation (EC) No 1072/2009 – market access**

5.1 The EESC welcomes the amendments proposed with a view to clarifying market access rules regarding cabotage and availability of evidence at roadside checks. Nevertheless, the proposals made raise a number of questions, as set out below. The EESC also regrets that a number of issues, mainly relating to cabotage, remain unresolved, as further explained below.

5.2 The EESC draws attention to the following overarching issues.

- As pointed out in point 4.2, the EESC regrets that Regulation (EC) No 1072/2009 is not extended to LCVs which means an unwarranted market opening for vehicles covered by rules on access to the profession. This might distort competition and have a negative impact, for instance on congestion and the environment.
- The EESC regrets that the question of when a cabotage activity is no longer temporary but turns into such a continuous and permanent activity that the right to provide services in a Member State other than the one where the undertaking is established, as set out in Article 8, no longer applies, is not addressed in the Proposal at all.

The current situation, where operations respecting the formal criteria for cabotage operations, as set out in Article 8, can be carried out systematically and regularly over a long period, even under a long term contract, and still remain temporary is not satisfactory and not consistent with the criteria defining the temporary character of the right to provide cross-border services (see European Court Reports 1995 p. I-04165 and European Court Reports 1985 p. 01513). The EESC therefore deems it crucial to find a clear rule on what is temporary.

The EESC points out that Article 91(1)(b) of the TFEU gives the EU legislator a wide margin of appreciation in establishing the conditions for carrying out cabotage as a temporary provision of services. Possible solutions could be a maximum number of operations or operational days over a given period or to establish a cooling-off period between batches of cabotage operations. In the EESC's opinion, it is very important that rules on this matter are clear and easy to apply, for instance at a roadside check.

- Ensuring national authorities have access to staff with adequate competence to carry out effective checks under the proposed Article 10a is key to efficient compliance monitoring. In the EESC's opinion, it is vital that both these elements are in place and that a network is set up for exchanging best practice.
- The EESC regrets that the proposal for a review of Directive 92/106/EEC on combined transport is not submitted at the same time as the Proposal since in practice that directive grants a parallel market access to national transport operations for hauliers established in another Member State. In the opinion of the EESC, the fully legitimate transport policy aim to promote combined transport chains can be achieved without this special market access rule. Therefore, the road leg of a combined transport operation to and from ports or railway terminals inside one Member State should be considered as a national transport operation and the provisions on cabotage in Regulation (EC) No 1072/2009 or provisions to that effect should apply.

- 5.3 The EESC takes note of the addition to Article 1 paragraph 1 regarding carriage of empty containers or pallets and concludes that a transport contract is decisive and will also make a very insignificant load qualify as carriage for hire or reward.
- 5.4 The current limitation to three cabotage operations during the cabotage period has been subject to different interpretation as to what is included in one operation, and it has proved difficult if not impossible in practice to check compliance with this rule.

The EESC approves the proposal to eliminate the limitation to three operations and to reduce the time available for cabotage operations from seven to five days provided that:

- 1) the temporary character of cabotage is ensured by a clear definition, as requested in point 5.2 above;
- 2) the rules on posting of workers (Directives 96/71/EC and 2014/67/EC) apply to all cabotage operations from day one. This could be done by including Directives 96/71/EC and 2014/67/EC among the rules applicable to cabotage operations in Article 9, irrespective of the provisions of Article 1(3)(a) of Directive 96/71 EC.

Otherwise, the EESC prefers keeping the current rules on cabotage because the proposal made by the Commission without compliance with the above conditions would in practice mean almost full market opening which might cause unpredictable effects on the market.

The EESC also welcomes the limitation of cabotage operations allowed in Member States other than the one which is the destination of the international journey (the host Member State), to Member States contiguous to that Member State which facilitates compliance control. However, the Proposal should be amended to make it clear that new cabotage rights following a new international transport operation to a contiguous Member State will extinguish existing cabotage rights in order to prevent cumulation of such rights ("chain cabotage"). This question of legal foreseeability is very important.

- 5.5 The proposed adjustments to the rules on the posting of workers to the transport sector [COM(2017) 278] make it clear that those rules will apply to cabotage operations from day one. Though the rules on posting of workers may not entirely eliminate the cost level gap between Member States, this rule would reduce it. However, the EESC questions the efficiency of the lighter posting declaration for even a six month period and lighter documentation requirements without obligation to designate a representative regarding cabotage proposed by the Commission in the proposal for specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU, as long as the issue of the temporary character of cabotage set out in points 1.6 and 5.2 is not resolved.

5.6 In 2011, the Commission gave its views on the interpretation of the provisions on cabotage on a number of points (The New Cabotage Regime under Regulation (EC) No 1072/2009, available on the website of DG MOVE). The current proposal has included the Commission's understanding of a cabotage operation in the proposed amendment to the definition in Article 2 point 6 and settles the question of availability of documentation in the vehicle for roadside inspections, addressed in the proposed new paragraph 4a under Article 8.

The EESC welcomes those clarifications but regrets that some other pertinent questions addressed in the Commission's interpretative document have not been addressed in the Proposal. This is the case regarding the question of whether all international cargo must be delivered before cabotage can start and how the seven-day cabotage period stipulated in Article 8 paragraph 2, as it now stands, is to be calculated.

The EESC also regrets that the opportunity was not used to make it clear whether tachograph data may also be used for checking compliance with cabotage provisions. The Commission's 2011 interpretative document makes it clear that the view of the Commission is that this is the case. The EESC considers that the opportunity should have been used to make this crystal clear in the text of the Regulation.

The EESC in any case points to the importance of full availability of the digital tachograph as a means of compliance control and would like to see a substantial reduction in the time limit for retrofitting existing vehicles with this type of tachograph.

5.7 The EESC welcomes the new liability provision in Article 14a but points out that proving voluntary commissioning of illegal services may be problematic.

Brussels, 18 January 2018.

Georges DASSIS

The president of the European Economic and Social Committee