Impact of intra EU posting on (French) road transport

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A few facts…

- France (alike Germany) is a crossroad…
- Important volume of transported merchandises **transit** through the French territory.
- **High Social standards**…. "attract" competition from south-eastern Member States through **cabotage** operations as well as **intragroup transfers or agency workers** (drivers)…

A- Transit….

- In the course of a transport operation between Member States A and B, transit through Member State C :no posting
- International Carriage (Reg. 881/92): highly mobile workers
- Applicable law: *Koelzsch v. Luxembourg* (case C-29/10)
- Law of the country in which the employee habitually carries out his work, is that in which **or from which**, in the light of all the factors which characterise that activity, **the employee performs the greater part of his obligations towards his employer.**
- German law on minimum wage….. Commission v. Germany

B- Posting of workers in the international road transport sector

- Directive 96/71/EC
- Three cases:
  - In the course of a provision of services on the account of the employer (haulier), to or from France (cabotage operations included, see bellow)
  - Intra group posting (haulier group): ND scandal/letterbox company
  - As a temporary worker on the account of a temporary work agency established in another Member State and for the benefit of a haulier established in France
- art. 2§1: Temporary nature of posting
- Problem with international road transport drivers (IRTD) : Succession of temporary assignments= no habitual place of work
- In that sense, are IRTD posted????

Impact of Posting of workers on the French transport sector

- No data regarding posting in the transport sector: see Ministry of Labour report on analysis of posting declarations (travail-emploi.gouv.fr/IMG/pdf/Bilan_PSI_2013.pdf
- Until recently, a posting declaration was required after 7 days of presence within the French territory… Declarations were therefore rare
- However, according to the national committee for transport (CNTR), while French hauliers held until 1999 50% of the French-EU market, 10 years later they only held 10%.
- Approximately 21000 job-losses

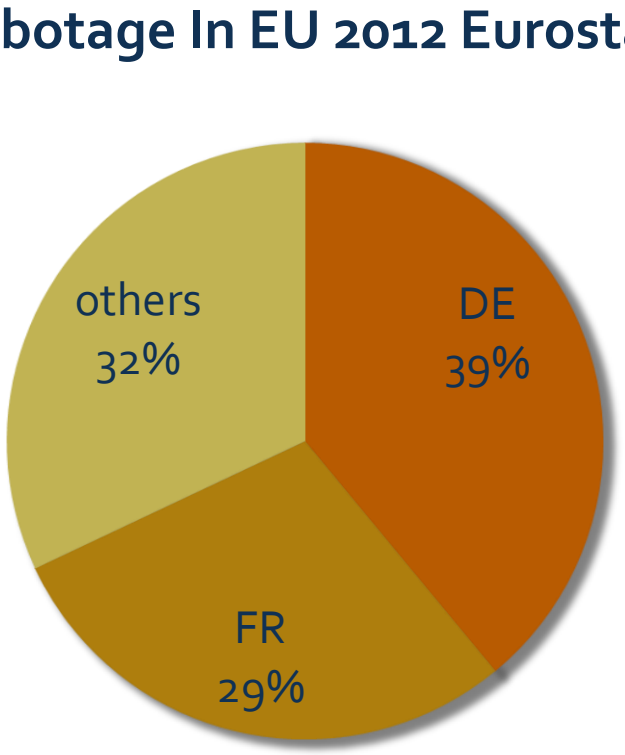
C- Cabotage : définition

- Cabotage operations consist of the provision of services by hauliers within a Member State in which they are not established. They are not prohibited as long **as they are not carried out in a way that creates a permanent or continuous activity within that Member State**
- Reg 1072/2009
- Art.8 **up to three cabotage operations** following the international carriage from another Member State or from a third country **within 7** days from the last unloading in the host Member State

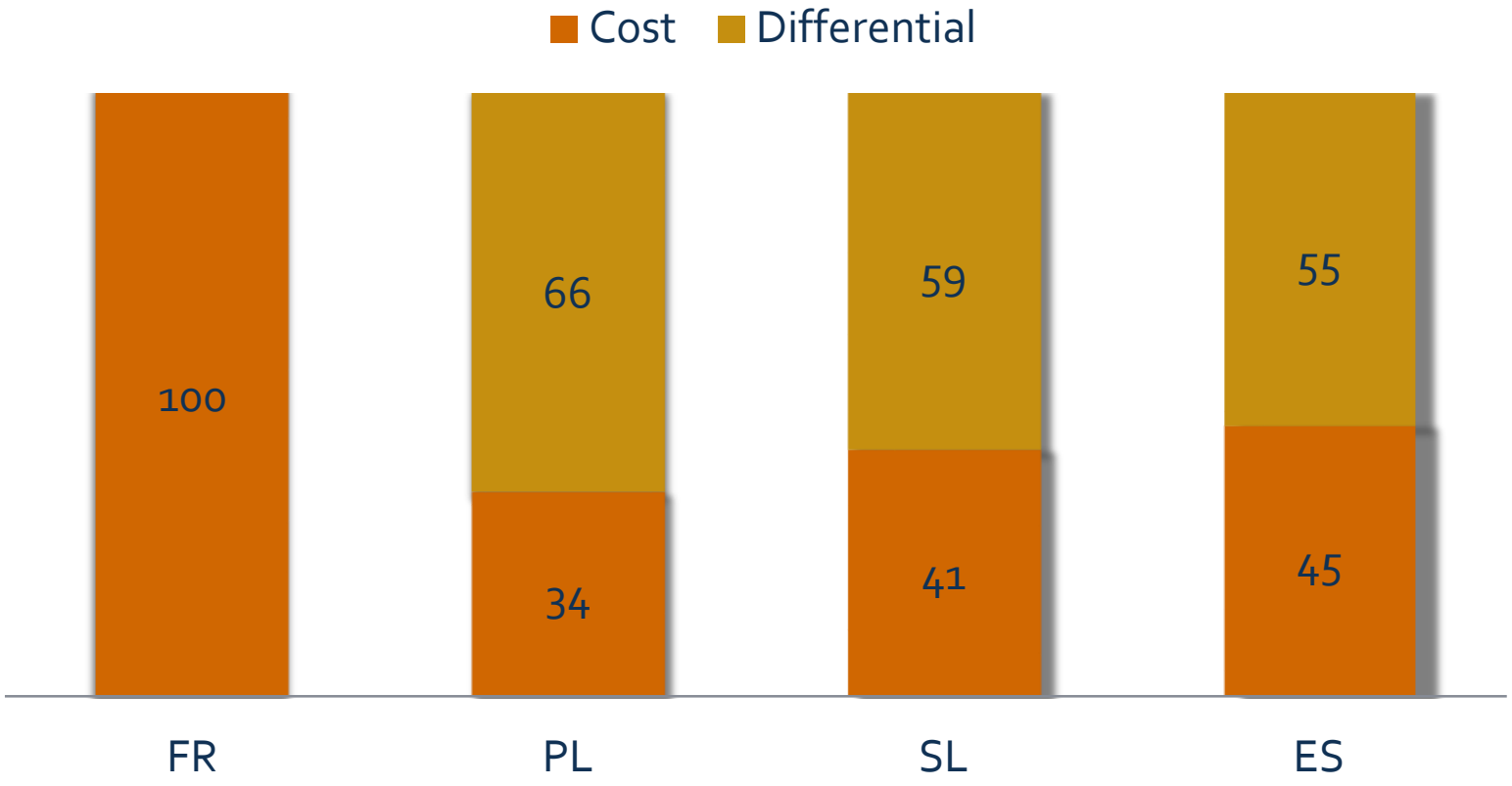
C- Cabotage: regulation

- Reg 1072/2009
- Article 9 : During cabotage working time limitation according to the legislation of the host country applies:
  - 56 hours per week
  - Rec 17: Posting of workers directive applies. Among others …**minimum rates of pay of the host country**

C- Cabotage: impact



Why recourse to "posting" remains relevant in the road transport sector?



Recent legislative reforms

- Loi Savary **n° 2014-790 du 10 juillet 2014**
  - **Fighting againt unfair competition**
  - **Decree n° 2016-418 7 April 2016** adapting labour law provisions (on posting) to transport hauliers when posting their workers to the French territory
  - **Loi Macron 8 août 2016**
  - **Application of the equal wage principle**

Scope of the regulations

+ *Regulations entered into force on July 1st, 2016.*

According to the Ministry of transport the new regulations apply:

- *To transport undertakings (or temporary employment agency hiring mobile workers) established outside France*
- ***But also….***
- ***to cabotage and international transport to and from France***

"Where all posting conditions are satisfied…." **dès lors que sont remplies les conditions de détachement »**

TEMPORARY FEATURE AS WELL?

By contrast

+ *Does not apply to transit nor to self-employed*

Posting certificate instead of declaration

- *The posting certificate replaces the declaration normally requested in other economic sectors.*

This is filled in by the worker's employer or, failing that, host company (when applicable). ***It is kept on board of*** *the vehicle*

Validity up to 6 months, for several postings. No need to specify the operations concerned.

Employment contract

- *In case of intra-corporate transfer : translated copy of amended employment contract and agreement regarding the provision of staff*
- *In case of posting by temporary employment undertaking : translated copy of temporary employment contract and agreement regarding the provision of staff*

Employer Representative

- *Designation of employer representative in France*
- ***Representative should be able to provide control services during the posting and for a 18-month period after the posting with :***
- *Certificate of posting*
  Pay-Slips (including details of pay items)
  Any proof of payment
  Copy of representative's designation
  Title of collective agreement (if applicable to worker).

Sanction in case of failure

- *4th class fine (max. 750 €) if posting certificate is not on board or non compliant,*
- *3d class fine (max. 450 €) if the employment contract is not on board*
- *Administrative fine (max. 2000 € per worker but no more than 10000) if the employer didn't provide a posting certificate or appoint a representative*

Joint liability of the principal (donneur d'ordre)

- *Principal (donneur d'ordre) is required to check the existence of posting certificate and employer representative.*
- *Failing to do that, in case of intra-corporate transfer or temporary employment, the host company is supposed to fill in the attestation.*

Joint liability of the recipient

- *Provided that neither the principal nor the employer are established in France, the professional recipient may be alerted by control services, so that he calls upon the employer to correct illegal situations (minimum wage not paid, inadequate accommodation, violation of main labour rules). He shall report his attempts. Failing to do that, he may be jointly liable for the consequences of the breach of the rules.*

Commission v. France, 16 June 2016

- *« While fully supporting the principle of a minimum wage, the Commission considers that* ***the systematic application of the minimum wage legislation by France and Germany to all transport operations touching their respective territories restricts*** *in a disproportionate manner the freedom to provide services and the free movement of goods »*

Proposal for the revision of the posting of workers directive COM (2016) 128

- « **Because of the highly mobile nature of work in international road transport**, the implementation of the posting of workers directive raises particular legal questions and difficulties (especially where the link with the concerned Member State is insufficient)**. It would be most suited for these challenges to be addressed through sector-specific legislation together** with other EU initiatives aimed at improving the functioning of the internal road transport market ».

Recent developments…

- Last February eight western European member States (France, Germany, Italy, Denmark, Austria, Luxembourg, Belgium, Sweden) have signed in Paris a common declaration
- They oppose themselves to further liberalisation of the road transport market, through liberalisation of cabotage operations

Questions to be answered

- Are IRTD really posted in the course of a provision of service ? Temporary feature lacking
- Accordingly, is the application of the revised posting of workers directive to IRTD, going to bring them an additional advantage ? (see Koeltzsch)
- Has the widespread application of the posting of workers directive to IRTD, another reason of existence, than a purely dissuasive function against (unfair) competition (most likely) ?
- The Answer in May….or not….

Thank you very much for your attention!