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LEGAL ANALYSIS OF THE MOBILITY PACKAGE 1

21 March 2019

1. CONTEXT

1.1. State of play of Mobility Package 1

On 31 May 2017, the European Commission ("**Commission**") proposed the Mobility Package 1, called 'Europe on the Move', a legislative package consisting of three main initiatives focusing on posting requirements, driving and rest time, and cabotage ("**Proposed Legislation**").[1]

On 4 July 2018, the plenary of the European Parliament ("**Parliament**") rejected the compromise text to the Proposed Legislation prepared by the Committee on Transport and Tourism ("**TRAN Committee**") and referred the matter back to the committee.

On 3 December 2018, the Council of the European Union ("**Council**") (in its Transport, Telecommunications and Energy Council configuration) agreed on its general approach regarding the Proposed Legislation.

On 10 January 2019, the Committee on Transport and Tourism ("**TRAN Committee**") within the Parliament approved a report on cabotage, but rejected the reports on posting requirements and driving and rest time. This casts uncertainty regarding the next steps in the legislative procedure.

During the legislative process, certain amendments by the Parliament and Council have been proposed which deviate substantially from the Commission's version of the Proposed Legislation.

1.2. Significant amendments by Parliament and Council

The amendments to the Commission's initial Proposed Legislation by the Parliament and Council include, among others, the following provisions:

1. Bilateral transport (as opposed to cross-trade transport) is excluded from the requirements on the posting of drivers;
2. Introduction of a requirement to return the vehicle to the home Member State every 4 weeks;
3. The requirement to organise the return of the driver to his Member State of residence or to the Member State where the employer is established after each period of 4 consecutive weeks;
4. Additional limitations of cabotage operations, 60 hours "cooling off" period (during

[1] The Proposed Legislation consists of (1) Directive of the European Parliament and the Council amending provisions on enforcement requirements of Directive 2006/22/EC and laying down specific rules on the posting of road transport drivers in the framework of Directive 96/71/EC and Directive 2014/67/EU (Procedure No. 2017/0121 (COD)), (2) Regulation of the European Parliament and the Council amending minimum requirements for maximum daily and weekly driving times of Regulation 561/2006, minimum breaks, daily and weekly rest periods, and requirements for tachograph positioning of Regulation (EU) 165/2014 (Procedure No. 2017/0122 (COD)), and (3) Regulation of the European Parliament and the Council amending Regulation 1071/2009 and Regulation (EC) 1072/2009, in line with developments in the sector (Procedure No. 2017/0123 (COD)).

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which no operation is allowed);
5. Reduced weekly rest periods shall not be taken in a vehicle or outside certified safe and secure parking areas; and
6. Introduction of an obligation on Member States to implement equivalent posting measures in their bilateral agreements with third countries when granting access to the EU market to road transport undertakings.

1.3. Objectives of the legal analysis

The legal analysis in this memorandum is intended to achieve the following objectives:

1) Identify all possible violations during the decision-making procedure regarding the Proposed Legislation;
2) Identify the potential legal consequences of the identified violations in the decision-making procedure;
3) Determine whether there is a fundamental discrepancy between the European Commission's Proposed Legislation and the proposals of the Council of the European Union and the European Parliament, and whether this discrepancy can be seen as a basis for the European Commission to withdraw the Proposed Legislation, and if so, to identify the procedure for initiating the withdrawal;
4) Assess possible remedies, including the possibility of challenging the Proposed Legislation, if adopted, before the Court of Justice of the European Union, provided that the content of the legislation will consist of the aforementioned provisions of the general approach of the Council of the European Union and as set out in the European Parliament's position.

2. EXECUTIVE SUMMARY

1) Since the amendments to the Proposed Legislation had not been translated prior to the vote within the TRAN Committee, the legislative process in the Parliament has potentially violated the Parliament's Rules of Procedure. To this end, it should be established whether or not the TRAN Committee has agreed to waive this requirement, and, if so, whether or not this was objected by at least three members of the Committee.

2) Despite the fact that the Proposed Legislation is presented as a set of proposals that are interlinked, there is no rule which precludes the Parliament from adopting one proposal while rejecting the other proposals under the Proposed Legislation.

3) The voting modalities within the TRAN Committee, whereby not every single amendment/provision was made subject to voting, but rather the respective proposal as a whole was voted on, would violate the Parliament's Rules of Procedure, if a separate or split vote had been requested (with the threshold of at least three MEPs). If no such request had been made in the Committee, the vote on the proposal as a whole would not constitute a violation of the Parliament's Rules of Procedure.

4) Amendments which have been rejected during plenary can be re-introduced after the respective proposal has been referred back to the TRAN Committee. This does not constitute a procedural violation.

5) It could be argued that the Parliament's Rules of Procedure do not allow a proposal which was rejected within the TRAN Committee to be submitted for voting in plenary, and that doing so would entail a procedural violation.

6) According to the Interinstitutional Agreement on Better-Law Making, the Parliament

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and Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's proposal. It is up to the Parliament and Council to determine whether or not the amendments they introduce are 'substantial' and, if so, whether or not carrying out an impact assessment would be appropriate and necessary for the legislative process.

As such, it is difficult to argue that the absence of an impact assessment for significant amendments to key issues, if adopted, would be qualified as a procedural violation that would be sufficient to annul the validity of such provisions. However, the provisions of the Interinstitutional Agreement on Better-Law Making provide a solid basis to request the EU institutions to carry out an additional impact assessment of the amendments introduced by the Parliament and Council.

7) On the basis of our analysis, the following amendments to key issues introduced by either the Parliament and/or Council have not been subject to or deviate substantially from the findings of the Commission's impact assessment and the Commission's proposal:

   i. Return of the vehicle to the Member State of establishment;
   ii. Applicability of posting rules;
   iii. Additional limitation on cabotage operations followed by cooling off period;
   iv. Third-country operators' compliance with posting measures;
   v. Prohibition to take reduced weekly rest periods in a vehicle or outside certified safe and secure parking areas.

8) The current draft of the Proposed Legislation (as amended by the Council and Parliament) contains the following (potential) violations of the substantive EU law provisions:

   i. The proposed provision, requiring the Member States to implement in their bilateral treaties with third countries equivalent measures to the EU legislation regarding posting of workers in the road transport sector, is contrary to Article 2(2) and 3(2) of the TFEU on the allocation of competences between the EU and the Member States.
   ii. The proposed provision on the obligatory return of the truck, if adopted without a proper impact assessment, could constitute a violation of Article 91(2) TFEU.
   iii. The requirement of the obligatory return of the truck and the application of different standards (including the posting of workers requirements) to bilateral and cross-trade transport could result in a hidden discrimination of the operators from peripheral Member States, contrary to the TFEU provisions prohibiting discrimination.
   iv. The provision on the obligatory return of the truck proposed by the European Parliament, the prohibition to take reduced weekly rest periods in a vehicle or outside certified safe and secure parking areas, proposed by the European Parliament, and the provisions regarding additional limitation of cabotage operations, proposed by the European Parliament and by the Council, could be considered "manifestly disproportionate" and contrary to the principle of proportionality established in the EU founding Treaties, unless their necessity is justified by additional impact assessments or economic studies. In particular, based on the available assessments by the IRU and by the University of Gdansk, and by in the Study on Parking Places for Trucks, carried out for the European Commission, these provisions are expected to result in significant negative economic impact. The

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proportionality of these provisions has not been assessed and measured against the objectives of the Mobility Package in any impact assessment.

9) At the current stage of the legislative process, and before the Council would adopt its common position, approving the Parliament's position from first reading, the Commission has the right to withdraw any of the proposals under the Proposed Legislation if it concludes that the achievement of the respective proposal's objective is prevented by an amendment by the Parliament and Council, and only after having had due regard to the Parliament's and Council's concerns resulting in the proposed amendment.

10) The Council Legal Service could be addressed to formulate an opinion on the legality of the amendments introduced by the Council and by the European Parliament, particularly on whether or not these amendments violate substantive provisions of EU law.

11) Member States can bring an action for annulment before the Court of Justice of the European Union ("**CJEU**") with the request to review the legality of the adopted legislative acts on the grounds of a breach of an essential procedural requirement or an infringement of substantive provisions of EU law.

3. POTENTIAL PROCEDURAL VIOLATIONS AND LEGAL CONSEQUENCES UNDER EU LAW

In this section, we will analyse potential irregularities and/or violations during the decision-making process and in the content of the Proposed Legislation, and provide the legal assessment of such irregularities under EU law.

In particular, this section will discuss the following potential: procedural irregularities:

1. Lack of translation of amendments in the Parliament;
2. Indivisibility of the Proposed Legislation;
3. Adjustment of voting modalities;
4. Re-introduction of amendments rejected by the plenary; and
5. Voting in plenary on a proposal that has been rejected at committee level.

3.1. Lack of translation of amendments in the Parliament

On the basis of available information, it is our understanding that during the legislative process at Parliament level, amendments and compromise texts put forward by the rapporteur have not been provided in all official EU languages prior to the voting, and that a request had been submitted to provide such translations of the amendments prior to the voting.

According to rule 169 of the Parliament's Rules of Procedure[2], amendments can only be put to the vote after they have been made available in all the official EU languages, unless Parliament decides otherwise. However, the Parliament cannot decide otherwise if at least 40 Members of the European Parliament (MEPs) object. In addition, rule 169 of the Parliament's Rules of Procedure stipulates that the Parliament shall avoid taking decisions which would place MEPs who use a particular language at an unacceptable disadvantage.

Where fewer than 100 Members are present, Parliament may not decide to proceed to the vote on amendments without providing translation in all official EU languages if at least one tenth

[2] Rules of Procedure of the European Parliament (2014-2019) available at: http://www.europarl.europa.eu/sipade/rules20190211/Rules20190211_EN.pdf.

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of the Members present object.

This rule also applies to the translation of amendments in the committee. The Parliament's Rules of Procedure stipulate that in committee, the number of votes needed is established on the basis of Rule 209 proportionally to that applicable in plenary, rounded up, where necessary, to the nearest complete number.

Therefore, in the TRAN Committee, which consists of 49 MEPs, a number of 3 MEPs is necessary to object to the committee's decision to vote on amendments without making them available in all official EU languages.

It is unclear to us whether the TRAN Committee has formally decided to proceed with the voting without the translations in all the EU official languages. If this is the case, it should be established whether or not such a decision has been objected to by a sufficient number of MEPs (at least 3 MEPs) requesting the translations of the amendments to all the EU official languages. If such objections have been raised by the required number of MEPs, the failure to provide such translations would constitute a violation of the Parliament's Rules of Procedure.

3.2. Indivisibility of the Proposed Legislation

As mentioned above, the Proposed Legislation consists of a set of three separate legislative proposals on posting requirements, driving and rest time, and cabotage. The three sets of legislative proposals are interlinked and should be dealt with as a whole, meaning that if one proposal would be rejected, the others would have to be rejected as well.

It should be noted that the information on the Parliament's website dedicated to the legislative process of Mobility Package 1 indeed indicates that "*all initiatives contained in the three parts of the mobility package form a single set of consistent policies, addressing the many interlinked facets of EU mobility system*".[3]

So far, the three separate legislative proposals have followed the same process and timeline within the Parliament.

Therefore, it might be politically difficult to progress on one proposal included in the Mobility Package, while rejecting the two other proposals included in the Mobility Package due to the existing linkages between the proposals and potential cross-referencing in the respective texts of the proposals.

However, from a legal point of view, there is no clear rule precluding the Parliament from separating the legislative process on individual proposals of the Mobility Package. It should be further noted that the three proposals included in Mobility Package 1 have been formally allocated to a distinct procedure file (both at the Commission level and Parliament level) with a different rapporteur in the Parliament for each of the proposals.

3.3. Adjustment of voting modalities

On the basis of available information, it is our understanding that the voting modalities within the TRAN Committee changed in the course of the legislative process. Particularly during the first consideration in the TRAN Committee before the plenary session of 4 July 2018, the amendments proposed in the TRAN Committee were voted on separately. During the second consideration in the TRAN Committee, *i.e.* after the rejection of the respective proposals in

[3] http://www.europarl.europa.eu/legislative-train/theme-resilient-energy-union-with-a-climate-change-policy/package-eu-mobility-package.

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plenary, the TRAN Committee voted on the amended proposals as a whole and not on individual amendments.

Rule 174 (6) of the Parliament's Rules of Procedure allows the President to put a set of amendments to vote collectively, unless a political group or MEPs reaching at least the required 'low threshold'[4] have requested separate or split votes, or unless other competing amendments have been tabled.

Furthermore, Rule 174 (7) of the Parliament's Rules of Procedure stipulates that the President may also put other amendments to the vote collectively where they are complementary, unless a political group or MEPs reaching at least the required 'low threshold' have requested separate or split votes. Authors of amendments may also propose collective votes on their amendments.

This rule also applies to the vote in the committee.

Therefore, the practice of voting on single proposals as a whole is allowed on the basis of the Parliament's Rules of Procedure and cannot be considered as a procedural violation thereof, unless a separate or split vote (with the required thresholds) has been requested prior to the voting.

3.4. Re-introduction of amendments rejected by the plenary

Certain amendments, such as the introduction of a cooling-off period for cabotage that have been rejected the European Parliament's plenary vote on 4 July 2018 and re-introduced at committee level into the respective legislative proposal that has been referred back to the committee for reconsideration.

Rule 59 (4) of the Parliament's Rules of Procedure provides that if a draft legislative act fails to secure a majority of the votes cast within Parliament, the President shall announce that the first reading has been concluded, unless, on a proposal of the Chair or rapporteur of the committee responsible or of a political group or MEPs reaching at least the 'low threshold', Parliament decides to refer the matter back to the committee responsible for reconsideration.

In the underlying case, the Proposed Legislation has been referred back to the TRAN Committee for reconsideration. Such a referral, however, does not preclude the TRAN Committee or its rapporteur from re-including amendments that were part of the previous draft legislative act and that did not secure a majority of votes.

Therefore, the re-introduction of amendments rejected by the plenary at committee level cannot be considered as a violation of the Parliament's Rules of Procedure.

3.5. Voting in plenary on proposal that has been rejected at committee level

Based on the available information, it is our understanding that the Conference of Presidents is considering to schedule the voting in plenary on the legislative proposals that have been rejected within the TRAN Committee. Against this background, the question arises whether the legislative proposals that have already been referred back to the committee after an initial rejection in plenary can be resubmitted to plenary if they were not adopted within the committee.

According to the Parliament's Rules of Procedure and practice, the Conference of Presidents, as the highest governance body within the Parliament, has a broad discretion to decide on

[4] 'Low threshold' means one-twentieth of Parliament's component Members or a political group.

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matters which are not clearly governed by the Parliament's Rules of Procedure.

From a legal point of view, there is no clear rule in the Parliament's Rules of Procedure or any other legal act which precludes the Conference of Presidents from submitting a legislative proposal to plenary for voting that has not been adopted at committee level.

However, on the basis of systemic reading of the Parliament's Rules of Procedure, in particular Rules 49(3), 50(2), 59(5) and 59a, a sound argument could be made that a report on the legislative proposal including a draft legislative resolution has to be adopted by the committee before it can be submitted to plenary for voting.

In addition, to our knowledge there has been no precedent or authoritative interpretations by EU institutions or courts confirming the possibility to resubmit a legislative proposal to plenary for voting after it had been referred back to the committee where it (repeatedly) had not been adopted.

Given this legal uncertainty and political controversy around the Mobility Package, it would be appropriate for the Conference of Presidents to obtain a formal authoritative interpretation of this matter from the Parliament's Committee on Constitutional Affairs (AFCO), which is in charge of interpreting the Parliament's Rules of Procedure.

4. COMPATIBILITY OF AMENDMENTS WITH IMPACT ASSESSMENT

In this section we will analyse to which extent certain amendments to key issues proposed by the Parliament and Council deviate from the Commission's proposal and impact assessment.

4.1. Return of the vehicle to Member State of establishment

Commission's proposal

In view of ensuring that undertakings established in a Member State have a real and continuous activity in that Member State and to curb the use of letter-box companies, the Commission's proposal seeks to introduce additional conditions relating to the requirement of establishment[5].

The Commission' proposal does not contain any provision requiring the return of the vehicle to the Member State of establishment.

Commission's impact assessment

The impact assessment acknowledges that implementing additional criteria for stable and effective establishment will generate significant costs for businesses. Therefore, the Commission has proposed only a limited list of additional requirements, the costs of which would be lower than the costs of the whole range of requirements initially considered by the Commission.

Importantly, according to the Commission's impact assessment, the costs resulting from the proposed requirements would mostly impact the illegally and "lightly established" hauliers and would be less burdensome for already compliant hauliers.

The provision in relation to the return of the vehicle to the Member State of establishment has

[5] Amendment of article 5 of Regulation 1071/2009.

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not been assessed in the Commission's impact assessment.

Parliament's proposal

In addition to the requirements that have already been proposed in the Commission's proposal, the Parliament's proposal introduces a new article 5, point (aa), requiring vehicles to perform, in the framework of a transport contract, at least one loading or one unloading of goods every four weeks in the Member State of establishment.

Council proposal

No provision in relation to the return of the vehicle is proposed.

Analysis

The Parliament's proposed amendment to require the return of a vehicle to the Member State of establishment has not been assessed in any impact assessment. This requirement will generate very significant costs for all businesses affected, while the Commission's impact assessment has already indicated that its proposed criteria will generate very significant costs for businesses. The Commission's impact assessment also justified its proposed criteria on the basis that additional costs would be largely borne by illegally and "lightly established" hauliers only. The Parliament's proposed requirement to have a vehicle return to the Member State of establishment is a measure that affects and will generate significant costs for all hauliers.

Therefore, the Parliament's proposal deviates substantially from the findings and reasoning of the Commission's impact assessment.

4.2. Return of the driver to Member State of establishment

Commission's proposal

In order to improve drivers resting conditions, the Commission's proposal requires a transport undertaking to organise the work of drivers in such a way that the drivers are able to spend at least one regular weekly rest period, or a weekly rest of more than 45 hours taken in compensation for reduced weekly rest, at home within each period of three consecutive weeks.[6]

Commission's impact assessment

The Commission's impact assessment stresses that long periods away from home and inadequate rest facilities are factors contributing to stress, fatigue and deterioration of social standards. More specifically, the impact assessment refers to studies showing that long periods away from home contribute to driver stress and fatigue, in particular when combined with inadequate accommodation for rest periods and the lack of access to sanitary facilities. In addition, long periods away from home also have adverse effects on drivers' health because of the inadequate access to proper nutrition, which is frequently the case for drivers away from their home base, as well as poor quality of sleep and work-related sleep disorders.

Parliament's proposal

[6] Amendment of article 8 (8b) of Regulation 561/2006.

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The Parliament proposes to have transport undertakings organise the work of drivers in such a way that the drivers are able to spend at least one regular weekly rest period, or a weekly rest of more than 45 hours taken in compensation for reduced weekly rest, at home or at another location of the driver's choosing before the end of each period of four consecutive weeks.

This proposal is in line with the Commission's proposal and impact assessment.

Council's proposal

According to the Council's proposal, a transport undertaking shall organise the work of drivers in such a way that the drivers are able to return to one of the operational centres in the Member State of the employer's establishment or to the drivers' place of residence within each period of four consecutive weeks, in order to spend there at least one regular weekly rest period or a weekly rest of more than 45 hours taken in compensation for reduced weekly rest. However, in the case that a driver has taken two reduced weekly rest periods consecutively without return, the transport undertaking shall organise the work of the driver in such a way that the driver is able to return already at the end of the third week.

Analysis

There are no substantial deviations between the impact assessment and the respective proposals by the Commission, Parliament, and Council.

4.3. Applicability of posting rules

Commission's proposal

According to the Commission's proposal, the posting rules do not apply to international road transport operations that are shorter than or equal to 3 days.[7] The posting rules, however, do apply to cabotage, irrespective of the frequency and duration of the operations carried out by the driver, since the entire transport operation is taking place in a host Member State.

Commission's impact assessment

The Commission's impact assessment notes that establishing a proportionate common approach for the application of the posting provisions in road transport would contribute to reducing the inequalities between foreign and national drivers and operators working on the territory of the same country. As such, the operators established in high-cost Member States would not face an undercutting through cost-based competition from other operators applying the terms and conditions of employment of "low-cost" Member States.

According to the Commission's impact assessment, one of the negative side effects of the posting provisions may be the creation of a situation of unequal opportunities for drivers employed in the same undertaking in a "low-cost" country and assigned with international operations on different routes, where some assignments involve work in high-cost countries (meaning that the driver will receive a higher salary) and others in low-cost countries (in which case the driver will receive the salary of his "home" country).

Therefore, in its impact assessment, the Commission has considered both costs and benefits of the proposed provision.

Parliament's proposal

[7] Amendment of article 2 (2) of Directive 2006/22/EC.

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The Parliament's proposal introduces a distinction between bilateral and cross-trade transport operations for the applicability of the posting requirements.

According to the Parliament's proposal, a driver will not be subject to the posting provisions when performing bilateral transport operations, *i.e.* the movement of goods from the Member State of establishment to another Member State or third country, or the other way around.

In addition, the posting provisions will not apply if such a bilateral transport operation is complemented with one activity of loading and/or unloading in the Member States or third countries that the driver crosses, provided that the driver does not load goods and unloads them in the same Member State.

Where a bilateral transport operation, starting from the Member State of establishment, during which no additional activity was performed, is followed by a bilateral transport operation to the Member State of establishment, the exception shall apply for up to two additional activities of loading and/or unloading, under the conditions set out above.

Council's proposal

The Council's proposal equally stipulates that a driver shall not be considered as posted when performing bilateral transport operations.

When a driver performing a bilateral transport operation in addition thereto performs one activity of loading and/or unloading in the Member States or third countries that the driver crosses, provided that the driver does not load goods and unloads them in the same Member State, the posting provisions will also not apply.

Where a bilateral transport operation, starting from the Member State of establishment, during which no additional activity was performed is followed by a bilateral transport operation to the Member State of establishment, this exception shall apply for up to two additional activities of loading and/or unloading.

Analysis

The Parliament's and Council's proposals introducing a distinction in posting requirements for bilateral and cross-trade transport operations deviate substantially from the Commission's proposal, which does not contain such a distinction.

These proposed differences in the applicability of the posting rules have not been assessed in the Commission's impact assessment.

4.4. Additional limitation of cabotage operations with a cooling off period

Commission's proposal

As regards cabotage operations, *i.e.* transport operations in a host Member State carried out by a haulier from another Member State, the Commission's proposal stipulates that cabotage operations can be carried out in a host Member State for 5 days from the date of international delivery.[8]

[8] Amendment of article 8 of Regulation 1072/2009.

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Commission's impact assessment

The Commission's impact assessment notes that reducing the time limit for cabotage operations to 4 days is expected to have a significant negative impact on cabotage activity and would therefore have a possibly negative impact on the transport market.

An alternative maximum period for cabotage of 5 days is expected to have less negative impact on cabotage activity.

In addition, according to the Commission's impact assessment, removing the limit on the maximum allowed number of cabotage operations within the permitted period is expected to have a positive impact on the transport market.

Parliament's proposal

The Parliament's proposal further limits the timeframe to carry out cabotage operations from the Commission's proposed 5 days to 3 days. In addition, the Parliament's proposal imposes a cooling off period of 60 hours following the end of the 3 day period, during which no cabotage operations can be carried out in the same host Member State.

Council's proposal

According to the Council's proposal, the existing limit of 3 cabotage operations in 7 days is maintained, but would be followed by a cooling off period of 5 days, during which the vehicle cannot operate in that particular host Member State.

Analysis

By even further reducing the maximum period for cabotage from 7 to 3 days, the Parliament's proposal deviates substantially from the Commission's proposal, and the findings of the impact assessment indicate that a reduction of the maximum period for cabotage to 4 days (or lower) could have a possibly negative impact on the transport market.

The amendments by Parliament and Council introducing a cooling off period of 60 hours or 5 days, respectively, have not been assessed in the Commission's impact assessment. Following the logic of the Commission's impact assessment, such a cooling off requirement is likely to have a negative impact on cabotage operations and the transport market.

4.5. Prohibition to rest in a vehicle during reduced weekly rest

Commission's proposal

According to the Commission's proposal, regular weekly rest periods and any weekly rest of more than 45 hours taken in compensation for previous reduced weekly rest shall not be taken inside a vehicle. They shall be taken in a suitable accommodation, with adequate sleeping and sanitary facilities.[9] The Commission's proposal does not prohibit drivers to take reduced weekly rest periods in a vehicle (as is currently allowed by Article 8(8) of EU Regulation 561/2006).

Commission's impact assessment

The Commission's impact assessment notes that the proposal should reduce the existing legal

[9] Amendment of article 8 (8a) of Regulation 561/2006.

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uncertainty in regard to the allowed site for weekly rest. In particular, under the current legal framework, a driver may choose to spend his daily rest (minimum of 9 or 11 hours) and his reduced weekly rest (min. of 24 hours) inside the vehicle, when away from base, provided that it has suitable sleeping facilities for each driver, and that the vehicle is stationary. The current regulation does not clearly specify whether or not drivers may spend the regular weekly rest on board their vehicle.

It is important to note that in its judgment of 20 December 2017 in the case C-102/16 *Vaditrans BVBA v Belgische Staat* the CJEU ruled that Article 8(8) of EU Regulation No 561/2006, currently in force, must be interpreted as prohibiting drivers to take the regular weekly rest periods in a vehicle 561/2006.[10]

However, the EU Institutions (the Council, the Parliament and the Commission), in adopting the amendments to EU Regulation 561/2006, introduced by the Proposed Legislation, are not required by EU law to prohibit the regular weekly rest periods in a vehicle based the CJEU judgment in the *Vaditrans BVBA* case (C-102/16). The Court's judgement in the abovementioned case merely interpreted text of the current Regulation 561/2006 in order to clarify its application by the Member States. In adopting the Proposed Legislation the EU Institutions are free to amend the article 8(8) of Regulation 561/2006, allowing the regular weekly rest period in a vehicle, if they politically agree so, based on the current economic, social and market considerations, and are not precluded to do so by the CJEU judgment in the *Vaditrans BVBA* case.

The above analysis is confirmed also by the European Commission in its impact assessment regarding the Proposed Legislation. In particular, in its impact assessment the Commission concluded, that "*The Court judgment will interpret the current text of the Regulation on driving and rest time. This does not however prevent the Commission from assessing the relevance of the current rule and, if justified, to propose new provisions on the taking of regular weekly rest which are better suited to business needs while ensuring a high level of protection for drivers.*"[11]

In its impact assessment the Commission acknowledged the difficulties in implementing the prohibition on the regular weekly rest in a vehicle. The Commission also noted that only some Member States (such as France and Belgium) prohibit the regular weekly rest in a vehicle based on the current EU Regulation 561/2006 and impose sanctions for violation of this prohibition. At least half of the EU Member States in practice do not prohibit the regular weekly rest in a vehicle or do not enforce this prohibition because the respective provision (Article 8(8) of EU Regulation 561/2006 is unclear or because they consider that the prohibition on the weekly rest cannot be complied with by hauliers due to lacking resting facilities and safe parking areas.

Furthermore, in its impact assessment the Commission also concluded that the clarification of the issue of whether taking the regular weekly rest on board the vehicle is allowed, is not expected to solve the problem of enforceability of such a prohibition and the other relevant issues of lacking adequate accommodation and lacking flexibility in organising weekly rest periods in order to reach home/base. Therefore, the Commission concluded that the

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[10] CJEU Judgment of 20 December 2017 in the case C-102/16 *Vaditrans BVBA v Belgische Staat*, para. 48.

11 Commission Staff Working Document: Impact Assessment accompanying Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) 165/2014 as regards positioning by means of tachographs, SWD(2017) 186 final, p. 8.

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prohibition to take the regular weekly rest periods in a vehicle will be difficult to comply with, in particular by international drivers, and difficult to enforce for the Member States.[12] The Commission also noted in its impact assessment that *"in the context of lacking resting facilities, time pressure and stringent application of the current rules on driving and resting times, the prohibition of spending weekly rests in the vehicle may even further increase drivers' stress levels".*[13]

However, in the impact assessment, the Commission justified the proposed prohibition on the regular weekly rest in a vehicle by the occupational health, working conditions, and road safety considerations, which the Commission prioritized over the difficulties of compliance and enforcement specified above. The impact assessment concluded therefore that the proposed prohibition is proportionate does not go beyond what is needed to achieve the objectives of legal clarity, improving the occupational health, the working conditions of drivers and the road safety.

In addition to the impact assessment accompanying the Proposed Legislation, the European Commission Commissioned a Study on Safe and Secure Parking Places for Trucks **("Study on Parking Places for Trucks")[14].** This study was carried out by a consortium including the World Road Transport Organisation (IRU), Panteia, Centre for Research and Technology Hellas (CERTH), DEKRA, CBRA, and the European Secured Parking Organisation (ESPORG). The study has identified a significant shortage of facilities that enable safe and secure parking of trucks and that also provide a minimum level of services to drivers. In particular, the study concluded that currently in the EU there are only 7,000 HGV (heavy good vehicle) parking spaces that offer an adequate level of security, which has been certified, while on an average weekday there are approximately 400,000 lorry drivers engaged in long distance transport across Europe, requiring overnight parking. Furthermore, such secured parking sites are located only in a few EU countries, therefore with the geographical distribution currently offered, it would not be possible for drivers to rely on the availability of certified secure parking along any given European transport corridor.

Importantly, the Study on Parking Places for Trucks was concluded only after the European Commission presented the Proposed Legislation, and after the Council and Parliament formulated their proposals regarding rest in a vehicle (the Study was published on 11 March 2019). Therefore, while this study hould be considered as an additional impact assessment regarding the provisions of the Proposed Legislation on the rest in a vehicle, the results of this study were not taken into account in the Commission's, Council's or Parliament's proposals regarding the rest in a vehicle.

Parliament's proposal

The Parliament's proposal provides that, in addition to the regular weekly rest periods and weekly rest of more than 45 hours taken in compensation for previous reduced weekly rest, the reduced weekly rest periods shall not be taken in a vehicle, either. They shall be taken in a quality and gender-friendly accommodation, outside the cabin, with adequate sanitary and sleeping facilities for the driver.

However, the Parliament's proposal provides for an exemption to this rule in case the regular weekly rest periods and reduced weekly rest periods are taken in locations certified as

[12] *Ibid.*, p. 24.
[13] *Ibid., p. 34.*
[14] Study on Safe and Secure Parking Places for Trucks, MOVE/C1/2017-500, published on 11 March 2019, available at: https://sstpa.eu-study.eu/download/19/final-report/1188/final-report-sstpa-28022019-isbn.pdf.

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complying with the requirements mentioned above, and under the condition that the vehicle is stationary and has suitable sleeping facilities for each driver.

In addition, the Parliament's proposal provides for an additional exemption period of three years after the entry into force of this provision, during which the regular weekly rest periods and reduced weekly rest periods may also be taken in the vehicle when it is parked in a parking area not fulfilling the requirements for Dedicated Parking Areas as set out in the annex of the regulation.

Council's proposal

The Council's proposal stipulates that daily rest periods and reduced weekly rest periods away from base may be taken in a vehicle, as long as it has suitable sleeping facilities for each driver and the vehicle is stationary. Regular weekly rest periods and any weekly rest of more than 45 hours taken in compensation for previous reduced weekly rest shall not be taken in a vehicle.

Analysis

The Parliament's proposal prohibiting to spend reduced weekly rest in a vehicle or outside secured and certified parking sites does not take into account the findings of the Study on Parking Places for Trucks that currently in the EU the availability of certified parking cites for HGV is completely inadequate for transport companies to comply with this prohibition. While the Parliament's proposal provides for a transitional period of three years, during which reduced weekly rest can be taken in a vehicle also in parking areas not fulfilling the requirements for Dedicated Parking Areas, there is currently no obligation in the Proposed Legislation for the Member States to establish an adequate infrastructure of safe and secure parking places for trucks. Therefore, if after the transitional period of three years such infrastructure is not put in place by the Member States, the prohibition on reduced weekly rest in a vehicle or outside certified Dedicated Parking Areas, will have a disproportionate impact on transport companies.

The Commission's and the Council's proposals, which are largely similar as regards the provisions on the weekly rest, do not prohibit the reduced weekly rest in a vehicle, but prohibit the regular weekly rest in a vehicle. In this regard, the Commission's and the Council's proposals to a large extent disregard the findings of the impact assessment on the lack of adequate resting facilities and safe parking places, and do not take into account the results of the Study on Parking Places for Trucks regarding the shortage of suitable parking places. While the Commission's and the Council's proposal can be seen as consistent with the Commission's impact assessment, which justified the proposed prohibition based on the grounds of the legal clarity, occupational health and working safety, the proposals do not address the significant difficulty to comply with this prohibition due to the lack of adequate resting facilities and secure parking spaces, and the difficulty to enforce it for the Member States acknowledged in the Commission's impact assessment.

4.6. Third-country operators' compliance with posting rules

Commission' proposal

No provision in relation to third-country operators' compliance with posting rules is proposed.

Commission's Impact assessment

A provision to impose an obligation on Member States to assure third-country operators' compliance with posting rules in bilateral agreements has not been assessed.

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Parliament's proposal

The Parliament's proposal imposes an obligation on Member States to implement equivalent posting measures in their bilateral agreements with third countries when granting access to the EU market to road transport undertakings established in such third countries.[15]

Council's proposal

No provision in relation to third-country operators' compliance with posting rules is proposed.

Analysis

The Parliament's proposal deviates substantially from the Commission's and Council's proposal, as well as from the impact assessment.

5. CONSEQUENCES OF DEVIATION FROM IMPACT ASSESSMENT

On the basis of our analysis in section 4, certain amendments proposed by the Parliament and Council have not been subject to or deviate substantially from the respective impact assessments that have been carried out by the Commission. This section analyses the legal consequences of such a deviation.

5.1. Legal requirements for impact assessments by the Commission

EU institutions are required to consult stakeholders and to conduct impact assessments in the process of proposing new legislative acts which are expected to have significant economic, environmental or social impact.[16]

In particular, article 11 of the Treaty on the European Union ("**TEU**") requires the European Commission to carry out broad consultations with parties concerned, in order to ensure that the Union's actions are coherent and transparent. Protocol No. 2 to the Treaty on the Functioning of the European Union (**"TFEU"**) also stipulates that "*before proposing legislative acts, the Commission shall consult widely*".[17]

Furthermore, article 5 of the Protocol No. 2 to the TFEU requires that proposed legislative acts should be justified with regard to the principles of subsidiarity and proportionality. Proposed legislative acts should be accompanied by an explanatory statement with an assessment of the proposal's financial impact and of the compliance with the principle of subsidiarity and proportionality.

These Treaty requirements are further detailed in the Better Regulation Guidelines[18], consisting of main Guidelines and an associated better regulation "Toolbox". The main Guidelines set out the mandatory requirements and obligations for each step in the policy cycle, while the Toolbox provides additional guidance and advice, which are not binding unless expressly stated to be so.

5.2. Impact assessment by the Parliament and Council

[15] Amendment of article 2 (2) of Directive 2006/22/EC.
[16] SWD (2017) 350, page 15.
[17] Article 2 of the Protocol No. 2 to the Treaty on the Functioning of the European Union.
[18] SWD (2017) 350.

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According to the Interinstitutional Agreement between the Parliament, Council and Commission on Better Law-Making of 13 April 2016[19] ("Interinstitutional Agreement on Better Law-Making"), impact assessments are an instrument to help these institutions to reach well-informed decisions, but are "*not a substitute for political decisions within the democratic decision-making process*".

The Interinstitutional Agreement on Better Law-Making stipulates that the Parliament and the Council will take full account of the Commission's impact assessments when considering legislative proposals from the Commission. To this end, impact assessments shall be presented in such a way as to facilitate consideration by the Parliament and the Council of the options chosen by the Commission.[20]

The Interinstitutional Agreement on Better Law-Making provides that the Parliament and Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's proposal. What qualifies as a 'substantial' amendment is to be determined by the respective institution.[21]

There is neither a legal definition of the term 'substantial amendment' nor any clarification in the case law of the CJEU. Therefore, the Parliament and Council have certain discretion to decide whether or not amendments are regarded to be 'substantial' on a case-by-case basis. In addition, when an amendment is considered to be 'substantial', it is still up to the Parliament and Council to determine whether it is appropriate and necessary for the legislative process to carry out an additional impact assessment.

Furthermore, the Interinstitutional Agreement on Better Law-Making provides that the Commission can, on its own initiative or when invited by the Parliament or the Council, complement its own impact assessment or carry out analytical work it considers necessary, while taking into account all available information and the stage in the legislative process in order not to cause undue delays.[22]

In line with the Interinstitutional Agreement on Better Law-Making, both Parliament and Council have taken certain steps to establish internal capabilities to conduct their own impact assessments.

The Parliament has established an internal Directorate for Impact Assessment and European Added Value to provide support to parliamentary committees in terms of screening the Commission's road maps, assessing the Commission's impact assessments and conducting *ex-ante* impact assessments on substantial amendments being considered by the Parliament.

At Council level, no separate body has been established to carry out regulatory impact assessments of the amendments produced in working groups. Due to the lack of such a body and methodology to conduct such assessments, impact assessments are left to EU Member States' own discretion, capacities, and methods.

On 5 April 2017, as a follow-up to the Interinstitutional Agreement on Better Law-Making on the issue of impact assessments within the Council, the Committee of the Permanent Representatives of the Governments of the Member States to the EU ("**COREPER**") endorsed the Council General Secretariat's proposed approach for a two-year pilot project to provide the

[19] L 123/1.
[20] Ibid, point 14.
[21] Ibid, point 15.
[22] Ibid, point 16.

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Council with a capacity to conduct impact assessments in relation to its substantial amendments (to be operational by the beginning of January 2018).

The procedure for triggering a request for an impact assessment on a Council amendment, as endorsed by COREPER on 10 May 2017, provides that an impact assessment may be considered appropriate and necessary if the proposed Council amendment is considered to be a substantial amendment to the Commission proposal and gathers sufficient support by delegations, while not unduly delaying the legislative process.[23]

As a general rule, a Council request for carrying out an impact assessment should be made before a general approach has been agreed and before the trilogues with the Parliament have started. However, the Council may consider an impact assessment on a Council's substantial amendment as appropriate and necessary at a later stage of the legislative procedure. An impact assessment on a section of a proposal should not automatically lead to a suspension of discussions on the other parts of said proposal.

5.3. Case law on impact assessment

In *Afton Chemica Limited v Secretary of State for Transportl*[24], the CJEU explicitly ruled that the Commission's impact assessment was not binding on either the Parliament or the Council.

The Court ruled that differences of opinion between the Commission and those majorities in the Parliament and Council cannot, as such, be criticised by the courts, as the institutional balance in the relevant legislative procedure would otherwise be called into question.

5.4. Legal implications for the underlying case

As discussed above, the Interinstitutional Agreement on Better Law-Making provides for an impact assessment to be carried out by the Parliament and Council in case they introduce substantial amendments to the proposed legislation, if considered appropriate and necessary for the legislative process.

Based on the analysis in section 4 above, a number of amendments to the Proposed Legislation introduced by the Parliament and Council deviate substantially from the Commission's proposal and have not been subject to an additional impact assessment at either Parliament or Council level.

Therefore, a strong argument could be made on the basis of the provisions of the Interinstitutional Agreement on Better Law-Making that the Parliament and Council should carry out an additional impact assessment of these amendments. Alternatively, an additional impact assessment could be carried out by the Commission.

However, it should be noted that both the Interinstitutional Agreement on Better Law-Making and the case law allow a degree of discretion to the Parliament and Council to deviate from the Commission's proposal and impact assessment.

Therefore, if the Parliament and Council would refuse to carry out an additional impact assessment and proceed with the adoption of their amendments, it is unlikely that this in itself would constitute a procedural violation that would be sufficient to annul the respective legal acts.

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[23] Council Document 8680/17.
[24] Case C-342/09 *Afton Chemical*, para 57.

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6. ANALYSIS OF AMENDMENTS TO KEY ISSUES UNDER SUBSTANTIVE EU LAW

6.1. Violation of the TFEU provisions on allocation of competences between the EU and Member States (Art 2(2) TFEU and 3(2) TFEU)

Following the amendment proposed by the European Parliament, the Proposed Legislation, if adopted, will impose on the Member States an obligation to conclude bilateral agreements with third countries regarding the posting of workers.

In particular, the following amendment regarding the posting requirements for drivers in the road transport sector, was proposed in the TRAN Committee of the European Parliament:

"Member States shall implement equivalent measures to Directive 96/71/EC and this Directive [XX/XX] (lex specialis) in their bilateral agreements with third countries when granting access to the EU market to road transport undertakings established in such third countries. Member States shall also strive to implement such equivalent measures in the context of multilateral agreements with third countries. Member States shall notify the relevant provisions of their bilateral and multilateral agreements with third countries to the Commission."

Such an obligation for the Member States to implement "equivalent measures" on the posting of drivers in bilateral and multilateral agreements is contrary to the provisions of the TFEU on the allocation of competences between the EU and the Member States (Articles 2 and 3(2) TFEU).

The TFEU envisages three categories of EU competence: (1) exclusive competence, (2) shared competence, and (3) the competence only to take supporting, coordinating or supplementary action.

In the areas of the EU's exclusive competence (which includes such areas as customs union, competition rules necessary for the functioning of the internal market, monetary policy for the Euro currency, the common fisheries policy and the common commercial policy), only the EU institutions may legislate and adopt legally binding acts. In these areas of competence, the Member States can only adopt legislation or other binding legal acts if they have been empowered to do so by the EU, or in relation to the implementation of the EU acts.[25]

Transport policy and legislation belong to the area of shared competence.[26]According to Article 2 TFEU, in the areas of shared competence, both the EU and the Member States can legislate and adopt legally binding acts. However, in this area of competence, the Member States may only exercise their competence to the extent that the EU has not exercised its competence.[27]

It follows from the above provisions of the TFEU that, once the EU has adopted the legislation on the posting requirements in the transports area, the EU Member States cannot enter into international agreements or adopt other binding legal acts on this subject.

In its jurisprudence, the CJEU has confirmed on several occasions that, when the EU adopts provisions laying common rules in the Transport area, *"the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third States which*

[25] Article 2 (1) TFEU.
[26] Article 4 TFEU.
[27] Article 2(2) TFEU.

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affect those rules."[28]

It follows from the abovementioned provisions of the TFEU on the allocation of competences between the EU and the Member States, and from the jurisprudence of the CJEU, that if the Member States were allowed to enter into international commitments which would affect common rules adopted by the EU in the area of transport, this would jeopardise the attainment of the objective pursued by such common rules and would prevent the EU from fulfilling its task in the defence of the common interest in the area of transport.[29]

Since the EU has already exercised its competence and adopted common rules on posting of workers in the area of transport, and with the adoption of the Mobility Package will further complement these rules with specific requirements on the posting of drivers, the Member States are no longer allowed to adopt bilateral or multilateral treaties in this area.

Consequently, the provision, requiring the Member States to implement in their bilateral treaties with third countries equivalent measures to the EU legislation regarding the posting of workers in the road transport sector, is contrary to Article 2(2) and 3(2) of the TFEU on the allocation of competences between the EU and the Member States.

Furthermore this amendment proposed by the European Parliament is contrary to the Article 14 of Directive 2006/22/EC concerning social legislation relating to road transport activities, which requires the EU (and not the Member States) *"to begin negotiations with the relevant third countries with a view to the application of rules equivalent to those laid down in this Directive"* as regards the working conditions and social protection of drivers. Notably, the amendments proposed in the TRAN Committee of the European Parliament regarding the posting requirement, which include an amendment to Article 14 of Directive 2006/22/EC, maintain in the text of this article the requirement for the EU to begin negotiations with third countries. Therefore, the Parliament's amendment requiring Member States to implement 'equivalent measures' on the posting of drivers in their bilateral treaties with third countries is inconsistent and flawed.

As regards the requirement for the Member States to apply and enforce the EU rules on posting requirements towards the transport undertakings from third countries, in principle EU law allows delegating to the EU the enforcement of EU legislation *vis-à-vis* third-country operators. However, as regards the posting of drivers, the current EU legislation and the Proposed Legislation (Mobility Package 1) do not provide a clear mechanism for such enforcement by the Member States. Therefore, given the lack of clear legal provisions in the EU legislation, and absent any international agreements with third countries which would require third-country undertakings to comply with the EU rules on the posting requirements for drivers, a requirement for the EU Member States to enforce the EU posting rules against third country operators would create a significant legal uncertainty, and would be difficult for Member States to comply with in a uniform manner.

It should be noted, that currently a number of the EU Member States, have bilateral treaties with third countries in place in the area of transport, which govern access to the European transport market. However, these treaties do not contain provisions on positing of drivers similar to those included in the Proposed Legislation. As mentioned above, requiring Member

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[28] See, *inter alia, the* Opinion of the 2/15 of the CJEU of 16 May 2017, para. 170; Case 22/70, *Commission v Council*, paras. 17-32; Case C-467/98, *Commission v Denmark*, para. 77, CJEU Judgment of 26 November 2014, in Case C-66/13 *Green Network.*

[29] CJEU Judgment of 5 November in Case C-467/98, *Commission v Denmark*, para. 79, see also the CJEU Judgment of 5 November 2002 in Case C-476/98 *Commission v Germany*, paras. 124-136 and CJEU judgment of 26 November 2014, *Green Network*, C-66/13, paras. 29-32.

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States to conclude or amend bilateral treaties to include provisions on posting of drivers, and on control and enforcement of such provisions, would be contrary to the TFEU provisions on allocation of competences with between the EU and the Member States.

Notably, in its judgment in the case 22/70, *Commission v Council*[30] the CJEU considered the question whether the Member States could be party to the international AETR treaty in the area of road transport. In that case, the Court concluded that the Member States could become party to that treaty, because at the time of the negotiating the provisions of the AETR in question (in 1970), the EU had not exercised its competence in the area regulated by such provisions, and therefore the Member States still had the competence to enter into the treaty individually. *A contrario,* with respect to the posting rules in the Proposed Legislation, the EU has already exercised its competence and therefore the Member States are not any longer allowed by EU law to conclude bilateral treaties on this subject.

Importantly, if the Member States in the future conclude such bilateral agreements with the third countries, regarding the posting of drivers, such agreement would face a significant risk of being challenged before the national courts due to their contradiction to the EU Treaties, which could lead to a situation of legal uncertainty regarding the rules stipulated in such agreements.

A legally sound way, compliant with EU law, would be for the EU regulations to establish a clear mechanism for the enforcement and control of the posting requirement with respect to transport undertakings from third countries, and to conclude treaties between the EU (and not Member States) and third countries regarding posting.

Overall, from a legal perspective, EU-level agreements with third countries regarding the posting requirements for drivers should be considered as the preferable option compliant with EU law (rather than bilateral agreements), due to the following reasons:

- After the EU has legislated on the posting requirement for drivers, the EU has acquired exclusive competence in this area, including the exclusive competence to conclude international agreements in this area. According to settled case law of the CJEU bilateral agreements by the Member States with third countries in the area of EU's exclusive competence would be contrary to EU law.[31]
- Article 14 of EU Directive 2006/22 concerning social legislation relating to road transport activities already imposes the obligation on the EU to begin negotiations with the relevant third countries with a view to concluding international agreements regarding the application of rules, equivalent to those laid in the Directive. Since the rules on the posting of drivers, as well as the whole Mobility Package 1, are closely interrelated with the rules of the Directive 2006/22, international agreements with third countries regarding the posting of workers should also be concluded at the EU level, rather than by the Member States.
- Finally, there is a significant recent precedent from in the EU's practice of concluding international agreements at the EU level. In particular, in the context of the UK's planned exit from the EU ("Brexit"), the EU is planning to conclude an EU-level international agreement ("Withdrawal Agreement") which, among other matters will govern the applicability of the EU's transport legislation to road carriers operating between the EU and the UK. On 19 December 2018 the European Commission has

[30] CJEU judgment of 31 March 1971 in Case 22/70, *Commission v Council*.
[31] CJEU Judgment of 31 March 1971 in Case 22/70, *Commission v Council*, CJEU Judgment of 5 November in Case C-467/98, *Commission v Denmark*, CJEU Judgment of 5 November 2002 in Case C-476/98 *Commission v Germany*, CJEU judgment of 26 November 2014, *Green Network*, C-66/13, CJEU Judgment of 5 November 2002 in case C-472/98, *Commission v Luxembourg*.

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proposed a draft EU regulation, which will govern the applicability of the EU transport legislation to road carriage operations between the UK and the EU, before an international agreement between the EU and UK is concluded.[32] Article 3(3) of the abovementioned proposal explicitly states that *"The Member States shall neither negotiate nor enter into any bilateral agreements or arrangements with the United Kingdom on matters falling within the scope of this Regulation. Without prejudice to existing multilateral agreements, they shall not otherwise grant UK road haulage operators any rights other than those granted in this Regulation*." This proposal has been approved by the European Parliament's legislative resolution on 13 March 2019. Therefore, the requirement for the Member States to regulate the rules on the posting of drivers in bilateral treaties, proposed by the European Parliament in its amendments to the Proposed Legislation, if adopted, would contradict the abovementioned regulation on the applicability of the EU transport legislation to the road transport operations between the EU and the UK.

Based on the provision of the TFEU governing the conclusions of the EU's international agreements, international agreements with third countries are concluded by the EU Council, and are negotiated by the European Commission (a negotiating team appointed by the EU Council) based on a mandate ("negotiating directives") issued by the EU Council. Following the adoption of an EU international agreement on a subject where the EU ordinary legislative procedure applies (such as transport rules) such an agreement has to be approved by the EU Parliament.

Currently EU law does not establish a specific and clear obligation for the EU to conclude international agreements with third countries on the posting of drivers. However, once the EU has exercised its competence and adopted EU legislation on this subject, such an obligation for the EU arises on the basis of Article 3(2) TFEU, which provides that *"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope"*. Therefore, as regards the international agreements on the posting drivers, the requirement for the EU to conclude international agreements with third countries on this subject should be further clarified by establishing such a requirement in the Proposed Legislation (similarly to the Article 14 of EU Directive 2006/22, which establishes the requirement for the EU to negotiate international agreements with third countries rules of EU social legislation in the area of road transport).

After the requirement for the EU to conclude international agreements with third countries is specified in the EU legislation, if the Council fails to initiate the adoption of the required international agreement within the prescribed time limit or within a reasonable time (if the time limit is not prescribed), an action for failure to act can be brought against the Council by any EU Member State before the CJEU.[33].

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[32] European Commission Proposal for a Regulation of the European Parliament and of the Council on common rules ensuring basic road freight connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union, COM(2018) 895 final.

[33] A similar action for failure to act (to negotiate international treaties with third countries) could potentially be brought against the Council in the CJEU by a Member State or a group of Member States also if the specific requirement to conclude such treaties is not established in the Mobility Package. However, in such a case it would be more difficult to prove in the Court that the Council violated its obligations under the TFEU, because, as mentioned above, the obligation to conclude international agreements is not currently clearly defined in EU law.

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6.2. The proposed provision on the obligatory return of the truck without a proper impact assessment could constitute a violation of Article 91(2) of the Treaty on the Functioning of the European Union "TFEU"

Article 91(2) TFEU requires the EU Institutions, when adopting legislation in the area of transport, to take into account *"cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities".*[34] The proposed amendments on the obligatory return of the truck will have a significant negative impact on the road carriers from peripheral Member States.

As a result of the significant costs arising from this requirement,[35] the market operators from peripheral Member States could be cut off from the international value chains, which will negatively affect employment and the living standards of a large number of people in Member States, directly or indirectly dependent on the road carriers' industry.

This expected significant negative impact was not taken into account by the Members of the European Parliament in proposing and supporting its amendment on the obligatory return of the truck, and no impact assessment of this amendment has been carried out.

The failure to take into account the impact of the provision proposed by the Council on the level of employment and standard of living in the affected Member States is contrary to the requirement of Article 91(2) TFEU, and could constitute a reason to challenge the validity of this provision before the CJEU.

6.3. The current positions of the European Parliament and of the Council contain provisions that are contrary to the prohibition on discrimination under the TFEU

Article 18 TFEU prohibits any discrimination on grounds of nationality (which includes the country of establishment for companies). Furthermore, Article 95 TFEU prohibits discrimination in the area of transport resulting in different conditions for the carriage of goods based on the country of origin or destination of the goods.

The amendments proposed by the Parliament and by the Council, in particular the requirement of the obligatory return of the truck and the application of different standards (including the posting of workers requirements) to bilateral and cross-trade transport, will disproportionally affect the carriers from certain Member States based on the periphery of the EU, in comparison to the more centrally-located Member States. This could lead to a hidden discrimination of the operators from peripheral Member States, and therefore constitute a violation of the TFEU provisions prohibiting discrimination, in particular Articles 18 and 95 TFEU.

Including such provisions in the proposed transport legislation would potentially constitute a reason to annul the legislation as contrary to the TFEU. In its jurisprudence, the Court of Justice of the EU has annulled legislation containing discriminatory provisions recognised by the Court as contrary to the TFEU.[36]

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[34] Article 91 (2) TFEU.
[35] IRU open letter on the potential consequences of obligatory return of truck, Brussels, 26 October 2018.
[36] CJEU Judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats and Others*, C-236/09.

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6.4. Potential violation of the Principle of Proportionality

Under Article 5 of the **"TEU"**, the EU Institutions are bound by the principle of proportionality, which requires that the content and form of Union action *"shall not exceed what is necessary to achieve the objectives of the Treaties".*[37]

The application of the principle of proportionality is further detailed in Protocol 2 to the TFEU, which requires that draft legislative acts take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

The proportionality requirement is applicable to the legal acts adopted by the EU Institutions, as well as to the legal acts and measures taken by the Member States. According to the case law of the CJEU regarding the principle of proportionality, the test applicable when measuring the proportionality of EU legal acts differs from the test applicable to the national legal acts and measures adopted by the EU Member States.

In the case of the national acts, the *"least restrictive measure"* test applies, so that the Member State, that has adopted the measure, has to demonstrate that the objective of the adopted rule or measure cannot be achieved by another measure, which is less restrictive of trade.[38] The objectives of the EU's legislative acts and proposed provisions are usually specified the text of the proposed legal act or its preamble, and further specified by the explanatory note by the Commission accompanying the legislative proposal. As regards amendments proposed by the Parliament and the Council, they have to be in line with the objectives of the proposed legislation (as stated in the text, preamble or Commission's explanatory note), and could also serve an additional objective, which usually has to be specified in an accompanying explanatory note of the institutions or their members proposing the respective amendments. In any event, in case of a dispute before the CJEU, it would be for Institutions to demonstrate, what specific objective a certain provision is intended to serve and whether the proposed provision is suitable for achieving such an objective.

In the case of the EU legal acts, the CJEU applies the "*manifestly inappropriate"* test, which represents a significantly higher threshold that has to be established in order to recognise an EU legal act to be contrary to the principle of proportionality. In assessing proportionality of legal acts adopted by the EU, the Court *"has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".*[39]

While, as mentioned above, the jurisprudence of the CJEU allows a broad discretion to the EU Institutions in choosing measures to achieve the objectives of their legal acts, if the measure is proved to be manifestly inappropriate/disproportionate, this constitutes a ground for annulling such a measure.

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[37] Art. 5 TEU.
[38] CJEU case 120/78, *Rewe-Zenral AG v Bundesmonopolverwaltung für Brentwein (Cassis de Dijon* [1979] ECR 649; Case 302/86 *Commission v Denmark (Danish bottles* [1988] ECR4607, para 6.
[39] CJEU Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraphs 82 and 83; CJEU Case c-58/08 Vodafone, EU:C:2009:596, para. 52.

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Based on the available information, a strong argument can be made that certain amendments proposed by the EU Parliament and Council are manifestly disproportionate.

According to the assessment provided by the International Road Transport Union (IRU), the provision on the obligatory return of the truck, as proposed by the European Parliament, could increase the mileage of heavy goods vehicles 80-135 million vehicle kilometres per year (an increase of 45 to 75 %). This could significantly increase the empty mileage and generate up to 100 000 tonnes of truck CO2 emissions per year.[40] As such, this measure contradicts the objective of reducing the number of empty runs, which is one of the key objectives of the Mobility Package 1, as well as the EU's objective to reduce fuel consumptions and CO2 emissions.[41] Such a major negative impact is disproportionate to the objective sought by the proposed amendment of ensuring the genuine establishment of transport undertakings and curbing the use of letter-box companies.

As regards the proposed provisions on limitation of cabotage operations, and the binding cooling off period for cabotage operations proposed by the European Parliament and Council of 60 hours (the Parliament's amendments) or 5 days (the Council's amendments), it can also be argued that the expected impact of such limitations is manifestly disproportionate. According to the study by the Gdansk University, the limitation of cabotage operations would significantly reduce employment in the Polish road transport sector (in both SMEs and large enterprises), lead to a significant increase in total operating and labour cost, and have a negate impact on the size of the vehicle fleet.[42]

As mentioned above in section 4 of this memorandum, these amendments by the Parliament and the Council deviate significantly from the European Commission's proposals, and their proportionality has not been assessed in any impact assessment by the EU institutions. If these provisions are adopted without carrying out an additional impact assessment, which would justify the proportionality of these provisions, this would constitute a strong ground for challenging the legality of these provisions on the basis of the principle of proportionality.

Finally, the European Parliament's proposal to prohibit drivers to spend their reduced weekly periods in a vehicle or outside certified safe and secure parking areas has not taken into account findings of the Study on Parking Places for Trucks regarding the existing huge gap in the availability of safe and secured parking spaces in the EU Member States. As discussed above in this memorandum, currently there are only 7,000 appropriately certified safe and secure parking places in Europe, as opposed to approximately 400,000 places required by drivers on a daily basis. Therefore, the prohibition on reduced weekly rest in a vehicle or outside certified safe and secure parking areas will cause a significant negative impact on transport undertakings, and could lead to a chaotic situation, if the transport undertakings are required to comply with it before an appropriate infrastructure is put in place.

The proposal to prohibit the reduced weekly rest in a vehicle or outside safe and secure parking areas contradicts the findings of the Study on Parking Places for Trucks for and has not been justified by any additional impact assessment by the Parliament or other Institutions, and therefore could be considered as manifestly disproportionate, given its expected negative impact on the road transport sector.

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[40] IRU open letter on the potential consequences of obligatory return of truck, Brussels, 26 October 2018.

[41] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Low-Emission Mobility, SWD(2016) 244 final.

[42] Economic Consequences of Regulation in the European International Road Transport, Study by the University of Gdansk, Faculty of Economics, presented in Brussels on 22 November 2017.

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Similarly, although the Commission's Impact assessment concludes that the proposed provisions prohibiting the regular weekly rest in a vehicle are proportionate, a strong argument potentially could be made that also the prohibition of the regular weekly rest in a vehicle (proposed by the Commission, the Parliament and the Council) is disproportionate, as the Commission's impact assessment clearly recognised the serious difficulties for the Member States and transport undertakings to implement and comply with this prohibition, due to the lack of adequate resting places, which was confirmed by the Study on Parking Places for Trucks.

7. POSSIBLE REMEDIES

In the context of the irregularities and violations that have been established in the sections above, this section discusses possible remedies to challenge the Proposed Legislation.

7.1. Withdrawal by the Commission

According to article 293 (2) TFEU, the Commission may alter, *i.e.* amend or withdraw, its proposal at any time during the ordinary legislative process "*as long as the Council has not acted*". The Commission has, however, no obligation to withdraw its proposal as such.

The CJEU confirmed in *Council v Commission*[43] that the Commission has the power to withdraw legislative proposals that have been changed in their substance by the Parliament and/ or Council, so that they no longer match the Commission's original goals.

The Court ruled that "*where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its raison d'être, the Commission is entitled to withdraw it*". However, it may only do so once it has had due regard to Parliament's and Council's concerns resulting in their wish to amend the proposal.

It should be noted, however, that in order to ensure the institutional balance during the ordinary legislative procedure, the Commission's power to withdraw a proposal becomes increasingly limited as the legislative process advances.

In particular, the Commission cannot withdraw or amend its proposal after the Council has approved the Parliament's position from first reading, *i.e.* after the Council has adopted its common position.

It should be noted that a withdrawal of a legislative proposal is a far-reaching step by the Commission, and the Commission would only be allowed to withdraw its proposal if it considers that the amendments by the Parliament and Council are contrary to the objectives of the Proposed Legislation, and taking into account the concerns by the Parliament and Council.

In the underlying case, the Council agreed on a general approach on the respective legislative proposals, but has not yet adopt a common position. Therefore, it has not yet 'acted' within the

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[43] Case C-409/13, *Council v Commission* (ECLI:EU:C:2015:217). In this particular case, the Commission had proposed a legislation which would increase the efficiency of the decision-making process regarding micro-financial assistance through the Commission's implementing powers. In trilogue, however, Parliament and Council agreed to replace the implementing powers with the ordinary legislative procedure, which was contrary to the Commission's objective. The Commission therefore decided to withdraw its proposal for a framework regulation in accordance with the article 293(2) TFEU. The Court ruled that such a withdrawal was justified.

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meaning of article 293 (2) of the TFEU, and at the current stage of the legislative discussions the Commission could still withdraw its proposal. Before the Council adopts its common position in the present case, the Parliament has to adopt the text in the plenary session, which will be followed by the trilogues. Following the trilogues the Council will adopt its common position regarding the Parliament's position. Therefore, the Commission can also withdraw its proposal during the trilogues, if it considers that the positions of the Parliament and Council prevent the achievement of the legislation's objectives, contain provisions contrary to EU Law or if it sees that given the discrepancies between the Parliament's and the Council's position the progress in the legislative process is blocked.

7.2. Request for opinion by the Council Legal Service

The Council Legal Service ("**CLS**"), part of the Council General Secretariat, acts as the legal service to both the Council and the European Council (and must be distinguished from the respective legal services to the Commission and Parliament).

In its advisory role, the CLS gives legal opinions in complete impartiality, either orally or in writing, to the Council (and European Council) or its preparatory bodies, on any legal or institutional questions which may be raised in the course of the Council's work.[44]

As such, the CLS can be addressed to form an opinion regarding proposed regulation including whether certain provisions of the proposed legislation are compliant with general rules and principles of EU law. Even if the CLS is not asked for such an opinion, it is still entitled and expected to draw the Council's attention to any legal issues.[45]

Moreover, in view of its aim "to take a creative approach where appropriate, to identifying legally correct and politically acceptable solutions",[46] the role of the CLS goes beyond assessing whether proposed legislation is legally correct or not. If possible, the CLS would ideally propose alternative ways to achieve the politically desired outcome in a legally correct manner, which can include concrete drafting suggestions.[47]

In terms of timing to deliver an opinion, there is no prescribed deadline. The CLS' mission statement requires the CLS to provide an opinion in a 'timely manner'. This means that the CLS should take into account the state of play of the political discussions and provide its input without undue delays, in such a manner that its legal assessment can the legislative process and be taken into account. In our experience, this usually takes between two and three months.

In addition, it should be noted that although the CLS' opinions are followed in most instances, they are not binding upon the Council. In other words, it is ultimately up to the Council to decide whether or not it will follow the opinion of the CLS.

Public access to the opinions of the CLS

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[44] Rules of Procedure of the Council available at: https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf.
[45] BISHOP, M, and NAERT, J. (2017), The Role of the Council Legal Service in Ensuring Respect for the Law. In M. MARESCEAU (Ed.), *The EU as a Global Actor - Bridging Legal Theory and Practice*, Leiden: Koninklijke Brill, 103.
[46] The 'Mission statement' of the Council Legal Service, 5 September 2013, SN 3320/13.
[47] BISHOP, M, and NAERT, J. (2017), The Role of the Council Legal Service in Ensuring Respect for the Law. In M. MARESCEAU (Ed.), *The EU as a Global Actor - Bridging Legal Theory and Practice*, Leiden: Koninklijke Brill, 103.

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There is no formal register of inquiries made during a particular legislative process, but access to opinions by the CLS can be requested in the framework of Regulation No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

According to article 4 (3) of Regulation No 1049/2001, however, access to documents that have been drawn up by an institution for internal use or received by an institution and relate to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

In line with its previous case law, the CJEU delivered a restrictive interpretation of this exception to public access to documents in *Kingdom of Sweden v MyTravel Group plc and European Commission*, clarifying that the risk of interest being undermined "*must be reasonably foreseeable and not purely hypothetical*" and that in such a case the Council has "*to ascertain whether there is any overriding public interest justifying disclosure*".[48]

The Court concluded that "*Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*."[49]

Therefore, the CLS assesses any requests for access to its opinions against the criteria set out in the case law on the exceptions to public access under Regulation No 1049/2001, including those on the protection of the Council's decision-making process.

7.3. Action for annulment by the CJEU

If the Proposed Legislation is adopted by Parliament and Council, it could be challenged by bringing an action for annulment before the CJEU. The Proposed Legislation cannot be challenged before the CJEU during the legislative process.

Article 263 TFEU explicitly states that Member States (as privileged actors) can bring an action for annulment before the CJEU on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Such legal proceedings can lead to the annulment of the act concerned if it is judged to be contrary to EU law.

The possibility for individuals or legal persons to bring an action for annulment of an EU legislative before the CJEU is very limited. In particular, in order to challenge a legislative act, a direct and individual concern has to be demonstrated according to article 263 (4) TFEU. In practice, the Court applies a very high threshold for this requirement and it is very difficult to prove direct and individual concern with respect to legislative acts.[50]

The time-limit to submit the applications pursuant to Article 263 TFEU is two months following the publication of the legislative act in the EU Official Journal.

In view of the underlying case, both the grounds of infringement of an essential procedural requirement as well as the infringement of the Treaties or of any rule of law relating to their

[48] Case C-506/08 P *Kingdom of Sweden v MyTravel Group plc and European Commission*, para 76; Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council* EU:C:2008:374, paras 43 - 44.
[49] Ibid, para 68.
[50] Individuals and legal persons have a possibility to question the legality of EU legislative acts before the CJEU indirectly via preliminary ruling procedure following a referral from the national court.

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application are discussed below.

Infringement of an essential procedural requirement

In regard to infringements of an essential requirement, it should be noted that not every procedural requirement will be regarded as 'essential'. An essential procedural requirement is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may influence the content of the measure.[51]

The fact that such a rule has been breached in the preparation or adoption of a measure will constitute a ground for its annulment only if the CJEU finds that, in the absence of the irregularity in question, the contested measure might have been substantially different.[52]

The ground for infringement of an essential procedural requirement encompasses the requirement for institutions to comply with the internal procedural rules they have adopted in their Rules of Procedure[53] and thereafter are obliged to comply with. Such rules may be categorised as essential procedural requirements.

In a case before the CJEU, the Court for instance annulled a Council directive which was adopted by the so-called written procedure and therefore in violation of article 6 of the Council's rules of procedure since two Member States had expressed objections to use it.[54]

Infringement of the Treaties or of any rule of law relating to their application

An action for annulment can also be grounded on the infringement of the Treaties or of any rule of law relating to their application. Article 263 TFEU explicitly mentions the TEU, TFEU, the protocols annexed thereto, the Charter of Fundamental Rights of the EU and the Accession Treaties and Acts.

The term 'any rule of law relating to [the Treaties'] application' covers all other binding provisions of the EU legal order. These include provisions of international law and customary international law. In addition, there is a category consisting of the general principles of Union law, such as the principle of proportionality and the principle of equal treatment.

The CJEU applies a high threshold for annulling legislative acts that have been adopted by the Parliament and Council, and serious procedural violations or/and violations of substantive EU law have to be established in order for a legislative act to be annulled.

As demonstrated above, should the Proposed Legislation be adopted, including the current amendments proposed by the Parliament and Council, strong legal arguments for annulment of the Proposed Legislation could be made before the CJEU on both procedural and substantive grounds.

8. CONCLUSIONS AND RECOMMENDATIONS

The legal analysis in this memorandum demonstrates that certain amendments to the Proposed Legislation (Mobility Package 1) introduced in the Council and in the Parliament deviate significantly from the European Commission's proposal and have not been assessed in any

[51] Case C/54 *Netherlands v High Authority* [1954 to 1956] E.C.R. 103, 111-12.
[52] Joined Cases 209-215 and 218/78 *Van Landewyck v Commission* [1980] E.C.R. 3125, para 47.
[53] See article 232 TFEU (European Parliament), article 2403(3) TFEU (Council, and article 249 (1) TFEU (Commission).
[54] Case 68/86 *United Kingdom v Council* [1988] E.C.R. 855, paras 40-49.

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impact assessment.

In particular, the following proposals by the Parliament and the Council can be considered as substantial amendments deviating from the Commission's original proposal:

1) Return of the vehicle to the Member State of establishment;
2) Different applicability of the posting requirements to bilateral and cross-trade transport;
3) Additional limitation on cabotage operations followed by cooling off period;
4) The requirement for the Member States to conclude bilateral agreements with third countries to ensure third-country operators' compliance with posting measures.
5) Prohibition (introduced by the European Parliament) to take weekly rest periods in a vehicle or outside certified safe and secure parking areas.

Given that these amendments deviate substantially from the Commission's proposal and have not been subject to any impact assessment or contradict the available impact assessment, and taking into account the expected major economic and environmental impact of these amendments, a strong argument could be made that the Parliament and the Council carry out an additional impact assessment of their proposed amendments, based on the Interinstitutional Agreement on Better Law-Making. Alternatively, an additional impact assessment of the Council's and Parliament's amendments could be carried out by the European Commission, before or during the trilogues.

Furthermore, since in their proposals regarding the provisions on the rest in a vehicle, the Commission, the Council and the Parliament did not take into account the finding of the Study on Parking Places for Trucks (published on 11 March 2019), which identified a significant gap in the availability of safe and secure parking spaces in Europe, findings of this study should be presented to the Institutions, with the request to take these findings into account (as part of the impact assessment) and to amend the relevant provisions of the Proposed Legislation, in order to avoid the disproportionate impact of the prohibition on reduced weekly rest (proposed by the Parliament) in a vehicle. In particular, taking into account the findings of the study, the Institutions could be requested to introduce an adequate transitional period during which the prohibition on the rest in a vehicle would not apply, accompanied by an obligation for the Member States to establish a sufficient number of certified safe and secure parking spaces during the transitional period.

Based on the legal analysis of this memorandum, a strong argument could be made that the amendments proposed by the Parliament and the Council are contrary to substantive EU law, in particular to the following provisions of EU Treaties and EU secondary legislation:

1) TFEU provisions on the allocation of competences between the EU and the Member States (Articles 2(2) TFEU and 3(2) TFEU);
2) Requirement to take into account the impact on the standard of living and level of employment in certain regions and on the operation of transport facilities (Article 91(2) TFEU;
3) Prohibition of discrimination (Articles 18 and 95 TFEU);
4) Violation of the principle of proportionality.

In addition, an argument potentially could be made, depending on the factual circumstances during the voting in the TRAN Committee (if objections have been raised by a sufficient number of MEPs in the TRAN Committee) that the process of adoption of the Parliament's position has violated the Parliament's rules of procedure.

Given the deviations of the Parliament's and the Council's amendments from the Commission's Proposal an impact assessment, and the potential contradictions of this amendments to EU law

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as discussed above, and taking into account the current stage of the legislative process concerning the Mobility Package 1, we recommend the following steps to oppose the adoption and application of the provisions proposed by the Parliament and the Council:

1. Request for a legal opinion by the Council Legal Service

It is recommended to address the Council Legal Service with a request to provide a legal opinion on the compatibility of the Council's and the Parliament's amendments with EU law, and on the necessity for an additional impact assessment of the amendments substantially deviating from the Commission's proposal.

A request to the Council Legal Service can be submitted by the EU Member States concerned, individually or, jointly, during one of the upcoming meetings of the Council Working Party on Land Transport.

2. Engagement with the European Parliament

In addition to addressing the Council Legal Service, it is recommended to raise the concerns with the European Parliament regarding the legality of the Parliament's proposals and potential procedural violations in the European Parliament. Furthermore, the Parliament should be requested to conduct an additional impact assessments of its proposed amendments, and to take into account the findings Study on Parking Places for Trucks, as regards the provisions on the rest in a vehicle.

In order to increase the impact of such an address to the European Parliament, a letter presenting the main arguments on the potential illegality of the Parliament's amendments should be supported by a group of MEPs in the TRAN Committee and beyond (no specific minimum threshold is required but a larger number of MEPs would increase the impact), and addressed to the TRAN Committee, the President of the Parliament and the Conference of Presidents, as well as to the Parliament's Legal Service.

Alternatively, if obtaining such support by the MEPs is not feasible, the letter outlining legal arguments could be addressed to the TRAN Committee, the President of the Parliament and the Conference of Presidents by the Transport ministries of any of the EU Member States supporting this initiative, or by a group of national associations representing road carriers and other stakeholders in the transport sector.

Given that in the coming weeks the Conference of Presidents is to decide on whether to submit the the Mobility Package 1 to the plenary vote or refer it for amendments to the TRAN committee, it is recommended to proceed with the addressing the Parliament at the earliest convenience.

Finally, if the Proposed Legislation is submitted to vote in a plenary, or in the TRAN committee, in the coming weeks, the Parliament is required to follow the procedural requirements regarding the translation and voting with respect to the amendments proposed in the Parliament (as discussed in sections 3.1 and 3.3. above). Therefore if the sufficient number of MEPs (40 MEPs for the plenary vote and 3 MEPs in the TRAN Committee), requires so, the Parliament is required to translate the text of relevant amendments into all required language and to ensure separate votes on the amendments rather than voting on amendments jointly. It is therefore recommended to monitor closely if these procedural requirements are observed, in the Parliament and raise objections (via MEPs) if these requirements are not followed.

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3. Engagement with the European Commission

It is further recommended to bring the concerns on the legality of the Parliament's and the Council's proposals to the European Commission, in particular to Transport Commissioner Violeta Bulc, DG MOVE (the unit responsible for the Mobility Package 1), and to the Commission's Legal Service.

In particular the European Commission should be presented with the arguments regarding potential violations of EU law, and could be asked to withdraw its proposal if the Parliament's and Council's positions on their substantial amendments to the Commission's proposal do not change in the course of the trilogues. Alternatively, the Commission should be requested to carry out an additional impact assessment of the Council's and Parliament's amendments in before or during the trilogues, before these amendments can be adopted.

The outreach to the Commission should be carried out by representatives of transport ministries of EU Member States (in order to increase the impact of such an action), or, alternatively, by national associations representing road carriers and other stakeholders in the transport sector. The outreach should be conducted on a basis of a position paper summarising the legal arguments regarding the Proposed Legislation, which would be presented to the relevant European Commission departments as discussed above.

It would be also important to bring to the attention of the European Commission, as well as of the Parliament and of the Council, if Parliament's and Council's amendment are adopted, the Proposed Legislation is likely to be challenged in the CJEU based on the violations of substantive EU law and on procedural violations.

4. Action for annulment in the Court of Justice of the European Union

If the Proposed Legislation, including the amendments of the Parliament and the Council, discussed in this memorandum, that are (potentially) contrary to EU law (i. e. if the outreach to the CLS, the Parliament and Council is unsuccessful) an action for annulment of the adopted legislation can be brought before the CJEU.

The action for annulment should be brought by the Governments one or more Member States. In actions for annulment before the CJEU national governments of the Member States are usually represented by the ministries of Justice.

The defendants to be specified in the action for annulment would be the EU institutions adopting the legislation, i.e. the Parliament and the Council.

As regards the timing of bringing an action for annulment to the CJEU, such an action can be brought within two months after the publication of the adopted legislation in the EU Official Journal.

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