

# SENSE – Position Paper

POLISH PERSPECTIVE ON THE REGULATION OF ROAD  
TRANSPORT SECTOR

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## 1. Introduction

Polish road transport sector is the biggest of its kind in Europe (it is bigger than German, French and British). Our country is not only a link between the Eastern and Western Europe but also between Southern and Northern parts of the EU, that is why Poland is called a “corridor of road transportation”. According to Polish Central Statistical Office (GUS) in 2017, our transportation companies shipped over 2053,3 mil tons of cargo (most of this was carried with road transport), what makes up 17,5% of whole EU transportation. Moreover, the whole sector is growing – in 2017 only, road transport shipped 13% more cargo than a year before. Growths were recorded mostly in road transport of goods such as textiles and clothing; leather goods (31,1% growth), food products, drinks and tobacco (26,8% growth) as well as ores and other mining products (18,3% growth). GUS recorded data about Polish companies’ fleet and according to its reports there were 3,2 mil trucks registered in Poland (what is 2,2% more than in 2016), but unfortunately, the biggest part of it contains the oldest trucks (up to 30 years old vehicles).

Poland found its way and in the 90s set out the course for accession to the EU and in 2004 Poland joined the big European family. That changed a lot not only in our legal system but it also pointed the way forward. Polish commercial contacts focused on Western Europe, especially on our closest neighbours. According to other GUS data in the first half of 2018 Poland shipped goods worth 452,5 bil zloty (approx. more than €100 bil). At the same time, we imported goods worth 457,7 bil zloty. The difference does not seem to be that big, but still, it shows that our transport is mostly outbound.

Nowadays, thanks to the improvement of economics and considerably good business climate in whole Europe, Polish economy and especially the transport sector is still growing too. In 2016, PWC reported for Transport Logistyka Polska (TLP) – one of the biggest unions of transport sector’s employers and a member of Polish Social Dialogue Council, that the market is demanding drivers. The situation turned over after many years of the exact opposite and now the employees are in a more preferable situation. The report indicated that the market is lacking new workers and that employers are looking

for over 100 thousand drivers. Such situation causes a way more preferential position for employees, but it also showed us that our law was not ready for rapid changes like those.

Taking into consideration all the above, it is evident, that transport sector and all the surrounding affairs play a very important role for Polish stakeholders. Poland has participated pretty profoundly in the recent discourse concerning the mobility package and amendment of the PWD Directive, not rarely supporting a stance quite opposite to the western EU Member States. This nonetheless does not mean that the “Polish view” is in principle opposite. We are witnessing conflicting interests of various stakeholders, involvement of a lot of capital value and political affiliations taking active part in shaping the current treatment of road transport sector in Poland. In this paper, the attention is being focused on all the said implications, with the aim to disassemble separate issues and analyse them in turn. The methodology used herein is based on various sources of information, including interviews with stakeholders, official stances of governmental bodies and agencies as well as available documents. The first area to be tackled will be the legal situation in Poland and in the EU, followed by socio-economic considerations and, finally, by the political layer of the dispute.

## 2. Legal state-of-art

### 2.1 Implementation of EU law in Poland

The implementation of European Union laws to the Polish legal system has been a gradual process starting in the mid 90s, when the provisions of the Europe Agreement establishing an association between the European Communities and the Republic of Poland came into force. As of the 1<sup>st</sup> of May 2004, when Poland officially became a part of the European Union all the EU laws existing at the time were to be binding in Poland. The Posting of Workers Directive was among those laws and thus became a directly effective law in its territory. Initially, the provisions were implemented in the Labour Code as “Chapter II.A Employment conditions for employees posted from an European Union Member State to work in the Republic of Poland”. In 2016, we got a separate piece of legislation implementing its provisions. Adoption of the Act of 10<sup>th</sup> of June 2016 on the posting of workers in the framework of the provision of services (hereinafter referred to:

the “Act”) had at its aim implementation of both the Posting of Workers Directive (hereinafter referred to as “PWD” or the “Directive”) and the Enforcement Directive.

In relation to the former instrument, the Act enlists in the art. 4 all the terms and conditions of employment, which shall be guaranteed to the workers posted to the territory of Poland. Generally, the content of those provisions is a reproduction of the art. 3(1) of the Directive, the only visible difference in Polish Act concerns including not only the “minimum rates of pay”, but also the “amount of remuneration” (art. 4(2)(4) of the Act). It is to be doubted, however, that the aim of this distinction was to alter or broaden in any way the scope of protection. It is rather only meant to emphasise the fact, that the “minimum rates of pay” is provided for in a separate piece of legislation in Poland (the Act of 10 October 2002 on the Minimum Wage), while components of remuneration are laid out in the Labour Code.

Nevertheless, there remain certain difficulties in connection with the Polish implementation of the laws on posting. Firstly, the Act explicitly excludes the international transport sector from its scope. This solution is surprising as no such exclusion has been envisaged in the PWD and seems to be directly contrary to the EU law. It is even more surprising when one takes into consideration the fact, that previous implementation in the Labour Code did not contain this exclusion – it only appeared in the 2016 Act. Still, it is important to remember that directives are effective even without proper implementation, therefore no Member State has the power to create exceptions to their material scope. Such a power would contradict the aim of the EU, that of single European market.

At this point it is nonetheless worth stopping for a moment and consider the objectives behind such an exclusion. The European Commission has itself expressed doubts as to the implications of the PWD in the international transport sector<sup>1</sup>. The mere fact that it has been not materially excluded from the application of the 96/71/EC does not mean, that it is in fact applicable. Taking into consideration the nature of employment in transport, one can think mainly of a very high mobility and frequency, resulting in constant change of

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<sup>1</sup> See Council document No 10048/96 SOC 264 CODEC 550, Statement No 3.

place of work. Amidst such circumstances it is difficult to point out a country where the worker “normally works”, apply the mandatory rules of the host state for example as regards the minimum paid annual holidays or even the minimum rates of pay. After all, how would one imagine paying one rate of pay for a couple of hours, then switching to another one due to crossing a border. Such an outcome is disastrous for legal certainty and creates enormous technical problems. Moreover, it falls short of protecting the employees; firstly, it deems their pay dependent on the route they choose or route they are assigned with, and secondly, it incentivizes the employers to look for loopholes or legal instruments which will enable them to circumvent the rules on posting. It is not uncommon for the employees themselves to assist their employers in implementing such practices (for example willingly agreeing to lower wage in lieu of an appropriate amount of remuneration to obtain higher allowances at the same time averting taxes and social security contributions or diverting to bogus self-employment to avoid the mandatory provisions).

Analysing the theoretical background of the legal provisions in question one must not disregard the treaty provisions which legitimize the secondary legislation of the EU. The Treaty on the Functioning of the European Union provides for a separate regulation of the transport in the EU. Nonetheless, the Directive has been implemented as an expression of the freedom to provide services, which is laid down in the art. 56 TFEU. Thereby, we have two separate lines of legislation, one of a very fundamental meaning for the EU touching upon the freedom of movement, and another one, being undoubtedly *lex specialis* to general provisions of EU law, regulating the transport sector. A far-fetched but not unfounded argument could invoke the latin maxim of *lex specialis derogat legi generali*, which would support the conviction, that transport as such has been regulated in separate provisions, and thus the more general rules shall not be applied thereto and this view has been presented by the Polish government. Yet, it seems that such conclusion could be deemed too bold, as on the other hand *exceptiones non sunt extentendae*, and all exceptions from the coverage of the Directive has been explicitly enumerated therein and they do not include the international transport sector.

The discussion as to the application of the PWD to transport sector has not only been confined to the most elementary players, namely employees and employers. On the contrary, it has been discussed widely in the institutional environment. The potential

breakthrough had taken place in June 2018, when the members of the European Parliament Committee on Transport (TRAN) voted on removing transport and transit from the scope of the application of the Directive.<sup>2</sup> Regrettably, soon after, the development was killed in the plenary session of the European Parliament.<sup>3</sup> Another tangible evidence suggesting the ill-fated adaptability of the Directive to the international transport surfaced when the European Commission took legal action against France and Germany when they applied the minimum pay principle to the transport with only a “marginal link” to their territory. The Commission has stated that such practice “restricts in a disproportionate manner the freedom to provide services and free movement of goods”<sup>4</sup>. Nonetheless, it proves that the issue of transport sector is constantly debated and in need of major revision, potentially weighing on the opinion that international transport should not be included in the application of the Directive at all, similarly to the already excluded seagoing personnel.

Concluding, inclusion of this reservation does not result in transport not being covered by the Posting of Workers Directive in the territory of Poland, however it does effectively exclude it from the coverage of the Act. Yet, the exclusion does create a lot of confusion among employers and the enforcement agencies, concurrently suggesting that the law in question is not suitable to cover international transport.

The Polish Act, as mentioned above, implements the Enforcement Directive. In the art. 9 it appoints the National Labour Inspectorate as the competent authority to carry out monitoring and enforcement tasks for the purpose of posting of workers. It imposes upon it the obligations to *inter alia* provide information about employment conditions (sec. 2(1)), accept statements from the employers posting to Poland containing information necessary to conduct a control of the factual state of affairs in a work place (sec. 2(2)); cooperate with competent authorities of other Member States (sec. 2(4)). There are

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<sup>2</sup> <http://zpp.net.pl/en/transit-and-international-transport-are-removed-from-the-posting-of-workers-directive-pwd-members-of-the-european-parliament-committee-on-transport-tran-voted-on-june-4th-on-three-report/> accessed: 23.12.2018, 21:10.

<sup>3</sup> <http://zpp.net.pl/en/the-european-parliament-voted-against-three-mandates-of-the-committee-on-transport-and-tourism-tran-regarding-reports-on-the-posting-of-workers-driving-and-rest-periods-for-drivers-and-cabotage-as/> accessed 23.12.2018, 21:35.

<sup>4</sup> [http://europa.eu/rapid/press-release\\_IP-16-2101\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2101_en.htm) accessed: 26.12.2018, 20:15

certain obligations imposed on the employer posting to Poland, including *inter alia* appointing a person authorised to intermediate in contacts with the National Labour Inspectorate during the period of posting (art. 24(1)); prior to starting the provisions of the service or on the day thereof submitting a statement containing the abovementioned necessary information (art. 24(3)). It is questionable however, to what extent the requirements of the Enforcement Directive are applied within the transport sector in Poland. One could likely say, that Poland had not properly implemented the rules on posting in relation to transport. Nonetheless, there exist certainly practical reasons for such an exclusion. The existing rules on posting fit nowhere in the transport industry; they do not take into consideration the frequency, the short-term nature and multiplicity of international context of even a single employment relationship in that sector. Due to mentioned practical difficulties, Poland likely decided to leave them out for the grey area of law.

Another issue present in the Polish implementation of both directives relates to the legal definitions contained in the Act. Firstly, the definition of “worker posted from the Republic of Poland” contained in the article 3(7) does not provide any viable content, as it is dependent on the law of the host country, and a status of such a worker should only be considered within the meaning of particular legal system of the host Member State and not in light of the sending state perspective. The definition of “the employer posting workers to the Republic of Poland” on the other hand is just repeating the words of the PWD, what seems redundant, however it possibly allows for better clarity for someone who reaches out just for the Act. The most surprising aspect of the legal definitions provided for in the art. 3 of the Act is the absence of the definition of a worker. According to the art. 2(2) of the PWD “for the purpose of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted”. Thus, in case of posting to the territory of Poland which is contemplated here, it should be the Polish definition of worker which is of importance. Presumably for that reason the legislator deemed providing a definition redundant, as it is explicitly covered by the art. 2 of the Polish Labour Code. At this point, however, it should be noted that there is a certain level of divergence between the EU-level “worker” and the Polish “worker” or rather “employee”. The Enforcement Directive in its art. 4(5) suggests that in order to fall within the applicable definition of a worker: “*Member States should be guided, inter alia,*

*by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.*" This article clearly emphasises, that irrespective of the legal basis of carrying out work, the meaning of worker shall be established on a factual basis, taking into consideration and weighing factors by way of example listed in the abovementioned article. Polish definition contained in Labour Code is thus much narrower, as it deems as employees only workers hired on the basis of contract of employment.

A major issue in Polish understanding of posting, not to be left out, comprises the debate between "posting" and "business trip". The latter one is defined by Polish labour code, art. 77<sup>5</sup> as "*work assigned by the employer away from the location of the employer's registered office, or away from his permanent workplace*" and entitles the employee "*to reimbursement of any expenses related to business trip*". No wonder that the institution of business trip is much more appealing to employers than the European mechanism of posting. They do not need to respect the host member state's mandatory labour provisions and can avoid the burden of taxation and social security contribution as the allowances paid in accordance with art. 77<sup>5</sup> do not count towards remuneration and hence are exempted from the abovementioned burdens. Undoubtedly, a view providing for the dichotomy of legal instruments aimed at changing the place of work of a worker is illusory. It is entirely irrelevant for application of the PWD or the ED which national mechanism has been used; whenever sending of the employee fulfils the premises of the posting of workers within the framework of provision of services (art. 1 of the PWD) the Directive will apply. However, it is important to bear in mind the fact, that not all cross-border work assignments will be covered by its scope. There are numerous scenarios in which the employee will be directed abroad to perform a task solely for his employer or the work performed will not count as within the framework of providing services.<sup>5</sup> Hence, business trip as defined in the Labour Code covers a range of circumstances wider than solely posting in the European sense and results in confusion and possible abuses of that

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<sup>5</sup> Michał Szypniewski, „Business Trip Versus Posting Workers – Central-Eastern Europe Way To Conquer The Single Market Or Just A Misunderstanding?”, <http://elw-network.eu/business-trip-versus-posting-workers-central-eastern-europe-way-conquer-single-market-just-misunderstanding/>.

institution, however it is still perfectly acceptable for a particular arrangement to be both business trip and posting in the meaning of the PWD.

## 2.2. Enforcement of the law by the governmental bodies

In Poland, a body established to enforce and control the compliance with labour law principles is “Państwowa Inspekcja Pracy” – the National Labour Inspectorate (“PIP”). Its mission, as expressed on its official website, is “*the effective enforcement of labour law, including occupational health and safety, through effective and targeted inspections and preventive actions aimed at reducing accident hazards and respecting labour law.*” The competences and obligations of PIP as regards posting of workers are enlisted in the art.9 of the Act. These include:

- (1) Providing information about the employment conditions enlisted in art. 4 (“*the minimum working conditions*”) and the scope of their application to workers posted to Poland;
- (2) Accepting statements, which the employers are obliged to submit, containing the information necessary to conduct a control of the factual state of affairs in a work place of posted workers;
- (3) Running and updating a website created as a part of the Entrepreneur’s Information Centre containing information on employment conditions, obligations of employer posting a worker to Poland, joint and several liabilities of the employer posting workers and economic operator entrusting works in the area of construction, and others;
- (4) Cooperating with competent authorities of other Member States; in particular providing information about the employment conditions of workers posted to the Republic of Poland, informing about irregularities discovered in connection with posting to or from the Republic of Poland including the actions which are subject to fines, filing a justified request with competent authorities and responding to justified requests;
- (5) Notifying employers and executing upon request of authorities of a decision concerning an administrative penalty or fine imposed on this employer as a result of infringement of provisions on posting of workers.

The above obligations clearly comprise duties as regards sharing information, controlling employers and cooperation with authorities from other Member States. As an implementation of art. 4 of the Directive, a liaison office has been appointed, and this function is fulfilled by Główny Inspektorat Pracy – the Chief Labour Inspectorate. Its duty is to communicate with institutions from other EU countries as an exercise of its information duties. The statistics shared by PIP show, that the most extensive exchange of information is carried out with Belgium, in 2017 amounting to 114 cases<sup>6</sup>. The trend shows that for all the countries involved, the number of cases is growing every year, in 2015 reaching 192, while in 2017 - 466. Taking into consideration the fact, that Poland has issued total of 43 requests of information, 24 out of them concerning strictly the posting of workers, there is still a way to go for Polish authorities and strengthen the habit of cooperating with European institutions. In a regulatory chaos, which undeniably characterises the current state of the regulation of posting in particular within the transport sector, a strong institutional framework is a key to success. Nonetheless, a visible progress has been made as regards execution of penalties and fines imposed by foreign institution as a result of finding violations of the law of posting – for the first time in 2017 Poland has realised its tasks in that regard.

An undeniably requisite element for effective control of the legality of posting is the statement referred to in the point (2) above, as it provides the authorities with the essential knowledge. Employers who are posting their workers into the territory of Poland shall present to the Chief Labour Inspectorate a “Statement of Posting of Workers into the territory of Poland” the latest on the first day of provision of service. This requirement has been imposed not only on the EU based employers, but also on those from third countries. The number of statements made each year is rapidly growing (1030 in the second half of 2016, 1503 in the first half of 2017), what is likely an expression not of growing phenomenon of posting, but of the increase in legitimate posting in line with the law. The numbers are however not impressive.

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<sup>6</sup> PIP report on its activities in 2017, <https://www.pip.gov.pl/pl/o-urzedzie/sprawozdania-z-dzialalnosci/97255,sprawozdanie-glownego-inspektora-pracy-z-dzialalnosci-panstwowej-inspekcji-pracy-2017.html>.

### Control over posting from Poland

As regards the control powers of PIP it is important to emphasise, that control over employers posting from Poland to other EU countries is highly hindered and it remains in the competences of host countries' institutions. PIP does not have the authority to execute application of foreign law, which is the minimum protection for workers allowed for by the Directive. This would be possible only if such enhanced working conditions (wages, leave, bonuses for overtime) were incorporated into the employment contracts in the form of a supplement or annex. Otherwise, the only legal ground for claiming those benefits is the law of foreign jurisdiction, which is out of reach for Polish institutions. According to the report of PIP on its activity in the year 2017, there were 243 controls carried out in 2017 concerning the issue of posting from the Republic of Poland, out of which 177 cases were started on request from foreign offices. Control was eventually performed over 229 entities, which does not seem like an impressive number, nonetheless becomes one when realising the number of employees involved – 26 700. In terms of industries which were under scrutiny, the majority of the entities were from construction sector (40%), transport sector amounting to 4<sup>th</sup> most popular (6%). The growing number of requests for information coming from other jurisdictions also points to the growing level of control abroad.

PIP has also recognised certain other difficulties. Considering the widespread phenomenon of people from Poland being sent to Germany to be a 24/7 care for the elderly, but at the same time being employed for a Polish employer, this has proven to be challenging sector for control. Firstly, there is no legal provision allowing the German labour authorities to enter a private house for the purpose of control and secondly, the regulation of that sector explicitly excludes 24/7 system of working.

Visibly, the biggest issue here is the lack of mandate of Polish authorities to control posting from Poland to other EU countries, and while Poland is one of the biggest exporters of labour force this shortage becomes even more important. In order to improve the level of control over employers, PIP suggests that all changes of place of performance of work and the minimum working conditions applicable under foreign law should be provided for in the employment contract, thus creating a ground for action for PIP and other controlling bodies in Polish jurisdiction. An important advancement would be to improve the communication and availability of data between PIP and the Polish

Social Insurance Institution (*Zakład ubezpieczeń społecznych* – ZUS), especially getting access to the registrar of A1 certificates.

One of the most prevailing issues identified by PIP is the circumvention of the Act by using the “business trip” arrangement, already referred to in the previous chapter. It allows for restriction of expenses by not having to pay the minimum wage of the host jurisdiction and significantly cutting the liabilities towards Polish revenue offices.

#### Control over posting to Poland

This phenomenon is of a smaller range, than the above mentioned, it does however still play a considerable part for Polish labour market. In this regard PIP has the authority to control:

- a) the legitimacy of posting, especially the genuity of the commercial activity of the posting employer in the home state and the temporariness of the work performed in Poland;
- b) providing not less favourable working condition, than those specified in the Polish Labour Code, to the posted workers.

The year 2017 has witnessed 97 controls over employers posting workers to the Republic of Poland. The incentive to inspect mostly resulted from the submitted statements on the posting of workers (which are obligatory for the posting employers), but also from issued “permissions to work” for third country nationals, notifications from other institutions or even direct complaints filed to PIP. Violations have been found in the astonishing 79% of controlled entities. Most of them pertained to non-payment of the overtime bonuses, not abiding to the provisions on minimum rest periods, health and safety violations and absence of the documentation which is required to be stored. One of the most common weaknesses of the sanctioning of the said infringements is the absence of posting employer in the territory of Poland, what prevents the authorities from imposing a fine on him, and lack of address in Poland prevents from imposing a fine via post. Whatsoever, the fines or penalties anticipated for violation of the Act are imposed through a penal procedure (they are treated as offences). In order to facilitate the process of enforcement of law, PIP has supported the idea to amend the law and move the said procedure to the sphere of administrative law, hence the fines could be imposed without judicial intervention.

The abovementioned issue could be minimised, if employers, in line with the obligation imposed by the Act, appointed liaison officers in the host country while submitting their statements. Unfortunately, this duty is often neglected and an absurdity results, as they should be the intermediaries between authorities and employers, so PIP is unable to file to the employer a request to appoint a liaison officer. Simultaneously, the Act does not specify what procedure shall be followed in case of submitting an incomplete statement. Current control method is almost inapplicable in the transport sector. Assuming, that a driver who is transporting goods into other country or passing thorough a third country in course of such delivery falls under a “posting” arrangement, the employer who is posting the employee would be obliged to submit the statement to PIP at the latest on the day of commencement of posting. Nature of transport is however so dynamic, that it is likely that the information (contained in the statement) of such arrangement would reach the controlling bodies after posting had already ended and there would be no opportunity to control the legitimacy and lawfulness of posting.

It is important to bear in mind the fact, that contrary to the above assumption, transport sector in Poland is excluded from the coverage of the Act. Therefore, there are no statistics regarding the practical application of the provisions on control to employers in transport.

### 3. Socio-economic analysis

According to the fact, that Mateusz’s parents used to own a road transport company it became obvious that their experiences would become a priceless asset to this position paper. They were undertaking transport for about 8 years and the main course of their trucks were Member States of the European Union (especially Germany, Hungary and Czechia). In this chapter, we would like to include their experiences and perspective. As mentioned above, Polish road transport is the biggest of its kind in Europe, thus it indicates that the market is oversaturated. Polish transport companies are forced to compete not only with their competitors within the domestic market, but also with other companies from other MS. Polish truck drivers are known for being hardworking and for their magnificent attitude, but undertakers need to find other solutions to remain buoyant.

First of all, one has to focus on the first element of the capitalist system – money. It has been already said that Polish employees are still, after 15 years from the accession to the

EU, less paid than their western neighbours. In Poland, a minimum wage stands at 2250 zloties (about €520). For comparison, in Germany, one of our closest neighbours and economic partners, it stands at €1498, which is almost 3 times more. Another crucial point is, of course, to bear in mind the PWD and all the discrepancies around its interpretation especially in terms of transport.

### 3. 1 Remuneration and working conditions

The remuneration of the Polish truck drivers has caused a countless number of problems and doubts for decades, not only for the employers and employees themselves but also for lawyers. The most popular practice stated that drivers are fulfilling their duties as employees on a business trip, but in 2008 the Supreme Court in its resolution II PZP 11/08 recognised that a driver who works outside their employer's seat is not on a business travel. The decision confused not only the whole transport sector but also impacted the social security system. Polish Social Security Office (ZUS) basing on above resolution (because it had a retroactive effect), could claim for returning unpaid contributions (with interest) for 10 years back. In 2010, after MPs initiative, the situation changed and the parliament adopted a new act about drivers' working time and restored business trip as the driver's work model.

Nevertheless, business trip provisions do not refer to drivers directly and do not take into account the specificity of their work. However, when it comes to the particular parts of drivers' remuneration it is hard to distinguish the salary and all of the benefits paid in the title of business trip. It is almost impossible to estimate an average driver's salary in Poland, because of lack of provisions that could regulate it comprehensively. For example, according to the EU report entitled "Employment Conditions in the International Road Haulage Sector" from 2015, the average driver's salary depends on the size of the company, but for smaller undertakers, it was 2620 zloties (approx. €610), for bigger companies 3970 zloties (approx. €920). Those amounts do not include all the expenses that are connected with business trip. Other data established salaries from 296 zloties even up to 9000 zloties. But how much do drivers earn actually? A popular Polish vlogger and truck driver - Iwona Blecharczyk a.k.a. "Trucking girl", claimed in that, according to her data, drivers earn up to 9000 zloties per month. It seems to be true, employees are

able to earn the mentioned before salaries because it's the net value what really interests employees. As we mentioned above, the biggest part of the drivers is employed on working contracts and some of them are not actually employed at all because they fulfil their duties as self-employed or on minimum wage contracts. But we have to remember about the allowances and other components not included in the salary. Indeed, drivers do earn even 9000 zloties on average, but only the minimum wage is the official part of their remuneration. In 2019, the government established the minimum pay at 2250 zloties (gross), so it is less than  $\frac{1}{3}$  of an average driver's salary. Popular practise bases on minimum wage and allowances paid for the drivers for their needs in the travel. However, those are said to be too low to satisfy even the basic needs, such as accommodation, food and access to sanitation devices. Interesting thing is that the allowances are not covered by social security contributions and that is the reason why it is such a popular way to remunerate drivers.

### 3.2 Trade Unions' perspective on the remuneration and working conditions

Just a few days before writing this paper, we met Mrs Ewa Podgórska-Rakiel, PhD, who is *inter alia* a member and expert of the Legal Team of the biggest Polish trade union - NSZZ Solidarność (Solidarity), she is also a member of the team for international social dialogue councils and expert committees for the European Union. Mrs Podgórska-Rakiel presented us the stance of Polish drivers who are active members of Solidarność and their point of view about remuneration. As mentioned above, allowances are the biggest part of the whole remuneration of the drivers, but still, canned food is the stereotype of the Polish drivers. According to Solidarność's data, most of the employees get the lowest allowances - €7,5 per day and that is not enough to provide even for their basic needs. Employees are forced to pay for many needed things straight from their own pockets, so if they want to earn as much as they can, they have to save on everything, even on food. For example, if the driver is tired and needs to rest outside their car's cabin, in a hotel, they do not get extra pay or return for such expenses. So, in conclusion, we must admit - allowances and lump sums help employers in hiding true driver's remunerations and let them reduce the cost of their undertakings. At first glance, such a situation seems to be beneficial for both employers and employees - first of them save money for their future undertakings, others get more money each month to their own pockets. On the other hand, social security

contributions paid by employers are noticeably lower (because in Polish social security system the contributions are paid in proportion to the salary agreed in the working contract). This leads us to many other problems, i.e. when the employee goes on a sick leave the sickness benefit is only 80% (excluding a few examples such as pregnant women for whom the sickness benefit is still equal to salary) of basic remuneration. An employee who actually earns up to 9000 zloties, now being sick gets only 1800 zloties (gross) because his official salary (agreed in the contract) is just a minimum wage, so 2250 zloties. This practice put employees in such a tough spot because instead of recovering their financial situation concerns them most.

### 3.3 Employers' perspective on the remuneration and working conditions

Polish undertakers claim that the application of the Directive's provisions would cause their disaster and it would be destructive for the whole market. It is not unknown that undertakers from the Member States where salaries are noticeably lower compared to other, wealthier MSs, are against those provisions. The PWD forces them to pay their employees higher hourly rates than those existing in younger European Union countries. Those provisions significantly raise the total cost of service and reduce the competitiveness of eastern companies. According to our interview, we had learnt that Polish undertakers consider the PWD provisions to be discriminatory as wealthier countries' salaries are similar to each other and for poorer undertakers it sometimes becomes impossible to afford higher hourly rates as the cargos prices are noticeably lower for Polish companies.

Polish employers' organisations still claim that there is no point on changing the current driver's situation in terms of salaries and especially in accommodation. As mentioned before, TLP – the biggest Polish transport undertakers' organisation is rather sceptical towards proposed amendments to current provisions. Marek Wroński, the president of TLP officially stated that Mobility Package would actually worsen drivers working conditions. The undertakers consider the ongoing situation as considerably good for posted drivers as TLP in its official opinion deems that mobile workers in transport would actually experience poorer conditions i.e. in terms of accommodation at the time of fulfilling their duties. The employers submit that modern trucks guarantee more

comfortable resting conditions than crowded and poorly equipped roadside hotels. Moreover, avoiding renting hotel rooms would also help the undertakers with lowering labour costs that do not need to be artificially risen with provisions of Mobility Package as it considers sleepovers in the cabs as inadequate. On the other hand, employers detect the problem rather in different areas. According to TLP's data approximately 30 000 parking areas are currently missing and those facilities that exist do not have proper infrastructure in terms of security and accommodation, for example on the road from Warsaw to Madrid (that takes about 5 days to travel) there are only 53 accommodation points (such as hotels or motels). Another real threat for mobile workers according to Polish employers are traffic jams which cost is 100 billion euros (which is 1% of EU GDP) per year and road dangers. It may be considered controversial, but our interlocutors pointed out that unregulated flow of migrants is also a threat for worker's and cargo's safety. It is known that especially in transit places such as Calais, France migrants used to break into the semi-trailers to illegally cross the France-UK border. Such incidents cause for example damage to the cargo and expose oblivious to this fact employees to criminal liability. Such situations cause also delays in transport which means loses for undertakers and their counterparties.

Finally, the employers predict that the lack of exclusion of the transport sector from the objectives of the European Commission will lead to an extreme administrative burden on transport companies, that operate in several EU markets at the same time. As the market is highly dispersed, the smallest enterprises constitute over 80% of all companies in the sector (most of them are self-employed, the so-called bogus self-employment) – additional administrative burden proposed with Mobility Package and control duties are infeasible for them.

### 3.2 Social dialogue

Employers' associations are trying to find a new way and a solution for the current situation. Transport Logistyka Polska is one of them and together with trade unions and government members as members of Social Dialogue Council established a team for transport affairs. This special team is looking for a compromise between the interests of all parties (the Government, employers and employees). One of the aims of this

community was working out a new model for remunerating drivers for their work, what leads us to the next point – a way forward.

As we mentioned above – Solidarność and TLP are the leading social dialogue partners when it comes to road transport problems. Polish Social Dialogue Council since 2016 is trying to work out proper solutions for both employees and employers. The Council set up a special team for conducting social dialogue for transport affairs, that is composed of representatives of three parties – the government, employers and of course employees. Together, they were supposed to find a new model for remunerating driver and finally, in 2017 the team has presented a bill about changing the current model. Changes proposed in the bill concern two aspects – regulating drivers' working time and change of a current remunerating model. This caused many controversies on both sides, and after 2 years discussion still continues. Firstly, business travel as posting drivers model is said to be the main issue, but waiving this way of practice may cause (according to employers' claims) bankruptcy of the smallest transport companies (they form 95% of the whole sector in Poland). A new remunerating model would base on drivers working as posted workers what would cost companies over 4 billion zloties per year, because of social security contributions growth. TLP points that such changes may cause a mass dissolution of working contract and lead many employees to sing civil contracts, that do not oblige employers to pay contributions for social security – for them, it would be the only way to save money, but for employees, it would cause a rather uncomfortable and unstable situation.

Polish social dialogue is rather weak, there are many interest groups that do not want changes, especially those which are considerably better for employees. Employers' representatives still emphasise that posting drivers based on PWD would cause an enormous growth of costs that could destroy the whole sector. This leads us all to one conclusion – not only Poland but also the EU need to find a new way, a new solution for regulating drivers' situation. The next PWD clearly will not regulate this issue, that is why this problem continues to exist. Moreover, the Mobility Package is no less controversial than the current situation. Surely, a wide social dialogue and many discussions would help with finding a compromise that would satisfy the whole sector, but it is really hard to reconcile so many interests. The future works on drivers' situation should be preceded by

a constructive and complex market investigation with a view to the structure of employment and remunerating drivers and also an analysis of the influence of different options for the market.

#### 4. Political discussions on transport

The significance of the discourse on the regulation of transport sector in Poland could not be stressed enough. The extent of reach and amount of people involved in this sector has been presented in the first part of this paper. It is important to emphasise, that Poland approaches this discussion from the sending country point of view, as due to relatively low costs and lower labour standards Poland is one of the leading countries in posting of their workers. Consequently, there are strong voices and conflicting views from the opposite parties to the employment and the government. It is worth to discuss them in turn.

The employers being the more powerful party to the contract of employment have an undoubted privilege in dictating the terms on which the industry is run. In Poland, there are a few very big transport companies, which organise in the employers' organisations, and have a considerable impact on the course of the politics, due to the strong lobby they create and significant revenue they generate. In their view, the Directive and any incentive to stronger regulate posting (e.g. the Revised Directive) are seen as harmful to their interest. Hence, they rely on the argument of freedom to provide services to support their view. Undoubtedly, as has been exhibited above, the principal objective of the Directive was indeed to organise the service sector and prevent the abuses stemming from the practice of social dumping and usage of letterbox companies. As the Directive is based on the art. 56 TFEU it is safe to say that the argument put forward by the employers in transport sector is a strong one. Taking the said presumptions into consideration, the working conditions which are mandatory in the host state (especially the minimum pay) and administrative requirements to be fulfilled by an employer posting workers could in fact amount to serious burdens to the guaranteed freedom of services. Moreover, the transport sector founded on constant movement could be particularly susceptible to those burdens.

The position invoked above is not surprisingly shared by the government. The transport lobby is very strong and not infrequently the same people circulate between the corporations and the Ministry of Infrastructure (which covers transport sector). Hence, the official Polish stance reflects the view above. They emphasise the importance of fundamental freedoms and deny the applicability of the Directive to the transport sector. Recently, Poland together with countries like Romania, Hungary, Czech Republic expressed their concerns and disapproval as to the Revised Directive which will come into force in 2020. It is claimed that the review is premature and that the principle of equal pay for equal work may lead to effects which will be contrary to the idea of Single Market and will interrupt the fair competition.

The contrary view is presented by the transport sector employee representation. They insist upon the application of the provisions contained in the Directive to themselves, relying mostly on the wording of the Directive, namely on the lack of an explicit exclusion of transport sector, as opposed to the exclusion of seagoing personnel in the art. 1(2) therein. This position is however disturbed by the exclusion included in the Polish Act and together with the relative weakness of the employees' voice results in a bad bargaining position on their side. The conditions of working and remuneration (which undoubtedly is the core issue here) require a thorough improvement, as in the present shape they lead to abuses and often leave the drivers in dreadful conditions (sleeping in the car cabins, no air-condition or airflow whatsoever, saving money on food, cuts in social security contributions and many others). Said situation leads to employees choosing the "lesser evil" and fight for their rights within the available framework of PWD, even though it is a very unfortunate piece of legislation for the transport sector.

To sum up the remarks on the political discussion it is necessary to emphasise, that each point of view has strong arguments on its side. Although from a purely legal point of view, it seems that the more legitimate view is shared by the government and the employers, the opinion of workers shall never be overlooked and is in fact in a terrible need for change. Mutual concessions are necessary, together with a stronger social discourse, the latter being a very difficult aim in the current state of the art in Poland. Even when the willingness to talk appears, it is quickly blocked by an invisible hand of the biggest market players.

## 5. Conclusion

After going through the analysis above, one can easily realise, that the legal context of posting of workers is more complicated than it primarily appears to be. There are significant discrepancies between the Member States both with regard to implementation of the law and its enforcement by the authorities. The mentioned issues emerge both on the EU level and internally in a given jurisdiction. Amidst the described chaos, Poland has its own specific ambiguities in that regard. There is the ongoing battle between the scope of application of “business trip” and “PWD”. The Polish Act purports to reconcile opposite interests of stakeholders, but it introduces even more confusion, especially by excluding transport sector from its coverage. Apart from the legal dimension of the discussed phenomenon, the most decisive factor remains the politics and commercial profits derived from the transport industry. Thus, one needs to remember that those areas intersect and most of the settlements are reached offstage.