

COMMISSION INTERPRETATIVE COMMUNICATION
on the temporary nature of road cabotage in the movement of freight

(2005/C 21/02)

(Text with EEA relevance)

The main object of this interpretative communication is to examine and clarify the concept of 'on a temporary basis' featuring in the Community Regulations on cabotage operations. Whereas Regulation No 12/98 on passenger transport cabotage has not given rise to any problems of interpretation or application, the same cannot be said of Regulation No 3118/93 ⁽¹⁾ on freight transport cabotage. Consequently, this communication will focus on freight cabotage.

Chapter 1 defines the concept of cabotage and describes the problem. Chapter 2 gives an overview of the current cabotage position in the Community based on a description of the economic and legal aspects of these transport operations as well as the problems encountered, particularly at the level of controls by the Member States. Chapter 3 provides legal guidelines drawn up on the basis of the case law of the Court of Justice, while taking account of the national regulations in this sector, as applied by the Member States. The conclusions follow in Chapter 4.

This Communication is without prejudice to the case law of the Court of Justice and the Court of First Instance as regards the interpretation of the Treaty concerning cabotage and of Regulation No 3118/93.

1. INTRODUCTION

1.1. Cabotage

Based on Article 71(1)(b) of the EC Treaty, the Community Regulations ⁽²⁾ give the following definition: Any non-resident carrier who is a holder of the Community authorisation is entitled to operate, on a temporary basis and without quantitative restrictions, national road haulage services in another Member State, without having a registered office or other establishment in that State.

One of the two essential characteristics of cabotage transport, therefore, is that this type of service can be performed only on a temporary basis.

1.2. The issue

The reason why the Commission has focused on the problems posed by cabotage transport is in response to a request from the Member States of the European Union. Indeed, the lack of a definition of the concept of 'on a temporary basis' in the Community regulations has posed a problem for some time. It creates uncertainty among operators in the transport sector as to the exact scope of the cabotage operations. Also, despite the fact that the Treaty of Accession provides for transitional periods with regard to cabotage for the majority of the new Member States, the enlargement has triggered a reaction of fear among the road hauliers and this, in turn, has prompted the national authorities to react and to ask the Commission to interpret the concept of the temporary character of cabotage.

Lastly, a number of Member States have pointed to the difficulty of supervising cabotage operations and, more particularly, the reference period. Some of them have specified the periods beyond which hauliers must return to their country of origin. In some cases, they have also formalised criteria for determining whether the provision of a service or of a set of services by a haulier in a Member State other than that in which the haulier is established complies with the 'temporary character' criterion.

⁽¹⁾ Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ L 279, 12.11.1993, p. 1).

⁽²⁾ Regulation No 3118/93 concerns road cabotage in the movement of freight; passenger transport cabotage is governed by Regulation No 12/98

2. THE LEGAL AND FINANCIAL ASPECTS OF CABOTAGE

2.1. The economic aspects

Although cabotage services provided by hauliers registered throughout the Member States rose to almost 11 billion tonnes/kilometres in 2002, i.e. an impressive increase of 25.3 % compared to 2000, the share accounted for by cabotage out of all the road transport services provided nevertheless remains very low: in 2002, at EU-14 level (EU not including Greece), only 0.8 % of all transport activities (national and international) consisted of cabotage. It must be stressed, however, that even if this figure of 0.8 % does not appear very high in absolute terms, the problem of cabotage is being perceived on a growing scale and is becoming a matter of concern by virtue of the enlargement.

According to Eurostat, ⁽³⁾ for hauliers in the smaller Member States, which have limited home markets or nearby foreign transport markets, cabotage transport can, however, be of considerable importance: in 2002 it represented 22 % of the total road transport performance of Luxembourg hauliers, 4 % of that of Belgian and 3 % of that of Irish hauliers. In absolute terms, the Benelux hauliers continue to be the most active on the cabotage market, 55 % of the total cabotage performance in 2002 being to the account of these three countries alone. The German hauliers, with a market share of almost 15 %, are also very active.

France and Germany are the two preferred Member States in which to undertake cabotage transport, with each accounting for 31 % and 28 % of the total cabotage respectively. The United Kingdom, with 13 % of the total, is the third most 'cabotaged' country. The geographically peripheral countries of the EU have a share of well under 1 %.

2.2. The legal aspects

2.2.1. *The legal framework — Regulation No 3118/93*

Under Article 1 of Council Regulation (EEC) No 3118/93, any road haulage carrier operating for hire or reward who is a holder of the Community authorisation provided for in Regulation (EEC) No 881/92 is entitled, under the conditions laid down in this Regulation, to operate on a temporary basis national road haulage services for hire or reward in another Member State, without having a registered office or other establishment therein.

The concept of 'on a temporary basis' echoes the wording of Article 50(3) of the EC Treaty on freedom to provide services. Neither the Commission nor the Council considered it necessary to clarify this notion when adopting regulations. Obviously, a clear distinction needs to be drawn between an activity associated with the freedom to provide a service, because it is exercised on a temporary basis, and an activity associated with the right of establishment when it is exercised on a permanent basis. Under the provisions of the Treaty on freedom to provide services and on the right of establishment, economic operators must respect one of these two basic freedoms under Community law; one begins where the other leaves off. Consequently, national regulations which limit, in one way or another, the provision of a service oblige the operator to take up residence at the end of the limited period, thereby interfering with the basic right of freedom to provide services.

In practice, it has to be conceded that it is not easy to demonstrate exactly when an activity ceases to be temporary and becomes permanent. The need for clarity in this area, however, is essential on the grounds that economic operators have the right to know the real extent of their opportunities to carry out cabotage operations, and Member States have the right to protect their markets against service providers who, under the guise of temporary activity, actually engage in a permanent activity without submitting to the host State's rules on establishment.

2.2.2. *Court of Justice case law*

To date, the Court of Justice of the European Union has not ruled on the interpretation of the 'temporary' nature of transport services. What it has done, however, is to define criteria on the temporary character of the provision of services.

Three judgments may provide food for thought.

⁽³⁾ 'Trends in road freight transport 1990-2002', Eurostat, Luxembourg, 2004

The Gebhard judgment ⁽⁴⁾

In the case in point, the *Consiglio nazionale Forense* (Italy) referred the matter to the Court of Justice for a preliminary ruling on the interpretation of Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services. In particular, the *Consiglio Nazionale Forense* called on the Court to make known its views on the criteria — based on the duration or frequency of the services provided by the lawyer acting within the framework of the system set out under the abovementioned Directive — to be applied in order to assess the temporary character, or otherwise, of this activity.

According to the Court, the concept of establishment within the meaning of the Treaty is a very wide-ranging concept implying the possibility for a Community citizen to participate, in a continuous and stable manner, in the economic life of a Member State other than his country of origin and to derive benefits therefrom, thus promoting economic and social interpenetration within the Community in respect of activities of self-employed persons (cf., in this connection, judgment of 21 June 1974, *Reyners*, 2/74, ECR 631, point 21). On the other hand, where a service provider relocates to another Member State, the provisions of the chapter relating to services and, in particular, Article 60(3) of the Treaty stipulate that the service provider in question should exercise his activities on a temporary basis.

In answer to the questions referred to it, the Court ruled that:

- 1) The temporary character of the services provided, as envisaged in Article 60(3) of the EC Treaty, should be assessed by reference to their duration, frequency, periodicity and continuity.
- 2) The provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.
- 3) A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the chapter relating to the right of establishment and not the chapter relating to services.

It should be stressed that the duration criterion alone is not enough to determine whether the provision of the service or services in a Member State is taking place on a temporary basis. As indicated in the Advocate-General's conclusions, the temporary character of the activities in question should be assessed not only in the light of their duration but also in the light of their frequency, periodicity and continuity.

The Schnitzer judgment ⁽⁵⁾

In the case in point, where the provision of craftsman's plastering services was involved, the Court repeated the arguments set out in the *Gebhard* judgment and ruled that 'no provision in the Treaty permits the determination, in abstract terms, of the duration or frequency starting from which the provision of a service or certain type of service in another Member State can no longer be regarded as provision of services within the meaning of the Treaty'.

The Court added that 'the mere fact that an economic operator established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, cannot be sufficient for it to be regarded as established in the second Member State'.

This means that neither the periodicity and/or frequency nor the continuity of an activity can be used as the sole criterion for determining whether the activity derives from freedom to provide services or the right of establishment.

⁽⁴⁾ Judgment of 30 November 1995, *Gebhard*, C-55/94, ECR I-4165

⁽⁵⁾ Judgment of 11 December 2003, *Bruno Schnitzer*, C-215/01

The *Andreas Hoves* judgment ⁽⁶⁾

This case is supposed to determine whether a transport company having its head office in Luxembourg and carrying out cabotage operations in Germany is liable, in that country, to pay motor vehicle tax in respect of heavy goods vehicles registered in Luxembourg.

In his conclusions the Advocate-General made the point that cabotage, by definition, is temporary in character in that there is the requirement that the carrier does not have a seat or an establishment in the host State. Cabotage, by its very nature, is an activity limited in time, involving the provision of services lacking any degree of permanency associated with the possession of a seat.

The Court has made clear that the temporary character of the activities in question should be assessed not only in the light of their duration but also in the light of their frequency, periodicity and continuity.

The 'temporary character' criterion is thus closely linked to the criterion of absence of a seat or establishment in the host state.

2.2.3. *The national regulations*

In December 2003 the Commission convened a meeting of national experts to examine the difficulties encountered over recent years regarding the application of the 'temporary' character inherent in cabotage operations. As a result, it has been possible to list the current national practices which demonstrate the need for a common approach.

On 1 December 2002 the United Kingdom adopted an interpretation of the concept of 'temporary' stipulating that the haulier must be able to prove that the vehicle has been leaving the country at least once a month.

By circular dated 8 December 1998, Greece adopted a time limit for cabotage operations by the other Member States which was set at a maximum of two months per year (based on the period of validity of the former cabotage authorisations). Following representations by the competent Commission departments, this circular was replaced by another dated 19 April 2000. This circular no longer sets a time limit but instead introduces an interpretation of the concept of 'temporary' for lorries registered in another EU Member State and operating on Greek territory:

- the activities of a transport company must be of an exclusively temporary nature and must, under no circumstances, take on a permanent, frequent, regular or continuous character,
- the fact that the vehicles belonging to a company engaged in cabotage never leave the territory of the host Member State constitutes an infringement of Regulation (EC) 3118/93,
- the activities must be carried out on an exclusively occasional basis, at significant and infrequent intervals,
- the haulier must be able to prove that the vehicle left the territory of the host Member State at a given point in time, and at a frequency of at least once a month.

These criteria will help to provide guidelines when carrying out inspections, on a case-by-case basis, with a view to assessing whether these activities are in line with Regulation (EC) 3118/93.

By circular of 22 January 2002, France introduced limits on cabotage stipulating that 'any vehicle continuously engaged in cabotage operations for more than a week on the national territory must be considered to be in breach'. The French Conseil d'Etat (supreme administrative court), sitting in chambers, decided first to suspend, and then to annul, the execution of this circular, given that the circular in contention, which lays down binding provisions of a general nature, has drawn up new cabotage rules lying outside the remit of the Minister of Transport.

The Commission has made representations to the French authorities denouncing this unreasonable restriction which was subsequently removed by a judgment by the Conseil d'Etat.

By Ministerial Decree of 29 April 2004, Italy recently restricted cabotage operations by Community undertakings in Italy to 15 days per month, including not more than five consecutive days at any one time. Furthermore, the Ministerial Decree obliges hauliers to carry on board the vehicle a book of record sheets for national cabotage operations to be issued, according to the Director-General's Decree dated 31 May 2004, by the Italian Minister of Transport.

⁽⁶⁾ Judgment of 2 July 2002, *Andreas Hoves Internationaler Transport Service Sarl*, C-115/00

3. CRITERIA FOR ASSESSING THE TEMPORARY CHARACTER OF CABOTAGE OPERATIONS

It is clear from the foregoing that before the temporary character of the cabotage operations can be defined account must be taken of all the elements and circumstances associated with a specific operation.

3.1.1. *The four criteria (duration, frequency, periodicity and continuity)*

While not the only determining factors, the four criteria for assessing the temporary character of the cabotage operations, as drawn up by the Court of Justice, constitute a good basis of analysis. These criteria cannot be applied automatically. Rather, they should serve as a point of reference for the checks to be carried out, although not to the extent of exempting the national authorities from conducting an analysis of the particular circumstances associated with each situation.

Duration represents the space of time (weeks, months) during which an operator carries out one or more cabotage operations on the territory of a Member State other than the haulier's Member State of establishment. Duration is closely linked to frequency, which determines the number of cabotage operations carried out per month or per year. In reality, the temporary character of the service provision needs to be assessed differently when a haulier carries out cabotage operations over two periods (service frequency criterion) of 20 days (criterion for the duration of each service provided) during the same year, or when the haulier carries out cabotage operations over 12 periods of 20 days within the same year.

The Commission services reacted negatively to a circular adopted by the French authorities limiting cabotage operations to one week. Apart from the very short period set by France, it was the automatic character of the application of this temporary criterion that was specifically denounced by the Commission services.

Regulation No 3118/93 provided for a gradual liberalisation of the cabotage services up to 1 July 1998. Over a period of 4 ½ years each of the Member States had a quota of authorisations each valid for a period of two months. Such an authorisation could be transformed into two short term authorisations, each valid for one month. Each authorisation was valid only for one period of either one month or two months.

In order to cope with the difficulties described in section 2.1 the adoption of a period of one to two months, after which cabotage services on the same territory are no longer permitted, could be acceptable to the extent that Member States apply this measure on a case by case basis.

Though it will not be possible to apply the limit strictly, automatically and in isolation, such a limit will at least constitute a useful reference. Upon expiration of this time limit, the vehicle would normally be required to return to its country of registration. At any rate, the Commission will examine the measures taken by Member States according to the four criteria established by the Court of Justice.

The concept of periodicity must not be confused with frequency. Periodicity indicates the regularity of the cabotage operations, i.e. whether the cabotage is carried out occasionally or regularly. At this level, account needs to be taken, for instance, of the type of relations – regular — or occasional — with customers based in the country in which the cabotage operations are being carried out.

Lastly, continuity means that, in a given period, a haulier is engaged solely in cabotage operations. The essential element is the permanence or constancy of the operations.

3.1.2. *Other factors to be considered*

It is also clear from the *Gebhard* judgment that steps should be taken to assess all the elements associated with service provision. Certainly, it is valuable to analyse the conditions governing the use of the vehicle, e.g. the number of days that the vehicle is present on the territory of a Member State. Other factors associated with the conduct of cabotage operations must also be taken into account, for instance the question as to who organises the transport operations and where the centre of operations is located. The number of lorries used by an operator also plays a role.

Thus, one might imagine a situation where a transport company has two lorries and just one driver. Lorry No 1 leaves the territory of the 'cabotaged' country after 20 days and does not come back to that territory until after a further 20 days have elapsed. Over the period during which lorry No 1 is no longer on the territory of the 'cabotaged' country, it is the company's lorry No 2 that carries out (with the same driver) cabotage operations for 20 days. The conclusion is self-evident: this one-man undertaking is clearly engaged in permanent activities on the territory of that State, whereas merely to have examined the use of the two lorries would have led to a different conclusion.

These considerations show that it is very difficult to lay down one or more criteria which, if applied automatically, would lead to the conclusion that an operation or set of operations are being carried on a temporary basis - or not, as the case may be - in a Member State. In the *Gebhard* judgment, the Court itself made a point of laying down criteria which would apply generally and automatically.

In this respect, it should be noted that a person or company could lodge a complaint with the European Commission if they considered that the legislation of a Member State limited freedom to provide services in a manner contrary to the Treaty or to Regulation No. 3118/93.

4. CONCLUSION

Economic developments and legal analyses relating to road cabotage operations show that an interpretation of the temporary character of these operations is indispensable, particularly with a view to avoiding a proliferation of Member State rules and practices. Therefore, the Commission would like to propose the following interpretation:

The criteria for assessing a cabotage operation conducted on a temporary basis must comply with the definition adopted by the Court of Justice: duration, frequency, continuity and periodicity of service provision. At all events, each specific situation will need to be examined individually in the light of the foregoing considerations.

Accordingly, the Commission will assess specific cases in the light of the criteria set by the Court tolerating a time limit set on a national level of one to two months.

In any event, the following types of activity by a haulier who is not established in the host State on the territory of that State are considered not to be in line with Regulation (EC) 3118/93:

- any activity that is permanent, exercised continually and regularly, or*
- any activity that is carried out systematically and not just on an ad hoc basis, or*
- any activity that involves a vehicle belonging to a non-resident haulier, where the vehicle in question never leaves the territory of the host State.*