

Protection of Road Safety and Proper Functioning of the Road Haulage Market (Case Study)

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Abstract

The article is about an important issue of regulating the minimum cost of production and, consequently, prices for the representation of entrepreneurs (associations) with reference to the requirements of road safety. These issues are often the subject of the case law at the Court of Justice at the level of the implementation of the rules governing competition. Recently the question was settled under a preliminary ruling concerned the requirements of Italian law, which, in the name of road safety protection, does not allow to offer prices lower than those benefits rigid minimum rates set by the service provider. The issues that are contrary to a competitive market, price-fixing agreements, are no strangers in different Member States, as exemplified by the findings of the national organization representing independent professionals. The question remains whether those situations are best remedied at the pace of the case law at the Court of Justice or whether there is a need for European Union legislation on the matter in the circumstances where transport contributes to the competitiveness of Europe. There is an interdependence between transport, environment, innovation and social as well as economic policies. The effort invested in this research translated into awareness of the complexity of the subject matter and – the author would encourage – possibilities for further exploration (which would require separate in-depth studies).

Keywords: road safety, minimum costs, competition, Treaty freedom, public and private interest.

Introduction. The role of preliminary ruling

Problem topicality. The importance of the topic addresses the main problem important from the point of view of the public interest – road safety protection and proper functioning of the road haulage market for hire and reward. Transport is one of the European Union's foremost common policies. It should be noted the proportionately high cost of transport for goods and households: transport

accounts for 13.2% of household budgets and up to 15% of the price of products (The European Committee of the Regions Opinion 2015, p. 4). Road transport is the principal means of transport in the European Union for both passengers and goods. The structure of the paper reflects the mainstream analysis due to the fact that this requires selection of adequate measures for this purpose. *The aim* of the research is to identify the factors that determine the protection of freedom of: competition, movement of undertakings, establishment of the provision of services compatible with the statutory provisions adopted by Member States which lay down minimum operating costs for the road haulage sector, what are the relationships between them and how are they determined – which involve the fixing by bodies external to the contracting parties of a component of the charge for the service concerned and, accordingly, of the contract price? Whether those situations are best remedied at the pace of the case law at the Court of Justice, is there a need for more European Union legislation (transport is governed by Title VI of the Treaty on the Functioning of the European Union (TFEU)) on the matter? Highlighting the importance of this short study (introduction to the relevant issue) is *objective* to the analysis of the recent case law.

The level of the scientific research problem.

Reference to a preliminary ruling is the fundamental mechanism of EU law aimed at enabling courts and tribunals of Member States to ensure uniform interpretation and application of that law within all countries. Under Article 267 (TFEU, 2012, p. 47), any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. It should be pointed out that

in so far as no appeal lies against the decisions of the national court, such a court is, in principle, obliged to make a reference to the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of the TFEU is raised before it. The Court has already held that the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout Member States institutes direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative of the parties (Judgment of: *Cartesio*, 2008, paragraph 90; *Consiglio*, 2013, paragraph 28; see *Galetta*, 2013, p. 824 and next).

Ab urbe condita? The evolutionary approach to interpretation describes the advantages of the dynamic model of interpretation over other current approaches to statutory interpretation. There are ways to argue that this model is more useful than the traditional approach. Some authors' concept goes far. The belief that judges always find law and never make it (in opinion of R. Dworkin, 1963, p. 624) is a tenet of a dogma called formalism, the result in a desire for something old-fashioned, unattainable and bad, called mechanical jurisprudence. A good example is reference to the principles of evolution created in the judicial practice of the European Court of Justice. The ideal of a rational equilibrium will never be reached (in the opinion of M. Safjan, 2014, p. 14) without a dialogue and a necessary degree of openness manifested by the parties of the debate. The framework of this dialogue has been well determined by the values and axiology which are expressed by the formula of Article 2 of the TEU and, in the opinion of the judge of the Court (...), rationality requires focussing the debate on the real issues and, above all, on the question what kind of the European Union is needed in the future.

Research methods. The sources of national law

The cases in the national proceedings, in this discussion practically all the responses Italian law concerned – in connection with which interpretation of EU law made by the Court of Justice (Judgment of *API*, 2014) – stem from a series of main and supplementary applications brought before the Tribunale amministrativo regionale per il Lazio (Tribunale amministrativo, <http://www.giustizia-amministrativa.it>) for annulment of the acts by which the Osservatorio sulle attività di autotrasporto established the minimum operating costs under Article 83a (Decree-Law, 2008) set up, as a body of the Consulta generale per l'autotrasporto e

la logistica, the Osservatorio sulle attività di autotrasporto, which carries out monitoring tasks concerning compliance with the provisions of road traffic safety and social security, inter alia, updates the practices and customs applicable to haulage contracts concluded orally. Also the Decree entrusted the Consulta with carrying out proactive activities relating to research, monitoring and consultation with public (and political) authorities as regards the drawing up of the action policies and government strategies in the road transport sector.

The national legislation at issue in the main proceedings provides that the minimum operating costs (road haulage market) are established, primarily, in the framework of voluntary sectoral agreements, concluded by professional associations of carriers and customers (having regard to consumer) failing that, in the absence of such agreements, by the Osservatorio sulle attività di autotrasporto and, in the event of inaction by the latter, directly by the Ministry for Infrastructure and Transport. This induced *the problem of the research* - the primary aim of the legislator and practice should be to enhance the efficiency of the road transport market to let it successfully face the future challenges (see either J. Grangeon, 2014, p. 69; E. M. Lanza, 2014, p. 867). So the Court should also refer to the principles of effectiveness when considering procedural rules.

Balancing between road safety protection and the minimum operating costs

Under Italian law, in order to ensure road safety protection and proper functioning of the road haulage market of goods for hire and reward, in a haulage contract concluded in written form, the amount to be paid to the carrier must be such as at least to cover the minimum operating costs which ensure, in any event, compliance with the safety standards laid down by law. The minimum costs shall be determined within the framework of voluntary sectoral agreements, concluded between haulage associations represented within the Consulta generale per l'autotrasporto e la logistica and customer associations. Legislative Decree No 284 of 21 November 2005 entrusted the Consulta generale per l'autotrasporto e la logistica with carrying out proactive activities relating to research, monitoring and consultation with public (and political) authorities as regards drawing up action policies and government strategies in the road transport sector. If such voluntary agreements are not concluded within due period, the Osservatorio sulle attività di autotrasporto shall determine the minimum costs. If the Osservatorio sulle attività di autotrasporto has not adopted calculation of the

minimum costs within a strict period, paragraphs 6 and 7 Article 83a (Decree-Law, 2008) shall apply also to haulage contracts concluded in written form solely for the purposes of fixing the charge. According to the Tribunale amministrativo regionale per il Lazio, Italian legislation introduces a regulated system of fixing the minimum operating costs, which constrains free bargaining and curtails the freedom to specify one of the essential elements of the contract (price transport service), albeit for the purpose of ensuring compliance with the safety standards.

Currently progress achieved in road transport safety has been recorded but also differences in Member States' legislation and standards regarding transport of dangerous products for instance. The European Committee of the Regions (Opinion, 2015, p. 30) reiterates its call for a scientific cost internalisation model, especially for road accidents. The need to maintain road safety is expressed in EU law as EU action focuses essentially on controlling the multiple costs of road transport. Tribunale amministrativo is uncertain whether the balance between conflicting interests as struck by Article 83a (Decree-Law, 2008) is consistent with EU law. By its preliminary ruling under Article 267 TFEU analyzed together, the Tribunale amministrativo asks, in essence, whether Article 101 TFEU 2012, p. 1), read in conjunction with Article 4(3), TEU (TEU 2008, p. 13), and Articles 49 TFEU, 56 TFEU and 96 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the price of road haulage services for hire and reward cannot be lower than the minimum operating costs, which are fixed by a body composed mainly of representatives of the economic operators concerned (More Fallon, 2011, p. 539 and next Bruyninckx, 2010, p. 214). Although it is true that Article 101 TFEU is concerned essentially with the conduct of undertakings (prohibition of cartels) and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 4(3) TEU, which lays down a duty of cooperation between the EU and Member States, none the less requires the latter not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

Effective competition rules applicable to undertakings

The principle of effectiveness is binding on Member States. Thus, national judicature, which is called upon, within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions if necessary refusing

its own motion to apply any conflicting provision of national legislation, including procedural provisions, and it is not necessary for the court to await the prior setting aside of that national provision by legislative or other constitutional means (paragraph 33 Judgment of 18 July 2013, Consiglio...). Violation of EU law is infringed where a Member State requires or encourages adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

Damage claims for breaches of Articles 101 of the Treaty create an important sphere of private enforcement of EU competition law. This law seeks to ensure effective enforcement of EU competition rules by optimising the interaction between the public and private enforcement of the competition law and ensuring obtain full compensation by victims of infringements of EU competition rules for the harm they suffered. Any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of the competition law. Damage claims for breaches of the Treaty constitute an important area of private enforcement of EU competition law are complementary to public law character and any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of EU competition rules.

Practical implementation of these rules depends on the problem of access barriers victims of competition breaches to the documents collected in connection with administrative action. To ensure effective private enforcement actions both instruments, so under civil law and effective public enforcement by competition authorities, are required to synergy to ensure full effectiveness of competition rules. Tribunal stated that EU Regulation (2001) is designed to confer on the public as wide as possible the right of access to documents of the institutions. Article 4 lays down exceptions that the right of access is nevertheless subject to certain limits based on reasons of the important public or the private interest. In order to justify refusal of access to the document, disclosure of which has been requested, the institution concerned must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article. The Court has already acknowledged the existence of that type of situation, recognising that there is a general presumption that disclosure

of documents of a certain nature will, in principle, undermine protection of one of the interests listed in the cited Article. The Court of Justice agreed with part of the Court's argument that any person is entitled to claim compensation for the loss caused to him by a breach of Article 101 TFEU. It should be noted the divergence between the line of case-law of the Court of Justice, adopted on Pfleiderer AG, Donau Chemie AG, and, on the other hand, in the EnBW Energie Baden-Württemberg AG case. In light of the case law, the right to damages for breach of competition rules is a subjective law which national courts have a duty to protect (Carpagnano, 2006, p. 66; Szpunar, 2008, p. 343). Initial analysis concerning the assessment of the subject covered by competition could be a starting point for the evaluation of problems in transport.

Research results. Between the public and private representation equilibrium

Consensus facit legem? In connection with a national request for a preliminary ruling, the Court of Justice decision in the first place settled whether it is possible to conclude on the basis of the legislation at issue in the main proceedings that an agreement, decision or concerted practice exists between private economic operators. It should be noted that the committee which established, in the cases in the main proceedings, the minimum operating costs, namely the Osservatorio sulle attività di autotrasporto, is composed principally of representatives of professional associations of carriers and customers. At the material time in the main proceedings, of all members of the Osservatorio chosen by the President of the Consulta generale per l'autotrasporto e la logistica, most represented industry, the views of the associations of carriers and customers, the decree appointing those members stating moreover that they were appointed 'as representatives' of the association or the undertaking to which they belong. There is no here a desirable balance between the public and private representation. Decisions of the Osservatorio sulle attività di autotrasporto are approved by a majority of its members, without a State representative having the right to veto or casting vote which might make it possible to rebalance power between public authorities and the private sector.

According to the Tribunale, administrative national standards establishing the Consulta generale per l'autotrasporto e la logistica and the Osservatorio sulle attività di autotrasporto does not indicate the guiding principles which of those bodies must observe and does not contain any provision such as to prevent representatives of the professional organisations from acting in the exclusive interest

of the profession (private) (Compare Henning, 2013, p. 785). Articles that can be used 83a (Decree Law, 2008) merely make vague reference to road safety protection and leave a significant margin of discretion and independence for the members of the Osservatorio sulle attività di autotrasporto in the determination of the minimum operating costs in the interest of the professional organisations which appointed them. Thus, the Commission observes, in that regard, that the minutes of a meeting of the Osservatorio refer to the fact that, when its members disagreed with one another on the scope of the minimum operating costs, one of those members expressed his opposition on account of the interests of the professional association that he represented and not on account of the public interest. In addition, Italian legislation does not contain either substantive requirements or procedural arrangements capable of ensuring that, when establishing minimum operating costs, the Osservatorio sulle attività di autotrasporto conducts itself like an arm of the State working in the public interest. Public authorities and other bodies or public associations do not exercise any review over the assessments of the Osservatorio regarding the criteria for fixing the minimum operating costs or the rate set.

The Court of Justice stated (paragraph 41 Judgment of 4 September 2014, API...) that, in the light of the composition and the method of operation of the Osservatorio sulle attività di autotrasporto, on the one hand, and in the absence of both of any public interest criteria laid down by law in a manner sufficiently precise to ensure that carriers' and customers' representatives, in fact, operate in compliance with the public interest that the law seeks to achieve and of actual review and of the power to adopt decisions in the last resort by the State, on the other, the Osservatorio must be regarded as an association of undertakings within the meaning of Article 101 TFEU when it adopts decisions fixing the minimum operating costs for road transport. Fixing of the minimum operating costs for road transport, which is made mandatory by legislation such as that at issue before national jurisdiction, is capable of restricting competition in the internal market. This prohibition is not absolute. According to Italian law, fixing of the minimum operating costs is intended to protect, in particular, road safety. This objective is axiologically correct. It is, however, requires an answer to the question whether the measures to achieve it are appropriate. Italian law, delegating in the executive reform of the law on the carriage of passengers and goods by road, laid down the principles and criteria governing road transport reorganisation. That law was intended, in particular, to introduce regu-

lated liberalisation and replace the previous system of compulsory bracket tariffs, which was introduced before, by a system based on free bargaining for setting prices for road transport services. The principles and criteria governing that delegation also included adaptation of the law to EU legislation with a view to an open and competitive market, competition between undertakings protection and traffic safety and social security protection (in un'ottica di mercato aperto e concorrenziale, la salvaguardia della concorrenza fra le imprese, nonché la tutela della sicurezza della circolazione e della sicurezza sociale).

Provisions of a Member State are appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a concrete, consistent and systematic manner, allow businesses to plan their business. Legal certainty allows beneficiaries the right to anticipate legal consequences of their behavior (Hartley, 1998, p. 142). The quality and safety of EU's transport networks are based on high standards. Meanwhile, Italian legislation merely refers, in a general manner, to road safety protection, without establishing sufficiently existence of any link between the minimum operating costs and achieving the specified standards of road safety. National measures represent the minimum amount, determined objectively, below which it would not be possible to satisfy the obligations imposed by the legislation on road traffic safety protection go beyond what is necessary (Judgment of 2005, Marks & Spencer, paragraph 54 to 56). They do not enable providers of road transport to prove that, although they offer prices lower than the minimum tariffs fixed, they comply fully with the safety provisions in force.

Analysis or discussion. The principle of proportionality

The principle of proportionality, which is one of the general principles of EU law, requires that the measures concerned should not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question, and that there is a choice between several appropriate measures recourse must be had to the least onerous (Judgment of: 2002, Omega, paragraph 62; 2004, Spain and Finland, paragraph 57; see either Fotinopoulou Basurko, 2005, p. 153-154 and next Trujillo Pons, 2013, p. 147-148). The Court of Justice in this judgment recalled that Member States should implement consistently primarily acts of secondary EU law in the national legal system. There are a number of EU law rules, these include, in particular, the requirements of the maximum weekly working time, breaks, rest, night work

and roadworthiness tests for vehicles. Particular importance here is the Directive on the organisation of the working time of persons performing mobile road transport activities (Directive, 2002) sets, in Articles 4 to 7 thereof, the minimum requirements concerning the maximum weekly working time, breaks, rest and night work. See either Laulom, 2014, p. 59 and next) and Regulation on the harmonisation of certain social legislation relating to road transport (Council Regulation 1985) sets, in Articles 6 and 7 thereof, common rules relating to driving and rest periods for drivers). Rigorous compliance with those rules can indeed ensure an appropriate level of road safety. The Directive complements the provisions of Regulation (EC) 561/2006 on driving times and rest periods that are of direct influence on road safety and competition, as they specify the maximum driving time allowed (Report, 2009; see either Stopher, Stanley, 2014, p. 277 and from a wider perspective Shanghai International Conference, 2014, p. 850).

On those grounds, the Court hereby rules: Article 101 TFEU, read in conjunction with Article 4(3) TEU (Compare Nefrani, 2010, p. 323, 326) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the price of haulage services for hire and reward may not be lower than the minimum operating costs, which are fixed by a body composed mainly of representatives of the economic operators concerned. The Directive, however, shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the health and safety of persons performing mobile road transport activities (but see, e.g., Stefanicki, 2011, p. 6). A correct transposition of the Directive is also linked to the problem of appropriate measures with regard to its effective enforcement (see Stefanicki, 2010, p. 232). These issues are covered by the autonomy of national laws provided the principle of equivalence of national and European Union standards. For reasons connected with road safety by way of example Member States should be able to apply their domestic provisions on the withdrawal, suspension, renewal and cancellation of driving licences to all licence holders having acquired normal residence in their territory (more Judgment of the Court of Justice of 21 May 2015).

The freedom to pursue an occupation is one of the general principles of EU law. The same is the freedom to conduct a business, which coincides with the freedom to pursue an occupation. Those freedoms are not absolute rights, however, but must be considered in relation to which serve to protect the private and general interests. Consequently,

restrictions may be imposed on their exercise, provided that legal restrictions correspond to objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Stefanicki, 2004, p. 91 and next). The whole of the foregoing considerations show that there are sufficient safeguards in the system of normative EU standards in the field of road safety. For the purposes of Member States to be transposed them to the internal order and selection of appropriate measures, subject to the above requirements. The judgment of the Court of Justice of 4 September 2013 gives clear guidance on interpretation of EU law, showing a direct relationship with the processing of proceedings. However, the mechanisms used by a Member State may not be in conflict with the normative order of the EU, and restrictions on the freedoms of the Treaty should be treated as exceptions to the rule. Extremely important from the point of view of the public interest, road safety protection and proper functioning of the carriage of goods by road for hire or reward, requires selection of adequate funds for this purpose. According to Forecast (USA), overall freight tonnage will grow 23.5% from 2013 to 2025, and freight revenues will surge 72% (www.atabusinesssolutions.com) so challenge is proportionately greater. It would be valuable to carry out a separate study from the point of view of the financial security (insurance as a guarantee, more D. Dąbrowski 2013, p. 288) of participants in the transport process as compensation of damage (particularly in the context of insolvency entrepreneurs).

Conclusions

Close-ups of the standards of Member States in the field of road safety should serve primarily to establishing common principles accepted by Member States (Ostrihansky, 2010, p. 19) including the use of the rules of professional conduct and codes of good practice. On the issue of unfair refer to the practice of commercial businesses on the codes of conduct (Stefanicki, 2007, p. 208 and next). The growing importance of the latter in the regulation of economic relations in the internal market is confirmed by the introduction of this structure to a horizontal Directive 2005/29. In accordance with the definition in it: the code of conduct means an agreement or a set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors. However, it failed to develop a pattern of such a code

would constitute a point of reference for Member States. EU law is not fully embedded in the tradition of the mainland but it is an intellectual synthesis system, civil law and common law (e.g., USA, United Kingdom, Australia) hence the role of the Court of Justice is reported. Normative regulations should be adopted after thorough market analysis and evaluation of the operation on road safety protection (compare Report (2014) which sets out the development of the road haulage market and describes the social dimension of the road haulage sector). This document's recommendations include more effective checks and improved working conditions in the way as to counteract the effects of major long term changes and of the proper functioning of the road haulage market so far, seems to be too anecdotal and inconsistent regulations. Such an outcome would be contrary to the objective of road safety, the importance of which is highlighted. The European Committee of the Regions also notes the interdependence between transport policies (Opinion, 2015, p. 4) and the environment, innovation, social, as well as economic policies. If we think about expanding the field of normative regulations, we should remember that a number of aspects of transport are the subject of European regulation, whether this is competition between transport operators, access to the profession, working conditions, the technical standards of vehicles, etc. The judgment of the Court of Justice gives a clear guidance on the interpretation of EU law having a direct relationship with pending proceedings. Mechanisms under domestic law may not be in conflict with the normative order of the EU, also refer to the principles of equivalence and effectiveness when considering procedural rules and this means that restrictions on the freedoms of the Treaty should be treated as exceptions to the rule.

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Protection of Road Safety and Proper Functioning of the Road Haulage Market (Case Study)

Summary

An infringement of EU law within the meaning of Article. 101 TFEU, among others, takes a place where a Member State requires or encourages the adoption of agreements contrary to or reinforces their effects, or deprives himself of the belonging power of the state, and carries the same responsibility - for taking decisions affecting the economic sphere - for private entities (business). The judgment of 4 September 2014, API of the Court of the European Union – Anonima Petroli Italiana SpA and others C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 concerns the compatibility with EU law of national legislation pursuant to which the price of road haulage services for hire and reward should not be lower than the minimum operating costs. These costs are fixed primarily in the framework of voluntary sectoral agreements concluded by professional associations of carriers and customers or by the Osservatorio in the absence of such agreements (a national body in Italy carrying out, inter alia, monitoring tasks concerning compliance with the provisions on road safety and social security), and if not directly by the Ministry of Infrastructure and Transport. However, the national legislation at issue in the main proceedings establishing the Osservatorio did not indicate the guiding principles which those bodies must observe and did not contain any provision such as to prevent representatives of professional organisations

from acting in the exclusive interest of the profession and merely makes vague reference to road safety protection but a very large margin of discretion to members of the Osservatorio in the determination of the minimum operating costs – is regarded as an association of undertakings within the meaning of Article 101 TFEU – in the interest of the professional organisations which appointed them. The quality and safety of European Union's transport networks are based on high standards so the Court found that fixing of the minimum operating costs cannot be justified by a legitimate objective and, thus, it was not necessary to interpret Article 49 TFEU and Article 56 TFEU. Under domestic law the mechanisms regulating the minimum (rigid) prices should not be in conflict with the normative order of the EU. Road safety protection and proper functioning of the carriage of goods by road for hire or reward plays an important role from the point of view of the public interest and require selection of adequate funds for this purpose.

Keywords: road transport, amount of the minimum operating costs determined by a body representing the operators concerned, working time, association of undertakings, restriction of competition, public interest objective, safety, proportionality, operating costs.