

NIWO

ERRU POLICY RULE

Policy Rule with regard to proportionality test and penalties in the event of loss of good repute with regard to transport of goods by road.



28 March 2013

Policy Rule of the Dutch Road Haulage Organisation for National and International Transport
[Stichting Nationale en Internationale Wegvervoer Organisatie: 'NIWO'] with regard to the applicability of Regulation 1071/2009/EG, the Dutch Transport of Goods by Road Act *[Wet wegvervoer goederen]* and the Dutch Transport of Goods by Road Decree *[Besluit wegvervoer goederen]* with provisions in connection with the proportionality test and imposing penalties on the road transport operator and transport manager upon loss of good repute in connection with transport of goods by road (Policy Rule on proportionality Test and Penalties upon loss of Good Repute in connection with transport of goods by road).

13 March 2013

The Dutch Road Haulage Organisation for National and International Transport,

With a view to Article 6 of Regulation 1071/2009/EG, Sections 2.8 and 2.8a of the Dutch Transport of Goods by Road Act *[Wet wegvervoer goederen: 'WWG']*, Articles 1 and 2 of the Transport of Goods by Road Decree *[Besluit wegvervoer goederen]* and Section 4:1 et seq. of the Dutch General Administrative Law Act *[Algemene wet bestuursrecht]*;

Resolves:

CHAPTER 1 DEFINITIONS AND INTRODUCTION

Article 1

The following definitions apply in this Policy Rule:

- a. *most serious infringements:* most serious infringements of the Community rules as meant in Annex IV of Regulation 1071/2009/EG
- b. *penalty points:* points attributed to the road transport operator as a result of committing a most serious infringement as meant in this Article under a.

Article 2

This Policy Rule relates to:

- a. the minimum number of penalty points that must be collected before the proportionality test is carried out;
- b. the proportionality test involves an investigation whether there are facts and circumstances which could lead to the opinion that the loss of good repute of the road transport operator or transport manager would be a disproportionate penalty;
- c. the circumstances which are taken into account in preparing any decision to withdraw or suspend the Community license of the road transport operator or the declaration of unfitness of the transport manager.

Article 3

1. The loss of good repute is not a disproportionate response if the road transport operator exceeded the number of penalty points related to him pursuant to Article 5 for most serious infringements attributed to the respective undertaking.
2. The loss of good repute of the transport manager is not a disproportionate response if the road transport operator, for which the transport manager works as a professionally skilled manager, exceeds the number of penalty points connected to him in Article 5.
3. Contrary to the provisions in the first paragraph the loss of good repute of a road transport operator will be a disproportionate response if Article 7, first, second or third paragraph is applicable.
4. Contrary to the provisions in the second paragraph the loss of good repute of a transport manager will be a disproportionate response if Article 8, first or second paragraph is applicable.

CHAPTER 2 PENALTY POINTS

Article 4

1. The number of penalty points to be attributed for most serious infringements is as follows:

MOST SERIOUS INFRINGEMENTS ('MSI') OF ANNEX IV OF REGULATION 1071/2009, QUOTING THE MSI CODE	PENALTIES
101 (a). Exceeding the maximum permissible six-day driving time limit by $\geq 25\%$	3
101 (b) Exceeding the maximum permissible two-week driving time limit by $\geq 25\%$	3
102. Exceeding the maximum permissible daily driving time limit on one day with a margin of $\geq 50\%$ without taking a break or without any uninterrupted rest period of at least 4½ hours.	4
201. Not having a tachograph installed as required by Community law	6
202. Fraudulent use of a device able to modify the records of the recording device	10
203. Not having a speed limiter installed as required by Community law	10
204. Fraudulent use of a device able to modify the settings of the speed limiter	10
205. Falsifying record sheets of the tachograph	10
206. Falsifying data downloaded from the tachograph and/or the driver card	10
301. Driving without a valid roadworthiness certificate (if required by Community law)	4
302. Driving with a most serious deficiency of, inter alia, the braking system, the steering linkages, the wheels/tyres, the suspension or chassis that would create such an immediate risk to road safety that it leads to a	6

	decision to immobilise the vehicle	
401.	Transporting dangerous goods that are prohibited from transport (transport prohibition)	10
402.	Transporting dangerous goods in prohibited or non-approved means of containment, endangering lives or the environment and leading to a decision to immobilise the vehicle	6
403.	Transporting dangerous goods without identifying them on the vehicle (labels/signs) as dangerous goods, endangering lives or the environment and leading to a decision to immobilise the vehicle	6
502.	Transporting goods without holding a valid driving license	6
504.	Transport of goods by an undertaking not holding a valid Community license	4
601.	Driving with a driver card that has been falsified	10
602.	Driving with a driver card of which the driver is not the holder	10
603.	Driving with a driver card obtained on the basis of false declarations (false statement/document)	10
701.	Carrying goods exceeding the maximum permissible laden mass by $\geq 20\%$ for vehicles with a permissible laden weight $> 12t$	4
702.	Carrying goods exceeding the maximum permissible laden mass by $\geq 25\%$ for vehicles with a permissible laden weight of $12t$	4

2. The penalty points attributed by the Dutch Human Environment and Transport Inspectorate [*Inspectie Leefomgeving en Transport*] are added up within a period of two years.
3. Attributed penalty points will lapse two years after the respective conviction or penalty due to a most serious infringement of Community rules have become final and conclusive.

Article 5

The minimum number of penalty points related to the number of certified copies in possession of the road transport operator, is the following:

Number of certified copies	Minimum number of penalty points
1	15
2-5	30
6-20	40
21-50	50
51-500	$50 + 0.40 \times (\text{number of licenses} - 50)$
501 or more	$230 + 0.20 \times (\text{number of licenses} - 500)$

CHAPTER 3 BLAMEWORTHINESS AND PREVENTION

Article 6

1. The NIWO will give the road transport operator as soon as possible, if possible, a written warning after at least 50% but not more than 100% of the minimum number of penalty points have been reached.
2. The NIWO will apply the proportionality test on the basis of the advisory report of the Dutch Minister of Infrastructure and the Environment, carried out by the Dutch Human Environment and Transport Inspectorate, in which it is established that the minimum number of penalty points have been exceeded.

Article 7

1. The NIWO decides that the loss of good repute of the road transport operator is a disproportionate response if:
 - a. the acts of third parties forming the basis of the most serious infringements have had a material influence;
 - b. there is a non-attributable lack of knowledge about the facts and circumstances which led to committing the said infringements while having had knowledge of it would have prevented the infringements, or
 - c. there is a different force majeure situation to be demonstrated by the road transport operator showing that he cannot be blamed for one or more infringements.
2. The NIWO decides that the loss of good repute of the road transport operator is a disproportionate response if the transport manager can demonstrate that he durably restricted the commitment of the respective infringements by:
 - a. giving the necessary and knowable instructions to the drivers;
 - b. taking structural measures in the management aimed at stimulating compliance with the regulations in which the most serious infringements are penalised or imposed with fines;
 - c. providing the driver with the necessary resources to comply with the regulations meant under b; and

- d. conducting supervision reasonably to be demanded with regard to the items a up to and including c.
- 3. The NIWO decides that the loss of good repute of the road transport operator is a disproportionate response if circumstances occur as meant in Article 8 paragraph three.

Article 8

1. The NIWO decides that the loss of good repute of the transport manager is a disproportionate response if the road transport operator who employs him does not lose his good repute pursuant to Article 7 paragraph one or two.
2. The NIWO decides that the loss of good repute of the transport manager is a disproportionate response if the transport manager can demonstrate that:
 - a. he is not responsible for the respective most serious infringements because at the time he was not the person who managed the transport activities; or
 - b. on the authority of the road transport operator, meant in the first paragraph, or a superior he was forced to give or omit to give directions or instructions which resulted in committing the respective most serious infringements.
3. The loss of good repute of the transport manager is not a disproportionate response if the transport manager by his solo performance or actions contrary to the company's steady policy, can be held responsible as the sole person for committing or having committed most serious infringements.

Article 9

1. In carrying out the proportionality test the NIWO will ascertain that the investigation of the Dutch Human Environment and Transport Inspectorate has taken place with due care.
2. In carrying out the proportionality test the NIWO bases its conclusion in any event on:
 - a. the advisory report of the Minister of Infrastructure and the Environment, carried out by the Dutch Human Environment and Transport Inspectorate, drawn up in connection with an investigation by the Dutch Human Environment and transport Inspectorate;
 - b. a point of view expressed by the road transport operator or the transport manager respectively provided this has been submitted within six weeks after the road transport operator or the transport manager respectively have been notified of the intended decision of the NIWO with regard to the loss of good repute and the possibility to put forward a different point of view against it.

CHAPTER 4 WITHDRAWAL AND SUSPENSION OF THE COMMUNITY LICENSE AND THE DECLARATION OF UNFITNESS OF THE TRANSPORT MANAGER

Article 10

Upon preparing the decision to withdraw or suspend the Community license as well as the duration of the suspension the NIWO takes into account the following circumstances:

- a. the size of the road transport operator measured according to the number of certified copies;
- b. the vital importance of the continuity of the transport activities and the available alternatives for those activities;
- c. the extent to which the interested parties are affected by withdrawal or suspension of the Community license;

- d. the distortion of the market;
- e. any realistic alternatives for principals of the road transport operator;
- f. any repeated infringements established within two years;
- g. the serious social or economic consequences.

Article 11

1. After having taken into account the circumstances referred to in Article 10 under a up to and including g, the NIWO will suspend the Community license for a maximum of six months, or
2. After having taken into account the circumstances referred to in Article 10 under a up to and including g, the NIWO will withdraw the Community license if suspension of the Community license is not sufficient.
3. The NIWO will in any event withdraw the Community license if the road transport operator is considered a repeat offender, as meant in Article 10 under f.

Article 12

1. The NIWO will declare the transport manager unfit for the duration of two years.
2. The period of two years referred to in the first paragraph can be shortened if the transport manager demonstrates that he has taken the necessary measures to ensure that the most serious infringements which led to the decision to declare the transport manager unfit, will no longer occur.

CHAPTER 5 REHABILITATION

Article 13

After the suspension or withdrawal of the Community license the penalty points which the road transport operator accumulated and which were incorporated in the decision for suspension or withdrawal, will be deleted.

Article 14

If the Community license is withdrawn, the rehabilitation period amounts to two years.

CHAPTER 6 OTHER PROVISIONS

Article 15

This Policy Rule may be referred to as: Policy Rule with regard to proportionality test and penalties in the event of loss of good repute with regard to transport of goods by road.

Article 16

This Policy Rule becomes effective as from 1 May 2013

The Dutch Road Haulage Organisation for National and International Transport,

*The Chairman,
M.C. van der Harst*

*The secretary,
G.J. Olthoff*

EXPLANATORY NOTES

I. General

Regulation 1071/2009/EG of the European Parliament and the Council of 21 October 2009 is aimed at equal conditions of competition and the creation of a high level of professional skill, a rationalisation of the market, a better quality of services provided and traffic safety. These objectives are for instance pursued by tightening the requirements for access to the profession of road transport entrepreneur. One of these tightened requirements is that of good repute. Under previous regulations a road transport operator had to submit a recent Certificate of Good Conduct (*Verklaring Omtrent het Gedrag: further herein 'VOG'*) to demonstrate that the good repute requirement was satisfied. By Regulation 1071/2009/EG becoming effective the mere submission of a VOG is insufficient. Pursuant to Article 6 paragraph one under b of Regulation 1071/2009/EG, no final and conclusive conviction or irrevocable penalty should have been imposed on the road transport operator or the transport manager in the Netherlands or another Member State due to a most serious infringement of Community rules (further herein: most serious infringement). These most serious infringements referred to above are classified and exhaustively listed in Annex IV of Regulation 1071/2009/EG. This Policy Rule provides details of the powers of the Dutch Road Haulage Organisation for National and International Transport [*Stichting Nationale en Internationale Wegvervoer Organisatie: 'NIWO'*] with regard to the additional good repute requirements arising from Article 6 paragraph one under b of Regulation 1071/2009/EG.

National electronic register

Every Member State is obliged to have a national electronic register in place. Every Member State must record in it all most serious infringements for which final and conclusive convictions or irrevocable penalties have been pronounced or imposed with regard to its road transport operators and transport managers. These also include most serious infringements committed in other Member States. The Member State in which the most serious infringement has been committed, will inform the State of residence so that the State of residence can enter the most serious infringement into the national electronic register after a conviction or penalty for this has become final and conclusive. A conviction or penalty becomes final and conclusive when a(n) (ordinary) remedy at law against the judgement of a court or against an administrative fine is no longer possible (no longer possible to file objections, bring proceedings, appeal or appeal to the Supreme Court). In the event that there is a proposal for out-of-court settlement, the penalty becomes final and conclusive from the payment date of the proposal for out-of-court settlement.

Member States can consult each others' national electronic register. This way a Member State can ascertain whether or not a road transport operator or transport manager in a Member State no longer has a good repute due to final and conclusive convictions or penalties due to a most serious infringement. The road transport operator or a transport manager who no longer has a good repute in one Member State, can not or no longer satisfy in any other Member State the requirement of good repute. If a road transport operator or his transport manager cannot or no longer demonstrate that he satisfies the requirement of good repute, this will lead to the withdrawal, suspension or refusal of the Community license or the declaration of unfitness of the transport manager.

A final and conclusive conviction or penalty due to a most serious infringement can already lead to the loss of good repute according to Regulation 1071/2009/EG. However, according to Dutch legislation and regulations one final and conclusive conviction or irrevocable penalty cannot lead to the loss of good repute. This starting point has been detailed in this Policy Rule. Attributing weighted penalty points to the various most serious infringements (Article 4) and the provision of the number of accumulated penalty points that must be reached before one can lose good repute (Article 5) are thereby very important elements in this Policy Rule.

Moreover, this Policy Rule provides for the manner in which the NIWO carries out the investigation in the event of the good repute of the road transport operator and the transport manager being questioned, because of them exceeding a minimum number of penalty points for final and conclusive convictions or irrevocable penalties due to most serious infringements. This investigation is also called the proportionality test. In carrying out the proportionality test, the NIWO examines whether the loss of good repute is a proportionate response.

This Policy Rule will be evaluated two years after becoming effective.

II. Explanatory note to each Article

Article 3

It ensues from Article 3 that the good repute of the road transport operator and the transport manager is not (yet) questioned when the road transport operator remains under the minimum number of penalty points related to him in Article 5; the loss of good repute is deemed to be a disproportionate response if that number has not been exceeded. Should the road transport operator exceed the number of penalty points, this would not only lead to the loss of good repute of the road transport operator but also to the loss of good repute of the transport manager.

Article 4

Most serious infringements

The European Commission represented exhaustively in Annex IV of Regulation 1071/2009/EG which infringements are considered to be most serious infringements. In order to draw a clear picture what behaviour qualifies as most serious infringements, please find below a further specification of several most serious infringements.

101a Exceeding the maximum permissible six-day driving time limit by $\geq 25\%$

The 101a code refers to exceeding the weekly driving time by a margin of 25% or more. The maximum driving time amounts to 56 hours (4 x 9) + (2 x 10) per week. In practice this means that the road transport operator infringes the rules if his driver has driven 56 hours x 1.25 = 70 hours or more in one week.

101b Exceeding the maximum permissible two-week driving time limit by $\geq 25\%$

The 101b code refers to exceeding the two-week driving time limit by a margin of 25% or more. The maximum driving time limit during two weeks amounts to 90 hours. In practice this means that the road transport operator infringes the rules according to 101b as soon as his driver has driven 90 hours x 1,25 = 112 ½ hours during two weeks.

202 Fraudulent use of a device able to modify the records of the recording device

This infringement covers the use of a device (aid) to manipulate the data of a recording device. The use of a magnet to manipulate the digital tachograph, constitutes a most serious infringement according to code 202.

401 Transporting dangerous goods that are prohibited from transport (transport prohibition)

According to the ADR (abbreviation of: The European Agreement concerning the International Carriage of Dangerous Goods by Road) certain categories of dangerous goods are excluded from transport. These are the dangerous substances that should never be transported which are covered by the infringement of code 401.

502 Transporting goods without holding a valid driving license

The carrier infringes this rule if he employs a driver who does not hold the right driving license category to drive a lorry. Example: the road transport operator infringes code 502 if he employs a driver and then let him transport goods while this driver does not hold a category C driving license (with code 95). The driver who despite disqualification from driving due to a traffic offence privately (for instance driving under influence) continues to drive a lorry without informing the road transport operator of his disqualification, is an example of a situation where infringement of code 502 cannot be attributed to the road transport operator.

504 Transport of goods by an undertaking not holding a valid Community license.

The road transport operator who transports goods with an expired Community license comes under this most serious infringement.

Penalty points system

Despite the fact that this Policy Rule deals with the most serious infringements, the seriousness is nevertheless somewhat different for the various 21 most serious infringements. This is expressed by giving to each most serious infringement a weighting factor by a scale ranging from one to ten. Therefore the height of the number of penalty points represents the seriousness of the most serious infringement. For each most serious infringement one can read the number of penalty points in the last column of the table of Article 4. For instance this table shows that of all the most serious infringements the number of penalty points for most serious infringements with a fraudulent nature is the highest. The number of penalty points for each most serious infringement has been determined in dialogue with the Dutch Human Environment and Transport Inspectorate and after intensive consultations with the transport sector.

The two-year period (Article 4, paragraph two and three)

According to Regulation 1071/2009/EG most serious infringements are only recorded in the national electronic register after a conviction or penalty for it has become final and conclusive. The convictions or penalties which have become final and conclusive and the most serious infringements

are kept for a period of two years in the national electronic register. This is why certain penalty points have a period of validity of two years from the moment that the respective conviction or penalty has become final and conclusive. Penalty points received from the first final and conclusive conviction or irrevocable penalty onwards, are added to any other penalty points for two years after the respective date. If a certain behaviour constitutes more than one most serious infringement (concurrency of offences arising from the same action) the road transport operator will receive the penalty points of one of those most serious infringements. The sum total of the penalty points received should not exceed the minimum number of penalty points in those two years. The penalty points received for most serious infringements will not be recorded in the national electronic register and are therefore not visible for the other Member States. The road transport operator has access to the secured environment of *mijnNIWO* where has access to the number of penalty points received. This offers an extra possibility to take measures within due time to prevent exceeding the minimum number of penalty points. In addition, the warning letter meant in Article 6 facilitates the possibility to take these measures within due time.

Article 5

A minimum number of penalty points

Pursuant to Article 3 the road transport operator as well as the transport manager(s) employed by him can lose their good repute if the road transport operator exceeds the minimum number of penalty points.

For as long as the road transport operator remains under the minimum number of penalty points, his good repute and that of his transport manager(s) will not be questioned. In order to subject the small as well as the big undertakings in an honest and equal manner to conditions enabling them to satisfy the good repute requirement, the minimum number of penalty points has been made dependent on the business size. It has also emerged from research that the possibility to organise the business activities, in this case the transport activities, more efficiently increases as the business of the road transport operator increases in size. By organising the transport activities more efficiently the capacity to comply with the law increases. A road transport operator who has organised his business operations more efficiently, is generally better able to comply with the legal regulations applicable to him. By better knowledge, technical resources, experience, skilled employees, organisational structure, environmental and occupational health and safety, accounting and the capacity to learn from mistakes, relatively less offences will be committed. It has also appeared for instance from research by the Dutch Human Environment and Transport Inspectorate that in connection with road checks the number of notifications of fraudulent devices and the use of another person's driver card

occurs in a relative sense (so re-calculated per lorry) more often in connection with smaller business than with big businesses. This could increase to a factor of 20.

The above has been taken into account in the formation of a simple table with a minimum number of penalty points for 6 different size categories. The smallest category relates to the road transport operator with one vehicle and the highest category relates to the road transport operator with more than five hundred vehicles. The classification is roughly based on the manner in which the operational management is organised. Please find below three examples of road transport operators of a particular size and the minimum number of penalty points they are permitted to receive before their good repute is questioned.

Examples include:

- A license holder with 80 vehicles will then have as a minimum $50 + (0.40 \times (80-50)) = 62$ penalty points.
- A license holder with 380 vehicles will then have as a minimum $50 + (0.40 \times (380-50)) = 182$ penalty points.
- A license holder with 780 vehicles will then have as a minimum $230 + (0.20 \times (780-500)) = 286$ penalty points.

The number of penalty points will in practice probably be a sum total of most serious infringements with different weighting factors. This means that various combinations are imaginable. Say a small road transport operator with 2 vehicles infringes the rules by falsifying record sheets of the tachograph (10 penalty points) and infringes the prohibition to transport dangerous substances which according to the ADR should never be transported (10 penalty points). His total is then 20 penalty points while the minimum number of penalty points has been determined at 30. His good repute is not yet questioned but he will receive a warning because he exceeded the 50% limit. The table would have to prove itself in practice as a justified and efficient means and will therefore be part of the evaluation referred to above.

Article 6

However, if the road transport operator threatens to exceed his minimum number of penalty points, the NIWO will inform the road transport operator of this after the road transport operator accumulated 50% but not more than 100% of his minimum number of penalty points. It may happen that the warning limit has not yet been reached but penalty points will be attributed to the road transport operator within a relatively short period, so that he might exceed in the national register the 100% limit almost in one go. Sending the warning letter is then no longer possible. By sending relatively soon a warning letter to the road transport operator, this situation will be avoided as much

as possible. At the same time it is prevented that the warning letter has no longer any meaning. As soon as the road transport operator has reached 50% of his minimum number of penalty points, any expansion or reduction of the fleet of vehicles will no longer have any effect on the minimum number of penalty points. The minimum number of penalty points applicable to the road transport operator will be maintained after he has reached the 50% limit.

Article 7

Should the road transport operator exceed the minimum number of penalty points this might lead to the loss of his good repute. It ensues from Article 6 paragraph two under a. of Regulation 1071/2009/EG that the competent authority (read: the NIWO) must carry out the proportionality test in order to investigate whether facts and circumstances occur by which the loss of good repute is a disproportionate response. Pursuant to Article 1 paragraph two of the Dutch Transport of Goods by Road Decree, in its proportionality test the NIWO takes into account two circumstances. These circumstances are specified in Article 7 paragraph one and two.

The first circumstance to be taken into account by the NIWO is the extent of the blameworthiness of the road transport operator when the most serious infringement took place (paragraph 1). Although the road transport operator is responsible for the state of affairs in his undertaking, circumstances are imaginable whereby the road transport operator cannot (completely) be blamed for the most serious infringements because he could not exert any essential influence on the actions of third parties which led to the most serious infringements.

The second circumstance that can be taken into account by the NIWO is the extent to which the transport manager has exerted essential influence to reduce or to completely prevent the most serious infringement (paragraph 2). An example is a most serious infringement relating to the driving time and the rest periods. The transport manager must demonstrate that according to Article 8:1 paragraph three of the Dutch Working Hours Decree [*Arbeidstijdenbesluit*] he has given the necessary instructions, has taken the necessary measures, has provided the necessary resources and kept supervision reasonably to be required in order to ensure compliance with the driving time and rest periods. An example of this is a driver who, despite the measures taken in the company, displays completely on his own initiative irresponsible driving behaviour and thereby commits most serious infringements.

The third circumstance which the NIWO can take into account is the situation in which a transport manager can be held responsible as the sole person. The starting point is that the road transport operator is responsible for the actions of a transport manager operating under his authority as an employee or contractor. The third paragraph stipulates that a road transport operator cannot be

held responsible for a transport manager performing solo or acting as meant in Article 8 paragraph three. The loss of good reputation of the road transport operator is then considered as a disproportionate response.

If the circumstance as described above occurs, the NIWO will decide that the loss of good reputation of the road transport operator is a disproportionate response and this results in retaining his good reputation.

Article 8

Article 8, paragraph one

If the road transport operator retains his good reputation pursuant to Article 7 paragraph one or two above, the loss of good reputation of the transport manager will not be a proportionate response. It can be said that the loss and retention of good reputation of the road transport operator has a direct relationship with the loss and retention of the good reputation of the transport manager. Two exceptions to this are possible which are listed in the second and third paragraph.

Article 8, paragraph two

The loss of good reputation of the road transport operator leads in two situations not directly to the loss of good reputation of the transport manager. The first situation relates to the case in which the transport manager demonstrates that he is not responsible for the most serious infringements because at the time of the respective most serious infringements he was not the person who managed the transport activities. In such a case the transport manager will retain his good reputation despite the fact that the loss of good reputation of the road transport operator is a proportionate response.

A second situation is in the case where the transport manager was in a relationship of authority of a subordinate versus a superior in which he was forced to give or omit directions or instructions which led to most serious infringements. The transport manager must demonstrate that there was a business superiority such that he as transport manager could not or not sufficiently resist. In such a case the transport manager will also retain his good reputation despite the fact that the loss of good reputation of the road transport operator is a proportionate response.

Article 8, third paragraph

The transport manager who in a completely irresponsible manner and against the company's steady policy has performed solo which led to most serious infringements, will lose his good reputation. The transport manager acted such that the road transport operator was not aware of his unreliable behaviour and that this should not be required from the road transport operator either. In such a case the loss of good reputation of the transport manager will be a proportionate response. This case is

an exception to the principle in the first paragraph that the loss of good repute of the transport manager can only be a proportionate response after the road transport operator for whom he works has lost his good repute.

Article 9

The NIWO carries out the proportionality test after the Dutch Human Environment and Transport Inspectorate has carried out an investigation into the reliability of the road transport operator and has incorporated the results of it in an advisory report. The NIWO receives the advisory report from the Dutch Human Environment and Transport Inspectorate. This advisory report includes for instance a description of the facts and circumstances which led to committing the most serious infringements. The criminal offences which might have been committed by the road transport operator, are not included in the advisory report. This is the reason why the NIWO has no insight in the criminal past of the road transport operator. Because in assessing the good repute of the road transport operator the NIWO is based on the advisory report of the Dutch Human Environment and Transport Inspectorate, it should ascertain pursuant to Section 3:9 of the Dutch General Administrative Law Act [*Algemene wet bestuursrecht: 'Awb'*] that the advice has been formed with due care before it bases its decision with regard to the good repute of the road transport operator on this advisory report. The NIWO observes its duty to ascertain this with due care by enabling the road transport operator to express his views pursuant to Section 4:8 of the Awb within six weeks after the road transport operator has been informed of the intended decision of the NIWO with regard to the loss of good repute. Considering the expertise of the Dutch Human Environment and Transport Inspectorate and its long-standing experience with regard to advising on the good repute requirement of road transport operators, the NIWO bases its decision on an advisory report provided by the Dutch Human Environment and Transport Inspectorate, provided this advisory report has been formed with due care.

After the proportionality test referred to above the NIWO, pursuant to Article 1 of the Transport of Goods by Road Decree, will reach the following decision:

- a) the loss of good repute of the road transport operator is not a disproportionate response, or
- b) the loss of good repute of the road transport operator is a disproportionate response.

The road transport operator and the transport manager(s) employed by him lose their good repute if the NIWO comes to the decision represented under a). If a case as referred under b) occurs the NIWO will have to ask consent from the Minister of Infrastructure and the Environment to declare

the loss of good repute as a disproportionate response. If the Minister of Infrastructure and the Environment gives consent to declare the loss of good repute as a disproportionate response, the road transport operator will retain his good repute and therefore satisfies the good repute requirement. The Minister of Infrastructure and the Environment can withhold his consent. In such a situation the loss of good repute is not a disproportionate response and the road transport operator will lose his good repute. The Minister of Infrastructure and the Environment will withhold his consent if retaining the good repute will be contrary to the law or the principle of equality in the interest of fair competition in the commercial transport market.

Article 10

Article 10, under a up to and including e

The Community license of the road transport operator who lost his good repute, will be withdrawn or suspended. Considering the size of the road transport operator, a choice between withdrawal or suspension of the Community license as well as the duration of a suspension can have farther consequences for the one road transport operator than for the other road transport operator. Therefore in its choice between withdrawal or suspension of the Community license as well as the duration of the suspension the NIWO takes into account the size of the road transport operator. Moreover, a withdrawal or suspension of a Community license can also have its effect on the parties involved who have no relationship whatsoever with the road transport operator. Therefore, in order to being able to impose a proportional sanction, when choosing between withdrawal or suspension of the Community license and the determination of the duration of any suspension, the consequences for these parties involved will be taken into consideration. Moreover, the withdrawal of a Community license of a road transport operator employing 80 employees not only affects the road transport operator but has also fundamental consequences for the 80 employed employees. The NIWO takes such circumstances into account in connection with a withdrawal or suspension and the duration of any suspension of the Community license.

Article 10, under f

A road transport operator whose Community license has already earlier been suspended or withdrawn in the past two years, is considered a repeat offender. Repetition of an offence justifies imposing a heavier sanction because a previous suspension or withdrawal did not prevent the road transport operator from committing again most serious infringements. If there is repetition of an offence, a suspension of the Community license will not be up for discussion and the NIWO will in principle immediately decide to withdraw the Community license.

Article 11

The withdrawal of the Community license is not an unknown sanction. Under previous law the Community license was also withdrawn if the requirement of good repute could no longer be satisfied. Apart from withdrawal of the Community license, pursuant to Article 3.2 paragraph five of the WWG, the NIWO can suspend the Community license if the requirement of good repute can no longer be satisfied. The NIWO can suspend the Community license with a maximum of six months. The NIWO withdraws the Community license if it appears from facts and circumstances as meant in Article 10, that a suspension of the Community license is no longer sufficient. This situation is in any event the case if the road transport operator can be regarded as a repeat offender (see further the explanatory notes to Article 10 under f).

Article 12

Upon the loss of good repute for the duration of two years the transport manager can be declared unfit. Until Regulation 1071/2009/EG came into force such a sanction was absent in previous legislation. Pursuant to Article 14 of Regulation 1071/2009/EG a transport manager declared unfit in one Member State cannot be appointed as a professionally skilled manager by any road transport operator within the boundaries of the European Union. It ensues from Article 12 second paragraph that the period of unfitness of two years can be shortened if the transport manager proves that he took the necessary measures to prevent in future the most serious infringements committed under his management. An example of this is the replacement of analogue tachographs by digital tachographs in order to comply more accurately with the driving times and rest periods and to prevent tachograph fraud.

Article 13

It ensues from Article 13 that the total number of penalty points forming the basis of the sanction imposed, is deleted after the Community license has been withdrawn or suspended. Penalty points that did not play a role in the withdrawal or suspension of Community license will not be deleted. This case occurs if penalty points are received after it has been established that the road transport operator has exceeded his minimum number of penalty points and after which the Community license was withdrawn or suspended.

Article 14

In the event of a withdrawal of a Community license the rehabilitation period amounts to two years. From eight weeks before the expiry of his rehabilitation period onwards the road transport operator can submit an application to the NIWO to grant him a Community license.