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IRU Position on the EU Mobility Package – technical analysis and recommendations on the revision of the EU rules on Access to the Profession of Road Transport Undertaking and Access to the Road Haulage Market

Additional technical analysis and IRU recommendations to European legislators on the European Commission proposal to modify the EU rules on access to the profession and access to the road haulage market (Regulations (EC) No 1071/2009 and 1072/2009).

I. BACKGROUND

IRU proposes simplification and clarification of the existing rules, more aligned implementation and efficient enforcement

IRU welcomes the new, long-overdue [Commission proposal](#) on access to the profession and access to the road haulage market, whose preparation was the subject of a very intense and constructive consultation process that lasted four years and in which IRU was deeply involved. The key IRU priorities for this revision are the creation of a fairer competitive framework in the EU road freight transport and logistics market, the simplification and clarification of the existing rules, a more aligned implementation and application of the existing rules and more efficient, intelligence-led enforcement. IRU has not been in favour of a further opening of the road haulage market, nor has it supported the creation of further restrictions in the market.

From this perspective, IRU welcomes the Commission's proposed modifications to further clarify the existing rules and to make them more enforceable. But IRU regrets that in the process, the proposed modifications introduce new unclear provisions in the EU access to the profession and road haulage market rules, which in turn could jeopardise efficient enforcement.

IRU therefore considers that the European Parliament and Council could certainly further improve the current Commission proposal and has formulated below a number of observations and suggestions that could help guide both institutions in this task.

II. REGULATION (EC) NO 1071/2009 ON ACCESS TO THE PROFESSION OF ROAD TRANSPORT OPERATOR

1. Article 1 – Inclusion of light goods vehicles

IRU supports the proposed application of the establishment rules and a light version of the financial standing rules to Light Goods Vehicles (LGVs) used for road freight transport for hire and reward. This is a positive step in the right direction and IRU appreciates that the Commission is taking the lead in the discussion on competition issues, which have arisen due to the increased use of LGVs, especially in long-distance, cross-border intra-EU road freight transport for operations where Heavy Goods Vehicles (HGVs) have been traditionally used.

However, IRU is not convinced that this amendment will entirely address the key issues. The main issue is that some companies only operating -3.5 tonne LGVs for hire and reward are undercutting cross-border, long-distance hauliers who have to comply with a stricter regulatory framework (access to the profession and access to the market rules). Given that operations with -3.5 tonne LGVs will continue to be exempt from the access to the market rules, the current proposal will not entirely rectify this imbalance.

The proposed rules for companies operating -3.5 tonne LGVs do not apply to companies operating mixed fleets of LGVs and HGVs. Such companies would be expected to apply the HGV rules to their entire fleet. This could lead to distortions of competition.

Of equal concern is that the proposed amendment continues to leave Member States too much flexibility. This could lead to situations of operators flagging out to Member States (or third countries) where the rules are the least stringent, which could be an issue.

The proposal could also have a negative impact on a wider range of undertakings only using LGVs but not being the source of competitive distortions with HGV operations. There are signals that this is a disproportionate response to the issue.

IRU suggests that the flexibility for Member States to apply the remaining access to the profession rules to goods transport vehicles below 3.5 tonnes should be limited and that rather all four criteria should apply to companies using such vehicles for hire and reward for cross-border intra-EU road freight transport. It could be envisioned to introduce exemptions for certain well-defined sectors. Undertakings operating mixed fleets should be allowed to apply the LGV criteria to their LGVs, they should not be obliged to apply HGV criteria to these vehicles. It should be avoided that distortions of competition are created between operators established in the EU and those established in third countries.

2. Article 1 – Non-commercial passenger transport

IRU cannot support this proposal, in that it is very difficult to prove the absence of remuneration, in particular in the case of charity or occasional school transport. Extending the definition of non-commercial passenger transport entails the risk of increasing the competitive pressure on commercial transport operators, reducing their transport opportunities and creating distortions of competition. IRU also considers that there is a lack of clarity between “non-commercial passenger transport” and “own account passenger transport”. The term “non-commercial” road transport is also used in Regulation (EC) No 561/2006 on driving and rest time rules.

IRU suggests to keep the current definition of non-commercial passenger transport and to clarify the difference with “own account passenger transport”. The difference between “non-commercial” and own-account” road transport in general should also be clarified in Regulation (EC) No 561/2006 on driving and rest times.

3. Article 3 – Possibility to impose additional criteria on access to the profession

IRU supports this proposal, as it will improve the aligned transposition of the access to the profession criteria by the different Member States.

4. Article 5 – Establishment

IRU welcomes the clarifications in relation to the documents that have to be kept at the premises of establishment, including the requirement to also keep commercial and labour contracts. While this will contribute to the further alignment of the transposition of the rules on establishment in the different Member States, IRU is not convinced that it will address the so-called “letterbox” companies’ issue and that it still allows Member States too much flexibility in interpretation. Rather, IRU expects that the new proposal could increase the administrative burden further for all road passenger and freight transport undertakings. IRU notes that a strengthening of the rules on establishment

will never be efficient without a strong Member State commitment to enforce those rules. IRU also notes that the proposal has not taken innovation and digitalisation in the sector into account, notably that documents are no longer necessarily kept in paper format but are stored electronically – not necessarily on a company premises, but in the so-called “cloud”.

IRU suggests as an alternative to the current proposal that the Commission establish a list of criteria for Member States to use to check whether an undertaking is a letterbox company or not. This is already being actively used by a number of Member States such as the Netherlands and has proven to be an effective tool. This list could be built on the basis of the provisions of Article 4 of Directive 2014/67/EU and could include information such as the existence of a VAT number, whether the invoicing address is the same as the company’s address, and whether the personnel are employed at the establishment. Member States could decide whether the full list of criteria applies or not, depending on the size and activity of an undertaking. Some Member States already use such a list and it could be considered as a best-practice case for wider use.

In addition, IRU suggests more clearly defining terms like “administrative and commercial activities” and “appropriate administrative equipment and facilities” (proposal for Article 5 [c]). It will also be important that in the proposal for the new Article 5 (e), “proportionate” is clearly defined in order to avoid misinterpretation and to ensure that it does not impose unrealistic employment targets on businesses. Furthermore, IRU suggests replacing “assets” by “vehicles” and “staff” by “drivers” in the same provision.

Finally, IRU recommends that the proposal reflect the fact there is an on-going trend of digitalisation and that the core business information might no longer necessarily be available in paper format. A provision allowing companies to store documents electronically in a remote place such as the “cloud” should be introduced.

5. Article 6 – Good repute

IRU welcomes the further clarification of the conditions on good repute, as this could contribute to a more aligned application of the rules across the Member States, but considers that more could be done in this respect. Notwithstanding the better-aligned application, Member States should retain sufficient flexibility in evaluating good repute of companies and persons to take account of national legal frameworks.

It should be noted however that the additions to the list of convictions or penalties to national rules which can be considered to assess good repute and the enlarged scope for the categorisation of infringements could have a considerable impact on the risk-rating status of individual undertakings. In addition, it is not clear which types of contracts would be included in the notion “law on contractual obligations”. It should also be noted that the current rules on the posting of workers do not apply to owner-drivers. Only rules applicable to all road transport undertakings for hire and reward should be used to assess good repute.

IRU also considers that the provisions stating “*the competent authority shall not rehabilitate the transport manager earlier than one year from the date of the loss of good repute*” provide insufficient certainty about whether there is an obligation for every Member State to have a rehabilitation procedure.

IRU suggests defining “*general partners*” and “*any other relevant person*” (proposal for Article 6 [a] [i]) more clearly. Compliance with the rules on posting of workers and the law applicable to contractual obligations should be removed from the list of points which could be considered for a withdrawal of good repute. Updates of the categorisation of infringements should become subject to a co-decision procedure. A provision should be introduced making a rehabilitation procedure mandatory in every Member State.

6. Article 7 – Financial standing

IRU supports the additional means proposed to provide evidence on compliance with financial standing.

While it is clear that no certified annual accounts are available for a newly established company, it should also be clarified that this provision is also applicable to existing transport companies established in countries where there is no legal obligation to certify the annual accounts.

In addition, IRU supports the proposed amounts for financial standing for -3.5 tonne LGVs, but these should also apply to LGVs part of mixed fleets.

IRU is concerned about the impact on compliance with financial standing of the new proposal to modify Directive 2006/1/EC on the use of hired vehicles without driver, especially where hired vehicles could be used on a temporary basis in addition to the regularly owned fleet and the potential distortions this could cause with companies not using hired vehicles.

IRU suggests that further clarifications be made in relation to the application of the rules on financial standing to hired vehicles without driver.

IRU also suggests to further clarifying the provision in the following way: *“to accept proof of financial standing in the form of a certificate or document from a financial institution (such as a bank guarantee) in the case where no certified annual accounts are available”*. Insurance policies should be added as an accepted document from a financial institution: *“to accept proof of financial standing in the form of a certificate or document from a financial institution (such as an insurance policy or a bank guarantee)”*.

7. Article 16 – National electronic registers and their interconnection at EU level (ERRU)

IRU supports the full implementation of the ERRU by all 28 Member States, as this is the key instrument to facilitate their cooperation. In addition, intelligence-led enforcement based on a risk-rating approach is welcomed; however, it will be essential that the approach be aligned across Member States so that the information gathered is comparable. Alignment is key, especially in relation to the interpretation and weighing of infringements, their proportionality, sanctioning, appeal procedures and the liability of drivers, transport managers, undertakings and third parties in the logistics chain, as differences could lead to distortion of competition.

IRU regrets that the amendment has not clarified whether roadside inspectors should be able to access electronic registers. This is a missed opportunity to improve enforcement by granting them access.

IRU suggests that the national registers should be required to contain information on owned, leased and/or hired vehicles on either a permanent or temporary basis in order to address potential enforcement concerns emanating from the proposed changes to Directive 2006/1/EC on the use of hired vehicles without driver.

8. Article 18 – Member State cooperation

IRU supports the proposal to ensure closer cooperation between Member States, as it will lead to further information sharing and alignment while reducing illegal operations. This will also be key in terms of evaluating good repute.

III. REGULATION (EC) NO 1072/2009 ON ACCESS TO THE ROAD HAULAGE MARKET

1. Article 1 – Scope

IRU supports this clarification of the rules in order to avoid that the simple presence of a number of pallets in the vehicle or the carriage of an empty container could be considered as an incoming cross-border load, which would open the door to cabotage.

2. Article 1 and 4 – Community Licence

IRU considers the revision of the access to the road haulage market rules as a missed opportunity to introduce an electronic version of at least the True Certified Copy of the Community Licence, which must always be on board the vehicle.

IRU suggests that introducing an electronic version could have contributed to further alignment of the national implementations, reducing of the administrative burden for operators and further simplification of roadside enforcement.

3. Article 2 – Cabotage definition

IRU welcomes the clarification of the definition of a cabotage operation, but notes that the clarification is not very useful in a cabotage scenario where the restrictions on the number of operations have been removed.

IRU considers that further clarifications of the cabotage definition could have been made.

IRU suggests to further clarify the time when a cabotage operation starts by codifying the existing Commission guidance note into the Regulation.

4. Article 8.2 – Cabotage rights

IRU considers the proposed modifications to the cabotage rules to be disproportionate with the EC's intention to clarify the existing rules and make their enforcement more efficient. IRU is concerned that the new proposal could create new distortions of competition rather than solve existing ones. Allowing cabotage over a five-day period could raise questions about potential distortions between smaller and larger domestic markets as the smaller domestic markets could likely be much more penetrated. It could also shift cabotage activity more to border regions and thereby create distortions between the more heavily penetrated border areas and other parts of domestic markets. It would also be more difficult to carry out cabotage in countries with many traffic bans.

It should also be noted that the application of the posting of workers rules, as proposed in the *lex specialis*, does not provide a sufficient guarantee for a potential limitation of the number of operations during a five-day period.

IRU is also not convinced that the EC properly clarifies different essential elements of its new proposals, including those relating to cabotage in a contiguous country to the host Member State. The possibility for hauliers to carry out cabotage in contiguous countries (with a common border) is also not a simplification of the current rules and may be a challenge to enforce. As hauliers will no longer have to provide evidence of each cabotage journey, the only proof required will be of the initial incoming international journey to the host Member State. This proof may cause confusion if presented in a contiguous country. In addition, the proposal states that cabotage may be carried out in "*the host Member State or in contiguous Member States*". It is not clear if the cabotage in contiguous Member States could be taken in one or several of such Member States. The new proposal does not indicate whether the journey from the host into a contiguous Member State would have to be a loaded one or not. An additional question raised is whether "contiguous Member States" signifies only those with a common land border or also with a maritime border.

The fact that empty running does not seem to be a problem in the case of contiguous cabotage is considered by IRU incompatible with the overall EU transport policy aim to

reduce CO₂ emissions and fuel consumption. It should be noted that shippers and intermediaries play a key role in the decisions on load factor of heavy goods vehicles. The transport operator does not have complete control over this.

IRU is also concerned about the potential impact of these proposed modifications on Directive 2006/1/EC, on the use of hired vehicle with driver, as it would allow cabotage in a host country with a vehicle registered in the host country but operated by an undertaking established in another Member State.

It should be noted that already today, the three cabotage operations during seven days provides ample cabotage opportunities. The challenge is with enforcement.

IRU suggests to keep the current cabotage rights, notably the three operations during a seven-day period together with the current provisions for the so-called “return cabotage” and to make its enforcement more efficient by a speedier introduction of the latest generation smart tachograph and electronic documents, including the use of the electronic version of the consignment note. The requirement to have a pre-registered consignment note, paper or electronic, on board the vehicle and available for every cabotage operation (with a potential requirement to keep records for a 28-day period) is an alternative that should be further explored.

5. Article 8.4a – Cabotage Enforcement

IRU welcomes and supports the inclusion of the possibility to provide evidence of the incoming cross-border load electronically. However, IRU regrets the missed opportunity to require that one single control document with all the available evidence is kept on board the vehicle. The list of seven items to be proven (Article 8.3) has not been replaced by the requirement to have one single control document, such as a consignment note (such as the CMR or its e-version), a measure that would greatly reduce the administrative burden as well as the duration of roadside checks and facilitate enforcement. Not all seven items feature explicitly on the international CMR note; the registration number of the vehicle is not explicitly requested.

IRU suggests replacing the current requirements in the proposal by the obligation to have a consignment note on board for the incoming cross-border operation and to add the obligation to include the registration number of the vehicle used for the operation on the consignment note. The consignment note should be available in paper or electronic format. The promotion of e-CMR to improve enforcement should be further stressed and enhanced.

6. Article 9 – Rules applicable to cabotage

IRU considers that the Commission has missed an opportunity to further clarify how the posting of workers rules should apply to cabotage, especially because this application also lacks clarity in the *lex specialis* proposal.

IRU suggests introducing a provision in Article 9 of the Regulation clarifying the application of the posting of workers rules to road freight cabotage.

7. Article 10 – Minimum number of cabotage checks

IRU cannot support a minimum number of checks on cabotage operations, as from an enforcement perspective, it will be difficult to identify which vehicles are undertaking cabotage operations from the roadside. Therefore, this could result in a higher number of general checks without necessarily achieving the objective.

IRU supports targeted enforcement and intelligence-led checks based on risk profiling which is aligned between Member States.

IRU suggests deleting the provisions imposing a minimum number of cabotage checks on Member States.

8. Article 14a – Liability

IRU welcomes the proposal for shared liability rules as a positive step in the right direction for a potential wider application.

IRU suggests that a reporting obligation on the application of this provision could be introduced for Member States. This could be followed by a Commission report evaluating the application after a trial period and assessing whether potential modifications to the currently proposed rules are necessary.

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