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European Commission proposal to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU

IRU Position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU.

I. IRU POSITION

IRU recognises the challenges addressed in this new European Commission proposal. IRU does not condone any willing facilitation, from drivers or commercial road transport operators, of the unauthorised entry, transit or stay of third-country nationals in the EU. IRU is strongly concerned about the impact on commercial road passenger and goods transport operators, transport managers or drivers who have been unintentionally involved in the facilitation of unauthorised entry, transit or stay. IRU also regrets the proposal's lack of consideration for such specific circumstances in individual economic sectors, and for existing or proposed legislation.

IRU expects a stronger commitment from EU institutions and Member States to support the road transport industry in its fight against cargo crime and migrant smuggling or trafficking, as well as a clear recognition of the efforts undertaken by the commercial road transport industry to combat the use of its resources, especially commercial vehicles, by illegal immigrants and organised crime groups.

To address the lack of consideration for the specific circumstances of the road transport industry, IRU suggests withdrawing European Commission proposal COM(2021) 753¹ and, in its place, preparing sectoral implementation rules linked to the new proposal. These would deal with specific circumstances in economic sectors, including the commercial road passenger and goods transport sector. These rules could, at the least, include:

- A clear description of the procedures that road transport operators and their staff can follow and on the basis of which they can provide evidence, defend themselves and prove their innocence. There should be guarantees that such procedures be put in place in all Member States.
- A more precise definition of the circumstances in which a road transport company and its staff can be held liable for the potential facilitation of unauthorised entry, transit and stay of third-country nationals in the EU.
- A checklist which can be used by a transport company or its staff to prove the measures and actions they have taken to prevent the facilitation of unauthorised entry, transit and stay of third-country nationals in the EU.

¹ Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the EU.

II. ANALYSIS

On 28 November 2023, the European Commission tabled a new proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay of third-country nationals in the EU ([COM\(2023\)755](#)). This proposal is part of the implementation of the renewed Action Plan against Migrant Smuggling (2021-2025). The new Directive will eventually replace the very general Union legal acts of the so-called “Facilitator Package” composed of Directive 2002/90/EC and Framework Decision 2002/946/JHA.

According to the European Commission, the new proposal complements an earlier proposal [COM\(2021\)753](#) which proposes direct EU measures against transport operators facilitating or engaging in person trafficking or migrant smuggling in relation to illegal entry into the EU. IRU provided [observations](#) relating to this proposal.

IRU recognises the challenges addressed in the proposal and does not condone any willing facilitation from drivers or commercial road transport operators of unauthorised entry, transit or stay of third-country nationals in the EU.

The two proposals have an impact on Regulation (EC) No 1071/2009 on admission to the occupation, notably on “good repute”.

1. General impact

For two decades, IRU and several of its members have been working closely with the European Commission services, individual Member States and third countries to address the continuing challenges for the commercial road transport sector posed by people trafficking and migrant smuggling and to encourage commercial road transport operators and drivers to implement additional security measures to protect the driver, vehicle and load against related crime.

The new proposal is too general and does not take into account specific circumstances in individual economic sectors and already existing or proposed legislation.

IRU is strongly concerned about the impact of the new proposal on commercial road passenger and goods transport operators, transport managers or drivers who have been unintentionally involved in the facilitation of unauthorised entry, transit or stay. The possibility to be investigated, prosecuted and sanctioned for the facilitation of unauthorised entry, transit or stay in the EU is considerably increased. Before the actual guilt of a natural or legal person has been established, precautionary measures should be avoided without solid proof. This raises serious concerns regarding the burden of proof and could lead to arbitrary and unnecessary closure of the operational activity, or part of it, of a road transport operator, transport manager or driver, resulting in income loss and unnecessary financial difficulties. In other words, the European Commission’s action could cause immediate and irreparable damage without the possibility to defend and prove innocence. The possibility of a fair trial, based on the presumption of innocence, where a natural or legal person is provided the opportunity to be heard, to prove innocence and to have the possibility to appeal against any decision is essential.

It should be noted that Regulation (EC) No 1071/2009 already foresees procedures allowing Member States to withdraw the good repute of a commercial road transport operator and the transport manager when infringements have been committed and penalties or convictions have been received for human trafficking. These procedures are based on the principles of the assumption of innocence until proof of guilt has been established and foresee a procedure of appeal against decisions taken after administrative or judicial procedures.

In addition, the European Commission already came in 2021 with a proposal (COM(2021) 753) introducing direct EU measures against transport operators involved in people smuggling. This proposal suggests replacing the Member State jurisdiction and jurisprudence with direct EU measures. IRU questions whether so many legislative initiatives are necessary to tackle the potential involvement of transport companies and workers in people smuggling and unauthorised entry, transit and stay in the EU. With the tabling of the present proposal, the European Commission should consider withdrawing proposal COM(2021) 753.

IRU calls for:

- The withdrawal of European Commission proposal COM(2021) 753.

2. Impact on natural and legal persons

a) Natural persons

The proposal can lead to an increased risk for professional drivers or other staff of commercial road passenger or goods transport operators becoming the subject of investigations or administrative or criminal charges and sanctions when unauthorised third-country nationals are found on board a vehicle without the knowledge or intention of the company's staff. It should be noted that unauthorised boarding of a truck by third-country nationals is a dangerous and illegal act. A driver or a road goods transport company should not be held liable when third-country nationals board their vehicle unless it can be proven that the driver, other staff or the company is knowingly and willingly involved. It must be recognised that in most incidents, the commercial road goods transport companies are the targeted victims of third-country nationals and organised crime.

In the case of collective passenger transport, the Schengen Convention, created on 26 March 1995, outlines rules on carrier liability for passengers found on board without valid identity and entry papers. Bus and coach operators and drivers have always been obliged to check identity and immigration papers and deny boarding to non-complying passengers. Compared to the maritime, air and rail sectors, this obligation poses considerable challenges for bus and coach operators who are not supported by the authorities nor the infrastructure to adequately check passengers' travel documents at every bus or coach pick-up point. The drivers are also not adequately trained to recognise worldwide travel documents and necessary entry papers for the EU and Schengen Area. A driver or a bus and coach company should not be held liable when third-country nationals board their vehicle unless it can be proven that the driver, other staff or the company is knowingly involved.

The threat of investigation, potential prosecution, sanctions, including denial to work can also deter professional drivers from reporting incidents with third-country nationals trying to board their vehicles. It is essential that drivers are encouraged to report incidents without the risk of immediately being considered guilty. It is also essential to ensure rapid response and follow-up when a driver reports an incident. Unfortunately, too often cargo crime and incidents involving third-country nationals trying to board commercial vehicles are not a priority for the police and the security services.

b) Legal persons

A commercial passenger or goods transport company can be considered a legal person. Regulation (EC) No 1071/2009 already provides sanctions if it can be established that they are knowingly and willingly involved in people smuggling, which includes the facilitation of unauthorised entry, transport or stay by third-country nationals in the EU. The new proposal adds another layer of sanctions which could hold companies liable for the actions of their staff even when the company is not knowingly or willingly involved. Lack of control or oversight can already be sufficient to raise suspicion of involvement.

It should be noted that commercial road goods transport companies train drivers and provide security instructions for several operations. These instructions can vary with the type of cargo carried or the route taken. Despite the training and the instructions given, it is difficult to permanently monitor the activities of a driver while on route with a vehicle, and given GDPR rules, it is questionable whether this is legal.

The efforts and measures undertaken by the vast majority of commercial road passenger and goods transport operators to avoid getting involved in unauthorised third-country national entry, transit and stay facilitation are unfortunately not recognised. In 2016, IRU estimated that to deal with the challenges relating to unauthorised entry into the UK alone, the costs incurred by road goods transport operators on these routes amounted to EUR 1.5 billion per year, including costs for additional precautionary

security measures, additional waiting times due to security checks, the use of more expensive alternatives such as unaccompanied multimodal transport, additional insurance premiums, damage to vehicles and loads and increasing difficulties in finding drivers willing to work on UK routes. Despite the costly measures, attacks, especially against goods vehicles and their drivers, continue to happen not only in EU external border areas but throughout the EU territory. Negligence of the police and security services of such crimes is one of the causes of the serious driver shortage which the commercial road transport industry in the EU is facing. It is essential that drivers and commercial road transport operators who have implemented adequate security measures and procedures are not discouraged and continue their efforts. The levying of penalties and sanctions regardless of security measures having been taken risks having the complete adverse effect.

IRU calls for:

- A clear recognition of the efforts undertaken by the commercial road transport industry to counter the use of its resources, especially commercial vehicles, by illegal immigrants and organised crime.
- A specification that the new proposal only complements where necessary and appropriate the provisions laid down in Regulation (EC) No 1071/2009 on admission to the occupation of road transport operators and does not seek to replace them.

3. A lack of solutions

IRU regrets, despite the efforts of the industry, the continued coercive approach of the European Commission against the transport industry in the fight against challenges posed by the international illegal immigration crisis and the lack of support by the police and security services in case of incidents whereby vehicles, drivers and cargo are violently attacked, often damaging the cargo and vehicles and injuring or severely traumatising the drivers. The road transport industry is in most cases a victim and a target of third-country nationals trying to use it in an unauthorised manner.

IRU notes that whereas enormous efforts are undertaken by the European Commission to deploy additional funds to invest in safe and secure parking areas and to improve EU security standards, Member States, regional and local governments are lagging behind in providing a sufficient number of safe and secure parking areas for commercial vehicles which prevents drivers from using them more regularly and which could reduce cargo crime-related challenges, including people trafficking and migrant smuggling. According to an EU study in which IRU participated in 2019, there are 300,000 parking spots in the EU, of which only 7,000 are safe and secure. There are 100,000 missing parking spots in the EU, which means many drivers do not even have the option of parking their vehicle in a designated area.

The offer of mitigating circumstances is not sufficient. Member States must foresee an appeals procedure against any precautionary measure or verdict and sanction taken against commercial road transport companies or their staff.

IRU also notes that no solutions are offered which could allow road transport companies and their staff to prove that they have done everything in their power to prevent vehicles from being used to facilitate unauthorised entry, transit or stay in the EU of third-country nationals.

IRU calls for:

- A strong commitment from the EU institutions and Member States to support the road transport industry in its fight against cargo crime and migrant smuggling or trafficking.
- The preparation of sectoral implementing rules to deal with specific circumstances in various economic sectors, including for the commercial road passenger and goods transport sector. These rules could at least include:

- The possibility of a fair trial, based on the presumption of innocence, where a natural or legal person is provided the opportunity to be heard, and to prove their innocence and has the possibility to appeal against any decision, is essential. Additional legislation should not lead to the cause of immediate and irreparable damage without the possibility to defend and to prove innocence. Only commercial road transport operators, transport managers or drivers for whom it has been established prima facie evidence that they have been intentionally involved in people trafficking and migrant smuggling should become the subject of investigation and prosecution.
- The guarantee for an appeals procedure against any decisions taken.
- A more precise definition of the circumstances in which a transport company can be held liable for actions committed by staff:
 - A commercial road transport company or its staff should not be held liable for any harm to third-country nationals due to the latter's actions in trying unauthorised boarding of a vehicle unless they are willingly and knowingly involved.
 - A simple lack of control and oversight should not be a sufficient condition to make a company liable. Knowing and willing involvement with actual or promised financial or material benefit or intention to cause harm to a person should be established.
- A clear description of the procedures that road transport operators and their staff can follow and on the basis of which they can demonstrate and prove that they have done everything in their power to avoid involvement in third-country nationals boarding their vehicles unauthorised, and a guaranteed right to present their case before any decision is taken against them.
- A simple checklist to demonstrate with accompanying proof that all necessary measures have been undertaken to prevent unauthorised boarding by third-country nationals before any further drastic measures against them are being considered.

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