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IRU POSITION ON KEY ELEMENTS FOR A COMMON EU ENFORCEMENT MEMORANDUM OF UNDERSTANDING (MOU) ON REGULATION 561/2006/EC

IRU Position on an enforcement Memorandum of Understanding on EU Driving and Rest Time Rules.

I. ANALYSIS

1. Background

The EU Driving and Rest Time Rules Regulation (561/2006/EC) entered into force on the 11 April 2007. However, many articles of the Regulation remain unclear and could lead to different interpretations between Member States. This calls for the development of a set of common enforcement interpretations elaborated as a Memorandum of Understanding (MOU). Such a project is in accordance with article 25.1 (b) of the new Regulation which states the following objective: to 'clarify the provisions of this Regulation, with a view to promoting a common approach'. This position paper aims to set out the priority issues and articles of the Regulation which require clarification within an MOU.

2. Priority Issues to be presented for inclusion within the MOU

A detailed examination of the issues listed below as well as recommendations for an MOU is contained in annex I, which is an integral part of this position paper.

– Application of the Regulation

Concerning the application of the Regulation the MOU must establish clarity concerning controls carried out on vehicles originating from, going to or transiting through Switzerland.

– Scope of the Regulation

Clarifications must appear in the MOU confirming exemptions from the scope of the rules pertaining to vehicles brought to and from a garage for repairs. Clarifications must also be made concerning equivalent conditions for the scope of national exemptions.

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- **Definitions**

Clear enforcement interpretations must be established concerning the definition of a driver, break taken during double manning operations, insufficient reduced daily rest, insufficient reduced weekly rest, and daily driving time.

- **Driving and Rest Time requirements**

The MOU must recognise the impossibility of roadside or cross border enforcement of the Working Time Directive (2002/15/EC), the precedence of this Regulation over the Working Time Directive when daily rest is taken on a train or ferry and ensure clarity for the total time permitted for interruptions to this rest and concerning the period of time within which split breaks can legitimately be taken.

- **Liability and Sanctions**

Concerning liability and sanctions: the MOU must deal with the problem of misinformation being provided by drivers to undertakings concerning work carried out for another employer. Mechanisms to ensure co-liability of the whole transport chain must also be considered. Finally, the notification of justified departures from the rules; the application of extraterritorial sanctions, harmonised penalties for infringements and safeguards to prevent unfair vehicle immobilisation must be adopted.

- **Tachograph Records**

The use of manual records when digital tachograph cards have not been correctly issued by card issuing authorities and formal clarification over which records are required at roadside checks, also when operating under AETR rules, are needed in the MOU.

II. IRU POSITION

- A common interpretation and harmonised enforcement of EU Driving and Rest Time Rules will help minimise distortions of competition within the EU and the potential for unintentional infringements of the Regulation by international operators.
 - It is unacceptable that an MOU was not established before the entry into force of Regulation 561/2006/EC on the 11 April 2007. Nevertheless the IRU urgently requests the development of an MOU and its practical application in EU road transport enforcement as early as possible. The MOU must incorporate important clarifications relating to the application of the Regulation, its scope, the definitions in article 4, the core driving and rest time requirements, liability and sanctioning of offences and tachograph records.
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Technical Annex of Issues to be included within an MOU on EU Driving and Rest Time Rules

1. Application of the Regulation

- **Article 2.2(b) & 2.3:** These articles assert that from 11 April 2007 the new EU Regulation will apply to all journeys between the European Community, Switzerland and the countries forming the European Economic Area (EEA). However, Switzerland maintains that this cannot be the case under the terms of their bilateral transport agreement with the EU which requires them to pass their own equivalent legislation which may only be in place at the earliest in January 2008. Until that time the Swiss authorities have stated that their country will apply AETR rules. However the actions of EU enforcement officers towards vehicles which travel to, originate from or have transited through Switzerland must be clarified.

Until the situation is officially confirmed to the contrary the MOU should require EU enforcers to control vehicles travelling to, transiting through or originating from Switzerland on the basis of the AETR agreement only.

2. Scope of the Regulation and National Exemptions

- **Article 3 (g):** This article excludes from the scope of the Regulation 'vehicles undergoing road tests for technical development, repair or maintenance purposes, and new or rebuilt vehicles which have not yet been put into service'.

The MOU should confirm that the exemption included in this article also extends to vehicles that are brought to and from a garage for repair or maintenance by company personnel who may not be full time drivers in possession of a digital tachograph driver card.

- **Article 13 (h):** Article 13 (h) deals with permitted national exemptions from the Regulation provided to vehicles used in connection with essential services such as the provision of gas, electricity, refuse, road maintenance and sewerage. However regarding sewerage, in the Danish language version the exemption is effectively limited to vehicles used for constructing sewerage facilities rather than to all vehicles used in connection with the handling of sewerage, as is the case with other language versions. Regarding household refuse, in several language versions the collection and disposal is limited to door-to-door operations whereas in other language versions door-to-door is not mentioned.

All language versions of the Regulation should offer the same possibilities to Member States concerning the scope of national exemptions. The MOU should ensure that all Member States interpret the national exemption for vehicles used in connection to sewerage and household refuse in line with the most flexible language version.

3. Definitions

- **Article 4 (c):** This article describes a driver as 'any person who drives the vehicle even for a short period, or who is carried in a vehicle as part of his duties to be available for driving if necessary'. However, in the Danish translation of the Regulation - and potentially in others - the words 'as part of his duties' have been omitted, leading some authorities to conclude that any crew member on board the vehicle who might be in a position to drive are considered to be drivers. This was clearly not the intention of the Regulator and should be clarified.

The MOU should emphasise that in all language versions drivers are only those persons who drive or are expected to drive as part of their duties.

- **Article 4 (d):** The definition of a break is given in this article but the insertion of the words that breaks must be ‘used exclusively for recuperation’ has called into question the ability to take break when the driver is inactive in a moving vehicle engaged in a double manning operation.

The MOU should formalise the consensus that the time that a driver spends as a passenger in a moving vehicle during double manned operations can be treated as a break.

- **Article 4 (g):** The definition of a reduced daily rest gives no indication of how enforcers should treat a driver whose rest has only marginally fallen short of the required 9 hours. Should an enforcement officer be able treat this as ‘no reduced daily rest’ at all or more practically ‘insufficient reduced daily rest’?

The MOU should establish that where reduced daily rest has been at least 7 hours or approximately 70% of the required period it should be treated as ‘insufficient reduced daily rest’ and therefore with considerable leniency compared to when ‘no rest has been taken’.

- **Article 4 (h):** The definition of a reduced weekly rest gives no indication of how enforcers should treat a driver whose rest has only marginally fallen short of the required 24 hours. Should an enforcement officer be able treat this as ‘no reduced weekly rest’ at all or more practically ‘insufficient reduced weekly rest’?

The MOU should establish that where reduced weekly rest has been at least 17 hours or approximately 70% of the required period it should be treated as ‘insufficient reduced weekly rest’ and therefore with considerable leniency compared to when ‘no rest has been taken’.

- **Article 4(k):** In giving the definition of daily driving time this article states that this is ‘the total accumulated driving time between the end of one daily rest period and the beginning of the following daily rest period or between a daily rest period and a weekly rest period’.

The MOU should confirm that daily driving time is also the driving time between a ‘weekly rest period and a daily rest period’.

4. Driving and rest time requirements

- **Article 6.2:** This article states that ‘The weekly driving time shall not exceed 56 hours and shall not result in the maximum weekly working time laid down in Directive 2002/15/EC being exceeded.’ It is understood that this reference was made to ensure its provisions relating to a 56 hour week did not supersede the requirement of Directive 2002/15/EC for mobile workers to adhere on average to a 48 hour working week. Nevertheless, the Regulation 561/2006/EC was not intended to regulate Working Time in any way.

It must be emphasised within the MOU that enforcement officers shall not engage in cross border or road side enforcement of the Working Time Directive.

- **Article 6.3:** The Dutch language version and possibly others are insufficiently clear on this article, which sets a limit of 90 hours driving during any two consecutive weeks. The English text reveals that this means that the enforcer can look at any pair of consecutive weeks to verify that the 90 hour limit has been observed. By way of an example this means a driver checked in week 24 could have his total driving time in week 23 and week 24 examined or equally week 22 and week 23.

The MOU should confirm that for all language versions, checks are not carried out on fixed pairs of calendar weeks but rather can extend to any two consecutive weeks.

- **Article 6.5:** This article specifies the activities which need to be recorded as ‘other work’. For the definition of other work the article cites paragraph 4 (e) of the Regulation which in turn refers to the activities classed as working time included in article 3(a) of the Working Time Directive. However in some Member States national interpretations or collective agreements state that ‘working time’ can also include periods of a driver’s ‘availability time’. The recording of such time is a particular problem when operating with a digital tachograph.

The MOU should help to establish how drivers from such Member States shall record as ‘other work’ the time which would otherwise be recorded as a period of availability.

- **Article 7:** The second paragraph of this article specifies conditions under which split breaks can be taken during and after a period of 4 hours 30 minutes driving. The contents of paragraph 2 are insufficiently clear in stating that when taking split breaks the 4.5 hour period during which all breaks must be taken refers only to driving time and does not refer to driving time plus break time. The following scenario must remain legitimate even though the second split break was only completed 4 hours 45 minutes after he first began his driving period. The driver has driven for 1 hour and rested for 15 minutes, after which he drives for 3 hours and rests for 30 minutes.

The MOU must state that the ‘period’ during which split breaks must be taken as referred to in article 7 paragraph 2 represents accumulated driving time only and that in accordance with paragraph one a split rest of 30 minutes can be taken immediately after this period of 4 hours 30 minutes of driving time.

- **Article 9.1:** This article gives a derogation allowing a driver to take a regular daily rest period on-board a ferry or a train if he has access to a bunk or a couchette. However this conflicts with article 3 (b) of the Working Time Directive (2002/15/EC) which states that all travelling time must be considered a period of availability.

The MOU must assert that in this article the Regulation takes precedence over article 3(b) of the Directive on Working Time by permitting a driver to take rest on board a ferry or a train when he has access to a bunk or a couchette.

The article also states that such rest periods shall be interrupted not more than twice by activities not exceeding 1 hour in total. The MOU should establish that during one ferry or train journey a rest can be interrupted twice and that each interruption can consist of more than one activity but cannot exceed a duration of one hour.

5. Liability and Sanctions

- **Article 10.2:** Article 10.2 requires that a transport undertaking plans the work of its drivers so that they can comply with the provisions of this Regulation.

While a transport undertaking should plan the work of his drivers in such a way as to comply with the provisions of the Regulation, the MOU should recognise that the undertaking cannot be held liable if a driver gives misinformation concerning work carried out for other employers.

- **Article 10.4:** The principle of co-liability throughout the supply chain for infringements against the regulation is established in this article. The recognition that transport service contractors such as shippers and freight-forwarders can through their instructions to undertakings become responsible for infringements is positive. However this principle needs practical measures for implementation.

The MOU should require Member States to make known the mechanisms which will be established under their respective legal systems to put into practice the principle of co-liability. Evidence such as written instructions to transport operators should be recognised as evidence for a transport service contractor’s liability for a specific infringement of the Regulation.

- **Article 12:** This article contains provisions that would permit a driver to depart from the minimum rest requirements and maximum driving times contained in article 6 to 9 in order to find a suitable stopping place and thereby ensure the safety of his passengers or load. It states that the driver must indicate the reason for such a departure manually on the record sheet or on a print out from the recording equipment or in his duty roster. This must be done at the latest the moment he finds a safe stopping place. However, it will not always be safe or practical to do so before he reaches the place where his daily activities cease. This will certainly be the case when a manual note needs to be made on the print out of a digital tachograph. In such circumstances the driver should not be found guilty of an infringement if subject to a control before he has an opportunity to mark down the reasons for a departure from the provisions of the Regulation.

When a driver - in accordance with article 12 - exceeds the Regulation's minimum rest and maximum driving time limits, he should on the occasion of a control indicate immediately to an enforcement officer if it had not been practical or safe to note down the reasons for a departure from those provisions. On the basis of the drivers good faith to alert the officer to this omission in his records he should not be punished for any infringement of this article.

- **Article 19.2:** Under article 19.2 the Regulation establishes the principle of extraterritorial sanctions. This would allow an enforcement office to apply a sanction against a foreign or national haulier for an offence committed outside the territory on which it was detected. According to the Regulation this could be carried out through an on the spot fine or until 1 January 2009 through requesting the competent authorities in the operator's country of registration to apply sanctions under their own law.

The MOU should advise that extraterritoriality for offences should only be implemented once a Member State has clearly chosen and announced the option to be used to pursue the offence. This will ensure consistency. Secondly, it should be agreed that when checking the records of international drivers prior to the week in which the check takes place, enforcement officers should only check and sanction against the most serious offences.

- **Article 19.4:** The article requires Member States to establish a system of proportionate penalties for infringements of the Regulation which can be applied to undertakings, transport service contractors and driver employment agencies.

The MOU should state that Member States must develop a harmonised system of penalties for infringements applicable across the whole EU.

- **Article 20.3:** This article states that a driver who is employed or at the disposal of more than one transport undertaking shall provide sufficient information to each undertaking to enable it to comply with Chapter II (crews, driving times, breaks and rest periods).

As indicated above concerning article 10.2 the MOU must recognise that the undertaking can not be held liable for any inaccurate information supplied by the driver concerning activities undertaken for another employer.

- **Article 21:** This article states that when an infringement of the Regulation is considered to be of a kind that endangers road safety, the competent authorities should be empowered to immobilise the vehicle until the driver has rectified the infringement for instance by taking a daily rest. It may also be possible for the authority to suspend or restrict an undertakings licence if the operator is registered nationally or to suspend or withdraw the drivers licence.

The MOU should establish clear guidelines for enforcement authorities making use of article 21 to either immobilise the vehicle or withdraw or suspend an operator's or driver's licence. This should pay special attention to ensuring that such action can not be taken arbitrarily or because of a minor infringement of the Regulation.

6. Tachograph records

- **Article 26.4:** Amendments to paragraph 1 of article 15 specify alternative means for a driver to record his activities when using a digital tachograph ‘where a driver card is damaged, malfunctions, or is not in the possession of the driver...’

The MOU should make clear that a driver whose driver card has not been delivered within the maximum time limits set down by the card issuing authorities may continue to drive by making use of the provisions set down in article 26.4 (a) for alternative means of recording driving and rest times.

- **Article 26.4:** Amendments to paragraph 7 of article 15 oblige drivers to have in their possession tachograph charts or record sheets showing their activities ‘during the current week and the previous 15 days’.

The MOU should confirm that drivers are required to carry records for the current week and the previous 15 ‘calendar’ days not ‘working days’ as previously considered by certain Member State authorities.

It should also be confirmed in the MOU that until the current AETR rules are aligned with the new EU Regulation drivers operating under the scope of that agreement need only carry with them tachograph records for the current week and the last day of the previous week in which they drove.
