

Submitted by International Road Transport Union

IRU DOCUMENT ON ANNEX 9, PART III (for WP.30)

At its 123rd and 124th sessions, the Working Party on Customs Questions affecting Transport (WP.30) started discussions on a proposal for a new Annex 9, Part III of the TIR Convention, which would define the obligations of the International Organisation responsible to “take on responsibility for the effective organization and functioning of an international guarantee system provided that it accepts this responsibility” (Article 6.2bis of the TIR Convention).

During both sessions, the International Road Transport Union (IRU) asked some concrete questions and raised constructive concerns on some of the numerous obligations mentioned in the draft proposal of Annex 9, Part III, in particular in relation to the carrying out of several types of audits of the IRU by the UNECE auditors and/or any other persons authorised to do so by the UNECE.

During the 125th session of the WP.30, the Chairman asked the IRU to provide a detailed written account of its concerns, already exposed, in advance of the 126th session. This was reflected in the report as a request of the WP.30.

The IRU is therefore pleased to submit the enclosed document for consideration by the Working Party.

First of all, the IRU is, in principle, in favour of the idea of a new Annex 9, Part III of the TIR Convention, summarising the obligations of the International Organisation. The IRU even transmitted a proposal to that extent. Indeed, it must be noted that the IRU already fulfils these obligations by virtue of the UNECE-IRU agreement.

At this stage, only 3 specific clauses of the UNECE Secretariat recent draft of Annex 9, Part III, i.e. clauses o), p) and q) –, create serious legal and practical concerns for the IRU and all its national Member Associations. These concerns can be summarised as follows:

A. BACKGROUND ON THE CLAUSES o), p) and q)

The UNECE mentioned that its proposal was made further to consultations with the “competent UN services”.

Therefore, the IRU and some Contracting Parties, in a constructive spirit of transparency, have repeatedly requested access to the exchanges of correspondence that took place between the UNECE and these “competent UN services” to understand why clauses o), p) and q) were suddenly added to the proposal.

This information, which would throw some light on the justification for this proposal and would allow the Working Party to better assess the proposal currently on the table, has not yet been published by the UNECE and this is really unfortunate.

The IRU, therefore, must invite the Contracting Parties to formally urge the UNECE to publish all relevant documentation for the sake of more constructive discussions on this important issue.

B. LEGAL CONCERNS

The obligations contained in clauses o), p) and q) of the draft Annex 9, Part III call for numerous legal issues to be addressed at national and international public and private law levels.

At this stage, it is important to remind all concerned that the IRU is a private organisation with the status of an association. It was established in Switzerland and is governed by and answerable to Swiss private law in all circumstances.

Under Swiss law, and under most national legislation, the IRU, as for any other private organisation, cannot be forced to comply with requirements such as those contained under clauses o), p) and q) of the current draft proposal, when such requirements conflict with its governing law for, *inter alia*, the following reasons:

- This would infringe Swiss and European data protection laws, as well as the protection of know-how and the protection of private / commercial contractual relationships. Indeed, how would the confidentiality of such audit results be guaranteed?
- It would hamper the IRU in its compliance with its corporate / managerial liabilities and responsibilities under Swiss law.
- The absence of any judicial mechanism equipped to settle disputes and ensure financial compensation in the event of damage being caused to the international organisation because of incorrect audit results is also of serious concern.
- The IRU had not been provided with information as to how the auditors of the United Nations could be legally authorized, in line with UN rules, to undertake audits of a private entity, i.e. the IRU.

Furthermore, past experience has demonstrated that incorrect conclusions by UN auditors have led to unfounded accusations being levied against the IRU, which despite all evidence and a clear statement by the WP.30, have never been corrected either by the UNECE or by the UN Auditors, thus damaging the image and reputation of the IRU.

Finally, international public law Conventions such as the TIR Convention cannot impose on private entities any obligation that would conflict with other international conventions, general international principles of law, private law principles or fundamental rights, and particularly not through the simplified approval procedure chosen by the Secretariat to introduce such new obligations.

C. PRACTICAL CONCERNS

Besides the legal concerns, which obviously make it legally impossible for the IRU to agree to such potential audits foreseen in the draft Annex 9, Part III, several practical issues would also create serious difficulties leading to severe complications for the management of the TIR System, and in particular:

- **What would** happen if the audits imposed by the UNECE on the IRU, by virtue of the proposals contained in clauses o), p) and q) of the draft, reach different conclusions to those reached by the statutory external audits to which the IRU is subject according to Swiss law?

Such a possibility exists as different auditors often use different methods/criteria; focus on different things on which to base their audits. Furthermore, it is obvious that such audits would be performed by different persons.

In such cases, the IRU would have the legal obligation to abide by the results of its statutory audit but **would also** have to take into account the findings of the auditors appointed by the UNECE. This would simply disrupt the management of the TIR System and prevent the IRU's management in fully assuming its managerial / corporate liabilities and responsibilities under Swiss law.

- Such audits of the IRU, which would be available for the Working Party, i.e. for all Contracting Parties of the TIR convention, will create a clear interference of customs authorities in the management of the international guarantee system, in total contradiction with the principles established in Article 6.2bis of the TIR Convention.
- The identity of the person or persons likely to perform the audits is unclear. The draft proposal specifies that "any person authorised by the UNECE" could be selected. The IRU and some Contracting Parties have been unsuccessful in trying to obtain more information on this issue. The reply given by the UNECE during the 125th session (i.e. somebody can be nominated to "investigate an issue of possible concern..." as is the practice "for human right issues") is not sufficient and must be clarified.

E. CONCLUSION

- **The IRU confirms its in principle agreement for the introduction of a new Annex 9, Part III and to the necessary related amendment of Article 6.2bis of the TIR Convention.**
- **The IRU agrees with almost all of the points mentioned in the draft proposal.**
- **The IRU proposes to move forward with the adoption of the draft Annex 9, Part III without the clauses o), p) and q) which should be deleted.**
