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Item 5 (b)

Amendment proposals to the Convention transmitted by the TIR Executive Board

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Transmitted by the International Road Transport Union

In annex, the secretariat transmits a letter by the International Road Transport Union (IRU)

Annex

Item 5 of the agenda – amendment proposals to the Convention transmitted by the TIR Executive Board

IRU comments to the Amendment Proposals to explanatory note 8.10 (c) and Explanatory Note 0.6.2 bis-1

I. IRU comments to the new explanatory note to article 8.10 (c)

1. IRU agrees with the amendment proposal to this new Explanatory Note. As recognised by several TIRExB members, this proposal addresses the issues raised by the Romanian customs authorities and also sets out a mechanism to address similar cases in the future, should it be necessary (ECE/TRANS/WP.30/AC.2/2021/12, para 18).

II. IRU comments to both explanatory notes to article 6.2 bis-1

2. IRU cannot agree with any of the amendment proposals for Explanatory Note 0.6.2 bis-1. They imply a conflict between private and public law, as recognised by several TIRExB members in documents ECE/TRANS/WP.30/AC.2/2019/12 and ECE/TRANS/WP.30/AC.2/2021/12, as follows:

- The contract between the international organisation and its national associations is primarily a contractual relation under private law and that any involvement from governments in the drafting of new provisions should be limited to customs-related issues only.
- Interfering in the relationship between the international organisation and its associations did not fall under the mandate of the Board. A balanced approach should be reached on this issue.
- There are many aspects of the issue that TIRExB members were not and could not be expected to be familiar with as they related to the contractual relationship between two private entities.

3. To that extent, is important to clarify that:

- IRU is an association, established under Swiss law. The membership procedure to IRU is governed by the IRU Constitution and the Swiss Civil Code.
- While the authorisation of IRU and of the national associations are by essence public law, the relationships between IRU and the national associations affiliated to it, pertain to private law. Only the parties who are bound by these written agreements (IRU and national associations) can decide on the terms. This decision is based on the principle of contractual freedom, which provides that each party has the right to decide on the terms of the agreement established between them.

4. If the aforementioned principles are not respected:

- Both public and private law would be infringed (i.e., giving a different interpretation to the current provisions or intervening in the affiliation contracts between IRU and its members could endanger the very existence of the international organisation and the functioning of the international guarantee system, as well as the mandate given to IRU according to Article 6.2 bis); and
- The delicate balance between the public and private sectors' roles within the TIR system could be disrupted.

III. IRU comments to the first proposal to explanatory note to article 6.2 bis-1

5. The first proposal is to modify Explanatory Note 0.6.2 bis-1 to read:

0.6.2 bis-1 *The relationship between an international organization and its member associations shall be defined in written agreements on the functioning of the international guarantee system. **The agreements can be terminated by either party with a prior notice of at least six (6) months, except in case of an earlier revocation of either authorization.***

6. IRU cannot agree with such a proposal for the other following reasons:

A. Legal uncertainty

7. Different scenarios may be applicable for the agreements being terminated. Introducing a timeframe in the text of the Convention (as proposed in the amendment) may expose the guarantee chain to unpredictable risks (e.g. there could be a need for an urgent transfer of duties from one association to another, agreed by all parties, including competent authorities).

B. Aggravation of risk

8. Clause 9.1 of the Global Insurance agreement sets out that IRU is the only legal person responsible for managing the guarantee system : « *L’Lru a l’obligation de mettre en œuvre, au sein de sa propre administration ainsi que par son intermédiaire auprès des Associations et des utilisateurs de Carnets TIR, toutes procédures de gestion harmonisée liée aux risques à l’émission, à l’usage et au contrôle des Carnets TIR* ».

9. The Global Insurer entered into this agreement on the assumption that IRU is the only legal person responsible for managing its contractual relationships with third parties, including national associations. The Global Insurance agreement is a private relationship between IRU and the Global Insurer. It is ruled by private law and abided only by the concerned parties.

10. IRU has to inform the Global Insurer on any amendments to the TIR Convention and its contractual relationships with national associations and TIR Carnet holders. This is fundamental to the risk assessment performed by the Global Insurer, as per clause 9.2 of the Global Insurance agreement : « *L’IRU a l’obligation de fournir sur demande à AXA toute information concernant ses relations contractuelles et administratives avec les Associations et les utilisateurs de Carnets TIR* ».

11. If IRU’s power of decision over its contractual relationships becomes limited (i.e., if 6-month prior notice is imposed), the Global Insurer may consider it as an aggravation of risk, which could lead to the termination of the Global Insurance agreement or an unfavourable revision of its conditions, which will be detrimental to TIR attractiveness and its very survival.

C. Potential contradiction to article 6.2 of the TIR Convention

12. As per Article 6.2 of the TIR Convention, IRU is authorised by AC.2 to “*take on the responsibility for the effective organisation and functioning of an international guarantee system*”.

13. However, the amendment proposal imposes a deadline for the termination of the agreements between IRU and its national associations (i.e., 6-month prior notice). This means that IRU would have limited decision power on its contractual relationship, which is contradictory to its rights warranted by Article 6.2 (i.e., responsibility for the organisation and functioning of the guarantee system).

IV. IRU comments to the second proposal to explanatory note to article 6.2 bis-1

14. The second proposal is to modify Explanatory Note 0.6.2 bis-1 to read:

0.6.2 bis-1 “*The relationship between an international organization and its member associations shall be defined in written agreements on the functioning of the international guarantee system. **Should any of the parties decide to terminate the agreement, without a preceding revocation of authorization, the decision will become effective at the earliest three (3) months after the date of termination.***”

15. IRU cannot agree with such a proposal for the other following reasons:

A. Legal uncertainty

16. The current agreement between IRU and its association, provides that it can be terminated if a 3-month prior notice is sent by one of the parties (i.e., if one party decides to terminate the agreement on 31 December 2023, it should send a written notice of termination to the other party by 30 September 2023, at the latest).

17. However, the amendment proposal provides that the termination would be effective at the earliest 3 months after the date of termination. This means that 3 more months would be added to the termination date. In this case, the agreements would terminate at least 6 months after the issuance of the notice period. If we take the example mentioned above, instead of the agreement being terminated on 31 December 2023 (date of termination), it would be terminated only on 31 March 2024 (3 months after the date of termination).

18. As currently worded, the proposed amendment creates legal uncertainty as to which of the dates (date of termination or additional deadline of 3 months) is the effective termination date. This results in ambivalence as to the period of time that an association will remain responsible for the engagements of the TIR Carnets issued to its holders and for TIR Carnets used on its territory by foreign holders. Such ambivalence may have a serious impact on the whole guaranteeing chain, including the payment of claims to customs.

19. Moreover, the prolongation of the deadline will not bring any additional advantage to any of the stakeholders. On the contrary, it may result in an unnecessary extension of the national association’s financial exposure. As currently worded, the written agreements between IRU/national associations provide that if either of the parties decide to terminate the agreement, such a decision will only come at a time after the parties have tried, for several months, to find an amicable solution.

V. Considerations by the Administrative Committee

20. The adoption of any of the amendment proposals to Article 6.2 bis-1 may imply risks to the guarantee chain as well as infringe legal provisions which are currently in force.

21. Therefore, it is requested that a legal analysis be performed by the Office of Legal Affairs in New York, as per the terms of this document, prior to AC.2 deciding on this matter.
