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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	20 March 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 144 final
Subject:	Proposal for a COUNCIL DECISION on the position to be adopted on behalf of the European Union in the Group of Experts of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR), in the Working Party on Road Transport of the United Nations Economic Commission for Europe and, as appropriate, in relation to the notification by the UN Secretary-General pursuant to Article 21(1) of the AETR.

Delegations will find attached document COM(2023) 144 final.

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Brussels, 20.3.2023
COM(2023) 144 final

2023/0075 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be adopted on behalf of the European Union in the Group of Experts of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR), in the Working Party on Road Transport of the United Nations Economic Commission for Europe and, as appropriate, in relation to the notification by the UN Secretary-General pursuant to Article 21(1) of the AETR.

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Group of Experts on the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) of the United Nations Economic Commission for Europe (UNECE) and in the UNECE Working Party on Road Transport (SC.1), in connection with the envisaged adoption of an amendment to the AETR Agreement as regards the introduction of a 'force majeure' clause.

2. CONTEXT OF THE PROPOSAL

2.1. The European Agreement concerning the work of crews engaged in international road transport (AETR)

The AETR aims to harmonise the legislative framework of Contracting Parties to the AETR as regards driving and rest times for professional drivers and the corresponding technical requirements for the construction and installation of the recording equipment used in vehicles (the tachograph). The AETR entered into force on 5 January 1976. It has subsequently been amended, most recently on 20 September 2010.

All Member States are parties to the AETR[1].

2.2. The Group of Experts on the AETR and the Working Party on Road Transport

The Group of Experts on the AETR is a technical group set up by the Inland Transport Committee of the UNECE whose objective is to develop proposals to amend the AETR. According to the Decision establishing the Group of experts on AETR, the European Union can participate in the Expert Group[2].

The Working Party on Road Transport (SC.1) is a group set up by the Inland Transport Committee to promote the development and facilitation of international transport by road. This includes harmonising and simplifying the rules and requirements related to road transport.

Proposals to amend the AETR are generally first discussed by the members of the Expert Group and then, submitted to the UNECE Working Party on Road Transport (SC.1) for endorsement. If consensus is reached in both groups, a Contracting Party of the AETR formally tables the amendment to the United Nations Secretary-General, in accordance with Article 21 of the AETR. The bodies set up in UNECE (the Expert Group on AETR and the Working Party on Road Transport) provide a forum for discussion and endorsement, so as to

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[1] Austria (ratified on 11/6/1975), Belgium (ratified on 30/12/1977), Bulgaria (ratified on 12/5/1995), Croatia (ratified on 3/8/1992), Cyprus (ratified on 5/9/2003), Czechia (ratified on 22/6/1993), Denmark (ratified on 30/12/1977), Estonia (ratified on 3/5/1993), Finland (ratified on 16/2/1999), France (ratified on 9/1/1978), Germany (ratified on 9/7/1975), Greece (ratified on 11/1/1974), Hungary (ratified on 22/10/1999), Ireland (ratified on 28/8/1979), Italy (ratified on 28/12/1978), Latvia (ratified on 14/1/1994), Lithuania (ratified on 3/6/1998), Luxembourg (ratified on 30/12/1977), Malta (ratified on 24/9/2004), Netherlands (ratified on 30/12/1977), Poland (ratified on 14/7/1992), Portugal (ratified on 20/9/1973), Romania (ratified on 8/12/1994), Slovakia (ratified on 28/5/1993), Slovenia (ratified on 6/8/1993), Spain (ratified on 3/1/1993) and Sweden (ratified on 24/8/1973).

[2] Decision on matters relating to Inland Transport Committee: Establishment of a Group of Experts on European Agreement Concerning Work of Crews of Vehicles Engaged in International Road Transport (AETR), ECE/EX/2011/L.16, paragraph 3: "In accordance with the Guidelines, participation in the Expert Group would be open to all ECE member States, all AETR Contracting Parties and the European Union (…)"

prepare the formal submission of an amendment according to the AETR, and to avoid objections once an amendment is formally tabled to the United Nations Secretary-General. It is therefore relevant to establish Union positions in these groups as well, so that non-EU Contracting Parties submitting proposals to the relevant UNECE bodies are aware of the position of the Union as early as possible.

However, pursuant to Article 21(1) AETR, Contracting Parties can also directly communicate the text of a proposed amendment to the UN Secretary-General, which then communicates it to all Contracting Parties. Once the formal submission to amend the AETR has been notified, Contracting Parties then have 6 months to object to the proposal. The proposal is deemed to be adopted if no Contracting Party objects to the amendment within that deadline.

2.3. The envisaged act to be considered by the Group of Experts on the AETR and the Working Party on Road Transport

On 20 February 2023, during its 31st session, the Group of Experts on the AETR is to decide on whether to submit a proposal by the Government of Belarus to amend Article 4 of the AETR regarding the introduction of a 'force majeure' clause ('the envisaged act')[3] to the Working Party on Road Transport (SC.1). This envisaged act is set out in both ECE/TRANS/SC.1/GE.21/2023/2[4] submitted by Belarus and ECE/TRANS/SC.1/GE.21.2023.1[5] submitted by the Russian Federation.

The purpose of the envisaged act is to allow, for a period of up to 2 years, drivers of a Contracting Party engaged in international transport to use record sheets completed by hand, instead of a digital tachograph card, in the event of 'force majeure' circumstances faced by that Contracting Party.

The envisaged act, if adopted, would become binding on the parties in accordance with paragraph 6 of Article 21 of the AETR, which provides that '*Any amendment deemed to be accepted shall enter into force three months after the date on which it was deemed to be accepted*.'

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

Since the start of the illegal war of aggression by the Russian Federation against Ukraine on 24 February 2022, in which the Republic of Belarus has a complicit role, the European Union has adopted sanctions against both Russia and Belarus.

These sanctions have resulted, among other consequences, in certain EU companies suspending their operations in and with Belarus and Russia. These include companies that usually supply digital tachograph cards and chips to the card issuing authorities of these two countries. As a result, Belarus and Russia are effectively in a situation where they claim not to be able to deliver tachograph cards to their drivers, who can therefore not comply with the AETR when engaged in international road transport operations falling within its scope.

As a result, both governments have proposed to introduce a 'force majeure' clause in the AETR, which would allow drivers who should have a digital tachograph card issued by these countries to be exempted from the use of such, and to use alternative recording methods such

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[3] Agenda point 4, ECE/TRANS/SC.1/GE.21/69: ECE/TRANS/SC.1/GE.21/69 (unece.org).

[4] ECE/TRANS/SC.1/GE.21/2023/2: Прочие вопросы - (Belarus) | UNECE.

[5] The same amendment proposal is included by Russia in ECE/TRANS/SC.1/GE.21/2023/1: Добавление 1C - (Russian Federation) | UNECE, even though this document largely deals with comments to another Union proposal (new Appendix 1C to the AETR).

as record sheets. Such an alternative would enable these countries to legally continue their international transport operations by getting around a situation that is likely the result of the illegal war of aggression by Russia against Ukraine, in which Belarus has a complicit role, which led to the application of EU sanctions against Russia and Belarus. The Union's position should therefore be against the adoption of such a proposal for amendment, as it would run counter to the objectives pursued by the EU sanctions regime.

The proposed position is also in line with EU policy not to accept any Russian or Belarussian amendments to international agreements, given Russia's illegal war of aggression against Ukraine.

Furthermore, on substance, and independently of the geopolitical context in which it has been tabled, the proposed amendment would also significantly weaken the AETR. Indeed, under the proposal for amendment, any Contracting Party would, through a simple notification to the UNECE Working Party on Road Transport – which would itself simply be informed and not allowed to assess any justification for the 'force majeure' invoked by that Contracting Party – be allowed to bypass one of the primary purposes of the Agreement, namely the installation and use of harmonised recording equipment (the digital tachograph and digital tachograph card) for international transport operations. For up to 2 years, drivers who would be expected to have a driver card issued by that Contracting Party would not be obliged to use a digital tachograph card in international transport.

As a result, the enforcement of the drivers' compliance with driving and rest times as laid out elsewhere in the AETR would be made drastically more difficult, especially since this would take place on the territory of another Contracting Party to the AETR than that of the driver. In practice, this amendment would therefore create a loophole that would likely compromise the entire purpose of the Agreement.

A Union position is required as the amendment tabled by the Republic of Belarus, if accepted, will be binding on all AETR Contracting Parties, which includes all Member States. In its judgment of 31 March 1971 in Case 22/70 *AETR*[6], the Court of Justice of the European Union recognised that the area of the work of crews of vehicles engaged in road transport is an exclusive external competence of the Union. This competence has since been exercised in numerous legislative acts adopted by the Union co-legislators, including Regulation (EC) No 561/2006 of the European Parliament and of the Council[7] and Regulation (EU) No 165/2014 of the European Parliament and of the Council[8]. The envisaged act has direct implications on EU law, including Regulations (EC) No 561/2006 and (EU) No 165/2014. Since the subject matter of the AETR falls within the scope of Regulation (EC) No 561/2006, the power to negotiate and conclude the Agreement and its modifications lies exclusively with the Union pursuant to article 3(2) TFEU.

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6 ECLI:EU:C:1971:32.

7 Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ L 102, 11.4.2006, p. 1).

8 Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport (OJ L 60, 28.2.2014, p. 1.).

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement[9].

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[10].

4.1.2. Application to the present case

The Group of Experts on the AETR and the Working Party on Road Transport (SC.1) are bodies set up by the Inland Transport Committee of the UNECE.

The proposed amendment constitutes an act having legal effects. The envisaged amendment, if then adopted, would be binding under international law in accordance with 21(6) of the AETR and capable of decisively influencing the content of EU legislation, namely Regulations (EC) No 561/2006 and (EU) No 165/2014 which cover the AETR subject matter and explicitly refer to that agreement.

The envisaged act does not supplement or amend the institutional framework of the AETR.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to transport policy.

Therefore, the substantive legal basis of the proposed decision is Article 91 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 91 TFEU, in conjunction with Article 218(9) TFEU.

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[9] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

[10] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR)[11] entered into force on 5 January 1976.

(2) A Group of Experts has been established by the United Nations Economic Commission for Europe in the framework of the AETR. It is a body empowered to develop and submit proposals for amending the AETR to the Working Party on Road Transport.

(3) The Group of Experts on AETR, during its 31st session on 20 February 2023, is to discuss a proposal by the Governments of Belarus and the Russian Federation to amend Article 4 of the Agreement by introducing a 'force majeure' clause, laid out in ECE/TRANS/SC.1/GE.21/2023/2 and in ECE/TRANS/SC.1/GE.21/2023/1[12].

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Group of Experts on the AETR, and possibly in the Working Party on Road Transport, as the amendment to the Agreement which they are called to consider and endorse would be binding under international law in accordance with Article 21(6) of the AETR and is capable of decisively influencing the content of EU legislation, namely Regulations (EC) No 561/2006 and (EU) No 165/2014.

(5) In its judgment of 31 March 1971 in Case 22/70 *AETR,* the Court of Justice of the European Union recognised that the area of the work of crews of vehicles engaged in road transport is an exclusive external competence of the Union. This competence has been exercised since then in numerous legislative acts adopted by the Union co-legislators, including Regulation (EC) No 561/2006 of the European Parliament and of the Council[13] and Regulation (EU) No 165/2014 of the European Parliament and of

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11 OJ L 95, 8.4.1978, p. 1.

12 The same amendment proposal is included by Russia in ECE/TRANS/SC.1/GE.21/2023/1 even though this document largely deals with comments to another Union proposal (new Appendix 1C to the AETR).

13 Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations

the Council[14]. Since the subject matter of the AETR falls within the scope of Regulation (EC) No 561/2006, the power to negotiate and conclude the AETR and its modifications lies exclusively with the Union pursuant to article 3(2) TFEU.

(6) The proposed amendment aims at solving a practical problem that is likely the result of the illegal war of aggression by Russia against Ukraine, in which Belarus has a complicit role, which led to the application of EU sanctions against Russia and Belarus. It would allow a Contracting Party to unilaterally notify that it could no longer fulfil one of the main purposes of the AETR, namely the use of a harmonised recording equipment for vehicles engaged in international transport (the digital tachograph), for reasons of 'force majeure' which would not be subject to any type of validation or assessment.

(7) The envisaged act would allow, following such a declaration by a Contracting Party to the AETR, not to require the use of digital tachographs and digital tachograph cards for vehicles registered in that Contracting Party when engaged in international road transport operations. It would thus render the enforcement of the drivers' compliance with driving and rest times as laid out elsewhere in the AETR drastically more difficult, creating a loophole that would likely compromise the entire purpose of the Agreement.

(8) The Union's position to be taken in the Group of Experts on the AETR and in the Working Party on Road Transport, should be not to support the proposed amendment, in order to prevent a significant weakening of the enforcement of the rules on driving and rest times laid down in the AETR, and ensure the full effect of the EU sanctions regime.

(9) It cannot be excluded that the Russian Federation or the Republic of Belarus formally submits the proposal to amend the AETR under Article 21(1) of the AETR, disregarding the discussions in UNECE's bodies. In this case, Member States should object to the proposal under the procedure laid down in paragraph (b) of Article 21(2) of the AETR.

(10) The Union's position is to be expressed by the Member States of the Union that are members of the Group of Experts of the AETR and of the Working Party on Road Transport, acting jointly in the interest of the Union,

HAS ADOPTED THIS DECISION:

Article 1

The Union position at the 31st session of the Group of Experts on the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) and, as relevant, at the next session of the Working Party on Road Transport of the United Nations Economic Commission for Europe (UNECE), or at any subsequent sessions, shall be not to support the proposed amendment to the AETR as set out in ECE/TRANS/SC.1/GE.21/2023/2 and ECE/TRANS/SC.1/GE.21/2023/1 to include a 'force majeure' clause, as well as not to

(EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ L 102, 11.4.2006, p. 1).

[14] Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport (OJ L 60, 28.2.2014, p. 1).

support any similar amendment in substance to be tabled either by the Russian Federation or the Republic of Belarus.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the Group of Experts on the AETR and of the Working Party on Road Transport of the UNECE, acting jointly in the interest of the Union.

Article 3

Should Member States receive a notification under Article 21(1) of the AETR that the Russian Federation or the Republic of Belarus, disregarding the discussions in UNECE's bodies, have formally proposed the amendment set out in ECE/TRANS/SC.1/GE.21/2023/2 or any similar amendment in substance, Member States shall object to the proposal in accordance with paragraph (a) of Article 21(2) of the AETR.

Article 4

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President