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Agne Vaitkeviciute[*]

Combating Illegal Immigration to the EU – the Role of Transport Companies

1. The EU Legislative Framework in the Field

Transport companies or carriers actively contribute to immigration to the European Union (hereinafter referred to as the EU), as their business consists of carrying third-country nationals to the EU territory. With the creation of the Schengen area, the abolition of controls at the EU internal borders and enhanced controls at EU external borders, the activities of transport companies became essential.

Under the Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (hereinafter referred to as the Schengen Agreement), which included no mention of carriers, the contracting parties decided to abolish checks at common borders and to transfer these checks to their external borders. A consensus was reached that complementary measures should be taken to prevent illegal immigration to the territory of the contracting parties,[1] or the so-called Schengen area, which, for the time being, comprises most of the EU Member States[2] and several other European countries, including Switzerland.

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* *LL.M, administrator at the section Access to documents and historical archives of the Court of Justice of the European Union, Luxembourg; email: agne.vaitkeviciute@curia.europa.eu.*

1 Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ L 239, 22. 09. 2000, pp. 13–18.

2 The Schengen area comprises 22 out of 28 Member States of the EU, also including Iceland, Norway, Switzerland and Liechtenstein. For the time being, Bulgaria, Romania, Croatia, Cyprus, Ireland and the United Kingdom are not the members to the Schengen area.

In 1990, the Schengen Agreement was supplemented by the Convention Implementing the Schengen Agreement (hereinafter referred to as the Schengen Convention),[3] which encompassed more precise provisions applicable to carriers within the context of combating illegal immigration to the EU. More specifically, transport companies were put under a duty to check whether third-country nationals have necessary travel documents required for entry to the Schengen area. Besides, the carriers were obliged to assume responsibility for third-country nationals whom they took on board and whom competent authorities of the Member States refused entry. If this was the case, international transport companies could be obliged by national authorities to return third-country nationals to respective third countries from which they were transported or which issued them travel documents. Finally, the Schengen Convention mentioned sanctions to be imposed on carriers for non-compliance of the obligations mentioned above.

The rules introduced by the Schengen Convention have been completed/complemented and clarified in two EU directives. The main sedes materiae is Directive 2001/51 supplementing the provisions of the Schengen Convention implementing the Schengen Agreement of 14 June 1985. It introduced the main principles for sanctioning international transport companies for non-compliance with the rules mentioned above (hereinafter referred to as the Carrier Sanctions Directive).[4] Other relevant provisions can be found in Directive 2004/82 on the obligation of carriers to communicate passenger data (hereinafter referred to as the Passenger Data Directive).[5] It should be stressed that both directives have a common objective: to improve the control of EU external borders and combat illegal immigration to the EU Member States.[6]

Directive 2003/110 on assistance in cases of transit for removal by air (hereinafter referred to as the Removal Directive)[7] is also pertinent for outlining the obligations of carriers and delineating their role in combating illegal immigration to the EU. Therefore, certain provisions of the Removal Directive will also be discussed in this article. However, it should be mentioned that this Directive has a different aim: to lay down provisions

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3 Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22. 09. 2000, pp. 19–62.

4 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10. 07. 2001, pp. 45–46.

5 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data. OJ L 261, 06. 08. 2004, pp. 24–27. It should be mentioned in this context that the Passenger Data Directive is applicable to both EU citizens and third-country nationals.

6 Recital 2 of the Carrier Sanctions Directive; Art. 1 of the Passenger Data Directive.

7 Council Directive 2003/110 of 25 November 2003 on assistance in cases of transit for the purposes or removal by air. OJ L 321, 06. 12. 2003, pp. 26–31.

regarding the return procedure of third-country nationals illegally resident in the EU and subject to removal orders to third countries to finish their illegal residence in the EU.[8]

It should be similarly emphasised in this context that Regulation 2016/399 on the Union Code on the rules governing the movement of persons across borders (hereinafter referred to as the Schengen Borders Code),[9] which provided for the absence of internal borders' control between the EU Member States and laid down common rules for EU external borders' control,[10] has included a reference to the Schengen Convention and the Carrier Sanctions Directive. The Schengen Borders Code provides that if a third-country national has been refused entry, a carrier who brought him/her to the border should take charge of him/her and transport him/her back to the respective third country.[11]

It is evident that the EU legislator has entrusted carriers—as commercial entities—with specific responsibilities and has given them an active role in combating illegal immigration to the EU. Despite that, the scope of their obligations their role lacks extensive analysis in the legal literature. Legal authors concentrate mostly on carrier sanctions and the right to asylum in the EU and ignore other aspects of the role carriers play in combating illegal immigration to the EU.[12] Moreover, this policy field does not attract much attention of the European institutions, especially of the European Commission (hereinafter referred to as the Commission). The main focus of the EU seems to be with legislative measures regarding the strengthening of its external borders and the correct application of the Schengen rules in general.[13] Finally, there is also scarce case-law of the Court of Justice of the EU (hereinafter referred to as the CJEU), which could have contributed to the clarification of the carriers' role.

In the light of the above, this article aims at analysing the provisions of the Carrier Sanctions Directive, the Passenger Data Directive and, partly, the Removal Directive to delineate the scope of carriers' obligations towards competent border authorities and de-

8 Recitals 1, 2 and 4 of the Removal Directive.

9 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). OJ L 7, 23. 03. 2016, pp. 1–52.

10 Art. 1 of the Schengen Borders Code.

11 Annex V, Part A of the Schengen Borders Code, p. 36.

12 See, for example: Da Lomba, The Right to seek refugee status in the European Union. Intersentia (2004); Scholten, The Privatisation of Immigration Control through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015); Baird, Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries (2017), pp. 307–334; Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States' Obligations to Provide International Protection to Refugees (2008), pp. 315–364; Moreno-Lax, Guild, Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Cooperation with UNCHR (2013), pp. 1–34.

13 Commission Directorate General Migration and Home Affairs, URLhttps://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en.

termine the role carriers play in combating illegal immigration to the EU. In addition to that, sanctions that transport companies face for non-compliance with these obligations will be discussed to assess whether the Carrier Sanctions Directive and the Passenger Data Directive in their current versions can be regarded as creating a proper legal basis for sanctioning international transport companies. Finally, it will be determined what particular aspects still need to be clarified and what barriers remain to be removed so that the role international carriers play in combating illegal immigration to the EU becomes clearer and more unambiguous, and that illegal immigration to the EU can be effectively combatted with the help of international transport companies.

The transpositions of the Carrier Sanctions Directive, the Passenger Data Directive and the Removal Directive into national law of the EU Member States will not be analysed. Similarly, this article does not intend to research the relationship between an obligation imposed on carriers to pre-screen third-country nationals and the right of third-country nationals to seek asylum in the EU.[14]

Finally, it is important to mention that some Member States have special opt in/opt out rights in the area of Schengen that they have made use of. Therefore, the Carrier Sanctions Directive is not applicable to Ireland and Denmark. The United Kingdom decided, however, to take part in the adoption and application of the Directive. Denmark does not apply the Passenger Data Directive, whereas Ireland and the United Kingdom do so. Denmark, Ireland and the United Kingdom are not bound by the Removal Directive.

[14] For a more extensive analysis of this topic see e.g.: Da Lomba, The Right to seek refugee status in the European Union (2004); Kaunert, Léonard, The European Union asylum policy after the Treaty of Lisbon and the Stockholm programme: towards supranational governance in a common area of protection? (2012), pp. 1–20; Council of Europe, Handbook on European law relating to asylum, border and immigration (2013); Rodenhäuser, Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control(2014), pp. 223–247; Frelick, Kysel, Pudkul, The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants (2016), pp. 190–220; Gammeltoft-Hansen, Private Actor Involvement in Migration Management (2017), pp. 527–555; Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States' Obligations to Provide International Protection to Refugees (2008), pp. 315–364; Baird, Spijkerboer, Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage (2019), pp. 4–19.

2. Internal Borders Between the Member States v. EU External Borders

To map the scope of obligations imposed on carriers, it is essential to clarify whether transport companies operating in the EU and carrying third-country nationals to and within non-Schengen Member States[15] are entrusted with the same legal duties.

A distinction between internal borders, i.e. borders between the EU Member States, and external EU borders is relevant for defining the role international transport companies play in combating illegal immigration across the EU's external borders. Even though the Schengen Borders Code provides for the absence of border controls at internal borders between the Member States and introduces rules governing EU external borders' control,[16] border controls are still possible when entering the territory of the non-Schengen Member States.[17] Moreover, the Schengen Convention underlines that transport companies should assume responsibility for bringing third-country nationals to the territory of the "Contracting Parties"[18] or, in other words, only those EU Member States who have joined the Schengen area. Finally, the Carrier Sanctions Directive refers to the Member States but emphasises that it supplements the Schengen Convention.[19] As a result, it is not sufficiently clear whether carriers should be required to assume the same responsibility for transporting third-country nationals from a Member State that is the member of the Schengen area to a non-Schengen EU Member State or between two EU Member States that do not belong to the Schengen area.

The CJEU faced the problem mentioned above in its recent decision in the Touring Tours case.[20] The dispute, in this case, was related to the legality of decisions taken by the German Directorate of the Federal Police to impose fines on two transport companies that provided regular coach services between Germany and the Netherlands and between Germany and Belgium. These decisions prevented transport companies from transporting third-country nationals, not in possession of the necessary travel documents, to the territory of Germany. Even though the German Federal Administrative Court did not raise direct doubts concerning the interpretation of the Carrier Sanctions Directive, the Passenger Data Directive and/or the Removal Directive, the reasoning of the Advocate General Y. Bot and that of the CJEU gives some critical insights for the clarification of the carriers' role in combating illegal immigration to the EU.

15 For the time being, United Kingdom, Ireland, Bulgaria, Romania, Croatia and Cyprus are Member States of the EU that do not make part of the Schengen area.

16 Art. 1 of the Schengen Borders Code.

17 See, for instance, Recital 44 of the Schengen Borders Code for provisions regarding Bulgaria, Croatia, Cyprus and Romania.

18 Art. 26 of the Convention implementing the Schengen agreement.

19 Art. 1 of the Carrier Sanctions Directive.

20 Decision of 13 December 2018 of the Court of Justice, *Touring Tours und Travel*, Joined Cases C-412/17 and C-474/17, ECLI:EU:C:2018:1005.

Advocate General Y. Bot based his arguments on the provisions of Article 26 of the Schengen Convention, that expressly referred to external borders and maintained that, under these provisions, international transport companies bringing third-country nationals to EU external borders are under an obligation to check their travel documents. According to the Advocate General, carriers are also obliged to return third-country nationals to respective third countries provided that they do not possess the necessary travel documents. Consequently, international transport companies can be penalised if they infringe this obligation. Concerning the relationship between the Carrier Sanctions Directive and the Schengen Convention, the Advocate General maintained that the Carrier Sanctions Directive supplements the Schengen Convention and, as a result, cannot deprive of the practical effectiveness the principle of the abolition of internal borders controls. To put it differently, the Member States cannot retain or introduce any control obligations for international transport companies carrying third-country nationals across the internal borders of the Schengen area. Therefore, in light of the scheme and purpose of the Schengen Convention, the provisions of the Carrier Sanctions Directive should be interpreted strictly and only apply in connection with the crossing of EU external borders.[21]

The CJEU followed the reasoning of Advocate General Bot and ruled that the challenged decisions of the German Directorate of the Federal Police were contrary to the respective provisions of the Schengen Borders Code prohibiting border controls at internal borders and constituted measures having equivalent effect to border checks, which are prohibited by the Schengen Borders Code.[22]

In light of the abovementioned, international transport companies cannot be required to check travel documents of third-country nationals and face sanctions for non-compliance with this obligation when internal borders between the Member States are crossed. Since all the Member States concerned in the Touring Tours case—Germany, Belgium, and the Netherlands—belonged to the Schengen area, the CJEU and the Advocate General Y. Bot agreed on the scope of application of the provisions of the Schengen Border Code mentioned above, the Schengen Convention, and the Carrier Sanctions Directive. Nevertheless, as long as the Member States, which do not belong to the Schengen area, are concerned, the situation remains uncertain. Because border controls between Schengen and non-Schengen Member States still exist and are justified under the Schengen acquis,[23] international transport companies should be required to check travel documents of third-country nationals when third-country nationals are carried from the Schengen area to a Member State not belonging to the Schengen area, for

21 Opinion of Advocate General Bot delivered on 6 September 2018, *Bundesrepublik Deutschland v Touring Tours und Travel GmbH and Sociedad de Transportes SA*, joined cases C-412/17 and C-474/17, ECLI:EU:C:2018:671, paras. 154–164.

22 Para. 71 of the CJEU decision.

23 Recitals 38 and 42–44 of the Schengen Borders Code.

example, from Greece to Bulgaria. However, it remains uncertain whether international carriers can be sanctioned for non-compliance with this obligation. This issue should be clarified by the EU legislator.

3. Definition of a Carrier

The meaning of the term carrier is not sufficiently clarified in the EU legislation and contains several shortcomings. With regard to Article 2(15) of the Schengen Borders Code, the carrier is defined as "any natural or legal person whose profession is to provide transport of persons".[24] The Schengen Convention further adds that a carriers' occupation is to provide "transport by air, sea or land", including international transport companies' groups offering coach services.[25] Additionally, the Passenger Data Directive, applicable to air transport only, determines carriers as legal and natural persons transporting passengers by air.[26] The Carrier Sanctions Directive does not provide any definition and simply relies on the respective provisions of the Schengen Convention.[27]

Against this background, four points need to be discussed.

Foremost, transport companies must carry third-country nationals on a professional basis. That is true in the case of carriers who are legal persons. However, if a natural person provides transport services for passengers through EU external borders, it is not apparent whether a natural person is entitled to perform such transport activities and whether such transport activities are provided on a professional basis. On the one hand, it can be argued that a case-by-case verification is essential to prove that transport activities were performed professionally. The necessary documents, such as licenses or permits to perform transport activities and the frequency of the carrying activity are criteria that could be considered. However, on the other hand, it is not clear how to deal with cases involving carriers that operate illegally and carry third-country nationals to the territory of the EU without checking their travel documents. The EU legislator must provide clear guidance on what should be considered the carrying of third-country nationals on a professional basis and how to cope with cases involving illegal transport of third-country nationals.

Furthermore, third-country nationals must be carried by air, sea or land. Indeed, under the Carrier Sanctions Directive, transport companies can be penalised irrespective of how third-country nationals were carried, be it transport by air, sea, or land. To put it differently, all kinds of carriers might be sanctioned for non-compliance with obligations imposed on them. However, the Schengen Convention refers to coach services only

[24] Art. 2(14) of the Schengen Borders Code.

[25] Art. 1 and 26(3) of the Schengen Convention.

[26] Art. 2(a) of the Passenger Data Directive.

[27] Art. 1 of the Carrier Sanctions Directive.

when defining land transport activities.[28] Rail transport is, therefore, excluded from the scope of application of the Carrier Sanctions Directive.[29] Such exclusion is illogical and incoherent.

Third, only air transport companies are obliged to transmit passenger data to competent national authorities in accordance with the Passenger Data Directive. The obligation remains ambiguous in relation to the transport of third-country nationals by land or sea. It should be clarified in a recast Passenger Data Directive with the amendment requiring that land and sea transport companies shall also transmit specific passenger data to competent national authorities at their request.

Finally, the difference between private and public transport companies is open. A question can be raised whether public carriers should be entrusted with the same duties and responsibilities as private transport companies. Since the EU legislation, particularly the Carrier Sanctions Directive, does not differentiate between private and public carriers, this question must probably be answered in the affirmative. Nevertheless, for clarity and legal certainty, the EU legislator should provide clarification as soon as possible.

4. The Scope of Carriers' Obligations and Sanctions for Non-Compliance with Them

The Schengen Convention considers obligations of international transport companies towards competent national authorities and sanctions for non-compliance with these obligations as measures accompanying other provisions applicable to EU external borders' control.[30] These measures can also be regarded as important long-term complementary measures[31] to ensure internal security and prevent illegal immigration of third-country nationals to the EU territory.[32]

Obligations of international carriers consist of two main elements. First, the duty of transport companies to check travel documents of third-country nationals necessary for entry to the EU and to transmit certain (air) passenger information to competent national authorities. Second, the carriers' obligation to assume responsibility for third-country nationals if they are refused entry to the EU and to transport third-country nationals

[28] Art. 26(3) of the Schengen Convention.

[29] Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), pp. 103 and 105.

[30] Art. 26 of the Schengen Convention.

[31] Recital 7 of the Passenger Data Directive; Recital 6 of the Carrier Data Directive.

[32] Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), pp. 97, 106 and 115.

back to the respective third countries if external border authorities request them to do so. Finally, competent authorities of the EU Member States can impose sanctions on international transport companies for non-compliance with the duty to verify travel documents of third-country nationals before they get on board and to transmit certain (air) passenger data to competent national authorities. These three elements will be further examined.

4.1. The Obligation of Transport Companies to Check Travel Documents and Transmit Certain Passenger Data to Competent National Authorities

Under Article 26 of the Schengen Convention, international transport companies are obliged to take all necessary measures to ensure that third-country nationals are in possession of travel documents compulsory to enter the territory of the Member States, be it air or sea transport companies, or international coach transporting groups.[33] As travel documents should be considered passports or other equivalent documents entitling their holders to cross the external borders of the EU and to which a visa may be attached, as required under the Regulation 767/2008 on the Visa Information System (VIS) and the exchange of data between the Member States on short-stay visas (hereinafter referred to as the VIS Regulation).[34]

To recall, the EU Member States belonging to the Schengen area have agreed on a common visa policy. A so-called Schengen visa is necessary to enter their territory from certain third countries.[35] Therefore, carriers should be obliged to perform checks of passports or other equivalent travel documents possessed by third-country nationals to which Schengen visas must be attached. However, it should be kept in mind that nationals of certain third countries are exempt from the requirement to have a visa.[36] Besides, not all EU Member States belong to the Schengen area.[37] That means that national visas can still be issued for third-country nationals wishing to exceptionally enter the territory of the Member States not belonging to the Schengen area.

The visa requirements mentioned above and exceptions stemming from EU legislation can give rise to specific difficulties with respect to international carriers. On the one hand, it can be debated whether all employees of the transport companies are familiar

[33] Art. 26(1)(b) of the Schengen Convention.

[34] Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the VISA Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13. 08. 2008, pp. 60–80.

[35] Chapter 3 of the Schengen Convention.

[36] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. OJ L 303, 28. 11. 2018, pp. 39–57.

[37] Commission Directorate General Migration and Home Affairs, URL: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en.

with the EU legal rules regarding entry requirements and travel documents necessary to enter the EU.[38] This problem is accentuated because not all employees of the transport companies have similar qualifications and experience as competent national authorities of the EU Member States.[39] Therefore, it is difficult to ensure that carriers are familiar with the EU legislation mentioned above and, consequently, comply with it in practice. On the other hand, since transport companies operate on a professional basis, they should be aware of the EU legal rules related to the carriage of passengers to the territory of the EU. To ensure awareness and respect of these rules, competent national authorities should be obliged by EU legislation to engage more in transmitting the necessary information to international carriers operating through EU external borders. That can be accomplished by amending the Carrier Sanction Directive and the Passenger Data Directive.

The obligation of transport companies to transmit certain data of passengers (both the EU and third-country nationals) entering the territory of the Member States is specified in the Passenger Data Directive and, hence, complements the Schengen Convention and the Carrier Sanctions Directive to combat illegal immigration to the EU.[40] Against this background, the Passenger Data Directive requires that international air transport companies operating through EU external borders should transmit various data on passengers to competent national authorities of the respective Member States by the end of check-in. This information includes the number and type of travel document, nationality, full names, the date of birth, the border crossing point of entry into the territory of the Member States, code of transport, departure and arrival time of the transportation, total number of passengers carried and the initial point of embarkation.[41] For non-transmission or incorrect transmission of the passenger data mentioned above, air carriers can face several sanctions.[42]

Since the Passenger Data Directive is applicable to international air transport companies only, EU legislation creates a legal vacuum by not applying this Directive to sea and land transport companies and, therefore, not making conditional the obligation

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38 Sophie Scholten, The Privatisation of Immigration Control through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control. Leiden, 2015, pp. 105 and 115.

39 Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), p. 105.

40 Recital 7 of the Passenger Data Directive.

41 Art. 3(2) of the Passenger Data Directive.

42 Art. 3(3) of the Passenger Data Directive; See also Final Report for Directorate General for Home Affairs on the evaluation of the implementation and functioning of the obligation of the carriers to communicate passenger data set up by Directive 2004/82, URL: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/evaluation_of_the_api_directive_en.pdf, p. 3.

of sea and land transport companies to transmit specific passenger data to competent authorities upon the duty to check travel documents. One may argue that obligation of land and sea carriers to check travel documents will lose most of its relevance without the accompanying duty to transmit passenger data to competent national authorities. Nevertheless, this duty may remain a standalone one.

An argument speaking in favour of an exclusive application of the Passenger Data Directive to air transport is the specificity and frequent use of air transport services for travels from third countries. However, the Passenger Data Directive complements the Schengen Convention,[43] which requires that all carriers, be it air, road or sea transport, carry out checks of travel documents possessed by third-country nationals.[44] This means that all kind of international transport companies crossing EU external borders should have an obligation to check travel documents of passengers wishing to get on board and to enter the territory of the Member States. Despite that, neither the Schengen Convention nor any other EU legal act gives guidance on how road and sea transport companies should examine travel documents of passengers, including third-country nationals, and how they should communicate the aforementioned passenger data to competent national authorities. The EU legislator should address those situations as well. This can be done by amending the Passenger Data Directive and thus introducing the same obligation for sea and road carriers to communicate certain passenger data to competent national authorities at their request. This will not only ensure that carriers are aware of the duties imposed on them by the EU legislation but will allow them to properly comply with an obligation to perform checks of travel documents necessary for crossing EU external borders and not be sanctioned for non-compliance with a hypothetical obligation.

4.2. The Obligation of Carriers to Return Third-Country Nationals

The obligation of international carriers to return third-country nationals to respective third countries originates primarily in the Schengen Convention. The latter stipulates that if third-country nationals are refused entry, international transport companies which brought them to EU external borders by air, land and sea shall immediately assume responsibility for them. At the request of competent border authorities, carriers are, consequently, obliged to return third-country nationals to third countries "from which they were transported" or "which issued the travel document on which they travelled" or "to any other third country to which they are certain to be admitted".[45] On the one hand, this obligation incumbent on international transport companies is a logical conse-

[43] Recital 7 of the Passenger Data Directive.

[44] Art. 26 of the Schengen Convention; see also Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), pp. 109–110.

[45] Art. 26(1)(a) of the Schengen Convention.

quence of non-compliance with the obligation to carry out checks of travel documents, necessary for entry to the EU,[46] before third-country nationals get on board. On the other hand, carriers should be obliged to return third-country nationals in any other case when competent authorities of the Member States refuse their entry to the EU territory.

The provisions of the Schengen Convention mentioned above are further complemented by the Carrier Sanctions Directive. This Directive provides that carriers are also under an obligation to return third-country nationals if entry to the EU is refused to them in transit. Pursuant to the Carrier Sanctions Directive, this can occur in two different situations. First, when the carrier which was to take them to their country of destination refuses to take them on board.[47] Second, when competent authorities of the state of destination have refused entry of third-country nationals and have sent them back to the Member State through which they transited in the EU.[48] Moreover, the Carrier Sanctions Directive stipulates that international transport companies should similarly find means to immediately return third-country nationals and bear all costs of such transportation. Provided that immediate transportation is not possible, carriers should assume the costs of stay and return of third-country nationals concerned.[49]

Nevertheless, neither the Schengen Convention nor the Carrier Sanctions Directive specify how transport companies should participate in return procedures and what particular role they are supposed to play in these procedures. The Removal Directive only defines assistance between competent national authorities of the Member States and is applicable to removals by air exclusively.[50] Furthermore, the Removal Directive does not even include any mention of international carriers that illegally brought third-country nationals through EU external borders and primarily focuses on the removal of third-country nationals who are illegal migrants in terms of their residence in the EU Member States.[51]

This aspect should be explicitly addressed by EU legislation. For example, the Removal Directive scope could be broadened, and the role international transport companies play in carrying out return procedures could be outlined in more detail. The Removal Directive should be applicable to both removal of illegal residents of the EU and return of third-country nationals that were illegally transported without necessary travel documents through EU external borders by international carriers. Finally, since road, sea and air carriers are obliged to return third-country nationals to third countries in case competent border authorities so request, the Removal Directive should be applicable to all of them. Without knowing how the return of such third-country nationals should be performed

[46] Art. 26(1)(b) of the Schengen Convention.

[47] Art. 2(a) of the Carrier Sanctions Directive.

[48] Art. 2(b) of the Carrier Sanctions Directive.

[49] Art. 3 of the Carrier Sanctions Directive.

[50] Art. 1 of the Removal Directive.

[51] Recitals 1, 2 and 4 of the Removal Directive.

in practice, international carriers will not be able to comply with the requirements of the Schengen Convention mentioned above and, as a result, risk to be sanctioned.

4.3. Carriers Sanctions as Penalties for Non-Compliance with Obligations Entrusted with Transport Companies under EU Law

The idea behind the adoption of EU rules on the harmonisation of penalties to be imposed on international transport companies that carry third-country nationals without travel documents necessary for their admission to the EU and that do not transmit certain (air) passenger data to competent authorities of the Member States, is combating illegal immigration, safeguarding effective external border control,[52] and ensuring that the carriers' liability is harmonised as much as possible at the EU level.[53]

According to the Carrier Sanctions Directive and the Passenger Data Directive, international transport companies can be sanctioned in two different situations. First, for not checking travel documents of third-country nationals or for not refusing to take them on board without necessary travel documents. Second, for nonconformity with the obligation to transmit air passenger data or for transmission of incomplete or false information to competent national authorities.[54]

Attention should be drawn to the fact that neither the Carrier Sanctions Directive nor the Passenger Data Directive intends to unify carrier sanctions at the EU level. On the contrary, both directives recognise financial penalties that are already provided for by the Member States and take into account different national legal systems of the EU Member States.[55]

Against this background, both directives introduced a common requirement that financial sanctions imposed by competent national authorities of the Member States should be "dissuasive, effective and proportionate".[56] In conformity with the Carrier Sanctions Directive, the EU Member States have a leeway to choose between different options. Thus, the Member States are obliged to ensure that the maximum amount of the applicable financial penalties is not less than EUR 5.000 for each third-country national carried. As an alternative, a minimum amount of the penalties, which should be not less than EUR 3.000 for each third-country national carried, can be fixed. Also, a possibility exists to choose the maximum amount of the penalty, imposed as a lump sum

[52] Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), pp. 101–102.

[53] Ibid., p. 102.

[54] Art. 4 of the Passenger Data Directive.

[55] Recital 1 of the Carrier Sanctions Directive; recital 1 of the Passenger Data Directive.

[56] Art. 4(1) of the Passenger Data Directive; Art. 4(1) of the Carrier Sanctions Directive.

Art. 2 of the Carrier Sanctions Directive; Article 26 of the Convention.

for each breach of obligations, which should be not less than EUR 500.000 irrespective of the number of third-country nationals carried.[57] The Passenger Data Directive contains the same minimum and maximum amounts of financial penalties, except for sanctions as lump sums. Moreover, under the Passenger Data Directive, financial sanctions are imposed on air transport companies "for each journey for which passenger data was not communicated or was communicated incorrectly".[58] Other non-financial sanctions are similarly authorised by both directives. These non-financial penalties include seizure, confiscation, immobilisation of the means of transport, suspension or withdrawal of the licence to provide transport services in the event of serious infringement of the communication requirement.[59] Besides, both the Carrier Sanctions Directive and the Passenger Data Directive guarantee that international carriers possess an important procedural remedy—a right of appeal—against sanctions imposed on them. Within this context, the EU Member States must adopt necessary measures for the right of appeal to be effective in practice.[60]

Considering the aforementioned, several shortcomings can be identified.

Foremost, since both directives contain the same provisions on financial and non-financial sanctions, the infringement of carriers' obligations can lead to a situation when a transport company is sanctioned twice for the same breach of obligations. That concerns in particular cases when carriers have not verified travel documents of third-country nationals and, as a result, have not transmitted information comprising the number and type of travel documents of their passengers to competent national authorities. Consequently, the relationship between the Carrier Sanctions Directive and the Passenger Data Directive and their scope of application should be clarified.

Furthermore, even though the Carrier Sanctions Directive and the Passenger Data Directive incorporate an important obligation of the EU Member States to ensure that their national laws should grant carriers, against which proceedings have been commenced, "effective rights of defence and appeal",[61] both directives remain silent on which national authorities are competent for imposing penalties on transport companies and under which proceedings carriers can be sanctioned under the national law of the EU Member States. Moreover, if sanctions imposed on international transport companies are challenged and appeals against courts' decisions submitted, it is not clear which national courts should hear cases and which national proceedings should be followed. It should

[57] Art. 4(1) of the Carrier Sanctions Directive; see also Scholten, The Privatisation of Immigration Control Through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration Control (2015), p. 103.

[58] Art. 4(1) of the Passenger Data Directive.

[59] Art. 4(2) of the Passenger Data Directive; Art. 5 of the Carrier Sanctions Directive.

[60] Art. 5 of the Passenger Data Directive; Art. 6 of the Carrier Sanctions Directive.

[61] Arts. 4 and 6 of the Carrier Sanctions Directive; Art. 5 of the Passenger Data Directive.

be emphasised that the absence of more extensive provisions on procedural remedies in both directives deprives international carriers of their fundamental procedural rights. Therefore, this shortcoming should be remedied.

Third, the Carrier Sanctions Directive does not give any guidance on conditions for liability necessary for imposing sanctions on carriers. On the contrary, the Passenger Data Directive clarifies that fault is a necessary condition enabling competent national authorities to impose penalties.[62] That implies that the principle of strict liability should not be applied. Therefore, logically, the existence of fault must also be proven before imposing penalties on carriers under the Carrier Sanctions Directive. Therefore, carriers should be undoubtedly sanctioned for manifest and intentional failure to fulfil their obligation to check travel documents of third-country nationals before they get on board. However, it is debatable whether severe sanctions can be imposed on transport companies for simple and negligent failures, disregarding reasons for that, to perform checks of travel documents[63] or for neglectful non-transmission or incomplete transmission of (air) passenger data to competent national authorities.[64] As a consequence, more detailed provisions on conditions for liability for sanctioning carriers should be set up in the Carrier Sanctions Directive and the Passenger Data Directive.

Fourth, the possibility to impose other non-financial penalties on transport companies, such as immobilisation, seizure and confiscation of the means of transport or temporary suspension or withdrawal of the operating licence, in the case of a very serious breach of obligations according to the provisions of the Passenger Data Directive leaves a broad room for interpretation.[65] Even though the Carrier Sanctions Directive similarly allows the same penalties of non-financial nature, this directive does not specify under what conditions these penalties can be imposed on international carriers. Consequently, both directives should clarify the meaning and scope of application of a very serious breach of obligations. The absence of such provisions can give rise to the abuse and misuse of powers of competent national authorities and the imposition of severe non-financial penalties on international transport companies without any legal background.

Last but not least, no appropriate mechanism has been introduced to monitor the correct transposition of the provisions of the Carrier Sanctions Directive and the Passenger Data Directive, in particular those concerning sanctions and procedural remedies, into national laws of the Member States. The only requirement is that the Member States shall communicate to the Commission the main provisions of national legislation which they adopt in the field covered by the directives mentioned above.[66] Regrettably, the Commission

62 Art. 4(1) of the Passenger Data Directive.

63 Art. 4(1) of the Carrier Sanctions Directive; Art. 26(2) and 26(3) of the Schengen Convention.

64 Arts. 3 and 4(1) of the Passenger Data Directive.

65 Art. 4(2) of the Passenger Data Directive.

66 Art. 7(3) of the Carrier Sanctions Directive; Art. 7(2) of the Passenger Data Directive.

has no obligation to submit a report to the Council and the Parliament on the implementation of both directives and to hereby perform a monitoring task. As a result, there is a risk that necessary amendments of the Passenger Data Directive and the Carrier Sanctions Directive are not evaluated and proposed on a timely basis at the EU level.

5. Conclusions

This article has shed light on the EU's legislative framework concerning the role international transport companies have in combating illegal immigration to the EU Member States. The research has indicated, however, that the existing EU legal acts have failed to create an extensive and unambiguous legal basis for defining obligations of international carriers and laying down main principles for sanctions to be imposed on them for non-compliance with these duties. As a result, several legal lacunae have been identified. These shortcomings should be eliminated to ensure that not only the essential role carriers play in combating illegal immigration to the EU Member States is well defined and clear but also that illegal immigration can be appropriately curbed with the help of international transport companies at the EU level.

First, neither the Carrier Sanctions Directive nor the Passenger Data Directive clarifies whether private and public transport companies should be entrusted with the same tasks and responsibilities. Since the Carrier Sanctions Directive and the Passenger Data Directive do not differentiate between private and public carriers, they should possess the same obligations and responsibilities. Rail transport should be similarly included in the scope of application of the Carrier Sanctions Directive and the Passenger Data Directive. Also, both directives should clarify the definition of carriage of passengers "on a professional basis" and give guidance on how to treat illegal transport of third-country nationals to the territory of the EU Member States. It should explicitly be elucidated whether transport companies carrying third-country nationals to a non-Schengen Member State from the Schengen area are similarly required to check their travel documents and, accordingly, be sanctioned for non-compliance with this obligation.

Second, the duty of land and sea transport companies to communicate certain passenger information to competent national authorities is ambiguous, since the Passenger Data Directive is applicable to air transport only. This aspect should be removed with the recast Passenger Data Directive. Since transmission of passenger data is conditional upon the duty of land and sea carriers to check travel documents, land transport (both coach and rail) and sea transport companies should be equally obliged to transmit passenger data to competent national authorities at their request. This amendment is essential to ensure that all kind of international carriers crossing EU external borders are treated equally, and that clear and defined procedures are put in place.

Third, since both directives contain identical provisions on financial and non-financial penalties, it cannot be excluded that international transport companies are sanctioned twice for the same breach of obligations. Consequently, a clarification of the relationship between the Carrier Sanctions Directive and the Passenger Data Directive is needed. Besides, more detailed provisions on conditions for liability should be fixed in the both directives' texts. It is also essential to define which national courts are competent for hearing cases where sanctions imposed on international transport companies are questioned and how appeals against courts' decisions are to be submitted. National procedures shall be similarly clarified as otherwise international carriers will be deprived of fundamental procedural rights. Also, both directives should cast light on the meaning and scope of application of a "very serious breach of obligations". The absence of criteria defining such a breach of obligations as "serious" can give rise to the abuse and misuse of powers of competent national authorities and the imposition of severe penalties on international transport companies without any legal basis.

Fourth, the EU legislator is silent on how transport companies shall participate in return procedures and what particular role carriers are supposed to play in returning third-country nationals who were either transported through EU external borders without necessary travel documents or refused entry by competent national authorities in any other situation. Therefore, the international carriers' role in returning third-country nationals to respective third countries should be outlined in more detail in the Removal Directive. The scope of application of the Removal Directive shall thus be broadened. Without knowing how the return procedure is to be performed in practice, transport companies will not be able to perform this important obligation incumbent upon them.

Finally, there is no proper legal mechanism ensured and endorsed by the Commission to guarantee that the Passenger Data Directive and the Carrier Sanctions Directive are properly transposed to national laws of the EU Member States. Without this supervisory mechanism, the Commission is unable to evaluate all potential problems of the application of these directives and propose amendments on a timely basis at the EU level.

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Agne Vaitkeviciute

Boj proti nezakonitemu priseljevanju v EU – vloga prevoznikov

Transportna podjetja ali prevozniki prispevajo k priseljevanju v Evropsko unijo tako, da državljane tretjih držav prepeljejo čez zunanje meje EU na ozemlje držav članic EU. Kot del boja proti nezakonitim migracijam je EU prevoznikom v okviru nadzora zunanjih meja naložila posebne odgovornosti. Prevozniki so dolžni preveriti, ali imajo prepeljani državljani tretjih držav potrebne potne listine. Poleg tega morajo nekatere (letalske) podatke o potnikih posredovati pristojnim nacionalnim organom. V primeru neizpolnjevanja teh obveznosti se prevozniška podjetja soočajo z odvračilnimi, učinkovitimi in sorazmernimi sankcijami. Poleg tega morajo prevozniki prevzeti odgovornost za vse državljane tretjih držav, ki jih prevažajo, če jim nacionalni organi zavrnejo vstop v državo. Države članice EU lahko od prevoznikov zahtevajo, da te državljane tretjih držav vrnejo v zadevne tretje države. Avtorica na kratko analizira zakonodajni okvir EU glede mednarodnih prevoznikov. Pri ugotavljanju obsega obveznosti prevoznikov do pristojnih mejnih organov držav članic EU in vloge, ki jo imajo prevozniki v boju proti nezakonitemu priseljevanju v EU, avtorica predstavi veljavni pravni okvir EU, in sicer Direktivo 2001/51/ES, Direktivo 2004/82/ES ter deloma Direktivo 2003/110/ES. Poleg tega avtorica razpravlja tudi o sankcijah, ki prevozniškim podjetjem grozijo zaradi neizpolnjevanja teh obveznosti, ter poda oceno o ustreznosti direktiv v sedanjih različicah kot pravnih podlag za sankcioniranje prevoznikov. Avtorica tudi analizira, katere vidike je treba še pojasniti, da bo vloga, dodeljena mednarodnim prevozniškim podjetjem v boju proti nezakonitemu priseljevanju v EU, jasna in nedvoumna ter da bo nezakonito priseljevanje v EU mogoče učinkovito omejiti.

Ključne besede: prevozniki, prevozniške družbe, podatki o potnikih, nezakonito priseljevanje, potne listine, državljani tretjih držav, sankcije, nacionalni organi.

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Agne Vaitkeviciute

Combating Illegal Immigration to the EU – the Role of Transport Companies

Transport companies or carriers contribute to immigration processes into the European Union in that they carry third-country nationals across EU external borders to the territory of the EU Member States. As part of the fight against illegal migration, the EU assigned specific responsibilities to carriers within the context of external borders control. Carriers are obliged to perform checks to verify whether the transported third-country nationals have the necessary travel documents. Moreover, they have to transmit certain (air) passenger data to competent national authorities. In cases of failure to comply with these obligations, transport companies face dissuasive, effective and proportionate sanctions. Besides, carriers must assume responsibility for all third-country nationals on board if they are refused entry. The EU Member States can oblige carriers to return these third-country nationals to respective third countries. The author briefly analyses the EU legislative framework regarding international transport companies. To delineate the scope of carriers' obligations towards competent border authorities of the EU Member States and to identify which particular role carriers play in combating illegal immigration to the EU, the applicable legal framework (namely the Carrier Sanctions Directive, the Passenger Data Directive and, to a certain extent, the Removal Directive) are be discussed. Additionally, sanctions that transport companies face for non-compliance with these obligations are discussed to assess whether the directives in their current versions can be regarded as creating a proper legal basis for sanctioning carriers. Finally, the author analyses which particular aspects still need to be clarified so that the role assigned to international transport companies in the fight against illegal immigration to the EU is clear and unambiguous and that illegal immigration to the EU can be effectively constrained.

Keywords: carriers, transport companies, passenger data, illegal immigration, travel documents, third-country nationals, sanctions, national authorities.

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Univerza v Ljubljani