



**ADMINISTRATIVE COMMITTEE  
FOR THE TIR CONVENTION, 1975**

**TIR Executive Board (TIRExB)**

(Twenty-sixth session, 17 and 18 May 2005,  
agenda item 5)

**ISSUES RAISED BY THE AD HOC EXPERT GROUP ON THE TIR REVISION  
PROCESS**

**Note by the TIR Secretary**

**A. BACKGROUND**

1. At its twenty-fifth session, the TIRExB took note that the TIR Administrative Committee, at its October 2004 session, mandated the TIRExB to consider the amendment proposals of a technical nature, as identified by the Ad hoc Expert Group on the TIR Revision (hereafter called “Expert Group”), and to report to the UNECE Working Party (WP.30) with its findings (TRANS/WP.30/AC.2/75, para. 13). Following a short discussion, the Board requested the secretariat to prepare a consolidated document on the issue and invited its members to provide the secretariat with written comments on the proposed amendments (TIRExB/REP/2005/25, para. 25).

2. In line with this request, the secretariat has prepared underlying document, containing references to the proposals concerned and related extracts of documents.

**B. ISSUES OF A TECHNICAL NATURE**

3. The Working Party, at its one-hundred-and-ninth session, considered the following proposals, submitted by Contracting Parties and discussed by the Ad hoc Expert Group at its first session, to be of a technical nature and invited the TIRExB to study these issues in further detail and to revert to the Working Party with its conclusions (TRANS/WP.30/2004/32 and TRANS/WP.30/218, paras. 51-54):

- Definition of the term “TIR Procedure”
- Title to Chapter II;
- Article 28;
- Article 40;
- Article 41;
- Article 42 bis.

### **C. DEFINITION OF THE TERM “TIR PROCEDURE”**

Documentation: TRANS/WP.30/188; TRANS/WP.30/2004/32

4. So far, the term “TIR procedure” is used throughout the text of the TIR Convention without being defined. The term appears for the first time in Article 1 (a), which stipulates that “the TIR transport shall mean the transport of goods from a Customs office of departure to a Customs office of destination under the procedure called the TIR procedure, laid down in this Convention”.

5. At the ninety-fourth session of the Working Party, some experts stated that they were of the view that the term “TIR procedure” should also be defined in Article 1. Some wordings were proposed for that purpose, but no acceptable solution was found (TRANS/WP.30/188, para. 25).

6. At its first session, the Expert Group, as a result of the discussions (on Article 4), agreed to explore whether the term “TIR procedure” could be defined. This issue had already been discussed during Phase II of the TIR revision process without a consensus being reached (TRANS/WP.30/2004/32, para. 20).

7. The background information illustrates that it may be a complicated task to define a term which sums up everything which the TIR Convention entails. The TIRExB may wish to have a preliminary discussion in order to determine how to address the issue in detail.

### **D. TITLE TO CHAPTER II**

Documentation: TRANS/WP.30/2004/14; Informal document 2 (2004); TRANS/WP.30/2004/25, TRANS/WP.30/2005/15

8. In document TRANS/WP.30/2004/14, the European Community (hereafter referred to as “EC”) stated that the two subheadings to Chapter II of the Convention (“Issue of TIR Carnets” and “Liability of guaranteeing associations”) potentially may be misleading because the said chapter also includes the responsibility of the International Organization (Article 6.2 bis) and the liability of the person(s) directly liable (Article 8.7). For legal reasons the EC believes the Chapter heading should relate to the subject matter contained therein. For that reason, the EC

proposes to either reorder the Chapter into its distinct parts and rename the subheadings accordingly, viz: “Responsibilities of the International Organization”, “Liability of Guaranteeing Associations”, “Issue of TIR Carnets” and “Payment of duties and taxes” or to delete the second heading (“Liability of guaranteeing associations”), thus leaving the title to read “Issue of TIR Carnets” which, arguably, is sufficiently generic to cover the subject matter of the Chapter.

9. In Informal document 2 (2004), the Russian Federation, partly in support of the EC proposal, partly in view of its own proposal to amend Article 11, proposes to rename the title of Chapter II as follows: “Issue of TIR Carnets. Liability of guaranteeing associations and an international organization”.

10. The secretariat, in its primary evaluation of the proposals, stated that the TIR Convention, inter alia, deals with the issue of liability of the national guaranteeing association. The liability of persons directly liable is left to provisions of national legislation. Bearing this in mind, the title of Chapter II seems to be correct to the extent that it refers to the liability of the guaranteeing associations only. However, in view of the fact that in 1999 Chapter II has been amended with Article 6.2. bis which deals with the effective organization and functioning of an international guarantee system by an international organization, a reassessment of the title of the Chapter may be appropriate (TRANS/WP.30/2004/25, paras. 8-10).

11. The UNCITRAL secretariat, providing its observations (TRANS/WP.30/2005/15), informed of its varied experience with respect to the use of titles. No strict rules apply and, as a consequence, practice varies from legal instrument to legal instrument and from Contracting Party to Contracting Party. The only consistent aspect has been that the issue of titles for articles in any instrument has always been subject to discussions by States in the course of negotiations. For example, a footnote to the title of Article 1 of the UNCITRAL Model Law on International Commercial Arbitration states that “Article headings are for reference purposes only and are not to be used for purposes of interpretation”. Thus, in the view of the UNCITRAL secretariat, the issue is in the hand of Contracting Parties. To amend titles, the amending procedure set out in Article 59 should be followed.

12. A short review of the text of the TIR Conventions learns that, since the beginning, titles have formed part of the integral text of the Convention. Amendment 17 introduced, inter alia, an amendment of the title of Annex 1, applying the procedure set out in Article 59. Amendment 19 amended, inter alia, some titles of Annex 8. At that time, the amendment procedure of Article 59 was applicable<sup>1</sup>. However, there does not seem to be any indication that it would not be correct to assume that an amendment of a title in the body of the Convention follows the procedure, set out in Article 59, whereas any amendment of a title in one of the annexes follows the amendment procedure of Article 60.

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<sup>1</sup> As of Amendment 19, entered into force on 17 February 1999, amendments to Annex 8, follow the amendment procedure set out in Article 60 of the Convention

13. Bearing in mind these considerations, the TIRExB may wish to consider whether or not an amendment of the title of Chapter II is appropriate and advise the WP.30 accordingly.

## **E. ARTICLE 28**

Documentation: TRANS/WP.30/2004/14; TRANS/WP.30/2004/25

14. In document TRANS/WP.30/2004/14 the EC proposes to amend this Article so that:

- (a) Article 28, paragraph 1 incorporates the wording currently in the Comment concerning the placing of the goods under another Customs procedure or system of control;
- (b) Article 28, paragraph 2 stipulates that any irregularities arising under a following Customs procedure are not to be attributed to the guaranteeing association and
- (c) the comment “Applicable procedures after termination of a TIR operation” be changed into an Explanatory Note with a new wording.

15. To this end, the EC proposes to amend Article 28 as follows:

Insert a new opening sentence to read as follows:

“1 Termination of a TIR operation shall be subject to the goods specified on the manifest of a TIR Carnet being placed under another Customs procedure or another system of Customs control.”

Replace the text of paragraph 2 by the following:

“2 Any irregularities committed under another Customs procedure or another system of Customs control mentioned in paragraph 1 shall not be attributed to the guaranteeing association or the TIR Carnet holder as such or any person acting on his behalf.”

Renumber the existing Explanatory Note 0.28 into “0.28-1”.

Introduce a new Explanatory Note to read as follows:

“0.28-2 This Article provides that the termination of a TIR operation shall be subject to the goods being placed under another Customs procedure or another system of Customs control. This includes clearing the goods for home use (either in full or conditionally), the transfer across the border to a third country (export) or to a free zone, or the storage of the goods in a place approved by the Customs authorities while awaiting the declaration for another procedure.”

16. In its observations, the secretariat did not comment on the proposal as such but only raised doubt with regard to the proposed amendment to Article 28, paragraph 2, wondering whether it seems correct to mention the guaranteeing association itself. In the view of the secretariat, such mentioning would disregard the fundamental principle of the TIR system that, because of its joint and several nature, any liability of the guaranteeing association presupposes liability of the TIR Carnet holder. On top of that, an irregularity as such (not the liability for payment of Customs duties and taxes) can only be attributed to the person who has committed it and not to any third person(s) (TRANS/WP.30/2004/25, paragraph 18).

17. The TIRExB may wish to study the observations by the secretariat before embarking on a discussion of the amendment proposal by the EC.

#### **F. ARTICLE 40**

Documentation: TRANS/WP.30/2004/14; TRANS/WP.30/2004/25

18. In document TRANS/WP.30/2004/14, the EC wonders why in Article 40 the guaranteeing association does not profit from the dispensation granted to the TIR Carnet holder for discrepancies which relate to the Customs procedures which preceded or followed a TIR transport in which the TIR Carnet holder was not involved. The EC is not aware of any reason why this apparent anomaly exists. Therefore, the EC proposes to amend the text of Article 40 to read as follows: "The Customs administration of the country of departure shall not consider the guaranteeing association nor the holder of the TIR Carnet responsible for any discrepancies which may be discovered, when the discrepancies in fact relate to a Customs procedure which preceded the TIR transport and in which the guaranteeing association or the holder of the TIR Carnet, including any person acting on his behalf, were not involved."

19. In its observations, the secretariat pointed out that any liability of the guaranteeing association presupposes liability of the TIR Carnet holder. Therefore, it seems unnecessary to include references to the guaranteeing association in provisions dealing with the responsibility (or not) of the TIR Carnet holder (TRANS/WP.30/2004/25, paragraph 19).

20. So far, it has not become clear why the Community proposal no longer refers to the country of destination or to Customs procedures following a TIR transport, as contained in the current wording of Article 40.

21. In the light of the above, the TIRExB may wish to discuss the issue and provide the WP.30 with its comments.

## **G. ARTICLE 41**

Documentation: TRANS/WP.30/2004/14; TRANS/WP.30/2004/25

22. In its document TRANS/WP.30/2004/14, the EC argues that the natural wastage aspect of this article only extends to the goods being “short” which arguably does not apply to goods that are irretrievably lost by natural wastage. In any event, the word “short” is capable of being misinterpreted. To avoid any misunderstanding, the EC proposes an amendment of this article to read as follows: “When it is established to the satisfaction of the competent authorities that goods specified on the manifest of the TIR Carnet have been destroyed or have been irrecoverably lost by accident or force majeure or that they are irretrievably lost or missing by reason of their nature, payment of the duties and taxes normally due shall be waived.”

23. The secretariat, in its observations, did not comment on the proposal as such but raised the question whether the absence of a reference to “goods which are irretrievably lost or missing” had, so far, caused any problem in the application of the said article (TRANS/WP.30/2004/25, paragraph 20).

24. The TIRExB may wish to provide further guidance to the WP.30 with regard to the proposed amendment.

## **H. ARTICLE 42 BIS**

Documentation: TRANS/WP.30/2004/14; TRANS/WP.30/2004/25; TRANS/WP.30/2005/15

25. In its document TRANS/WP.30/2004/14, the EC questions whether the wording “ensure the proper use of TIR Carnets” sufficiently paraphrases the responsibility of the competent authorities. Surely, according to the EC, the competent authorities should “ensure the proper application of the provisions of the Convention”. In the view of the EC, it could be envisaged that this would imply the need to set out in the Convention what is meant by “proper application”, which could take the form of setting out the roles and responsibilities of the Contracting Parties. However, this would be a potentially controversial and far reaching proposal in that it would also require the creation of a mechanism to deal with Contracting Parties that fail to respect or comply with the Convention.

26. The EC, provisionally, provides two proposals to amend Article 42 bis. Firstly, by amending the first sentence of Article 42 bis to read: “The competent authorities, in close cooperation with the guaranteeing associations, shall take all necessary measures to ensure the proper application of the Convention. Secondly, by introducing a new Explanatory Note, to read: “Where in duly justified circumstances, information is received that the provisions of the Convention are not being applied properly, the Administrative Committee shall investigate and take the appropriate steps to regularize the situation.”

27. In its observations, the secretariat pointed at the difference between the “proper use of TIR Carnets” being a task to be fulfilled by competent authorities, in close cooperation with the associations, and the “proper application of the Convention” being an obligation Contracting Parties have to ensure independently from any cooperation with associations as a direct consequence of their accession to the TIR Convention. Furthermore, the secretariat referred to Rule 36 of the Rules of Procedure of the UNECE, stipulating that no action in respect of any country shall be taken without the agreement of the Government of that country. For that reason, the secretariat raised doubts as to whether the Administrative Committee could be in a position “to take the appropriate steps to regularize the situation” as contained in the EC proposal (see TRANS/WP.30/2004/ paras. 21 and 22).

28. With regard to the issue, the UNCITRAL secretariat’s opinion, contained in document TRANS/WP.30/2005/15, does not provide clear guidelines when it says that “while the proposed amendment to Article 42 bis would seem to be prudent in removing ambiguity and in ensuring that obligations are achievable, it must be reiterated that the Contracting Parties to the TIR Convention must, in the end, decide whether these amendments are warranted. Again resort to the Article 59 amendment procedure may be considered.” Although the impact of this opinion may require further consultation, it underlines the importance of full endorsement by all Contracting Parties of any amendment proposal, considering that already the objection of a single Contracting Party is enough to prevent it from entering into force.

29. Taking account of these considerations, the TIRExB may wish to study the issue and revert to the WP.30 with its findings.

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