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Economic Commission for Europe**Inland Transport Committee****Working Party on Customs Questions affecting Transport****Group of Experts on Legal Aspects of Computerization of the TIR Procedure****Second session**

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Item 9 of the provisional agenda

Format and administrative structure of the eTIR legal framework**Format and administrative structure of the eTIR legal framework****Note by the secretariat****I. Mandate**

1. At its first session, the Group of Experts on Legal Aspects of Computerization of the TIR Procedure (GE.2) discussed the decision-making processes in the context of a protocol to the TIR Convention and the importance of a clearly defined implementation timeline for eTIR once the legal framework is in place. Against this background, GE.2 recalled previous discussions in the Working Party on Customs Questions affecting Transport (WP.30), namely that a Protocol, although linked to the parent Convention, would only bind Contracting Parties that choose to accede to it and that, as such, the decision-making powers of the TIR Administrative Committee (AC.2) over the Protocol would either have to be limited, or the Contracting Parties to the Protocol would have to create a separate decision-making forum. In light of this information, GE.2 was of the view that a Protocol would potentially entail a lot more complexity than originally assessed by WP.30 (see ECE/TRANS/WP.30/GE.2/2, para. 8(f)). Following substantive discussions, GE.2 requested further information from the secretariat on (i) the exact nature and legal status of a protocol vis-à-vis its parent Convention and (ii) background information on similar computerization processes, e.g. eATA and eCMR. In line with this request, the secretariat has prepared the present document.

II. Characteristics of an optional protocol to a Treaty/Convention

2. The United Nations Treaty Section of the office of Legal Affairs at the United Nations Headquarters in New York City has defined an optional protocol to a treaty as an instrument that establishes additional rights and obligations to a treaty. It is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a "two-tier system"¹.

3. As a result, an optional protocol may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, to address a new or emerging concern or add a procedure for the operation and enforcement of the treaty. In the context of the TIR Convention, the Protocol will serve to add the legal framework for eTIR. A protocol is "optional" because it is not automatically binding on States that have already ratified the original treaty; States must independently ratify or accede to a protocol. In the context of Treaty law and practice, a protocol has the same legal characteristics as a treaty, in that it creates rights and internationally binding obligations for the States that accede to it.

III. The example of eCMR

4. An example of an optional protocol which emanates directly from UNECE would be the Protocol on the electronic consignment note (eCMR). The eCMR Protocol is open to accession by all States that are already Contracting Parties to the Convention on the Contract for the International Carriage of Goods by road (CMR), however not all CMR Contracting Parties have chosen to ratify or accede to the eCMR Protocol. The CMR Convention currently has fifty-five (55) Contracting Parties, and only nine (9) out of fifty-five (55) have acceded to the eCMR Protocol. More specifically, Article 7 of the eCMR Protocol reads:

“This Protocol shall be open for signature by States which are signatories to or Parties to the Convention [...].”

5. Therefore, since the Protocol is an optional addition of responsibilities to the main treaty, it is not possible for a State that is not a Party to the main treaty to only become a Party to the Protocol. This is because the main treaty contains all the objectives and principles on the basis of which the Protocol — as an addition to it — will function.

6. Concerning decision making processes in the context of an additional protocol, the example of eCMR provides that the Parties to the Protocol may make amendment proposals that are to be discussed in the forum of the relevant Working Party (in this case, the Working Party on Road Transport (SC.1)). Once an amendment is communicated to the Secretary-General, the nine (9) Contracting Parties to the eCMR Protocol have a period of nine (9) months to notify an objection. A single objection is enough to prevent the amendment from entering into force.

7. Consequently, the eCMR Protocol foresees the involvement of SC.1 and, by extension, all Parties to the main treaty (CMR Convention), in order to promote interest in

¹ https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml

and possible accession to the Protocol. However, it is only the nine States that are bound by the eCMR Protocol, that ultimately can decide whether or not to accept an amendment.

8. As a final note on the example of eCMR, it should be mentioned that the Protocol only loosely defines some of the technical elements for the use of electronic consignment notes, while leaving it almost entirely to Contracting Parties to agree on the details among themselves. For instance Article 4, paragraph 2 of the eCMR Protocol reads:

“The procedure used to issue the electronic consignment note shall ensure the integrity of the particulars contained therein from the time when it was first generated in its final form. There is integrity when the particulars have remained complete and unaltered, apart from any addition or change which arises in the normal course of communication, storage and display”.

9. Therefore, the eCMR example differs significantly from eTIR, in that (i) technical and functional specifications for eTIR have been defined in detail and (ii) the legal framework will be based on the technical and functional specifications.

IV. The example of eATA

10. The electronic Carnet for the temporary admission of goods (ATA Carnet) is established under a single article to the Convention on Temporary Admission (Istanbul Convention 1990) that reads:

“All formalities necessary for implementing the provisions of this Convention may be carried out electronically by using electronic data-processing techniques approved by the Contracting Parties”.

11. This amendment came into force on 15 May 2014, without any technical or functional details having been defined and without any clear implementation guidance. A relevant Working Group at the World Customs Organization (WCO) is in the process of developing a business model, on the basis of which a pilot project will be launched. In the meantime, there is no other legal or technical background other than the above provision in the main body of the Convention.

12. Administratively, this provision is subject to the decision making processes (Administrative Committee) and amendment procedure that apply for the Istanbul Convention as a whole. The provision provides for elective application, in that Contracting Parties to the Istanbul Convention may, if they so wish, implement the procedure established by the Convention by electronic means, while, at the same time, maintaining all responsibilities related to the paper-based procedure.

13. This is yet another example of a legal framework being put in place before the technical details, which, again, differentiates it from eTIR. Furthermore, it has been understood that a provision on eTIR, following the eATA example, would run the risk that one objection could prevent the amendment from entering into force. As such, including eTIR in the main body of the TIR Convention could possibly only be envisaged under a different, more flexible legal regime that would be more easily acceptable by Contracting Parties, possibly along the lines of the proposals tabled by the government of Switzerland (see ECE/TRANS/WP.30/GE.2/2016/5).

V. Summary comparison table

	<i>Format</i>	<i>Level of technical preparation</i>	<i>Implementation</i>	<i>Decision making process</i>
<i>eTIR</i>	To be determined	Advanced	Optional	To be determined
<i>eCMR</i>	Protocol	Minimal	Optional	Working Party discusses, CPs to the Protocol decide
<i>eATA</i>	Part of the Istanbul Convention	None	Optional	Istanbul Convention Administrative Committee

VI. Considerations by the Group of Experts

14. The objective of the work of GE.2 is, in essence, to develop the substantive provisions that would enable eTIR to be implemented. This substantive legal framework can take any one of many formats. For example, the article on how to submit an electronic declaration, or the article on the responsibilities of the administrator of the eTIR international system, could either be part of a Protocol, or an Annex, or of the main TIR Convention. It is also worth noting that each potential format would entail different parliamentary procedures under national law in each Contracting Party. However, the discussions on possible formats should not keep GE.2 from continuing to discuss the substance of the legal provisions as such. At the same time, GE.2 is invited to consider the information provided above in conjunction with the proposals of the Government of Switzerland. In light of this information, GE.2 may wish to consider whether referring the question of possible formats back to WP.30 would be the appropriate way forward.