TIR EXECUTIVE BOARD (TIRExB)
COMMISSION DE CONTROLE TIR (TIRExB)
ИСПОЛНИТЕЛЬНЫЙ СОВЕТ МДП (ИСМДП)

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ADMINISTRATIVE COMMITTEE
FOR THE TIR CONVENTION, 1975

TIR Executive Board (TIRExB)
(Twenty-eighth session, 26-27 January 2006,
agenda item 8)

APPLICATION OF ARTICLE 40

Note by the TIR Secretary

A. BACKGROUND

1. At its twenty-seventh session, the TIRExB considered Informal document No.17 (2005), prepared by the secretariat, containing some practical examples of the application of Article 40 as well as a draft comment intended to clarify its provisions. The Board generally advocated the practical examples, but did not support the proposed comment. Instead, the TIRExB felt that a broader example of best practices should be prepared addressing, inter alia, such issues as:

- providing distinction between the liability of the TIR Carnet holder for payment of Customs duties and taxes and his responsibility in terms of penal/administrative law;
- exchange of information between the Customs authorities, as provided for in Article 50;
- possible indication of the export cargo declaration number in the TIR Carnet.

B. EXAMPLE OF BEST PRACTICE

Discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment

2. At departure, when the holder of the TIR Carnet signs off boxes 13-15 of vouchers No.1 and No.2 of the TIR Carnet, he takes on the responsibility for the correctness of data on the goods manifest. Following that, in line with Article 19 and the Explanatory Note therein, the Customs office of departure has to apply strict controls with a view to ensuring the accuracy of the goods manifest. This idea is stressed in the comment to Article 19 "Inspection at the office of departure: "*…for the TIR system to operate smoothly it is essential that the Customs inspection at the office of*

departure should be stringent and complete, since the functioning of the TIR procedure depends upon it".

3. Nevertheless, the Customs authorities en route and at destination might reveal discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment. When deciding on the possible responsibility of the TIR Carnet holder in such situations, the Customs authorities should take into account the specific provisions of Articles 39.2 and 40 and should first investigate the following issues:

- May the TIR transport be accepted as being otherwise in order (Article 39)? In particular, have the Customs seals remained intact?
- Have these discrepancies been due to mistakes committed by the holder knowingly or through negligence (Article 39)?
- Do these discrepancies relate to the Customs procedures which preceded or followed the TIR transport and in which the holder was not involved? If this is the case, then, in line with Article 40, the holder should not be considered responsible.

4. As underlined in Article 39.2 and its Explanatory Note, when filling-in the TIR Carnet, the holder is supposed to take reasonable and necessary steps to ensure the accuracy of the facts in any particular case. However, there may be situations where the holder is not in a position to do so. For example, if the holder takes over a sealed non-TIR container at a seaport and starts a TIR transport, he is probably not able to check the goods and has to rely on accompanying documents (bill of lading, packing list, etc.) only. In case of discrepancies, according to Article 39.2, if the holder can prove to the competent authorities that these discrepancies were not due to mistakes committed knowingly or through negligence at the time when the manifest was made out, he should not be considered responsible.

5. In many situations, the TIR procedure is preceded with export formalities when an export cargo declaration is made out. Therefore, the particulars of the goods, as appear on the TIR Carnet, should correspond to the data from the export cargo declaration. If in doubt about the particulars on the goods manifest of the TIR Carnet, a Customs office en route and the Customs office of destination may send an enquiry to the Customs office of departure. In line with Articles 42 and 50 of the TIR Convention, on receipt of such a request, the Customs office of departure must furnish the inquirer with all the available information regarding the TIR transport in question, in particular, a copy of the export goods declaration. To facilitate inquiry procedures, it is recommended that the office of departure, where possible, should indicate the number of the export goods declaration under box "For official use" on all vouchers of the TIR Carnet.

6. In the case of discrepancies, the responsibilities of the TIR Carnet holder could be two-fold:

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- liability for payment of Customs duties and taxes for the missing goods, if any. If the holder or any other person directly liable fails to pay the sums due, the Customs have the right to request payment from the national guaranteeing association;
- responsibility in terms of administrative/penal low, in particular, fines and/or other pecuniary sanctions. It should be noted that the guarantee of the national guaranteeing association does not cover this component of the holder's responsibilities.

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7. Discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment do not necessarily imply that some goods have been taken out from the sealed load compartment illegally, put into circulation and the Customs duties and taxes are due. It may well happen that the transport operator has fulfilled his responsibilities and delivered all the goods with the Customs seals remained intact, but a mistake was made in the goods manifest of the TIR Carnet before the beginning of the TIR transport. Therefore, the Customs authorities concerned have to prove that these goods have indeed been illegally withdrawn from Customs control on the territory of their country.

8. The applicability of Articles 39 and 40 is highlighted in several practical situations below.

Situation 1

A TIR truck arrived at the Customs office of destination with intact Customs seals. The load was packed in carton boxes and described in the TIR Carnet as "men's overcoats made of textile materials"[1]. When inspecting the load, the Customs office discovered that, in fact, these were men's overcoats made of leather[2] with a higher level of taxation in the country of destination. The driver argued that, although present in the course of loading, he had not been in a position to check the content of the closed boxes and simply filled-in the TIR Carnet on the basis of a packing list and CMR consignment note. The Customs office of destination got in touch with the office of departure and found out that, actually, the goods were wrongly declared already by the exporter in the export cargo declaration. Obviously, in the underlying situation Article 40 should became applicable, and the holder should not be responsible for the discrepancy.

Situation 2

A TIR truck arrived at the Customs office of destination with no traces of tampering with Customs seals. The load was packed in carton boxes and correctly described on the goods manifest, but there were fewer boxes in the load compartment than indicated: 95 instead of 100. Apparently, this fact had been overlooked by the office of departure. The Customs office of destination was not satisfied with the driver's explanations and believed that he should have monitored the stuffing of his vehicle and should have counted the boxes. The Customs office considered this case as "a mistake committed through negligence" and imposed a small fine on the transport operator for non-

[1] HS code 6201
[2] HS code 4203

authentic declaring. At the same time, as there were no evidences that 5 missing boxes had disappeared on the territory of the country of destination, the office of destination raised no claim for Customs duties and taxes and only made a reservation in the TIR Carnet about the missing boxes. It seems that in this situation Article 40 cannot apply.

Situation 3

A TIR truck arrived at the Customs office of destination with intact Customs seals. The load was packed in carton boxes and described as "computer accessories: cases"[3] in the TIR Carnet. The Customs office certified termination of the TIR operation and put the goods under temporary storage in a warehouse. Following that, the importer started clearance procedures, lodged an import cargo declaration and paid Customs duties and taxes. Before final clearance, the Customs office decided to proceed with examination of the goods and discovered that, in fact, these were not only computer cases, but complete personal computers[4] with a much higher level of taxation. The importer faced charges of non-authentic declaration and evasion of Customs payments. He argued that he based his import declaration on the goods manifest of the TIR Carnet and, therefore, that was the holder of the TIR Carnet who should be held liable for this infringement. However, in the underlying situation the holder had fulfilled its obligations and presented the sealed goods, vehicle and related documents at destination, although with the incorrect goods description. The infringement in the form of non-authentic declaration and evasion of Customs payments was essentially linked with the subsequent import procedure. Thus, in line with Article 40, the holder should not be considered responsible for the infringement.

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[3] HS code 847330
[4] HS code 847120

COMMENTS BY TIRExB MEMBERS

Mr. R. Boxström (Finland)

Application of Art. 40:
- If the seals are broken, always investigation;
- If the seals have remained intact, case by case in line with informal doc. 3 situations 1-3.

Mr. G. Grigorov (Bulgaria)

As regards the application of Article 39 (2) and Article 40 of the 1975 TIR Convention (para. 22 of the draft report), I think that the specific situation needs to be judged very carefully in order to determine for each case which particular provision of the Convention is most relevant to be used. It is important that in case of discrepancies between the particulars on the goods manifest of the TIR Carnet and actual contents of a road vehicle should not be considered as infringement of the Convention by holder of the TIR Carnet when evidence is produced to the satisfaction of the competent authorities that these discrepancies were not due to mistakes committed knowingly or through negligence.

Mrs. N. Rybkina (Russian Federation)

The problem of discrepancies with regard to the transported goods is rather sensitive, in particular because it is linked to such a topical issue as security in the supply chain.

The approach of para.4 seems too radical, as it proposes not to consider the holder responsible for the discrepancies in case he was not in a position to check the content of the load compartment.

Who would be responsible in such situations? The unreliable consignor who did not properly complete documents related to the goods? Or the Customs office of departure which did not fulfil its obligations according to the TIR Convention and failed to ensure that the goods manifest of the TIR Carnet corresponds to the actual content of the load compartment? However, the Convention does not foresee a mechanism how the Customs office of destination can held liable the above mentioned actors.

Another important question: which discrepancies may be considered as minor ones? Where is the line that separates discrepancies in data on the goods from smuggling? For example, if these discrepancies affect the amount of Customs duties and taxes, they should not be considered "minor", because the TIR guarantee covering the sums due is one of the fundamental principles of the TIR procedure. This aspect may become even more important in case of infringement: the amount of a payment request is calculated on the basis of transport and goods-related documents which the transport operator has submitted to Customs.

It is also doubtful that the situations described in examples 1 and 2 fall under the provisions of Article 40, because the underlying discrepancies relate to the TIR procedure itself, not only to the previous Customs regime.

On the other hand, in example 3 the application of Article 40 is fully correct.

According to the established practice within the Russian Customs, there are no reasons to held the transport operator liable, for example, in the following situation:

- some packages are missing, but the Customs seals have remained intact, and
- the consignor confirms in writing that the missing packages were not loaded through his fault.

International transport law, in particular the CMR Convention, provides the transport operator with an opportunity to take a recourse action against the consignor with a view to recovering the damages suffered because of a consignor's fault. This possibility also applies to the administrative fines which may be imposed by Customs authorities when holding the transport operator liable for discrepancies in the goods' description. Thus, holding the operator liable may be treated as a disciplinary measure to make sure that the consignor, transport operator and the Customs office of departure properly fill-in and check the documents required for Customs purposes.

In view of the above, it seems advisable to include into the example of best practice only those situations which would not give rise to similar doubts and which would clearly relate not to the TIR procedure, but to another Customs regime.

In general, the issue of responsibility for the submission of documents containing incorrect data rests within the competence of national administrative law.