**ECONOMIC COMMISSION FOR EUROPE**

Administrative Committee for the TIR Convention, 1975

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BEST PRACTICES – EXAMPLES TO BE PUBLISHED IN THE TIR HANDBOOK

Application of Articles 39 and 40 of the Convention

Comments on the document ECE/TRANS/WP.30/AC.2/2007/9

Transmitted by the European Community (EC)

1. The forty-fourth session of the Administrative Committee for the TIR Convention, 1975 discussed the note by the secretariat concerning best practices in the application of Articles 39(2) and 40. At that occasion the European Community indicated that it had some comments to make on the document and was invited by the Committee to submit these prior to the next session of the AC.2 in January 2008.

2. The European Community recognizes the extensive work done by the secretariat to draft a document on best practices for Articles 39(2) and 40. Indeed the concept of best practices can be a useful tool to help guide the application of the TIR Convention ('leading by example'). In the opinion of the European Community a best practice is, by nature, directed to a practice that is repetitive and can be carried out uniformly. It poses therefore a particular challenge to establish best practices for Articles 39(2) and 40 which are provisions that waive the TIR Carnet holder's liability based on an assessment of many different individual factors and circumstances.

3. On the substance of the document (paragraphs 4 and 5), it is noted that much emphasis is placed on Article 8 of the CMR Convention to define criteria that are laid down in Article 39(2) of the TIR Convention (i.e. the absence of negligence on the part of the holder or the proof of the reasonable and necessary steps the holder must make to ensure the accuracy of the facts). It is noted that this Article 8 concerns the contractual relationship between a ender and a carrier and should have no binding effect on customs. Indeed, a reservation entered by the carrier on the basis of that Article may even not be enforceable against the sender (the reservation will only be binding when the sender has expressly agreed to be bound by it). Moreover, Article 11(2) of the same CMR Convention provides that 'the carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents and information' needed for the purposes of customs or other formalities. It should therefore be made clearer that a reservation based on the Article 8 can only be one of the many factors that customs could take into account.

4. For the European Community the exclusion by the guarantee chain of certain products above a defined quantity from TIR guarantee cover on its territory creates an additional complicating factor. If the European Community were to follow the best practices as described in the note by the secretariat the result could be that the holder is, in the light of what has been said in the previous paragraph, not liable to customs in addition to the exclusion of liability by the guarantee chain.

5. As regards paragraph 9 and Situation 2 the European Community considers that there is no burden of proof for the customs authorities that goods have been withdrawn from customs control on the territory of their country or have disappeared there. It may be clear from the wording of the Article 39 that the burden of proof rests on the holder and that he has to explain the discrepancies to the satisfaction of customs authorities. If the holder is successful in his explanations then he would not be held liable.

6. Concerning Situation 4 it cannot be accepted that a holder is considered to have fulfilled his obligations when, in fact, the goods description was incorrect. According to Community legislation, in the case of an incorrect goods description, a customs debt either would be incurred when the goods entered the Community under the TIR procedure or would be incurred as a result of their illegal introduction when the introduction preceded the TIR operation.

7. In conclusion, the European Community would ask that the document is re-examined by the TIRExB in light of the comments that it has presented.

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