

Distr.: General  
5 February 2013

English only

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## **Economic Commission for Europe**

### **Inland Transport Committee**

#### **Working Party on Customs Questions affecting Transport**

##### **133rd session**

Geneva, 5–8 February 2013

Item 9 (c) (iii) of the provisional agenda

##### **Customs Convention on the International**

##### **Transport of Goods under Cover of TIR Carnets**

##### **(TIR Convention, 1975): Application of the Convention –**

##### **Application of the TIR Convention in the Customs**

##### **Union of Belarus, Kazakhstan and the Russian Federation**

## **Application of the TIR Convention in a Customs Union**

### **Note by the secretariat**

#### **I. Background and mandate**

1. At the 132nd session of WP.30, the Eurasian Economic Commission (EEC) informed that the member States of the Customs Union of Belarus, Kazakhstan and the Russian Federation had nearly finalized a draft intergovernmental agreement on the functioning of the TIR procedure in the Customs Union, which inter alia provides for the use of only one pair of vouchers No. 1/No. 2 of a TIR Carnet. The Customs Union is a single Customs territory without Customs controls at the internal borders (ECE/TRANS/WP.30/264 para. 34).

2. EEC asked WP.30 to consider and to provide guidance on several issues related to application of the TIR Convention in the Customs Union raised in Informal document No. 17 (2012). WP.30 noted that a reply to these issues depends on the interpretation of the term “frontier” in Article 2 of the Convention. The Working Party noted that the current wording of Article 2 does not seem to allow for a clear-cut interpretation of this term in case of Customs unions.

3. The Working Party concluded that, to remove this ambiguity, it may be necessary to introduce an amendment or a new Explanatory Note to Article 2. Given the existing different interpretations and the economic conditions, a flexible solution should be found which, on one hand, would not question the long-standing practices in EU, but, on the other hand, would give newly emerging Customs unions the necessary freedom to apply the TIR

procedure according to their specific needs without being accused of non-compliance with the text and spirit of the TIR Convention. (ECE/TRANS/WP.30/264 para.34).

4. Since the 132nd session of WP.30, the secretariat has been made aware of two new developments. First, a Member of the European Parliament questioned the European Commission on reinstating the use of the TIR transit system for goods transport under Customs control within the EU. The Commissioner for Taxation and the Customs Union Mr. Šemeta replied that the absence of internal borders excludes the possibility of using TIR Carnets for EU internal transports.

The EU Customs code in article 91b allows the use of a TIR Carnet for transports which

- (1) begin or terminate outside the Community; or
- (2) relate to consignments of goods which must be unloaded in the Customs territory of the Community and which are conveyed with goods to be unloaded in a third country; or
- (3) are effected between two points in the Community through the territory of a third country;

5. Second, the Republic of Kazakhstan submitted a study which indicated that for the Customs Union of Belarus, Kazakhstan and the Russian Federation the TIR system is the most effective and practical means of financial security for Customs transit. This study concluded also that according to Article 48 and 49 of the TIR Convention, TIR operations can be performed for internal transports within a Customs Union (Informal document No. 1 (2013)).

6. The present document has been prepared by the secretariat with a view to provide the necessary background information that would allow WP.30 and Contracting Parties to make a consensus decision as to how to proceed in this matter. While Contracting Parties are, in principle, free to make mutually agreed arrangements, this should not in any case impede or jeopardize the functioning of the TIR Convention or the rights and obligations of third parties to the TIR Convention or related international legal instruments. In this regard, WP.30 is also invited to recall document ECE/TRANS/ WP.30/2010/6, prepared by the secretariat on the application of the TIR Convention in a Customs union with a single Customs territory.

## II. Interpretation of the term “frontier” in Article 2

7. The term “frontier” on its own is not commonly used in international Customs conventions. In the “Glossary of International Customs terms” (WCO, October 2011) only the term “Customs frontier” which means “the boundary of a Customs territory” is mentioned.

8. Customs transit is defined in the Revised Kyoto Convention, 1999 (RKC) managed by the World Customs Organization (WCO), as a “Customs procedure under which goods are transported under Customs control from one Customs office to another”. The WCO definition of Customs transit thus covers both national and international Customs transit.

9. For the purpose of defining the term “frontier” in the TIR Convention, the principles of interpretation as stipulated in the 1969 Vienna Convention on the Law of Treaties (VCLT) may be a useful place to start. According to Article 31 (1) of the VCLT “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*” The context includes, in addition to the treaty text itself, the preamble and the annexes as well as other agreements and documents which are considered by the parties as being instruments

related to the treaty (Article 31 (2)). Furthermore, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation has to be taken into account, too. Finally, there are supplementary means of interpretation as, for instance, the preparatory work of the treaty (so called "travaux préparatoires") and the circumstances of its conclusion (Article 32).

10. Against this background, and in accordance with the universally accepted provisions on interpretation as contained in the law of Treaties, the term "frontier" from Article 2 could be understood as "Customs frontier" where the necessary Customs clearance of TIR Carnets takes place, insofar as the object and purpose of the TIR Convention is that of Customs transit. As a Customs union with a single Customs territory does not have internal Customs frontiers, the above interpretation could lead to a conclusion that "the TIR procedure can only be used for a transit movement which begins or ends outside the single Customs territory, or is effected between two points in the Customs territory through the territory of a third country". The TIR Convention thus would not reasonably be applicable to national transit operations which, in this case would be comparable to transit within the Customs union.

11. Finally, reference should be made to the relevance of Article 48 of the TIR Convention which reads:

*"Nothing in this Convention shall prevent Contracting Parties which form a Customs or Economic Union from enacting special provisions in respect of transport operations commencing or terminating or passing through, their territories, provided that such provisions do not attenuate the facilities provided for by this Convention".*

12. In the first instance, the drafting of the article does not seem to imply that the conditions of "commencing", "terminating" and "passing through" are applied simultaneously. The lack of the qualifying "and/or", and, by contrast, the use of only the word "or" means that only one of these conditions should apply, not all together. If read in conjunction with Article 2, Article 48 does not seem to unequivocally provide the freedom to use the TIR procedure within a Customs Union. At the same time, the ambiguity of the drafting does not explicitly prohibit it either. As a result, the rules of Treaty interpretation and established practices would be the best way to identify the intended meaning of this article.

### III. Other Considerations

13. Customs Unions should be established in conformity with international norms as included in article XXIV (8) of the GATT 1994, that is to say that the GATT 1994 sets the defining requirements for a Customs Union. More specifically Article XXIV (8) (a) (i) and (ii) read as follows:

(a) A Customs Union shall be understood to mean the substitution of a single Customs territory for two or more Customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the Union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the Union;

14. Against this background there are two issues that need to be taken into consideration by WP.30 and Contracting Parties:

(a) Use of the TIR procedure within a Customs Union establishing a single Customs territory with no internal borders, for the transport of domestic goods could potentially be problematic with regards to certain provisions of the TIR Convention and – possibly – in relation to the provisions of the GATT 1994. In addition, it could be contended that the removal of customs controls that follow from the formation of a single customs territory dispenses with the need for a guarantee for domestic goods in transit. On the other hand it is possible that implementing the TIR procedure for goods originating outside the Customs Union and intended for consumption in one of the countries of the Customs Union may present valid concerns and reasons to continue to use the TIR procedure. However, such use would require certain adjustments to the TIR Convention.

(b) An issue of discriminatory practice could possibly be raised with regard to routes within the Customs Union where the TIR procedure and the TIR guarantee can presumably be used (e.g. St. Petersburg to Minsk, with crossing of the internal Belarusian-Russian border) and routes where the TIR procedure and the TIR guarantee cannot be used under any circumstances (e.g. St. Petersburg to Moscow entirely within the Russian territory). A possible discrimination between these two cases would be in contradiction with the basic principles of existence of a Customs Union with a single Customs territory without internal Customs borders, because transport operations would still be treated as either international or domestic, depending on the route selected.

#### IV. Amendment proposal

15. In order to facilitate considerations of the Working Party, the secretariat has taken the liberty to draft a proposal for an amendment to Article 2 itself or, alternatively, for the introduction of a new Explanatory Note to this Article. The proposed modifications to the current text of Convention are marked **in bold and strikethrough**.

Amendment proposal for Article 2

1. This Convention shall apply to the transport of goods without intermediate reloading, in road vehicles, combinations of vehicles or in containers, across one or more [**Customs**] frontiers between a Customs office of departure of one Customs territory Contracting Party and a Customs office of destination of another or of the same Contracting Party, provided that some portion of the journey between the beginning and the end of the TIR transport is made by road.
2. **The provisions of paragraph 1 of this Article shall not prevent the Contracting Parties [in particular those which form a Customs or Economic Union], from unilaterally, bilaterally or multilaterally enacting legislation that would allow the application of the TIR Convention solely in their Customs territory without the crossing of a Customs frontier.**

Proposal for a new Explanatory Note 0.2-3 to Article 2

**0.2-3 The provisions of this Article do not prevent Contracting Parties that form a Customs or Economic Union from, upon mutual agreement, implementing the TIR procedure for certain categories of transport operations within their territory for goods not originating in their territory, as long as the conditions of such operations**

are specified and do not otherwise contradict the [object and purpose] [spirit and text] of the TIR Convention.

## **V. Considerations by the Working Party**

16. The Working Party is invited to consider the above proposals and provide guidance to the secretariat as to which option should be pursued.

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