



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

TIR Executive Board (TIRExB)

(Thirty-first session, 25 and 26 January 2007,
agenda item 7)

APPLICATION OF ARTICLES 39 AND 40

Note by the TIR Secretary

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.

2. At the twenty-eighth session, the Board welcomed Informal document No.3 (2006), prepared by the secretariat, containing an example of best practice in case of discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment. Having made some preliminary remarks, the Board felt that this example would need to be studied in detail and invited its members to transmit written comments with a view to finalizing the document at the next session (TIRExB/REP/2006/28, para.22).

3. At its twenty-ninth session, the TIRExB continued its deliberations with regard to an example of best practice in case of discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment (Informal document No.3 (2006)/Rev.1). The Board highlighted that decisions in such situations should be taken on a case-by-case basis, depending on the circumstances and national legislation. Nevertheless, the TIRExB was of the view that general guidance on the application of Articles 39 and 40, including some

generic examples, could be of assistance to Customs authorities. In this respect, members of the Board informed of their experiences at national level. Furthermore, the Board noted that, in case of discrepancies, the CMR Convention may also apply. In order to take into account the above considerations, the TIRExB requested the secretariat to redraft Informal document No.3 (2006)/Rev.1 (TIRExB/REP/2005/29draft, para.15).

4. The TIRExB, at its thirty-first session, considered modified proposals by the TIR secretariat (Informal document No.3 (2006)/Rev.2) and continued its deliberations with regard to an example of best practice in case of discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual content of the load compartment. The Board was not in a position to agree to the document, as several members felt that the proposed example of best practice was not balanced, because it focused on only those situations where the holder of the TIR Carnet should not be liable for the above discrepancies. Therefore, the TIRExB felt that the best practice should be complemented with few situations where the holder should be considered liable and invited its members to transmit to the TIR secretariat, before 31 December 2006, relevant practical examples together with other comments, if any. The Board decided to revert to this issue at the next session (TIRExB/REP/2006/30draft, para.20).

5. In this context, the TIRExB may wish to consider the present document, containing updated proposals by the TIR secretariat..

**EXAMPLE OF BEST PRACTICE WITH REGARD TO
DISCREPANCIES BETWEEN THE PARTICULARS ON THE GOODS MANIFEST OF
THE TIR CARNET AND THE ACTUAL CONTENT OF THE LOAD COMPARTMENT**

1. 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. In addition, 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".

2. 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. In such situations, before considering those facts as infringements committed by the holder of the TIR Carnet, the Customs authorities should take into due account the provisions of Articles 39 and 40 of the TIR Convention:

Article 39

When TIR operations are accepted as being otherwise in order:

1. ...
2. **Likewise, discrepancies between the particulars on the goods manifest of the TIR Carnet and the actual contents of a road vehicle, combination of vehicles or container shall not be considered as infringements of the Convention by the 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 at the time when the goods were loaded or dispatched or when the manifest was made out.**

Explanatory Note to Article 39

0.39 The expression "mistakes committed through negligence" is to be taken to mean acts which, although not committed deliberately and in full knowledge of the facts, are due to a failure to take reasonable and necessary steps to ensure the accuracy of the facts in any particular case.

Article 40

The Customs administrations of the countries of departure and of destination shall not consider the holder of the TIR Carnet responsible for the discrepancies which may be discovered in those countries, when the discrepancies in fact relate to the Customs procedures which preceded or followed a TIR transport and in which the holder was not involved.

3. Therefore, when deciding on the possible responsibility of the TIR Carnet holder in such situations, the Customs authorities are first to investigate the following issues:

- May the TIR transport be accepted as being otherwise in order (preamble to 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, paragraph 2)?
- Do these discrepancies relate to the Customs procedures which preceded or followed the TIR transport and in which the holder was not involved (Article 40)?

4. As underlined in Article 39, paragraph 2 and Explanatory Note 0.39, 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. This responsibility of the holder is also based on the provisions of the CMR Convention¹ to which most TIR countries are also Contracting Parties. According to Article 8, paragraph 1 of the CMR Convention,

"1. On taking over the goods, the carrier shall check:

- (a) The accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and**
- (b) The apparent condition of the goods and their packaging."**

5. However, there may be situations where the holder is not in a position or not allowed 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. Under those circumstances, the holder is strongly advised to make a reservation on the CMR consignment note, as provided for in Article 8, paragraph 2 of the CMR Convention:

"2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based..."

¹ Convention on the Contract for the International Carriage of Goods by Road (CMR), of 19 May 1956

6. According to Article 39, paragraph 2 of the TIR Convention, in case of discrepancies, the holder has to 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. In other words, the holder should prove that he was not in a position to verify the particulars on the goods manifest. According to Article 39, paragraph 2, it is up to the Customs authorities to accept or decline the holder's explanations or evidence. In case of prohibited goods, it should also be borne in mind that specific provisions of national legislation may become applicable, as mentioned in Article 47.

7. In many situations, the TIR procedure is preceded by export formalities where an export cargo declaration is made out. Therefore, the particulars of the goods, as they 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 or to the exporter. In line with Article 42 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.

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

- 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 law, 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.

9. 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 or added to the sealed load compartment illegally, put into circulation and that 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 intact, but that 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.

10. The applicability of Articles 39 and 40 is highlighted in four practical situations below.

Situation 1 (Article 39)

A TIR truck (a tractor unit and a semi-trailer) arrived at the Customs office of destination with no traces of tampering with the 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. The driver argued that he had picked up the already sealed semi-trailer at a port where it had arrived by ferry. For this reason, the driver was not in a position to check the accuracy of the goods manifest and made a corresponding reservation on the CMR consignment note. The Customs office of destination got in touch with the sender of the goods who confirmed in writing that the missing packages were not loaded at departure by his fault. On this basis, the Customs office came to the conclusion that the inaccuracy in the goods manifest could not be considered as a holder's "mistake committed knowingly or through negligence". In line with Article 39, paragraph 2, the holder of the TIR Carnet was released from responsibility.

Situation 2 (Article 40)

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"² 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 computers³ 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.

Situation 3 (Article 39)

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: 98 instead of 100. According to the driver, he had overlooked this fact. 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

² HS code 847330

³ HS code 847120

should have counted the boxes. The Customs office considered this case as "a mistake committed through negligence" and imposed a fine on the transport operator for non-authentic declaring. At the same time, the Customs authorities found no evidences that 2 missing boxes had disappeared on the territory of the country of destination. For this reason, the office of destination made a reservation in the TIR Carnet about the missing boxes, but raised no claim for Customs duties and taxes.

Situation 4 (Articles 39 and 40)

A TIR truck arrived at the Customs office of destination with intact Customs seals. The load, including the number of boxes, was correctly described on the goods manifest. However, behind the boxes, next to the front wall of the semi-trailer, the Customs authorities discovered some pieces of furniture which were mentioned neither on the TIR Carnet nor on the CMR consignment note. The driver (vehicle's owner, at the same time) explained that he had bought this furniture for private purposes in the country of departure, and that the consignor was not aware of this fact. The driver felt that the furniture was personal, rather than commercial cargo, and that, therefore, there was no need to indicate the furniture in the goods manifest which should correspond to the CMR consignment note and to the export goods declaration lodged by the consignor. The Customs office of destination did not share this view, fined the driver for non-authentic declaring and instructed him to declare the furniture for importation on his own behalf. In the above situation, neither the exemptions of Article 39 nor of Article 40 apply to the holder of the TIR Carnet.
