



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)

Fifty-seventh session
Geneva, 3 February 2014
Agenda item IV (a)

The decision of the Russian Federal Customs Service affecting the functioning of the TIR system – Follow-up to the fifty-sixth session

Note by the secretariat

A. Background and mandate

1. At its fifty-sixth session, the TIR Executive Board (TIRExB), discussed, inter alia, the events that had taken place since 29 November 2013, when the Federal Customs Service (FCS) of the Russian Federation officially notified the Association of International Road Transport Carriers (ASMAP) about the extension of the FCS-ASMAP agreement until 1 July 2014. This would have assumed that, as a consequence, the guarantees provided by ASMAP in the framework of the TIR Convention would continue to be valid on the territory of the Russian Federation. However, at the time TIRExB met on 3 and 4 December 2013, it transpired that the FCS measures were still in full force and had even been extended to also include the customs directorate of Kaliningrad.

2. According to the information available at that time, it seemed that the FCS measure, so far, mainly affected importation. In addition, the Board had been informed about a pilot, which allowed Russian transport operators to benefit from a guarantee waiver under the national transit procedure. On the basis of the limited information available, TIRExB assessed that the application of the TIR system in the Russian Federation seemed to have led to discriminatory treatment of, in particular, foreign TIR Carnet holders.

3. TIRExB requested the secretariat to prepare, in cooperation with the IRU, an informal document assessing the application of the TIR system, including the differences in treatment between national and foreign TIR Carnet holders (if any), on the territory of the Russian Federation (See Informal document TIRExB/REP/2013/56draft, paras 10—16).

4. Further to this request, the secretariat, in cooperation with the IRU, prepared Informal document No. 2 (2014), recapitulating the developments of the TIR situation in the Russian Federation and evaluating the current state of affairs, for consideration by the Board. In addition, in Annex, the secretariat reproduces an excerpt from the IRU Annual report 2014 on TIR in Russia.

B. Introduction of the additional guarantee requirement

5. On 5 July 2013, FCS announced on its website that, starting 14 August 2013, carriers transporting goods in the territory of the Russian Federation under cover of a TIR Carnet would be required to provide an additional guarantee, in accordance with provisions of the Customs Code of the EurAsEC Customs Union. On 8 August 2013, it was announced that the introduction of the measure was postponed until 14 September 2013.

6. According to the information communicated by FCS, one of the reasons for requiring additional guarantees in connection with TIR operations on the Russian territory was the existence of a TIR related customs debt. On 19 November 2013, FCS provided the IRU with a list of some 3'500 cases with an outstanding customs debt, out of which, according to analysis by the IRU:

- In 1'500 cases, no irregularities in connection with a TIR operation had ever been reported by Russian customs to the TIR guarantee chain;
- In some 700 cases, no payment requests had been presented to the TIR guarantee chain;

7. The remaining cases had been resolved either through the various settlement agreements or withdrawn by Russian customs themselves or where the absence of customs debt or liability of the TIR guarantee chain had been confirmed by definitive court decisions. In the view of the IRU, this list confirms that the allegations by FCS with regard to outstanding TIR related customs debts remain unfounded.

C. Evolution of the situation

8. Upon its entry into force on 14 September 2013, the requirement to provide an additional guarantee was limited to the Siberian and Far Eastern customs regions. On 24 September 2013, the measure was first extended, to also include the Ural region.

9. Despite a judgement of the Supreme Arbitration Court of the Russian Federation dated 14 October 2013 (case number BAC-11682/2013), which confirmed that the FCS decision of 4 July 2013 was invalid, FCS continued to further extend the measure.

10. Over time, other areas became affected as well, so that, by 3 December 2013, the measure was applicable in the North Caucasian, Central, Southern, Far Eastern, Ural and Volga customs regions, , the customs offices of Pskov, Sebezh, Kingisepp and Kaliningrad of the North-western Customs district, as well as the Domodedovo, Sheremetyevo and Vnukovo airport customs.

11. At present (January 2014), TIR carnets are only accepted by the customs offices of Vyborg, Karelia and Murmansk of the North-western customs region, bordering Finland and Norway. This means that only twenty-seven customs points out of a total of 503 in the Russian Federation, accept, in principle, TIR Carnets (provided they are customs offices authorized for TIR).



Status of implementation per 1 December 2013, source: IRU.

D. Practical difficulties encountered by international road transport operators as a result of the FCS measure

12. Based on the information submitted by members to the IRU, the FCS requirement to provide an additional guarantee has caused numerous practical problems for the international transport of goods by road and international trade, including the following:

- a) uncertainty and interruption of transport operations resulting from the fact that none of the means suggested to secure transit as required by FCS (i.e. surety, bank guarantee, cash deposit) is available at Russian border-crossing points;
- b) considerable delays in transit and delivery of goods as a result of lengthy and complicated formalities, and resulting in considerable commercial risks for various economic operators involved in trade and commercial relationships with Russian partners, including Russian importers of goods;
- c) lack of clear and transparent information on tariff rates to determine costs of the required additional guarantees and to assess their impact on transport costs;
- d) additional costs resulting from various additional services required in connection with additional guarantees (i.e. related formalities, insurance policies, reported obligatory private escorts for some types of goods);
- e) legal uncertainty resulting from unclear legal obligations of additional guarantee providers towards transport operators and Russian customs, in particular companies issuing sureties;
- f) absence of risk management tools (such as TIR-EPD or SafeTIR) to ensure appropriate control over transit operations.

13. Furthermore, IRU members reported a significant increase of costs as a result of the necessity to provide additional guarantee.

Cost comparison for a transport of goods from Italy to the Russian Federation undercover of a TIR Carnet and by other means

- Cost of a transport under cover of only a TIR Carnet is 1980 RUB (55 CHF, the price of a TIR Carnet);

- Cost of a transport under cover of TIR Carnet (foreign countries) + costs of an additional guarantee in the Russian Federation = Minimum 6000 RUB (167 CHF)
- Cost of a transport without the use of a TIR Carnet = Minimum 10400 RUB (289 CHF)

14. Considerably higher costs are reported for transports with an additional guarantee from EU to Kazakhstan. For example, the cost of a transport without the use of a TIR Carnet from Italy to Kazakhstan (transiting through the Russian territory) ranges between 40'000 and 165'000 RUB (from 1'111 CHF to 4'583 CHF). These costs include the services to acquire surety in the Russian Federation, customs formalities, escort and storage of the goods and vehicles at the warehouses of temporary storage, etc.

E. Legal elements relating to the implementation of the measure

15. From a legal perspective, there are several issues that warrant consideration at the international level:

a. Infringement of the TIR Convention

16. As concerns the TIR Convention and questions as to the conformity of the measure therewith, the TIRExB found, among others, that:

- The FCS measure does not comply with the various provisions of the TIR Convention, in particular, its Articles 3, 4, 6, 42 *bis* and 49 and consequently results in a breach of the TIR Convention (Conclusions of the TIRExB at its fifty-fourth session, para. 8).
- According to the Vienna Convention on International Law of Treaties, 1969, provisions of the Customs Code of the Customs Union and/or national legislation cannot be invoked to justify the non-compliance with the TIR Convention (Conclusions of the TIRExB at its fifty-fourth session, para. 9).
- The parties concerned ought to accelerate the negotiations and find solutions which would remove the concerns raised by FCS (Conclusions of the TIRExB at its fifty-fourth session, para. 13).

17. The Administrative Committee – except for the delegation of the Russian Federation – endorsed the TIRExB findings (ECE/TRANS/WP.30/AC.2/115 para.14) and added that the steps taken by the Russian Federation run contrary to its commitments under the TIR Convention (ECE/TRANS/WP.30/AC.2/115 para.21).

18. For further details and analysis, the Board is referred to the relevant documents of the extra-ordinary session of the TIRExB, as well as the conclusions of that session and the finding of the Administrative Committee at its fifty-sixth session.

b. Potential contradiction with GATT provisions including article V on transit

19. As a starting point, Article V of the GATT 1994 stipulates freedom of transit of goods, vessels and other means of transport across the territory of Member States, along the routes assessed as most convenient for international transit, with no distinction based on flag of vessel, origin, departure, entry, exit, destination, or ownership of the goods, vessels or other means of transport involved. The Most Favoured Nation treatment with regards to charges, regulations and formalities must be observed. Furthermore, the imposition of unnecessary delays or restrictions on transit traffic and the levying of any duties and charges relating to transit are prohibited with only few notable exceptions related to transport and administrative costs or the cost of services rendered, that also have to be “reasonable”. Reasonableness in this context is an open-textured standard that can only be judged on a case-by-case basis. It is a term frequently debated in WTO panels as it occurs

in several GATT provisions, however, it has not been assessed by any competent WTO body to date in relation to article V and transit.

20. According to GATT article V, goods are defined as being in transit when the crossing of the territory of another WTO Member constitutes only part of the journey between departure and final destination country, regardless of whether trans-shipment, warehousing, breaking of bulk or change in transport mode are involved. GATT Article V, therefore, only refers to through-transit, thus it normally involves at least three States.

21. In sum, the obligation in Article V is that goods in transit are not to be unduly interfered with, nor discriminated against, by the transit state. Article V of GATT commits the Contracting Parties to facilitating transit traffic, however, this does not mean that the transit State cannot regulate the conditions for transit. Furnishing guarantees and performing checks are actions well within the rights of sovereign States. It is for this reason and in order to make transit easier that, in practice, regional or sub-regional cooperation has become the main vehicle for achieving the aims set forth in Article V of GATT, and the TIR Convention reflects this cooperation.

22. In the current context it may be appropriate to refer to a WTO Panel Report in the case concerning Colombia-Indicative Prices and Restrictions on Ports of Entry, which was delivered in April 2009. This was the first time that an authoritative interpretation of Article V was given. More specifically, on 12 July 2005, Colombia introduced a measure requiring certain textiles, apparel and footwear originating in or arriving from Panama and China to enter only at Bogota airport or Barranquilla seaport.

23. Panama ultimately brought a case against Colombia on the grounds of, inter alia, discriminative restrictions on ports of entry for certain of its goods exported to Colombia as being inconsistent with GATT Article V, an assertion that the panel upheld in its final report. That is to say, that according to the authoritative WTO case law, restrictions on points of entry are essentially prohibited since there is an obligation to allow transit via the most convenient route for the operator. On the other hand, it could be contended that:

- i. The TIR Convention in its Article 45 allows Contracting Parties to designate customs offices authorized to accept and/or process TIR Carnets; and
- ii. The customs offices that do not accept the TIR Carnet do not restrict transit transports but subject them to national regulation which is not prohibited by GATT Article V, unless it can be proven that the said national legislation imposes unnecessary delays and/or restrictions.

24. Considering the above, it is difficult to discern with any certainty whether or not there is in fact a contradiction with GATT article V, and it would be up to Contracting Parties to decide if they wish to bring such an assertion to the attention of the WTO dispute settlement mechanism.

25. Furthermore, customs unions are to 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. A former Judge of the WTO Appellate body has noted that “*an important task for the members of the WTO is to ensure that WTO disciplines are effectively applied to prevent customs unions and regional free trade agreements from being too exclusive and discriminatory in relation to outside parties*”. In this respect, considerations arise as to how the measure relates to the other members of the customs union and how it applies to foreign operators depending on the point of entry from the external borders of the customs union and not just the external borders of the Russian Federation. More specifically Article XXIV (8) (a) (ii) reads as follows:

- “(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.”

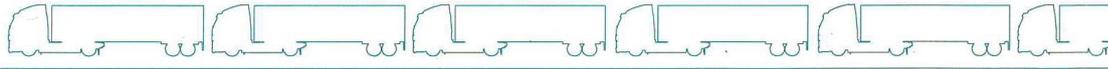
26. This appears to imply that practices towards non-members of the union should be uniform, and i.e. applied by all customs union members towards third countries. Furthermore, practices should not favour union members over non-union members and regulations should not – as per Article XX of the GATT – impose disguised restrictions on trade. Again, it is in the discretion of Contracting Parties to decide whether and how these provisions or combination thereof may be applicable to the case in point.

F. Final considerations by the Board

27. The Board is invited to take note of the above information and discuss if, based on the above assessment, it considers further steps with regard to the application of the TIR Convention in the territory of the Russian Federation appropriate.

Annex

76 | Road freight transport



over 40%
of Russian imports under TIR
USD 135 billion
worth of trade impacted per year.

Costs under new Russian Customs regime

- price of TIR Carnet
- price of national guarantee in Russia
- cost for security formalities (issuance and registration)
- cost of national transit through Ukraine
- services to obtain Russian guarantee, Customs formalities, escort to internal Customs clearance points, storage of goods and vehicles at Customs warehouses, ...

Transport with TIR from Italy, across foreign countries, to Russia



Transport with TIR from Italy, across foreign countries, to Russia under new Russian Customs regime



Transport without TIR from Italy to Russia, under new Russian Customs regime



Transport without TIR from Italy to Kazakhstan through Russia, under new Russian Customs regime



TIR in Russia

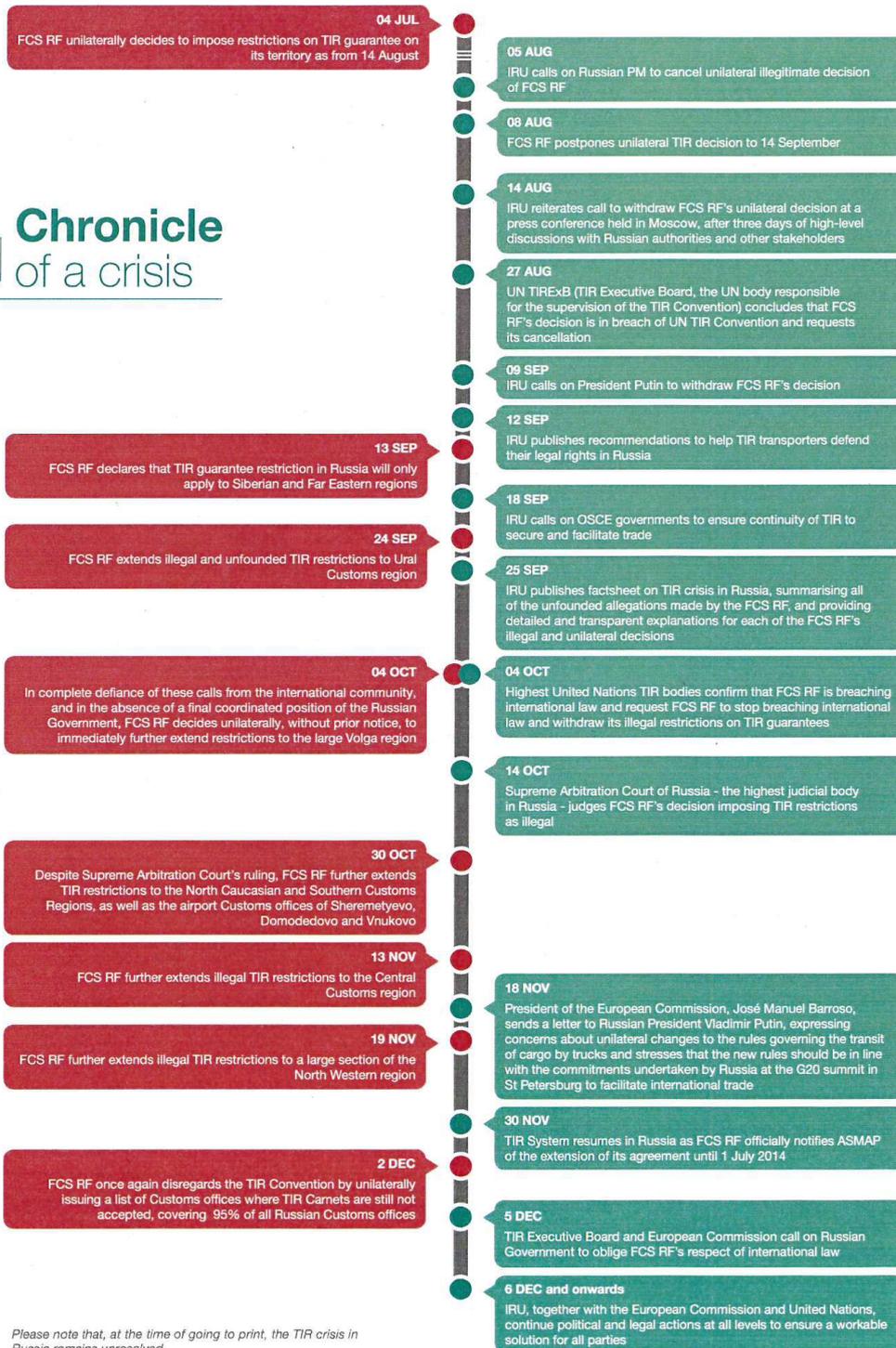
On 4 July 2013, the Head of the Russian Federal Customs Service (FCS RF), Andrei Belyaninov, breached international and national law by deciding unilaterally, without prior notice to TIR stakeholders at Russian or international level, such as the United Nations TIR bodies, to restrict the application of the TIR System in Russia.

In practice, this measure means that each TIR Carnet used to transport goods to, through or from Russia is subject to a substantial additional national Customs guarantee, which does not provide any security whatsoever for traders and authorities.

The Russian Federal Customs Service has long turned a deaf ear to multiple representations and calls for withdrawal made to the highest Russian authorities including by the IRU, EU Commission President, José Manuel Barroso, EU Commissioner responsible for taxation and customs union, audit and anti-fraud, Algirdas Šemeta, and UNECE Executive Secretary, Sven Alkalaj, together with a host of national governments and the Russian business community.

This illegal and illegitimate decision to no longer accept TIR guarantees on Russian territory was to take full effect as of 1 December 2013, when ASMAP's (IRU Russian Member Association guaranteeing TIR in Russia) agreement to act as the TIR guarantor in Russia was to be cancelled by the FCS RF.

Chronicle of a crisis



Please note that, at the time of going to print, the TIR crisis in Russia remains unresolved.