

Best Practice: 5.9 EXAMPLE OF BEST PRACTICE WITH REGARD TO THE APPLICATION OF ARTICLES 39 AND 40 (extract of the TIR handbook)*/

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 thereto, 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.”**

^{*/} {ECE/TRANS/WP.30/AC.2/2009/2, paragraph 15; ECE/TRANS/WP.30/AC.2/97, paragraph 29}

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. As regards his contractual responsibility, the holder is likely to avail himself of the provisions of the CMR Convention^{1/} 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:

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

(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 to make effective checks. 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...such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note."

6. Article 11 of the CMR Convention further specifies that for the purpose of the Customs or other formalities, the sender shall attach the necessary documents to the consignment note or place them at the disposal of the carrier. Moreover, this article clearly states that:

"2. The carrier shall not be under any duty to inquire either the accuracy or the adequacy of such documents or information. The sender shall be liable to the carrier for any damage caused by the absence, inadequacy or irregularity of such document and information, except in the case of some wrongful act or neglect on the part of the carrier."

7. The effect of Articles 8 and 11 of the CMR Convention on the contractual relationship between sender and carrier is one of the factors which Customs should take into account.

8. 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.

9. 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.

10. 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.

11. 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.

12. The applicability of Articles 39 and 40 is highlighted in five practical situations below. For each example, the Customs seals have remained intact, the road vehicle contains no places of concealment and no evidences of smuggling have been found.

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 certified the termination of the TIR operation with reservation, started an inquiry procedure and 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 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 believed that he should have monitored the stuffing of his vehicle and should have counted the boxes and considered this case as "a mistake committed through negligence" and imposed a fine on the transport operator for non-authentic declaring. However, as the Customs authorities accepted that only 98 boxes had been loaded, no claim for Customs duties and taxes was raised.

Situation 3 (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.

Situation 4 (Article 40)

The goods under cover of a TIR Carnet were delivered to the Customs office of destination. According to the goods manifest on the TIR Carnet, the load (shoes) was packed in 100 carton boxes. The Customs seals were intact. The Customs office took off the seals and terminated the operation without reservation, although it did not carry out a Customs inspection. The goods were unloaded and placed under temporary storage in a warehouse. Following that, the importer lodged an import declaration for the same quantity of the goods as described on the manifest of the TIR Carnet. But during physical examination of the consignment, the Customs office discovered not 100, but 150 boxes with shoes. The importer explained that he had based his import declaration on the goods manifest of the TIR Carnet and, therefore, not he, but the holder was responsible for this infringement. However, in this case the holder fulfilled his obligations and presented the sealed goods, TIR Carnet and vehicle at the office of destination, and the operation had been terminated. The goods were kept for some period of time in the warehouse, after termination of the TIR procedure, and the holder does not bear any responsibility for what could have happened with the consignment during storage. It is the responsibility of the importer to check the goods before lodging the import declaration. Therefore, according to Article 40, the holder of the TIR Carnet was not considered liable.

Situation 5 (Article 40)

In the country of departure, there existed restrictions (tariff and non-tariff) for the exportation of raw materials, including copper. At the same time, no such restrictions were imposed on articles made of copper. At the Customs office of departure, the exporter lodged an export cargo declaration where the goods were declared as "copper bushings". Following export formalities, the goods were sealed and placed under the TIR procedure. In both the TIR Carnet and CMR consignment note, the goods description coincided with the one from the export declaration. The TIR truck arrived at the Customs office of exit (en route) with intact Customs seals. Nevertheless, the Customs office of exit decided to make a physical inspection of the goods suspecting that the goods description was deliberately falsified in order to avoid the applicable export restrictions. Technical expertise proved that the articles could not be used as bushings and were actually foundry products (copper billets). Thus, the goods should have been declared as "raw copper". The exporter faced charges of non-authentic declaration, evasion of Customs payments and breaching export regulations. As the underlying infringement was essentially linked to the preceding export procedure, the holder of the TIR Carnet was not considered responsible, in line with Article 40.