



Economic and Social Council

Distr.: General
8 May 2013

Original: English

Economic Commission for Europe

Inland Transport Committee

Working Party on Customs Questions affecting Transport

134th session

Geneva, 11 – 14 June 2013

Item 8 (b) (i) of the provisional agenda

**Customs Convention on the International Transport
of Goods under Cover of TIR Carnets (TIR Convention, 1975) –
Revision of the Convention:
Preparation of Phase III of the TIR revision process**

Legal aspects of computerizing the TIR procedure

Note by the Secretariat*

I. Mandate

1. The Inland Transport Committee (ITC), at its February 2013 session, supported the continuation of the eTIR Project and the prolongation of the mandate of the Expert Group on Technical and Conceptual Aspects of the Computerization of the TIR procedure (GE.1) to the year 2013 and urged the Working Party on Customs Questions affecting Transport (WP.30), inter alia, to start working on the legal aspects of computerization of the TIR procedure without delay. This request corresponds with the WP.30 view expressed at its 133rd session that the GE.1 work should be complemented by WP.30 considerations of legal and policy aspects of eTIR (ECE/TRANS/WP.30/266, para. 24).

2. Moreover, TIR Executive Board (TIRExB) has among the priority objectives of its 2013–2014 programme of work, the facilitation of the computerization of the TIR procedure and, in particular, actively contributing to drafting the required legal amendments to the TIR Convention.

3. In line with the ITC, TIRExB and WP.30 objectives, the secretariat has prepared this first assessment of various options available to introduce the legal provisions required to enable a fully computerized TIR system.

* The present document was submitted late due to resource constraints.

II. Background

4. The eTIR international system aims to ensure the secure exchange of data between national Customs systems related to the international transit of goods, vehicles or containers according to the provisions of the TIR Convention and to allow Customs to manage the data on guarantees, issued by a guarantee chain to holders authorized to use the TIR system. In addition to replacing the current international functions of the paper TIR Carnet (i.e. the proof of existence of an international guarantee and the exchange of information between Customs administrations), the eTIR international system will bring further benefits for Customs administrations, transport operators and the actors comprising the guarantee chain. Such benefits include, but are not limited to, the availability of advance cargo information enabling risk assessment prior to the arrival of the cargo and the exchange of Customs information in a secure environment that will prevent the submission of different Customs declarations along a TIR transport.

5. With the recent completion of the eTIR Cost-Benefit Analysis (CBA), the circumstances have matured as to allow a shift of the work focus from the technical to the legal aspects. The CBA was a major undertaking and provided estimations of the profitability of the eTIR system, under various scenarios.

6. In 2007, WP.30 decided that it would consider the legal aspects of the eTIR project itself (ECE/TRANS/WP.30/232, para. 32). The main issues for consideration include, among others: the way(s) to incorporate the computerized system into the TIR legal framework and the impact of this incorporation on the existing legal provisions of the TIR Convention; the repercussions it might have for international private law and national administrative procedures and legal structures; as well as the role and responsibilities of the various actors (Customs authorities, national associations, international organization, insurers and TIRExB) in the TIR Convention, once the paper based system would be replaced by electronic data interchange (EDI).

III. Incorporation into the international legal framework

7. The eTIR system cannot be implemented outside of an international legal framework. However, various options can be envisaged to enable the use of electronic message instead of the paper TIR Carnet. The eTIR legal provisions could be included in the TIR Convention, be formulated as an additional protocol to the TIR Convention, or could become an entirely new Convention. The advantages and disadvantages of these options are discussed below.

A. Amending the TIR Convention

8. If the eTIR system was codified within the existing TIR Convention, this could be done by adding provisions on eTIR that would co-exist with the provisions on the paper based system under an either/or formula within the existing TIR Convention. An additional annex or separate implementing provisions seems necessary to define the technical details.

9. While this solution in principle appears appealing, there are complexities to be taken into account. The most significant one is found in the TIR Convention, article 59 on the procedure for amendments. As per paragraph 3 thereto:

“[...] Any proposed amendment communicated in accordance with the preceding paragraph shall come into force with respect to Contracting Parties three months after the expiry of a period of twelve months following the date of communication of the proposed amendment

during which period no objection to the proposed amendment has been communicated to the Secretary-General of the United Nations by a State which is a Contracting Party”.

10. As a result of the “veto power” of Contracting States to block an amendment, attempting such a large scale revision/amendment process without guaranteed participation of all Contracting Parties in the negotiations runs a high risk of an objection being raised at that final stage, by Contracting Parties that were not present for the decisions, or that were out-voted during negotiations. This would prevent the amendments from coming into force resulting in the eTIR system not becoming operational even for those countries highly interested in it.

11. To increase the chances of having an amendment to the TIR Convention accepted by all Contracting Parties, it could be envisaged that the implementation of the eTIR provision is optional and that countries could, for example, appoint eTIR Customs offices when they are ready to do so.

B. Additional Protocol to the TIR Convention

12. A supplementary Protocol would be a new legal instrument that would require signature, ratification and entry into force through the United Nations Depositary procedures. The main benefit of this option is that it may be agreed that it will be an optional Protocol and thus only Contracting States that wish to become Parties to the Protocol will be bound by the obligations therein. As such, the agreement reached will be open for accession to all TIR Contracting Parties as and when they decide they are ready and willing to undertake such additional obligations as would be stipulated in the Protocol. It should be reiterated at this point that the paper based TIR procedure as laid down in the TIR Convention will be simultaneously valid and operational, and the Protocol will be a separate albeit optional addition to the TIR Convention. Thus, paper TIR Carnets will continue to be recognized by the Customs authorities of Contracting Parties that have implemented the electronic system. Also, in the case of a Protocol, it should be further added that only Contracting Parties to the TIR Convention would be able to become Parties to it. The Protocol would be managed under the same administrative structure as the TIR Convention, namely Administrative Committee for the TIR Convention, 1975 (AC.2) and the TIRExB.

13. The questions to be addressed in the context of a protocol concern the nature and content of the legal instrument. For instance, would the new Protocol provide a framework of loosely defined obligations for implementation like the electronic Consignment Note (e-CMR) Protocol, or would it give strict and detailed legal, technical and operational instructions as per the New Computerised Transit System (NCTS) model? The technical description and details which will be included would not be sufficient to address the legal aspects of implementation. In this respect it is worth taking a closer look at e-CMR article 5, although some of its content may not be directly relevant to eTIR:

“1. The parties interested in the performance of the contract of carriage shall agree on the procedures and their implementation in order to comply with the requirements of this Protocol and the Convention, in particular as regards:

(a) The method for the issuance and the delivery of the electronic consignment note to the entitled party;

(b) An assurance that the electronic consignment note retains its integrity;

(c) The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement;

(d) *The way in which confirmation is given that delivery to the consignee has been effected;*

(e) *The procedures for supplementing or amending the electronic consignment note; and*

(f) *The procedures for the possible replacement of the electronic consignment note by a consignment note issued by different means.*

2. *The procedures in paragraph 1 must be referred to in the electronic consignment note and shall be readily ascertainable.”*

14. Article 5 of the e-CMR Protocol is the only provision of the Protocol dealing with implementation of the electronic consignment note in very generic terms, allowing ample room for flexible arrangements between Contracting Parties. In practice this could translate into either subsequently negotiated additional annexes to the Protocol or into a network of bilateral agreements. In the case of the e-CMR in particular, no results have been, as of yet, produced. Conversely, the regulatory framework of the European Union (EU) for NCTS is immensely more specific and detailed.

15. At the time the e-CMR was concluded, the parties had not yet studied the technical implications of an electronic consignment note, which is why they were not able to include anything more specific in the Protocol's provisions. In this respect, the eTIR project is much more advanced, and thus legal provisions can be developed to enable the application of a system with concrete technical specifications. This will facilitate the identification of the necessary legal aspects to be addressed and will hopefully result in an easily implementable system, also from a legal point of view. Furthermore, a framework protocol may also result in the absence of standard procedure for the final users of the system.

16. To ensure the continuation of the functioning of the current guarantee chain in case of an additional eTIR protocol, it will also be necessary to revise the agreements and contracts which are concluded between the Customs authorities and the national guaranteeing associations as well as between the private players within the TIR guarantee chain (TIR operators, associations, international organizations and insurance companies), to include references to the eTIR protocol.

C. New Convention

17. The main benefit of a new Convention on eTIR is that it could be acceded to by any United Nations Member State, even if they are not Contracting Parties to the TIR Convention, 1975. As a consequence, this new Convention might have to include many of the provisions already present in the TIR Convention, such as, for example, the organization of the provision of guarantees, the responsibilities of the parties involved in the system the technical requirements for vehicles and containers as well as the administrative structure of the Convention.

18. Those countries that will be Contracting Parties to both the TIR and eTIR Conventions, will have to continue to accept paper TIR Carnets, while at the same time operating the eTIR system. In order to simplify the relations among Contracting Parties to the new Convention and also ensure that the TIR Convention will be terminated when all of its Contracting Parties ratify the new Convention, the following provision could be added:

“Upon its entry into force, this Convention shall terminate and replace, in relations between the Contracting Parties to this Convention, the TIR Convention, 1975”

19. Countries that wish to entirely abandon the paper based system have the possibility to renounce the TIR Convention once the eTIR Convention enters into force. However, in

doing so they would jeopardize the functioning of the TIR Convention for those countries that did not ratify the eTIR Convention. Therefore, to avoid this it might be necessary to include special clauses that would enable the parallel functioning of the two procedures for a yet to be defined transitional period.

IV. Other legal considerations

20. A system like the eTIR cannot be solely reliant on an international legal instrument for its implementation. It is clear that the relevant administrative and legal infrastructures should also exist in national jurisdictions. Just to give an example, it is necessary to ensure the legal status of electronic communications in terms of recognizing their validity, enforceability and admissibility as evidence in a domestic justice system for the proper attribution of administrative or criminal liability in legal proceedings dealing with fraud, unauthorized access and other related offences. The capacity to investigate and prosecute eTIR related offences is of crucial importance for the effective and efficient functioning of the eTIR system at the national level.

A. Identification of the sender and verification of the integrity electronic data interchange messages

21. Domestic legislation giving legal effect to electronic communications also has distinct security functions. For instance, it would be necessary to ensure that the initial communication entering the eTIR secure system can be verified for the identity of the sender and for the integrity of the message. This may be possible by means of an electronic signature, or by means of another authentication system, such as the various methods used for electronic banking for example.

22. E-signatures are already broadly used and regulated in a vast majority of countries. However, problems arise in relation to the use of e-signatures for cross border communications as is often the case that the certification authorities of one country are not recognized by another country. Similar to the mutual recognition of controls in the TIR Convention, the eTIR system is based on the idea of mutual recognition of authentications as well as a secure Customs-to-Custom network. Thus, the electronic signatures, or any other means of authentication, used in one country need not be recognized in other countries. Once the information enters the secure network between Customs it will be considered as reliable. Specific legal provisions will have to be included in legal text enabling eTIR.

B. Data protection considerations

23. Data protection legislation can be a major hurdle for countries that must comply with strict conditions for the transfer of personal or commercial data to and from their jurisdiction, as well as for countries that have limited or no data protection legislation in place, as the foreign information they receive will not be protected under domestic legislation. Such transfers often impose obligations that are performed through contractual requirements that restrict the use of the data to purposes that meet the requirements of the sending countries' data protection regulations. This is mostly the practice between entities subject to private law, i.e. companies engaging in international commercial transactions involving the transfer of personal data (e.g. online sales, etc.).

24. How different countries deal with issues of cross-border data protection is extremely diverse, and with the exception of the European Union, international data protection

legislation is fragmented and limited largely to bilateral agreements. As a result it is very difficult to use this kind of contractual formula across a large number of countries. It may be worth exploring the possibility of setting up a legal framework of minimum data protection standards that will be acceptable by all parties, to be applied for the e-TIR data in particular, and codified in the legal instrument selected. Furthermore, the users of the eTIR system should agree at the moment of the submission of the declaration that the information they provide to the country of departure will be forwarded to the other countries en route.

C. Central administration of the system; receiving, transmitting and storing eTIR information

25. An additional consideration in legal terms would be the establishment or procurement of the services of an entity to take the role of the “data handler”, i.e. the entity responsible for receiving, transmitting and storing the eTIR information. The use of a supra-national public body such as the United Nations for this role could be envisaged. It is also feasible to subcontract a private company. In either case, the responsibilities of this body should be codified under international law (eTIR international legal instrument, whichever selected) and under the jurisdiction in which it will be based if it is a private company. Especially in the case of a private entity, a contract will be concluded, determining its liabilities and legal consequences for a breach of contract including the possibility of accidentally or purposefully losing or destroying data or disseminating it to unauthorized recipients.

26. Further considerations would be the means for financing the operation of this entity and meeting its staffing requirements, whether public or private. It may be envisaged that there would be a 24-hour helpdesk as well as procedures for auditing the accounts. If a private company is to be subcontracted, rules for bidding and tender may be applicable. In such a case, the role of the United Nations Secretariat in these procedures should be clarified.

D. Enforceability

27. An additional element to be considered is that of enforceability. The main difference between the eTIR and the NCTS for example is that the NCTS as an EU framework is readily enforceable while the eTIR will be codified in an international agreement between countries across the world and its implementation will be heavily reliant on Contracting Parties’ good faith and their willingness to quickly and effectively implement the system.

V. Conclusions

28. In general terms, it is not necessary to strictly harmonize the national laws of different countries for the eTIR to be legally functional. At the same time, it is necessary that either adequate national laws exist or that the provisions in the international instrument deal with the above-mentioned issues. In this respect it is highly recommended that governments study their national legislative measures, so as to identify the precise nature of the law reforms that each participating country would have to undertake in order to be prepared for the legal implications of eTIR. In general terms, most countries that engage in e-Commerce practices will have already enacted some form of legislation addressing those issues – however more regulatory reforms may be required in some countries.

29. The Working Party is invited to consider and discuss the options proposed and the issues raised in the present document, and to subsequently mandate the secretariat to prepare specific proposals on one or more of the options for discussion at the next session.
