

**Economic and Social Council**Distr.: General
7 September 2015

Original: English

Economic Commission for Europe**Inland Transport Committee****Working Party on Customs Questions affecting
Transport****Group of Experts on Legal Aspects of the Computerization of the TIR Procedure****First session**

Geneva, 16–17 November 2015

Item 4 of the provisional agenda

**Legal aspects of the computerization of
the TIR procedure: current status****Considerations related to the legal aspects of the
computerization of the TIR procedure¹****I. Introduction**

1. The Group of Experts will commence its work on the basis of the preparations and preliminary considerations of the Working Party on Customs Questions affecting Transport (WP.30) (ECE/TRANS/WP.30/2014/7 and ECE/TRANS/WP.30/2014/13). Furthermore, the non-technical findings of the Informal Ad hoc Expert Group on Technical and Conceptual Aspects of Computerizing the TIR Procedure (GE.1), contained in Chapters 1 and 2 of the latest version of the eTIR Reference Model (ECE/TRANS/WP.30/2011/4/Rev.1), as well as the recommendations of GE.1 as endorsed by WP.30 (ECE/TRANS/WP.30/2015/4), will also be integrally linked to the substantive considerations of the Group of Experts.

2. As a contribution to the work, the secretariat has prepared the present background document, providing an overview of pending substantive issues, in part as discussed by the Working Party, to be considered by the Group of Experts in the development of the legal framework required for the computerization of the TIR procedure. These include, but are not limited to, questions on the organizational, financial and administrative aspects for managing the eTIR international system, as well as the incorporation of legal concepts such as – for example – the mutual recognition of authentication mechanisms, the integration of

¹ Based on the draft Protocol and provisions contained therein (ECE/TRANS/WP.30/2014/13)

the technical documents (eTIR Reference Model) into the legal framework and other related questions.

II. Background

3. At its 137th session, the Working Party considered document ECE/TRANS/WP.30/2014/7, prepared by the secretariat at the request of the Working Party at its 136th session, and containing examples of the substantive legal framework that would enable the computerization of the TIR procedure (eTIR). These examples included draft amendments to the TIR Convention as well as, alternatively, a draft Protocol. Several delegations, including Azerbaijan, the European Union, Iran (Islamic Republic of), Turkey and Ukraine, were positively inclined towards further developing an additional legal framework to the TIR Convention. The European Union (EU) further added that as concerns, in particular, the administration of the eTIR international system, the EU and its member States are in favour of the United Nations or, in any case, an independent public body being in charge of administering the international system.

4. In order to progress in developing the content and structure of the eTIR legal framework, the Working Party requested the secretariat to prepare, for its 138th session, a further elaborated example of a Protocol, and invited interested parties to send their views on and contributions to the envisaged Protocol to the secretariat, in order to facilitate the drafting of provisions that would meet a high level of acceptance (see ECE/TRANS/WP.30/274, para. 19). Further to this request, the secretariat had prepared document ECE/TRANS/WP.30/2014/13, containing, in the Annex, an example of a Protocol.

5. The draft Protocol contained example provisions on:
- (a) Scope of application;
 - (b) Definitions;
 - (c) Conceptual, functional and technical specifications;
 - (d) Administration of the eTIR international system;
 - (e) Mutual recognition of authentication mechanisms;
 - (f) Miscellaneous provisions; and
 - (g) Final clauses.

III. Pending substantive issues

A. Compatibility with national legal requirements

6. A system like eTIR cannot be solely reliant on an international legal instrument for its implementation. Clearly, the relevant administrative and legal infrastructures should also exist in national jurisdictions. As 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. Another example would be the existence of national legislation

that requires the presentation of a paper document. Such a requirement would undermine the value added of an electronic paperless system.

7. In general terms, it is not necessary to strictly harmonize the national laws of different countries for eTIR to be legally functional. But it would be, nonetheless, highly recommended that governments study their national legislative measures, so as to identify the precise nature of the law reforms, if any, that they would have to undertake in order to enable eTIR to function in harmony with their national laws. It would also be useful for the Group of Experts to collect as many of those national requirements as possible, in order to enable the design of the eTIR legal framework in a way that minimizes the necessity for national legal reforms.

8. In general terms, most countries that engage in e-commerce practices will have already enacted some form of legislation addressing these issues; however more regulatory reforms may be required in some countries.

B. Administration and financing of the eTIR international system

9. Based on the discussions of WP.30, there are Contracting Parties that wish that the eTIR international system be hosted and operated by UNECE. In line with this request, the draft Protocol, in its Article 5, provides that:

“Article 5

1. The eTIR international system shall be hosted by UNECE. Under the responsibility of the Parties to this Protocol, the UNECE secretariat shall ensure that the eTIR international system is appropriately maintained and staffed.

2. UNECE shall also provide a helpdesk to assist countries in connecting their IT systems to the eTIR international system.

3. Pursuant to paragraphs 1 and 2 of this Article, unless the eTIR international system is financed by resources of the United Nations regular budget, the required resources shall be subject to the financial rules and regulations for extra-budgetary funds and projects of the United Nations. The financing mechanism and budget for the operation of the eTIR international system at the UNECE shall be decided and approved by the Parties to this Protocol.”

10. The main consideration would be the means for financing the operation of the system and meeting its staffing requirements. The draft Protocol has left enough room for situation-based decision-making by Contracting Parties. It may be recalled that the TIR Executive Board (TIRExB) and the TIR secretariat, established pursuant to the TIR Convention, 1975 are, currently, financed by extrabudgetary resources subject to the approval of the TIR Administrative Committee (AC.2). In the present circumstances, it appears unlikely that the United Nations regular budget would be able to absorb the cost of the eTIR international system. With this in mind, the Group of Experts may wish to look into possible means and methods for funding, for the consideration of Contracting Parties. GE.1, for example, has proposed the financing of the eTIR international system through some form of contributory system per TIR transport (see ECE/TRANS/WP.30/2015/4, para. 35 (c)(ii)). The Group of Experts may also wish to determine whether the proposed provision for the draft Protocol would be sufficient or if it needs to be amended.

C. Data confidentiality considerations

11. Confidentiality means “ensuring information access only to those authorized”. The way that different countries deal with issues of cross-border data confidentiality is extremely diverse, and with few exceptions, international data confidentiality legislation is mostly fragmented and limited largely to bilateral agreements. A brief review of the international standards in this area shows four main principles:

- (a) Data should be obtained by lawful and fair means;
- (b) Data should be obtained and used with the consent of the data subject;
- (c) Storage of data should be relevant to the purposes for which they are to be used;
- (d) Data should be protected by reasonable safeguards against such risks as loss or unauthorized access, destruction, unauthorized use, modification or disclosure.

12. In the case of the eTIR international system, it should firstly be recalled that it will be receiving, transmitting and storing electronic information that would otherwise and anyway be available in paper format. The difference would be that an electronic environment could potentially pose an elevated threat of misuse or loss as well as the additional risk of hacking for example. However, the eTIR international system has been designed in such a way that the electronic information will be transmitted to each customs office along the route via the centralized eTIR international system. This dispenses with the requirement for bilateral cross-border data transfer agreements and places the burden of responsibility onto the eTIR international system which must be able to provide the required security safeguards and guarantee against unauthorized access, use, dissemination or loss of the data stored therein. Such safeguards are described in the eTIR Reference Model, while the requirement for secure exchange of information is referred to in Article 2 of the draft Protocol:

“Article 2, paragraph 2:

The term “eTIR international system” shall mean the Information and Communication Technology (ICT) system devised to enable the exchange of electronic information between the actors involved in the eTIR procedure. It allows the management by customs of data on guarantees and the secure exchange of data between national customs systems related to the international transit of goods, vehicles and/or containers according to the provisions of the TIR Convention, 1975”.

13. The draft Protocol currently also provides example provisions that cover the storage of data, and conditions under which the stored data can be used for other purposes:

“Article 6

1. Data pertaining to TIR transports carried out under the eTIR procedure for which a certificate of termination has been obtained without irregularities shall be stored in the eTIR international system for a period of 3 years.
2. Data pertaining to TIR transports carried out under the eTIR procedure for which the certificate of termination has been obtained in an improper or fraudulent manner or for which no termination has taken place, resulting in a claim for payment of import or export duties and taxes, shall be stored in the eTIR international system for a period of 5 years after the settlement of the claim has been notified to UNECE.

Article 7

1. All data stored in the eTIR international system may be used by UNECE on behalf of the competent bodies of this Protocol for the purpose of extracting aggregated statistics.
 2. The actors involved in a TIR transport carried out under the eTIR procedure which becomes the subject of administrative or legal proceedings concerning the payment obligation of the person or persons directly liable or of the guarantee chain, may request UNECE to provide information stored in the eTIR international system pertaining to the claim in dispute for verification purposes. This information may be produced as evidence in national administrative or legal proceedings.
 3. In cases other than those specified in paragraphs 1 and 2 of this Article, the dissemination or disclosure of information stored in the eTIR international system shall be prohibited.”
14. The eTIR international system is designed, in the eTIR Reference Model, to ensure secure exchange of the information necessary for carrying out TIR transports electronically. The eTIR Reference Model also includes an elaborate fall back procedure. Seeing as these elements fall under the technical aspect of the eTIR international system, reference to security and fall back procedures in the Protocol were not considered a necessity when the draft Protocol was prepared.
15. With reference to consent, the Group of Experts is invited to consider this issue in more detail and, more specifically to assess:
- (a) Whether it would be needed to specify that, upon ratification of the Protocol, each Contracting Party consents, on behalf of its operators and customs authorities, to the transmittal of the information from the customs office of departure, by the eTIR international system, to the customs offices along the route;
 - (b) Whether, alternatively, such consent should be given by each operator individually when “lodging” the information into the system prior to departure; and
 - (c) Whether accession to the Protocol would imply tacit acceptance of its functional specifications that require, principally, the electronic transmittal of information via the eTIR international system.
16. Each option would largely depend on national legislation and the assessment of Contracting Parties on practicality.

D. Identification of the holder and verification of the integrity of electronic data interchange messages

17. Domestic legislation giving legal effect to electronic communications has distinct security functions. For instance, it is necessary to ensure that the initial communication entering the eTIR international 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 other authentication mechanisms, such as the various methods used for electronic banking for example.
18. 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 it is often the case that the certification authorities of one country are not recognized by another country. By extension, such signatures are not recognized in domestic Courts as evidence, which can be a significant drawback for the eTIR

international system. Similar to the mutual recognition of controls in the TIR Convention, the eTIR international system is based on the idea of mutual recognition of authentications as well as a secure Customs-to-Customs network. Thus, the electronic signatures, or any other means of authentication, used in one country need not necessarily be recognized in other countries. Once the information enters the secure network it could be considered as reliable.

19. GE.1 did not reach an agreement on establishing a standardized electronic authentication mechanism (e.g. by means of the creation of an eTIR certification authority or by enabling the communications of existing national certification authorities). Therefore, the eTIR Reference Model proposes that, since communications between customs IT systems and the eTIR international systems will be secured (including for integrity), the authentication of the Holder, which is performed by the country receiving electronic data from the Holder, should be recognised by the other countries involved in the transport and the information considered as having been submitted from them. The draft Protocol, thus, provides a simple mutual recognition clause:

“Article 8

The Parties to this Protocol shall recognize the authentication of the holder performed by the competent authorities of the country to which the advance cargo information is submitted”.

20. The Group of Experts is invited to assess the issue of authentication and whether a mutual recognition clause would suffice.

E. Legal status of the eTIR Reference Model and amendment procedure

21. The eTIR Reference Model provides the functional and technical specifications of the eTIR international system, and as such should be given legal force as an integral part of the eTIR legal framework. However, given its nature as a lengthy and technical document, thought should be given to the best way to incorporate it into the Protocol. The secretariat has suggested, in the draft Protocol, that the eTIR Reference Model be given legal status by reference, yet remain a separate document with a separate amendment procedure. This was deemed necessary in order to have an expedient and efficient way to provide the necessary updates and adjustments to the technical specifications, as required by the rapid developments in the technological world. In this sense, the model of the EU Customs Code and its implementing provisions could be a useful guide. The current example provisions read as follows:

“Article 3

The conceptual, functional and technical specifications of the eTIR procedure are laid down in the eTIR Reference Model. The Parties to this Protocol shall apply the eTIR procedure in conformity with the specifications contained therein.

Article 4

The procedure for amending or endorsing the specifications contained in the eTIR Reference model shall be approved by the Parties to this Protocol”.

22. The Group of Experts is invited to build on Article 4, by developing a more elaborate amendment procedure. The model of amending the Annexes to the TIR Convention, 1975, could serve as a basis for a simplified amendment procedure, i.e. a procedure with a higher required number of objections for blocking entry into force, or a tacit acceptance procedure. On the other hand, while the issue of a simplified amendment formula can be addressed on the basis of multiple international examples, the main issue

appears to be the identification of the appropriate technology experts to determine the necessity for amendments. In this respect, it may be worthwhile to consider establishing an ad hoc body of technical experts, to periodically meet, review and propose the necessary technical amendments, per the example of the EU.

F. Administrative structure of the Protocol

23. The Protocol shall be governed by the Contracting Parties to it, as is required by international law and principle. Nonetheless, it would be reasonable to assume that all Contracting Parties to the TIR Convention, even those that do not immediately become Parties to the Protocol, may be interested in its status and function, in view of possibly acceding at a later stage. In that sense, it would be reasonable to envisage that the Protocol would be discussed in WP.30, alongside the TIR Convention, 1975. There would be no need to make reference to WP.30 in the Protocol.

24. The Protocol will be a separate legal instrument, in which not all TIR Contracting Parties will participate from the beginning. On the other hand, given the direct link between the two instruments, it would, likely, be counterproductive to establish a new Administrative Committee. As discussions will take place within WP.30, decisions can be taken in that forum by the Contracting Parties to the Protocol.

25. In light of the above, the Group of Experts is invited to assess the above questions and to determine whether it is necessary to include provisions establishing an administrative structure for the Protocol.

G. Provisions of the TIR Convention 1975 that may be affected

26. Article 1, paragraph 2 of the Draft protocol provides:

“The provisions herein shall apply without prejudice to applicable provisions as stipulated in the TIR Convention, 1975”.

27. The provision refers to the mutatis mutandis application of the provisions of the TIR Convention under the Protocol. The term means “application by making necessary alterations while not affecting the main point at issue”. That is to say that, for example, where a paper Carnet is mentioned it is to be understood in the equivalent context of eTIR, i.e. information as contained in the paper Carnet, transmitted electronically in accordance with the procedure established by the Protocol. For the moment it appears that there is no contradiction or conflict between the two instruments. The combination of the draft provisions of the Protocol and the mutatis mutandis application of the TIR Convention seem to form a coherent set of rules. That is not to say that it is impossible to have affected provisions, but this can only be determined in the process of further developing the eTIR legal framework and checking new provisions against those of the TIR Convention.

28. The Group of Experts is invited to continuously monitor the relationship between newly designed provisions and the TIR Convention.

H. Cooperation with other organizations

29. The Group of Experts is invited to consider which other organizations may be in a position to substantively contribute to its work, and to instruct the secretariat to extend a standing invitation to its sessions or invite them to specific sessions.

IV. Considerations by the Group of Experts

30. The Group of Experts may wish to instruct the secretariat to include these issues or a selection thereof as separate agenda items for the next session, to enable a thorough and in-depth consideration and development of the relevant legal provisions.
