

BORDER CROSSING FACILITATION

NOTE BY THE INTERNATIONAL ROAD TRANSPORT UNION (IRU) ON THE TIR CONVENTION

The ITC Bureau requested at its meeting on the 21 February 2003 (see Report TRANS/BUR.2003/1, 5(b)) IRU to prepare a note including, inter alia, information about 9 specific items. This note contains IRU's answers to the 9 questions. The note also reflects the principle of Public-Private-Partnership, which was accentuated during the discussions in the Committee and the Bureau in February.

1. A general description of the administration of the TIR carnet system.

The TIR System is devised to facilitate to the greatest possible extent the movement of goods in international trade. It enables goods to be moved by sealed trucks through border crossings without interruption at the frontiers. The TIR Convention, signed by 66 Contracting Parties, has established the only universal Customs transit system, currently in operation in 54 Contracting Parties (53 countries plus the European Economic Community).

The administration of the TIR System can in short be described as follows:

In each TIR Contracting Party, a national Guaranteeing Association is approved by national Authorities, and is a member of the international guaranteeing organisation defined in art. 6 of the TIR Convention, currently IRU.

The national Guaranteeing Associations can only issue TIR carnets to road transport operators whose access to the TIR procedure has been granted by the national Authorities, according to art. 6 and annex 9 of the TIR Convention.

The TIR carnet constitutes a transit declaration and provides Customs Authorities with the required financial guarantee, valid for several years according to the Convention, covering "*import or export duties and taxes due under Customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation*" (art. 8), if the Competent Authorities have been unable to obtain the payment from the person or persons directly liable (art. 8.7).

After the loading of the goods, the vehicle is presented to the *Customs Office of Departure*, the *Goods manifest* in the TIR carnet and the load are compared, the vehicle is *sealed* and the TIR carnet is stamped by the Customs office of Departure. At each frontier the carnet and the vehicle are presented to the *Customs Office en Route*, which stamps the carnet. At the destination the vehicle and the carnet are presented to the *Customs Office of Destination*, which after having broken the seals compares the load with the goods manifest and certifies the termination of the TIR operation by stamping the carnet, by transmitting immediately the same day the SafeTIR data (Customs Office of destination electronic confirmation of termination) through the international IT network, financed and managed by the IRU, and by registering the termination of the operation in the Customs books.

The discharge procedure is finalised by exchange and matching of the relevant pages from the carnet (volets 1 and 2).

IRU and its Member Associations

- issue carnets and archive used carnets returned via national Guaranteeing Associations
- develop, manage and maintain the electronic international network linking 53 countries, with exchange of information between national Associations, IRU and Customs Authorities (SafeTIR) and compare these data with the data given on the used TIR carnet
- investigate concrete demands for evidence to validate the termination of a carnet
- deal with the required formalities following the declaration of a Customs irregularity involving a TIR carnet presented to the national Association by the local Customs Authorities regarding its non-discharge or its termination with reservation
- establish a global guarantee with coverage of the TIR risk involved, including liability of national Associations
- develop systematic risk assessment and risk management procedures at the national and international levels, in cooperation with the Customs Authorities.

2. An assessment of the weaknesses of the TIR System.

The weaknesses of the TIR System are related partly to the Convention itself, including the lack of proper provisions in the Convention to fight against the increased activities of organised crime and partly to its implementation at national level. As long as the TIR System was only confronted with about 40 payment requests per year, as was the case until the beginning of the 1990^s, the weaknesses were not remarkable. The weaknesses described below have become alarming when the TIR System was confronted with more than 3,000 files opened per year.

2.1. Languages: The TIR Convention was originally written in the French language and is published in 3 official languages, equally authentic as prescribed in art. 46. In reality quite a few language discrepancies still exist, even on such major issues as the definition of the Guarantee. Three cases are highlighted hereafter as examples:

- a) The French words "**se porter caution**" in the definitions in art. 1(q) are translated into "**act as surety**" in English and "**в качестве гаранта**" in Russian which, translated into English, means "**in its capacity as guarantor**".
- b) In the French text of article 6 concerning "the liability of Guaranteeing Associations", the words "**se porter caution**" remain whereas, in the English text, the words "**act as surety**" are replaced by the words "**act as guarantors**" and the Russian text of the same article is "**выступать гарантами**" which, translated into English, also means "**act as guarantors**".

These above-mentioned translation errors, associated with their different legal meanings and combined with the words "**Association garante / Guaranteeing Association / Гарантийное Объединение**" - which have the same meaning in the three languages - undermine the clear legal basis provided by words "**se porter caution**" - "**act as surety**" - which have an identical meaning - contained in the French and English texts (Definitions) of article 1(q) of the TIR Convention.

- c) In art. 8, par. 1 in the original French text, the words "**conjointement et solidairement**" are used to define the liability of national Guaranteeing Associations. In the English and Russian texts, the words used are respectively "**jointly and severally**" and "**в порядке солидарной ответственности**", which only reflect the meaning of the word "**solidairement**" used in the French text.

This comparison with the English and Russian texts demonstrates that the French text "**conjointement et solidairement**" of this article is erroneous, as one is either "conjointement" or "solidairement" liable. These two words have two incompatible legal meanings.

The solution to this misleading situation consists in editing all three languages versions of the TIR Convention by integrating in a standard and consistent manner, where appropriate, in the various articles, the French and English expressions "**se porter caution**" and "**act as surety**" as defined in article 1(q) of the Convention.

- 2.2. TIR Convention revision procedures: The revision procedures described in art. 59 and 62 of the Convention foresee 2 different procedures for amending or reviewing the Convention. According to international practice purely technical changes can be adopted through an amendment procedure, as described in art. 59, whilst fundamental changes are introduced by means of a Review Conference (art. 62).

The formal procedure for fundamental changes aims at securing proper understanding and acceptance of the changes among all Contracting Parties and by that, ensuring the necessary national legal procedure for signing, ratifying and publishing an international Treaty and all its amendments. The procedure laid down in article 62 was not followed during the introduction of Phases I and II in 1999 and 2002, which resulted in a substantive and extensive revision of the TIR Convention.

- 2.3. Different Convention texts: The TIR Convention exists in 4 different versions:
- a) The 1959 Convention
 - b) The 1975 Convention
 - c) The 1975 Convention including Phase I (May 1999)
 - d) The 1975 Convention including Phase I and Phase II (May 2002).

As far as the official publication of the TIR Convention at national level is concerned, all kinds of combinations of the above-mentioned texts can be found. In a few Contracting Parties no publication of the TIR Convention has ever been made. In some other countries, only the 1975 Convention has been published. In others, only the 1975 Convention has been published, together with Phase I. Finally, according to our information, the TIR Convention with Amendment Phase II, which entered into force in May 2002, has not yet been published in numerous Contracting Parties.

- 2.4. No update to trade and criminal development since 1975: Despite the adoption, since 1975, of 22 amendments, the TIR Convention has not been adapted to take into consideration the important extension of its geographical sphere, nor the evolution of international trade and business practices, nor the imperative necessity to prevent fraud and to fight against the increasing activities of organised crime.

In contradiction to the situation in 1975, where fraud mechanisms were rather primitive, falsification of Customs stamps, seals and commercial documents has become very sophisticated. The creation of "one-day companies" with the only purpose of abusing the trade facilitation established through the TIR System is in many countries possible with only minor restrictions. The TIR Convention has not been adjusted to take this development into account.

Furthermore, the necessary introduction in the body of the TIR Convention of risk management principles, procedures and new control tools, such as SafeTIR, has up to now not been dealt with and is still under discussion, despite the numerous requests from the trade and transport sectors to deal with these questions as a priority.

- 2.5. Excessive time periods for presenting claims: The periods foreseen by the TIR Convention in Art. 11 to notify the Guaranteeing Association of an irregularity and subsequently to claim payment are far too long (up to 4 years).

These excessive periods do not encourage prompt action by Authorities to identify potential Customs irregularities and their perpetrators and to require the payment of the taxes and duties from the person(s) directly liable.

This current practice and the excessive delay allow the true perpetrators of fraud under the TIR System to reap the full profits of their illegal activities, without risk and sanction, and to disappear long before the irregularity is discovered and is dealt with by the Competent Authorities.

- 2.6. Local legislation in contradiction to the TIR Convention: The TIR Convention is a framework convention which relies, for its implementation, on national legislation, national bilateral contractual relations and national practices, which should all be compatible with the TIR Convention. It has always been generally recognised that international conventions take precedence over national law.

However in the last decade, a number of countries have joined the TIR Convention with a different understanding of the principle of giving priority to international legislation over national law, which is too often not implemented.

This has resulted in the application, at national level, of legislation in contradiction to the TIR Convention.

3. The IRU's views on the obligations of Contracting Parties and the degree of implementation of control measures.

The answer to the question is divided into obligations (3.1 and 3.2) and the degree of control measures (3.3).

- 3.1. Access and exclusion: Despite the provisions in art. 6 par. 3 and Annex 9, part II, access to the TIR System is in a number of countries still not regulated as strictly as foreseen in the Convention, and the necessary communication between various national Competent Authorities involved is not organized. Also the obligation to revoke the authorization (art. 6.4) or - temporary or permanently - exclude a company (art. 38) is applied very seldom and, in most cases, inefficiently, because it is done far too long after the Customs irregularities have been committed.

- 3.2. The liability chain: According to the Convention, art. 8.7:

"the Competent Authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the Guaranteeing Association". This means that the order of priority should be the following:

- a) the importing (or sometimes exporting) company / person,
- b) the company / person responsible for transport and Customs clearance, such as forwarding agent, logistic service provider,
- c) the company / person owning or disposing of the goods
- d) the holder of the carnet,
- e) the Guaranteeing Association, acting as surety for persons using the TIR procedure [art. 1(q)].

Wrongly, it is often considered easier to present the claim directly to the Guaranteeing Association, being only *a civil debtor acting as surety according to the Deed of Guarantee*, without any serious attempt to require payment from the first, second, third or fourth part of the chain (*the real fiscal / Customs debtors*).

- 3.3. **Risk Management:** In the daily work with the TIR operations various indications should be used systematically by the Authorities as warnings to prevent and fight fraud. The systematic and permanent observation of such signals, like suspect itineraries, repeated violations by certain companies and thefts at well-known parking areas are usually neglected.

After 8 years of implementation of the Recommendation regarding a control system for TIR carnets (called the SafeTIR Recommendation) by the Administrative Committee, only 0.4 % of termination data are transmitted within 24 hours, instead of 100%.

In addition, the Reconciliation process needed when SafeTIR data is not available or differs from the information contained on the carnet is far from satisfactory (only 9 % of requests are answered within 24 hours instead of 100%).

Despite the huge investment and human resources made available by the IRU and many of the Customs Authorities, the current situation makes the SafeTIR data of little or no value in terms of effective risk management procedures.

4. The IRU's view on the responsibility of transport companies in the TIR procedure.

The art. 1(o) of the TIR Convention defines the holder of TIR carnets. The holder is the declarant of the transit operation and is responsible for the presentation of the goods, vehicle and TIR carnet at Customs offices (Departure, en route, destination).

In case of incident, he is the legitimate contact person for Customs Authorities and should assist them to solve any problem related to a TIR operation he has carried out.

In particular he should provide all commercial documentation at his disposal to allow the proper identification of the person(s) directly liable (importer, consignor, consignees, ...) who is (are), in most cases, the real beneficiary(ies) of a fraudulent act and to allow the Authorities to collect taxes and duties from those persons.

5. A description of the TIR guarantee system at national and international level and the insurance mechanisms behind it.

The guarantee system is described in Annex 1. The Competent Authorities are usually the Customs Authorities, but in a few countries other ministries are the Competent Authorities for the TIR Convention.

The national Guaranteeing Association is usually the Road Haulage Association or, in some countries, the national Chamber of Commerce.

The main company, which has established the global guarantee with the required financial coverage, is currently Zurich Compagnie d'Assurance.

The whole functioning of the International Guarantee Chain is based, as foreseen in the TIR Convention, on the bilateral contractual or legal relations (Acte de Caution / Deed of Guarantee) which exist in each country between the Competent Authorities and the national Guaranteeing Associations. These bilateral Deeds of Guarantee are governed by national law and are, from one country to another, based on private law (civil or commercial).

The relations existing between the Association and its holders of TIR carnets are also based on bilateral contractual relations governed by the same national law.

The relations between the IRU and its TIR Associations and between the IRU and the financial companies providing the TIR global guarantee coverage are also bilateral contractual relations, but they are governed by Swiss law.

The IRU has no legal relations with national Authorities.

6. A description of steps to be taken in practice with a view to asserting a claim, including rights of contention by IRU and the function of Article 11 paragraph 3 in that context stipulating payment without defining substantive law elements.

6.1. Steps to assert a claim:

When no evidence of termination is available to Customs [volet 2 (green) not returned to allow the proper discharge of the operation],

Customs should:

- Start without delay an internal enquiry procedure including use of CUTE-Wise (IRU application allowing the Competent Authorities to consult the IRU TIR carnet database).
- Notify and request payment from person(s) directly liable, including Holders.
- Pre-notify the national Guaranteeing Association.
- On receipt of documents (copy of carnet, CMR Note, Customs confirmation of termination, invoices, ...),
close the case if satisfactory, or undertake all necessary steps to obtain payment from the person(s) directly liable and implement art. 6.4, 8.7, 38 of the TIR Convention.
- Notify the Guaranteeing Association according to art. 11 of the Convention.
- Address a payment request to the Guaranteeing Association according to art. 11 of the TIR Convention.

To assert a claim, Customs Authorities should provide the Guaranteeing Association with appropriate evidences of accomplishment of those various steps.

All correspondence is copied by the Guaranteeing Association to the IRU, which, at each step, informs the issuing Association and the insurers.

The IRU, with its Guaranteeing Association acting as surety (caution) and the Insurers, will examine each case to determine its legitimacy.

The claim will be considered as legitimate and paid by the International Guarantee Chain when Customs Authorities have undertaken all measures, in due course, to identify and collect payment from the person(s) directly liable.

6.2. Rights of contention by the IRU and function of art. 11.3:

- Any claim arising at national level has to be examined in the framework of the TIR Convention, the practice of the TIR System over 54 years, the Deed of Guarantee existing between the Guaranteeing Association acting as a surety and the Customs Authority, and the national legislation governing this Deed of Guarantee.
- Each claim is examined formally (deadline, form of the claim, amount requested, ...) and fundamentally (implementation of the provisions of the TIR Convention such as art. 6.4, 8.7, 38 and Annex 9, competence to claim, ...).

The result of the examination can lead to a contestation by the Guarantee Chain of the validity of the claim.

- Art. 11.3 of the Convention and its Explanatory Note give a 3 month-period to the Association (and the guarantee chain) to examine the claims, and potentially to pay, during which Authorities cannot undertake any legal procedure to enforce the claim.

On expiry of a 3-month period, if a contestation of the claims is lodged, the national legislation applies. However, a Guaranteeing Association has, under certain circumstances, the right to obtain reimbursement of amounts paid.

7. Information of the overall financial flows of the IRU's involvement in the TIR System (sale of TIR carnets⁽¹⁾, payment of claims, etc.), as well as the related risk exposure of the IRU, national guarantee Associations and Contracting Parties.

a) Assessment of the financial guarantee provided by the international Guarantee Chain:

Each TIR carnet issued represents a financial guarantee amounting to 50,000 US dollars, valid for several years. In 2002, more than 3 million such documents were issued.

The total number of Customs irregularities declared and still open in IRU, subject to a reconciliation request, a pre-notification, a notification or a payment request, amounts to 70,000 carnets, representing an open risk of 3.5 billion US dollars.

The following figures illustrate the situation regarding payment requests:

In the period 1995-2002, in total 7,340 files with payment requests were dealt with and terminated. Out of these 3,965 resulted in payment of Customs duties and taxes by the Guarantee Chain and 3,375 were closed by Competent Authorities after completion of appropriate procedures.

At the end of 2002, 7,984 files with payment requests were outstanding. In addition, about 1,000 alleged Customs irregularities per month are at present dealt with by the IRU and its Associations.

b) Financial flow:

The number of carnets issued⁽¹⁾ by the IRU to national Associations in the last 5 years has developed as follows:

1998	2,733,000
1999	2,344,000
2000	2,783,000
2001	2,708,000
2002	3,096,000

In 2003, the IRU expects to issue 3 million carnets. As a consequence of the EU enlargement, the number is forecast to be reduced by about 30%.

⁽¹⁾ According to the obligation set out in the TIR Convention, the IRU does not sell TIR carnets, but it issues them to TIR-approved hauliers through its National Associations network. The latter (hauliers and Associations) have the obligation to return, without delay, each TIR Carnet to the IRU, following its use, for processing, archiving and handling of claims. The IRU remains the sole owner of all TIR carnets until the end of their legal existence which can last several years.

This duration of the legal existence can exceed 30 years if the TIR carnet in question is the subject of legal proceedings before the courts, following a Customs irregularity.

Indeed, in several countries, the Customs debts are never cancelled and appeals to higher legal instances can last several decades. The oldest TIR carnets still subject to appeal date from 1971.

The price per carnet is fixed according to the number of pages with CHF 48 per carnet as an average, out of which, an incentive of around CHF 8 per carnet is reimbursed to the Associations if all rules regarding issuance and use are respected.

In total, 3 million x CHF 40 = CHF 120 million is the sum, covering printing and distribution of carnets, IRU investment and staff for TIR management and administration, including the management of the network of IRU Guaranteeing Associations in 53 countries and the development, management and maintenance costs of the international IT network permitting the daily capture and communication of all SafeTIR data to ensure its processing and redistribution in all the TIR Contracting Parties, as well as premiums for international financial guarantee coverage and the intermediary levy covering the TIRExB budget.

8. Information on what extent Contracting Parties are informed about the mentioned financial flows.

Most of the information corresponding to that quoted under 7 is made available to the UNECE Secretariat and the bodies of the TIR Convention. The information will in the future be provided more systematically.

9. Proposals for improving the system both at national and international level.

IRU has drawn up a list of short-term improvements:

1. Establishment and signature of the revised agreement between the UNECE on behalf of the Contracting Parties composing the Administrative Committee and the IRU regarding the new "responsibility for the effective organisation and functioning of an international guarantee system" (art. 6.2 bis). In order to allow the IRU to accept this responsibility as stipulated in art. 6.2 bis, the agreement must stipulate clearly the rules and obligations of the IRU, of the Contracting Parties and of the Bodies competent for the TIR Convention, involved in the TIR System.
2. Introduction of SafeTIR, with the corresponding reconciliation procedure, in the body of the Convention to ensure its full implementation in each Contracting Party.
3. Transmission daily, in real time, of all electronic data (SafeTIR) regarding the termination of each TIR carnet at each Customs office of destination in all countries using TIR.
4. Request by all the bodies of the TIR Convention to all the Contracting Parties for a reinforcement of the application of art. 8.7 and 38 and the SafeTIR data transmission, permitting a joint fight, without delay, by the Customs Authorities in co-operation with the Guaranteeing Associations and the IRU, against the currently uncontrolled activities of defrauders and organised crime.
5. Establishment in the Convention of harmonised strict criteria for authorisation of access to the TIR System, for revoking this authorisation or for exclusion from the TIR System, to achieve the harmonised application of Annex 9, art. 6.4 and 38, in all countries.
6. Co-ordination of training activities for Customs Authorities, national Associations and holders of carnets as a consequence of Public-Private Partnership.
7. Systematic and permanent Risk Assessment based on "signals in the market place" and information generated at Customs offices; exchange of information in early warning systems.
8. Actions against theft of vehicles, goods and documents in certain countries with assistance of other enforcement Authorities.

In the medium term, a Review Conference should be called in order to adapt the TIR Convention to global trade facilitation and practice, as well as to include provisions to prevent and fight against fraud and organised crime. This conference should also harmonise the different versions in one consolidated text with correct translations, and ensure the national publication of the consolidated version before a fixed deadline.

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Annex 1

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The guarantee system

