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ECONOMIC COMMISSION FOR EUROPE

Administrative Committee for the TIR Convention, 1975

Forty-ninth session
Geneva, 4 February 2010
Item 9 of the provisional agenda

BEST PRACTICES

Note by the secretariat¹

I. BACKGROUND

1. At its forty-eighth session, the Committee decided to separately consider a recommendation of TIR Executive Board (TIRExB) concerning the use of subcontractors in the framework of the TIR procedure, as laid down in para. 9 of document ECE/TRANS/WP.30/AC.2/2009/4 (ECE/TRANS/WP.30/AC.2/99, para. 9).
2. Following this request, the secretariat prepared a draft comment for consideration by the Committee. Excerpts from reports of the TIRExB and the Committee are reproduced in the Annex to this document for easy reference.

¹ The present document has been submitted after the official document deadline due to resource constraints.

II. PROPOSAL BY THE SECRETARIAT

3. The Committee is requested to bear in mind that:
- (a) the TIRExB, at its thirty-eighth session, in conclusion of extensive discussions on the subject, established that:
 - (i) in view of the absence of any legal or practical problem with regard to the use of subcontractors, it did not seem to make sense to propose changes to the TIR Convention;
 - (ii) in order to support the uninterrupted use of subcontractors in the future, it seemed appropriate to recommend that, once the Customs authorities of the country of departure have accepted a TIR Carnet from another person than the authorized TIR Carnet holder, such TIR Carnet be accepted by the Customs authorities of other countries involved in a TIR transport without further requirements (see ECE/TRANS/WP.30/2009/4, paragraph 9).
 - (b) these considerations have been confirmed by the Committee at its forty-seventh session (see ECE/TRANS/WP.30/AC.2/97, para. 8).
4. Taking account of the above, the secretariat proposes to add a comment to Article 1 (o) of the Convention to read

Use of a TIR Carnet by (an) other person(s) than the holder

Some Contracting Parties accept that, with the consent of the TIR Carnet holder, (an) other person(s) perform(s) a TIR transport or part of it by means of a TIR Carnet issued to the TIR Carnet holder. In those Contracting Parties, when the TIR Carnet is presented at the Customs office of departure by (an) other(s) than the TIR Carnet holder, the latter shall, as proof of his consent, indicate in Box 11 of the cover page of the TIR Carnet the following:

- (a) the name(s) of the person(s) performing the TIR transport or part of it;
- (b) the words “acting on behalf of”, followed by
- (c) the name of the TIR Carnet holder.

Box 12 of the cover page should bear the signature of the TIR Carnet holder.

Once the Customs office of departure has accepted the duly filled-in TIR Carnet, all other competent authorities en route and at the Customs office of destination involved in that TIR transport are recommended to accept such TIR Carnet without further requirements.

III. CONSIDERATIONS BY THE COMMITTEE

5. The Committee may wish to discuss and, possibly, adopt the above comment.

Annex

I. Excerpts from the TIR Executive Board report at its twenty-seventh session (ECE/TRANS/WP.30/AC.2/2006/5, paras 19-21)

(19.) The TIRExB welcomed Informal document No. 21 (2005)¹ prepared by the secretariat, containing an overview of modern logistical schemes in so-called intermodal transport operations² where several transport operators can take part in one delivery. The Board noted that the provisions of the TIR Convention, in particular Article 2, definitely provide for such operations, and that the use of such logistical schemes within the framework of the Convention are widely accepted in practice. The Board felt, however, that the Convention does not seem to contain adequate provisions to ensure a harmonized intermodal application of the Convention at national level.

(20.) The TIRExB noted that the holder of a TIR Carnet often outsources a part of the transport operation to another carrier who is normally referred to as "sub-contractor". In this regard, the Board decided to address the following issues:

- (a) Can the sub-contractor undertake a TIR transport under cover of a TIR Carnet issued to another person (holder)?
- (b) If yes, under which conditions (if any) may such TIR transports be undertaken? Do these conditions have to be reflected in the legal text of the TIR Convention or somewhere else?

(21.) The Board agreed that the TIR Convention should not be an obstacle for modern logistic practices and, therefore, "sub-contractor" transport operations should somehow be accommodated within the TIR procedure. However, the TIRExB was not in a position to come to a consensus on the issue. Various views were expressed, such as:

- (a) The TIR Convention recognizes the TIR Carnet holder as the only person responsible for the duly accomplishment of a TIR transport. The holder may outsource a transport operation (contract), but not his liabilities. Thus, it is at his discretion and at his own risk to find reliable sub-contractors. The Customs authorities do not need to pay attention to sub-contractors, and neither amendments, nor new Explanatory Notes/comments to the provisions of the TIR Convention are required in this respect;

¹ TIRExB Informal document, not issued as official UNECE publication;

² Intermodal transport: The movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes (see term 1.1 of the Terminology on Combined Transport prepared by the UNECE, ECMT and the European Commission (United Nations, New York and Geneva, 2001)).

- (b) While sharing the above opinion on the sole responsibility of the TIR Carnet holder, some members felt that, nevertheless, a new Explanatory Note or comment, possibly to Article 1 (o), would need to be introduced with a view to ensuring a common approach at national level;
- (c) Some other members felt that TIR transports with sub-contractors involve a higher risk of Customs fraud and, thus, these operations have to be subject to a number of requirements. The basic requirement should be the authorization for the TIR procedure of not only the TIR Carnet holder, but also of any subcontractor. The representative of the IRU mentioned that this aspect was also subject of debates within IRU's membership. Some rules had been developed by the IRU to cover cases where Carnets were issued to TIR Holders using subcontractors for TIR transports (as presented in Informal document No. 14 (2005)).

II. Excerpts from the TIR Executive Board report at its twenty-eighth session (ECE/TRANS/WP.30/AC.2/2006/16, paras 11-14)

(11.) The Board continued its discussion of the subject on the basis of Informal document No. 2 (2006)³, prepared by the secretariat. In the document, the secretariat had tried to summarize the discussion by pointing at two main approaches to address the issue of subcontractors within the framework of application of the TIR Convention, the first approach being to *de facto* accept but not to *de jure* recognize subcontractors, thus leaving all liability with the authorized TIR Carnet holder, the second being the introduction of the requirement that all subcontractors need to be authorized in accordance with the requirements of Annex 9, Part II just like any ordinary person, desiring to use the TIR system.

(12.) The Board clarified that the use of subcontractors is not only limited to the intermodal application of the TIR system. In fact, the phenomenon very often appears in the situation where a number of successive unimodal transporters are involved in one single TIR transport.

(13.) In the course of the discussion, it was pointed out that for Customs it would be convenient to be confronted with one, single Customs debtor, being the TIR Carnet holder. On the other hand, the legal provision of Article 8.7 of the TIR Convention stipulates that Customs have to require payment, so far as possible, from all persons directly liable before making a claim against the guaranteeing association. Thus, it is not possible to ignore the existence of the subcontractor.

³ TIRExB Informal document, not issued as official UNECE publication.

(14.) Taking all these aspects in consideration, the TIRExB drew the following, tentative, conclusions in anticipation of further discussions:

- (a) The use of subcontractors under the TIR procedure does not contradict, in principle, the provisions and the spirit of the TIR Convention;
- (b) In case a subcontractor actually performs a TIR transport under coverage of a TIR Carnet issued to an authorized TIR Carnet holder, his position is comparable to that of a person acting on behalf of the holder. Therefore, in case of an infringement, the subcontractor might be one of the directly liable persons, as referred to in Article 8.7, in accordance with national law;
- (c) Information on the actual subcontractor(s) should be provided in the TIR Carnet or attached to it. Certain rules should be established which would allow Customs to distinguish between the legitimate use of a subcontractor and the illegal transfer of a TIR Carnet to third parties.

III. Excerpts from the TIR Executive Board report at its twenty-ninth session (ECE/TRANS/WP.30/AC.2/2007/4, paras 10-11)

(10.) The TIRExB, having had a general exchange of views on the concept of subcontractor when finalizing the text of the report of its twenty-eighth session, considered Informal document No. 7 (2006)⁴ by the TIR secretariat, containing proposals for the introduction of the subcontractor into the TIR Convention. Some members maintained the view that subcontractors must fulfil the criteria of Annex 9, Part II, whereas others argued that the application of the TIR system would be deprived of its flexibility in case a subcontractor would de facto obtain the same status as the TIR Carnet holder himself. It was mentioned that often a subcontractor was hired to cover only a limited distance (e.g. between the port and the nearest Customs warehouse), within the territory of a single country, thus making it seem disproportionate to expect him to fulfil the criteria for authorized TIR Carnet holders. Against this background, it was argued that the relationship between the TIR Carnet holder and the subcontractor should be considered as purely private or commercial, without any transfer of financial liability taking place, as e.g. in the CMR Convention. However, at the same time, the Board recognized that it would be difficult to maintain this point of view when considering the application of Article 8.7. In case, in a given situation, the subcontractor could be identified by law as a person directly liable, it would be impossible to ignore neither his existence nor his liability.

⁴ TIRExB Informal document, not issued as official UNECE publication.

(11.) Thus, without being able to reach consensus about the de jure position, the TIRExB realized it had to address the de facto existence of the subcontractor in order to avoid that the absence of any information in the TIR Convention would be considered by Contracting Parties as a clear interdiction to allow subcontractors. For that reason, the TIRExB requested the secretariat to further elaborate its proposal for an Explanatory Note to Article 1 (o) of the Convention, for discussion at its next session.

**IV. Excerpts from the TIR Executive Board report at its thirtieth session
(ECE/TRANS/WP.30/AC.2/2007/5, paras 11-12)**

(11.) On the basis of Informal document No.12 (2006)⁵, the TIRExB considered several alternatives how the concept of subcontractor could be introduced into the text of the TIR Convention. The Board came to the conclusion that none of the proposed options would reply to three basic questions that had to be addressed in order to allow for the smooth use of subcontractors in the framework of the TIR procedure:

- (a) Does the subcontractor have to be authorized to use the TIR procedure, in line with Annex 9, part II of the Convention or not?
- (b) Will the subcontractor be considered as one of the persons directly liable, as referred to in Article 8.7, thus necessitating the Customs authorities, in case of an infringement, to claim payment from the subcontractor before making a claim against the national guaranteeing association?
- (c) In practice, how do the Customs authorities distinguish between the subcontractor and a third party to whom the holder must not transfer the TIR Carnet?

(12.) The TIRExB felt that the views of the transport industry on the matter should also be taken into account. In this respect, the IRU informed the Board of various opinions which exist among the national guaranteeing associations. While some associations believe that the use of subcontractors is an established practice and, therefore, should be reflected in the Convention, some others are of the view that there is no automatic right for subcontracting: subcontractors should be authorized according to Annex 9, part II of the Convention or, at least, should be checked by the associations. With a view to making progress on the issue, the TIRExB invited the secretariat, in cooperation with the IRU, the Board's Chairperson and the European Commission, to analyze the situation and to draft a new document for consideration at one of the future sessions of the Board.

⁵ TIRExB Informal document, not issued as official UNECE publication.

**V. Excerpts from the TIR Executive Board report at its thirty-second session
(ECE/TRANS/WP.30/AC.2/2007/7, paras 14-16)**

(14.) The TIRExB considered Informal document No. 4 (2007)⁶, in which the secretariat provided a summary of the discussions by the Board over the past two years, with a view to allowing the Board to reassess how to focus its deliberations on the issue.

(15.) The TIRExB took note that in several countries authorized TIR Carnet holders conclude agreements with subcontractors in line with national law. Depending on national law, in such situations the liability may remain with the authorized TIR Carnet holder or could be transferred to the subcontractor. Some members of the Board stated that the flexibility of the application in accordance with national law would be lost if the concept of subcontractor were formally introduced into the text of the Convention and the conditions of Annex 9, Part II applied on an equal footing to both authorized TIR Carnet holders and subcontractors. On the other hand, some members argued that, due to the introduction of the authorization process for operators, the TIR system's status had been reinforced as a reliable and secure transit system. Allowing the TIR system to be used by non-authorized subcontractors would counter all the efforts, undertaken over the last decade, to ensure the long-term sustainability of the TIR system. Elaborating on this aspect, the TIRExB considered whether it would make sense to develop a separate, less stringent, set of criteria for subcontractors. It was decided, for the time being, not to further pursue this idea, because such an additional authorization mechanism might be difficult to monitor.

(16.) To continue its deliberations on the issue, the TIRExB decided to obtain more information on the application of the concept of subcontractor at the national level, including the relevant provisions on liability. To this end, the secretariat was requested to prepare for the forthcoming session of the Board a short survey for distribution among national Customs TIR Focal points and national associations. The TIRExB requested the secretariat, when preparing the survey, to take into account a TIRExB survey of 1999, which, inter alia, provided information that 14 out of 39 responding countries allowed TIR operations to be carried out by persons other than the TIR Carnet holder (See AC.2/WP.30 Informal document No. 5 of 1999).

**VI. Excerpts from the TIR Executive Board report at its thirty-eighth session
(ECE/TRANS/WP.30/AC.2/2009/4, paras 8-9)**

(8.) The TIRExB welcomed Informal document No. 10 (2008)⁷, prepared by the secretariat, containing the outcome of the questionnaire on the use of subcontractors, as conducted by the

⁶ TIRExB Informal document, not issued as official UNECE publication;

⁷ TIRExB Informal document, not issued as official UNECE publication.

TIRExB over the summer of 2008. The TIRExB noted with satisfaction that, besides a consolidated reply on behalf of the European Community, 27 Customs administrations and 34 national associations had replied to the questionnaire. The TIRExB agreed that the replies make it clear that, whereas a majority of countries and national associations permit the use of subcontractors, a number of countries do not, mainly for legal reasons and that countries seem to be more strict in permitting subcontractors, when the TIR Carnet holder is registered in their own country, than with foreign subcontractors arriving at their external border. In general, in case of infringements, the TIR Carnet holder will be held liable, often together with the subcontractor.

(9.) In view of the fact that a majority of countries had indicated that the use of subcontractors, so far, has not led to any legal or practical problems, the TIRExB agreed that, for the time being, it did not seem to make sense to propose changes to the TIR Convention. However, in order to support the uninterrupted use of subcontractors in the future, the TIRExB decided to recommend that, once the Customs authorities in the country of departure have accepted a TIR Carnet from another person than the authorized TIR Carnet holder, such TIR Carnet be accepted by the Customs authorities of other countries involved in a TIR transport without further requirements. Finally, the TIRExB invited those countries which, so far, do not accept the use of TIR Carnets by others than authorized TIR Carnet holders, to consider if, on the basis of the outcome of the questionnaire, their national policy would benefit from a review.

VII. Experts from the report of the TIR Administrative Committee at its forty-seventh session (ECE/TRANS/WP.30/AC.2/97, para. 8)

(8.) The Committee endorsed the reports of the TIRExB at its thirty-sixth and thirty-seventh sessions, as contained in ECE/TRANS/WP.30/AC.2/2009/1 and ECE/TRANS/WP.30/2009/2 respectively. Further, it took note of the oral report by the acting TIRExB Chairman of the thirty-eighth session of the Board. The Committee also welcomed Informal document No. 4 (2009), containing an executive summary of the outcome of a questionnaire, conducted by the TIRExB, on the use of so-called subcontractors at the national level. The Committee shared the opinion of the TIRExB that, in view of the fact that a majority of countries had indicated that the use of subcontractors had not led to any legal or practical problem so far, it did not seem required to propose legal changes to the Convention.
