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Administrative Committee for the TIR Convention, 1975
(Forty-first session, 1 June 2006,
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PROPOSALS FOR AMENDMENTS TO THE CONVENTION

Amendment(s) to the Convention with regard to the financing
of the operation of the TIRExB and the TIR secretariat

Transmitted by the International Road Transport Union (IRU)*

A. INTRODUCTION AND BACKGROUND

When Phase I of the revision process entered into force in 1999 introducing, through a new Annex 8, the TIRExB and the TIR Secretariat, it appeared impossible, at least for an interim period of 2 years, to finance the operations of those bodies through the regular UN budget.

That is why the financing of the operations of the two bodies on a temporary basis was ensured by instituting “a levy” on each TIR carnet distributed by the International Organization (Annex 8, Art. 13).

The interim period lasted longer than foreseen. During the discussions in 2003 in the “Friends of the Chair”, which led to the revision of the Agreement between the UNECE and the IRU, it was recalled that the main obligation for the IRU was to transfer the yearly amount needed in advance (before 15 November), and that the IRU recovered this advance payment through an amount collected per distributed TIR carnet that differed from the levy estimated by the AC.2 in the context of the budget procedure. This information has been repeated to the AC.2 in documents

* The secretariat reproduces the document as received.

TRANS/WP.30/AC.2/2005/17 and Informal document No. 4 (2006).

Because of the legal situation described below, despite the use of the word “levy” in the TIR Convention, neither the IRU, nor its Member Associations, have ever collected a “levy”, but the IRU has recovered the advance payment made to the UN Trust Fund through an amount collected per TIR carnet distributed in the following year.

B. A “LEVY” IS A TAX

As decided by the AC.2 in February 2004 (TRANS/WP.30/AC.2/73, point 44), the UN Legal Office in New York was asked by the secretariat, on the basis of a proposal by the Chairman of WP.30 in document TRANS/WP.30/AC.2/2004/4, if a change from the word “levy” to another word such as “fee” would change the legal nature of the provision. No answer has been reported in agendas or reports from meetings of the AC.2, but it is understood that the Legal Office has answered that the word in itself or a change of the word does not impact the legal qualification; what has to be considered is the nature of what is imposed.

It is indisputable that a levy, as foreseen by Annex 8, art. 13, is a tax and/or has a fiscal nature. Several UN documents point to this and the word “levy” is sometimes even substituted by “tax”. In the French text of the Convention the word “droit” was used – a word that certainly also implies the fiscal nature. In translations to other languages the UN has also used words leaving no doubt of the fiscal nature (e.g. the TIR Handbook in German, where the word levy is translated by “Abgabe”, the Spanish translation using the word “gravamen”, the Italian translation “prelievo” and the translation to Romanian: “printr-o taxa”).

It is indisputable that a “levy”, as described in Annex 8, Art. 13, is a tax, or at least has a fiscal nature by the purpose of the funds to finance a public entity in the framework of an international “public law” convention.

C. MECHANISM TO IMPOSE / DECIDE A TAX

According to general principles of constitutional nature, the decision to impose a tax and define the persons who are in charge of its collection is of a legislative nature, meaning that at national level a law adopted by the Parliament is indispensable. In many Contracting Parties, both members and non-members of the European Union, this condition is part of the Constitution. (Example: Denmark, where the Constitution in art. 43 says: “No taxes shall be imposed, altered or repelled except by statute” and where the legal documentation contains several examples of fees and levies falling under this obligation). In other countries a “statutory law” (in French a “disposition legislative”, in German language a “Rechtsgrundlage”) would be the minimum condition for collection of a tax.

The amendments to the TIR Convention introducing Annex 8 have been adopted following the simplified procedure as described in art. 59.

In several countries, those amendments have not been subject to any approval by the Parliament.

This is confirmed in the document TRANS/WP.30/AC.2/2004/4, page 2, paragraph D:

“As has been pointed out on various occasions, the word “levy” may be understood as “tax”. In such case, its imposition would have to be based on a specific formal law (in many legal systems, such specific formal law would require explicit approval by the Parliament). It is doubtful whether in all Contracting Parties the adoption of the amendments of Phase I of the TIR revision process, containing, inter alia, the amendment of Annex 8, Article 13, has taken place in accordance with such requirement”.

In the analysis carried out at national level, it appears that, even if the amendments would have been approved by a legislative procedure before Parliament, it would still not meet the requirements of some national legal systems that would require that the tax, the debtor, its amount, its base and the Body to which the collection is delegated are clearly expressed by law.

D. INVESTIGATIONS MADE BY THE IRU

As it became clear that the unusual financial arrangement foreseen in Annex 8, art. 13 would extend for more than a short interim period and as the issue of the legal basis for the levy was, despite promises, not followed up, the IRU was asked by its member Associations through external legal advice to investigate the legal basis for a collection of a levy per TIR Carnet. The following conclusions can be quoted from the legal advice of lawyers in France, Germany and Switzerland:

France: *“Dès lors, et par application des principes généraux rappelés ci-dessus, et en l’absence d’une disposition législative appropriée remplissant les conditions rappelées ci-dessus, je vous confirme qu’une association de droit français n’est pas habilitée à facturer ni collecter une taxe ou un « droit »”* (IRU’s translation: Consequently, and by application of general principles quoted above and in the absence of appropriate legislative dispositions fulfilling the conditions mentioned above, I confirm that an association established in accordance with French law is not authorized to invoice or collect a tax or a levy).

Germany: *“Failing the existence of such a “Steuertatbestand” and a statutory authorization neither BGL nor AIST nor any legal body/state entity/entrusted organization can collect taxes. Neither does Section 28 of the Customs Administration Act contain the mandatory features/terms of such Steuertatbestand nor does it authorize the Ministry of Finance to establish such features itself in a VO. The VO as of March 9, 1999 in turn does simply transform the new article in question of Annex 8 to the TIR Convention into German law, but does not (and could not) establish any substantive law terms of its own.”*

Switzerland: *“En principe, la perception de taxes ne peut se faire que – comme d’ailleurs toutes les autres tâches exécutives de l’Etat – par l’intermédiaire d’Organes de l’Etat. Une délégation de telles tâches à des entités privées est certes possible, mais elle doit se fonder uniquement sur une base légale appropriée.”* (IRU’s translation: In principle, the collection of taxes like all other executive tasks of the State can only be made by bodies of the State. A delegation of such duties to private entities is certainly possible, but only on an appropriate legal basis).

The detailed legal advice regarding the 3 countries was transmitted to the Director of the UNECE Transport Division in September 2005. They can of course be made available to the individual delegations of each concerned country.

E. LEGAL CONSEQUENCES OF THE INTERPRETATION OF ANNEX 8, ARTICLE 13

An interpretation of Annex 8, art. 13 inferring that the amount of the levy estimated by the AC.2 in connection with the approval of the budget should be the precise amount to be collected by the IRU per TIR Carnet and consequently by the national associations, would expose the whole system to legal disputes. Such an interpretation would also, in many countries, raise questions related to applicable VAT.

The possibility that a TIR Carnet Holder would object to the levy before national Courts cannot be excluded. Who would be liable and who would defend the collection of the levy?

Notwithstanding the debate on the legal aspects, it must also be made clear that the collection of the levy is in itself incompatible with any pre-financing arrangement. If a levy were to be collected, the payment could only be transferred after, not prior to, the collection, since the IRU could in no way play the role of a bank for the Trust Fund.

F. AMENDMENT OF ANNEX 8, ARTICLE 13

An amendment of Annex 8, article 13, limiting the obligation of the international organization to transferring – until such time as alternative sources of funding are obtained - the amount decided by the AC.2 needed to finance the operations of TIRExB and the TIR Secretariat, whilst leaving the method of collection to its own discretion, would solve the legal and practical problems described above.

As the UN external auditor at the fortieth session of AC.2 made it clear that the recommendations for changes to the UNECE-IRU Agreement were directly and solely related to the income for the Trust Fund generated by the collection of the “levy”, such an amendment as well as the consecutive minor adaptation of the UNECE-IRU Agreement would meet the recommendations of the auditor and allow for an acceptable solution for all parties.
