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Best practices: Use of subcontractors

Use of subcontractors

Note by the secretariat

I. Background and mandate

1. At its fifty-third session, the Committee had a preliminary exchange of views on the issue of subcontractors, based on document ECE/TRANS/WP.30/AC.2/2010/7, prepared by the secretariat and document ECE/TRANS/WP.30/AC.2/2012/3 as well as Informal document WP.30/AC.2 No.5 (2012), submitted by the State Customs Committee of Belarus. In order to get a clear picture of all issues at stake, the Committee requested the secretariat to prepare, for consideration at its next session, a consolidated document, containing background information together with all outstanding proposals for comments to the Convention, introducing the concept of subcontractor in the framework of the Convention. Delegations were invited to discuss the various proposals and provide the secretariat with written comments, if any (ECE/TRANS/WP.30/AC.2/109, para. 33).

2. In this document, the secretariat provides succinct background information on the discussions held by the TIR Executive Board (TIRExB) and the TIR Administrative Committee (AC.2) on the issue, together with various proposals to introduce the concept of subcontractor in the framework of the Convention, for consideration by the Committee.

II. Past considerations by TIR Executive Board and AC.2 on the issue of subcontractors

3. At its twenty-seventh session, TIRExB welcomed TIRExB Informal document No. 21 (2005), prepared by the secretariat, containing an overview of modern logistical schemes in so-called intermodal transport operations 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 contain adequate provisions to ensure a harmonized intermodal application of the Convention at the national level.

4. 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 "subcontractor". Thus, the Board decided to address the following issues:

(a) Can the subcontractor 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 elsewhere?

5. The Board agreed that the TIR Convention should not be an obstacle for modern logistic practices and, therefore, "subcontractor" transport operations should somehow be accommodated within the TIR procedure. However, 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/her liabilities. Thus, it is at his/her discretion and at his/her own risk to find reliable subcontractors. The Customs authorities do not need to pay attention to subcontractors, and neither amendments, nor new Explanatory Notes/comments to the provisions of the TIR Convention are required in this respect;

(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 subcontractors 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 the 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 TIRExB Informal document No. 14 (2005)) (ECE/TRANS/WP.30/AC.2/2006/5, paras. 19–21).

6. At its twenty-eighth session, the Board continued its discussion of the subject on the basis of TIRExB Informal document No. 2 (2006), prepared by the secretariat. In the document, the secretariat had tried to summarize the discussion by pointing out two main approaches to address the issue of subcontractors within the framework of applying 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. 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.

7. 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.

8. Taking all these aspects in consideration, 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/her 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 (ECE/TRANS/WP.30/AC.2/2006/16, paras. 11–14).

9. At its twenty-ninth session, 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 TIRExB Informal document No. 7 (2006) by the TIR secretariat, containing proposals for introducing 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/her 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/her existence nor his/her liability.

10. Thus, without being able to reach consensus on the de jure position, 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, TIRExB requested the secretariat to further develop its proposal for an Explanatory Note to Article 1 (o) of the Convention, for discussion at its next session (ECE/TRANS/WP.30/AC.2/2007/4, paras. 10 and 11).

11. At its thirtieth session, TIRExB considered several alternatives on how the concept of subcontractor could be introduced into the text of the TIR Convention, on the basis of TIRExB Informal document No. 12 (2006). 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. 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 on various opinions of 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, TIRExB invited the secretariat, in cooperation with the IRU, the Board's Chair and the European Commission, to analyse the situation and to draft a new document for consideration at one of the future sessions of the Board (ECE/TRANS/WP.30/AC.2/2007/5, paras. 11 and 12).

13. At its thirty-second session, TIRExB considered TIRExB Informal document No. 4 (2007), 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. 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, 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.

14. TIRExB, continuing on the issue, decided to obtain more information on the application of the concept of subcontractor at the national level, including the relevant provisions on liability. The secretariat was requested to prepare a short survey for distribution among national Customs TIR Focal points and national associations for the forthcoming session of the Board. TIRExB requested that the survey 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) (ECE/TRANS/WP.30/AC.2/2007/7, paras. 14–16).

15. At its thirty-eighth session, TIRExB welcomed TIRExB Informal document No. 10 (2008), prepared by the secretariat, containing the outcome of the questionnaire on the use of subcontractors, as conducted by TIRExB over the summer of 2008. TIRExB noted with satisfaction that, in addition to a consolidated reply on behalf of the European Community, 27 Customs administrations and 34 national associations had replied to the questionnaire. 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.

16. 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, 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, 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, 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 (ECE/TRANS/WP.30/AC.2/2009/4, paras. 8 and 9).

17. At its forty-seventh session, AC.2 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 Chair 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 TIRExB, on the use of so-called subcontractors at the national level. The Committee shared the opinion of 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 (ECE/TRANS/WP.30/AC.2/97, para. 8).

18. At its forty-eighth session, AC.2 endorsed the reports of TIRExB on its thirty-eighth (December 2008) and thirty-ninth sessions (March 2009) as contained in documents ECE/TRANS/WP.30/AC.2/2009/4 and ECE/TRANS/WP.30/AC.2/2009/5, respectively. At the proposal of the European Community, the Committee decided to separately consider, at its next session, a recommendation of 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, paras. 8 and 9).

19. At its forty-ninth session, AC.2 extensively discussed document ECE/TRANS/WP.30/AC.2/2010/7, containing a proposal by the secretariat for the introduction of a new comment to Article 1 (o) of the Convention and addressing the use of the TIR Carnet by other persons than the TIR Carnet holder, the so-called "subcontractors". Several delegations felt that it was premature to agree on the wording of a comment or any other format as long as the aspect of liability of the TIR Carnet holder or the subcontractor had not been duly addressed and settled. Other delegations pointed out that for many years TIR Carnet holders had made use of subcontractors to fulfil their commercial obligations with the full knowledge that this does not affect the liability of the TIR Carnet holder as set out in the provisions of the TIR Convention. In the absence of consensus, the Committee decided to revert to the issue at its next session. In the meantime, Contracting Parties were requested to carefully consider the proposal at national level and to submit any concerns in writing to the secretariat which would take care of their dissemination among all Contracting Parties. In order to facilitate future discussions, the Committee also requested the secretariat to reproduce Informal document No.4 (2009) from its forty-seventh session, containing the summary outcome of a TIRExB survey on the use of subcontractors at the national level, as an official document for consideration at its next session (ECE/TRANS/WP.30/AC.2/101, para. 30).

20. At its fifty-second session, AC.2 considered document ECE/TRANS/WP.30/AC.2/2010/7, prepared by the secretariat and containing the findings of TIRExB on the issue of subcontractors, formulated after extensive discussions, together

with a proposal for a new comment to Article 1 (o). The Committee also took note of Informal document WP.30/AC.2 No. 9 (2010), transmitted by the State Customs Committee of the Republic of Belarus, introducing various reservations on introducing the draft comment. Due to time constraints, the Committee decided to revert to this issue at its next session. In order to facilitate due preparation by delegations, the Committee requested the secretariat to submit Informal document WP.30/AC.2 No. 9 (2010) as an official document for consideration (ECE/TRANS/WP.30/AC.2/107, para. 34).

21. At its fifty-third session, the Committee had a preliminary exchange of views on the issue of subcontractors, based on document ECE/TRANS/WP.30/AC.2/2010/7, prepared by the secretariat and document ECE/TRANS/WP.30/AC.2/2012/3 as well as Informal document WP.30/AC.2 No.5 (2012), submitted by the State Customs Committee of Belarus. In order to get a clear picture of all issues at stake, the Committee requested the secretariat to prepare, for consideration at its next session, a consolidated document, containing background information together with all outstanding proposals for comments to the Convention, introducing the concept of subcontractor in the framework of the Convention. Delegations were invited to discuss the various proposals and provide the secretariat with written comments, if any (ECE/TRANS/WP.30/AC.2/109, para. 33).

III. Proposal by the secretariat

22. In view of the absence of any legal or practical problem with regard to the use of subcontractors and in order to support the uninterrupted use of subcontractors, the secretariat proposes to add a new comment to Article 1 (o) of the Convention to read:

“Comment to Article 1 (o)

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 holder, the latter shall, as proof of his or her 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 (See ECE/TRANS/WP.30/AC.2/2010/7, paras. 3 and 4).”

IV. Proposal by Belarus

23. The aim of the Belarus proposal is to cover the consecutive use of the TIR Carnet when it is known that the transport will be made by several holders. In addition, this proposal covers the situation when the need for other TIR Carnet holders occurs during transport.

“Comment to Article 1 (o)

Successive use of a TIR Carnet by several holders within one TIR transport:

It is allowed to successively use a TIR Carnet by several TIR Carnet holders within one transport. In such cases a guaranteeing association, issuing the TIR Carnet, indicates on the cover page of the TIR Carnet the following:

- (a) In Box 3: the name of the first TIR Carnet holder;
- (b) In Box 11: the name of the successive TIR Carnet holder. The information specified in Box 11 shall be certified in the manner provided for Box 4 of the cover page of the TIR Carnet;
- (c) In Box 12: signature of the first TIR Carnet holder.

When the need for the use of the successive holder(s) arises in the course of a TIR transport, the first holder of the TIR Carnet must provide the Customs authorities en route with a written confirmation of the possibility of the successive holder(s), issued by the guaranteeing association of the Contracting Party on which territory the TIR transport will be continued by the successive holder(s) and the Customs authorities of which will open the corresponding TIR operation. Here, the first holder must fill in Boxes 3 and 11 of the cover page of the TIR Carnet in the manner specified in the first part of the comment and make changes in the relevant boxes of vouchers No. 1 a 2 of the TIR Carnet and certify the records by his or her signature. In this case, the above-mentioned written confirmation issued by the guaranteeing association (or its copy) must accompany the TIR Carnet.

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 transport accept such TIR Carnet from persons specified as the TIR Carnet holders without further requirements.

In case of violation of the TIR procedure and the necessity of applying the provisions of the TIR Convention concerning the obligations to pay import or export Customs duties and charges, including the application of Article 38 of the TIR Convention, the first and successive holder(s) bear the same responsibility as defined by the TIR Convention (Informal document WP.30/AC.2/ No. 5 (2012)).”

V. Considerations by the Committee

24. The Committee is invited to discuss both proposals against the background information, elaborating previous considerations by TIRExB and the Committee on the issue of the use of subcontractors in the TIR procedure.
