



**ADMINISTRATIVE COMMITTEE
FOR THE TIR CONVENTION, 1975**

TIR Executive Board (TIRExB)

(Twenty-sixth session, 17 and 18 May 2005,
agenda item 6 (b))

PREVENTION OF CUSTOMS FRAUD WITHIN THE TIR SYSTEM

Harmonized application of Article 38 of the TIR Convention

Note by the secretariat, in cooperation with the IRU

A. BACKGROUND

1. The Board, at its twenty-fifth session, discussed document TRANS/WP.30/2005/9 by Turkey on a harmonized application of Article 38 of the TIR Convention. The Board felt that this issue should be split in two separate items:

- legal interpretation/definition of "serious offence against Customs laws or regulations" (Article 38.1);
- exchange of information regarding an exclusion of a transport operator from the TIR procedure (Article 38.2);

2. With regard to the first item, the TIRExB was of the view that, due to considerable differences in national legislations, it would be quite difficult to come to a common understanding of "serious offence against Customs laws or regulations", as it has not even been feasible in the European Union whose Member States have reached a very high degree of harmonization of national legislations. Concerning the second item, the TIRExB shared the concern of Turkey that more transparency on practical procedures in case of exclusions should be provided. To this end, the Board requested the secretariat to prepare a recommendation or example of best practice, addressing such issues as:

- notification to the transport operator being excluded;

- a minimum number of details which communications regarding the exclusion should contain, like its motivation, details of the infringement, if the exclusion is temporary or permanent, etc.;
- means of appeal (TIRExB/REP/2005/25draft, paras.19-21).

B. GENERAL CONSIDERATIONS ON THE APPLICATION OF ARTICLE 38

3. Chapter IV "Irregularities" of the TIR Convention contains references to national legislation of the Contracting Parties. In particular, in accordance with Article 36, *"any breach of the provisions of this Convention shall render the offender liable, in the country where the offence was committed, to the penalties prescribed by the law of that country"*. Article 38 constitutes in itself a framework provision which also relies on national legislation for practical implementation. For example, the gravity of an infringement ("serious offence against Customs laws or regulations applicable to the international transport of goods ") should be determined within national law.

4. It seems that an exclusion of a person from the TIR procedure is usually based on a decision taken in line with administrative law. As any administrative decision, it may be contested by the person being excluded, in accordance with the applicable national regulations. Information on the possible appeal procedures should be delivered by the competent authorities to the person concerned.

5. In general, Article 38 should be considered as a tool to protect and prevent the TIR procedure from abuses, rather than as an automatic mechanism of sanction in any circumstances. The application of Article 38 should be justified by the gravity of the infringement.

6. Article 38 is closely linked to the provisions of Article 6 and of Annex 9, part II which govern the procedure of access of physical and legal persons to the TIR procedure. This relation is highlighted by two comments to Article 38 "Cooperation between competent authorities" and "Exclusion of a domestic transport operator from the TIR procedure".

7. The following actors are mentioned in Article 38:

- the competent authorities of the Contracting Party where the offence has been committed and where Article 38.1 is implemented;
- the person being excluded;
- the competent authorities of the Contracting Party on whose territory the excluded person is established or resident;
- the association(s) in the country where the offence has been committed;

- the TIR Executive Board.

In addition, the national association of the Contracting Party where the excluded person is established or resident and the IRU are involved in the implementation of Article 38, although not mentioned explicitly in the text.

8. Because of the participation of various actors, the close cooperation among them is indispensable for the smooth application of Article 38. Such cooperation should be based on two major elements:

- duly fulfilment by the actors involved of their respective functions;
- a fast and transparent exchange of information.

A first draft example of best practices in this respect is given below*.

C. PROPOSED EXAMPLE OF BEST PRACTICE

9. The Customs authorities of the Contracting Party where an infringement of the TIR Convention has been committed should consider, in line with national legislation, whether this infringement constitutes "a serious offence against Customs laws or regulations applicable to the international transport of goods" and whether the TIR Carnet holder should be excluded from the TIR procedure according to Article 38.1.

10. If a decision is taken to implement Article 38.1, it should be set out in the form of an official document containing, at least, the following details:

- Date and place of the document's drawing up;
- Name and official address of the competent authority;
- Name, address, country and ID-number of the person being excluded;
- TIR Carnet reference number;
- Registration No(s) of road vehicle(s) (if applicable);
- Identification No(s) of container(s) (if applicable);
- Description of goods;
- Date and place of the infringement;

* According to the comment "Exclusion of a domestic transport operator from the TIR procedure", Article 38.1 should be applicable against foreign transport operators only. The proposed example of best practice addresses such a situation.

- Full description of the infringement;
- Motivation for the application of Article 38.1;
- Type of the exclusion (temporary or permanent) and the date of its entry into force;
- Duration of the exclusion (for temporary exclusions only);
- Information on possible appeal procedures (deadline, appeal bodies, etc.).

Where possible, a copy of the TIR Carnet should be attached to the decision.

11. As soon as the decision has been drawn up, it should be notified to the person being excluded by the fastest available means of communication (fax, electronic mail, etc.). Within one week, a certified copy of the decision should also be forwarded by registered mail to the person being excluded or should be handed over to his legal representative against signature on receipt.

12. Within one week, copies of the decision should also be transmitted, by the fastest available means of communication (fax, electronic mail, etc.), to the Customs authorities of the Contracting Party on whose territory the person concerned is established or resident, to the association(s) in the country or Customs territory where the offence has been committed and to the TIR Executive Board. If the exclusion is made in an EU country, copies of the decision should also be sent to all EU Member States and the European Commission.

13. Upon receipt of information on the exclusion, the competent authorities of the Contracting Party on whose territory the person concerned is established or resident and the association(s) in the country or Customs territory where the offence has been committed should inform, without delay, the association of the Contracting Party where the excluded person is established or resident.

14. In case of any changes in the status of the original exclusion (e.g., cancellation or suspension, etc.), the Customs authorities, which have excluded the person, should keep the addressees mentioned in paras. 11 and 12 above informed of these changes.

15. The Customs authorities of the Contracting Party on whose territory the excluded person is established or resident should consider, in cooperation with the national association of that country, whether the committed infringement can affect the minimum conditions and criteria set out in Annex 9, part II, that this person has to meet in order to have access to the TIR procedure. If the person no longer fulfils these requirements, his authorization should be withdrawn. Such a withdrawal should be reported within one week to the TIR Executive Board. It is also recommended to inform the Customs authorities which have made the exclusion.

16. If the Customs authorities of the Contracting Party on whose territory the excluded person is established or resident decide to withdraw his authorization according to para.15 above, they should without delay send to the national association of that country a written notification of the withdrawal. The association has to stop issuing TIR Carnets to this holder, request him to return all TIR Carnets he may have in stock and freeze all his financial guarantees, in compliance with the declaration of engagement/commitment signed by the holder and internal rules of the association. If the holder refuses to return the TIR Carnets he has in stock, the association may, through the IRU, request Customs authorities of all Contracting Parties not to accept and detain these TIR Carnets.

17. If the decision on withdrawal of authorization is not yet taken by the Customs authorities of the Contracting Party on whose territory the excluded person is established or resident, the issuing association should, nevertheless, assess the reliability of the holder and may impose on him some sanctions in compliance with the association's internal rules, for example, suspend issuance of TIR Carnets.
