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Best practices: application of Article 38

Application of Article 38

Note by the TIR secretariat

Summary

TIRExB adopted a revised text of the existing Example of best practice on the application of Article 38, as contained in Chapter 5.8 of the TIR Handbook, and requested the secretariat to transmit the revised example of best practice to the TIR Administrative Committee (AC.2) for consideration and endorsement (Informal document TIRExB/REP/2012/50draft, paras. 16 and 17).

Examples of best practices are included in the TIR Handbook to facilitate the application of the Convention in countries that have newly acceded to the Convention and/or in which TIR operations can be newly undertaken.

I. Background

1. Further to issues raised by the Turkish Customs authorities on the application of Article 38 of the Convention, TIRExB, at its fiftieth session, adopted a revised text of the existing Example of best practice on the application of Article 38, as contained in Chapter 5.8 of the TIR Handbook. TIRExB requested the secretariat to transmit the revised example of best practice to the TIR Administrative Committee (AC.2) for consideration and endorsement (Informal document TIRExB/REP/2012/50draft, paras. 16 and 17).
2. The updated text of Chapter 5.8. of the TIR Handbook is contained in the annex to this document. For the sake of clarification, amendments to the existing text are presented in **bold underlined**, deletions are in ~~strike through~~.

Annex

For the existing text of Chapter 5.8. of the TIR Handbook read

“5.8 Example of best practice with regard to the application of Article 38

A. Introductory remarks

1. 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, national law determines:

- gravity of an infringement ("serious offence against Customs laws or regulations applicable to the international transport of goods");
- date when the exclusion according to Article 38 comes into force;
- appeal procedures and possible suspension of the exclusion in the course of appeal.

2. 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 according to the gravity of the infringement.

3. 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".

4. Apart from the person being excluded, 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 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 is involved in the implementation of Article 38, although not mentioned explicitly in the text.

5. The application of Article 38 is limited to the exclusion of TIR Carnet holders.

~~6~~5. Because of the involvement of various actors, the close cooperation between them is indispensable for the smooth application of Article 38. Such cooperation should be based on two major elements:

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

An example of best practices in this respect is given below¹

B. Example of best practice

76. The competent authorities of the Contracting Party where an infringement **against the Customs laws or regulations applicable to the international transport of goods (including but not limited to, of the TIR Convention)** was 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.

87. If a decision is taken to implement Article 38.1, the person being excluded should be informed without delay. Such information should preferably be made in any of the three official languages of the TIR Convention (English, French or Russian) and should contain at least the following particulars:²

- Date and place of issuance of the document;
- Name and official address of the competent authority;
- Name, address, country and ID-number of the person being excluded;
- TIR Carnet reference number (if applicable);
- Registration No(s) of road vehicle(s) (if applicable);
- Identification No(s) of container(s) (if applicable);
- Description of the goods (according to the goods manifest) (if applicable);
- Date and place of the infringement;
- Detailed description of the infringement;
- Reasons 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, possible suspension of the exclusion in case of appeal, etc.).

Where applicable, a copy of the TIR Carnet should be attached.

98. The information should be transmitted to the excluded person by the fastest available means of communication (fax, electronic mail, etc.). Within one week, *where provided for in national legislation*, this information should also be forwarded by registered

¹ According to the comment "Exclusion of a domestic transport operator from the TIR procedure", the Customs authorities are recommended to use the provisions of Article 38.1 against foreign transport operators guilty of a serious offence of the Customs laws. The proposed example of best practice addresses such a situation.

² A specimen of information is given in the appendix to the present document. If a language other than the three official languages of the Convention is used to fill-in the form, at least the titles of the boxes should also be given in English, French or Russian.

mail to the person being excluded or should be handed over to his legal representative against signature on receipt.

109. Within one week, the same information should also be transmitted by the fastest available means of communication (fax, electronic mail, etc.) to the competent 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, to the TIR Executive Board and, as far as possible, to the association of the Contracting Party where the excluded person is established or resident (issuing association).

110. In case of any changes in the status of the original exclusion (e.g., cancellation or suspension, etc.), the competent authorities, which have excluded the person, should keep the addressees mentioned in paras. **9 and 10** and ~~9~~ above informed of these changes.

121. The competent authorities of the Contracting Party on whose territory the excluded person is established or resident should consider whether the committed infringement can affect the minimum conditions and criteria set out in Annex 9, Part II, that persons have to meet in order to have access to the TIR procedure. If the person concerned 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 competent authorities which have issued the exclusion.

132. Irrespective of the possible decision on withdrawal of authorization by the competent authorities of the Contracting Party on whose territory the person concerned is established or resident, the issuing association should assess the reliability of the holder and may impose on him some **restrictions or** sanctions in compliance with the association's internal rules, for example, suspend the issuance of TIR Carnets.

APPENDIX³**INFORMATION OF EXCLUSION FROM THE TIR PROCEDURE****(in accordance with Article 38, para.1 of the TIR Convention)**

To:

(name, address, country and ID-number of the person being excluded)

This is to notify that you have been excluded from the TIR procedure on the territory of _____
(name of the country)

This exclusion comes into force on _____ (date)

and is permanent temporary until _____ (date)Appeal against the exclusion can be launched with _____
(name of appeal body)

Within _____ (deadline for appeal in accordance with national legislation).

The exclusion has been a result of the infringement whose details are given below:

TIR Carnet reference number (if applicable)

Registration No(s) of road vehicle(s) (if applicable)

Identification No(s) of container(s) (if applicable)

Description of goods (according to the goods manifest) (if applicable)

Date and place of the infringement

Description of the infringement:

Reasons for the application of Article 38.1:

Attachments (if any)

Name and official address of the competent authority:

Date and place

Signature

Stamp (if applicable)

³ No changes to appendix.