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**ECONOMIC COMMISSION FOR EUROPE**

**INLAND TRANSPORT COMMITTEE**

**Working Party on Customs Questions Affecting Transport**

One-hundred-and-fourteenth session  
Geneva, 25-29 September 2006  
Agenda item 9 (b) (ii)

Administrative Committee for the TIR Convention, 1975

Forty-second session  
Geneva, 28 September 2006  
Agenda item 3 (a) (i)

**CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS UNDER  
COVER OF TIR CARNETS (TIR CONVENTION, 1975)**

**Application of Article 38 of the Convention**

Note by the secretariat\*

1. At its one-hundred-and-eighth session, the Working Party, at a request of the delegation of Turkey, undertook an in-depth discussion of the application of Article 38 and, in particular, the recent deletion of Explanatory Note 0.38.1. The Working Party recognized that it could be useful to elaborate some guidelines concerning the application of Article 38 with a view to aligning the application of the article at national level. In this context, the Working Party took

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\* The UNECE Transport Division has submitted the present document after the official documentation deadline.

note of a study of the TIRExB concerning the application of Annex 9 to the Convention. In this context, the TIRExB had decided to deal with the issue of exclusions according to both Annex 9 and Article 38 and to develop some guidelines for a harmonized approach in relation to exclusions. In this context, the Turkish delegation was invited to submit its observations for consideration by the TIRExB as well as by the Working Party (TRANS/WP.30/216, paras.28-32).

2. At its one-hundred-and-ninth session, the Working Party took note of the position of the TIRExB on this matter, that (1) Article 38 plays an important role for the sustainability of the Convention as a counterbalance to the rules of access to the Convention, (2) with regard to the reasons for exclusions according to Article 38, this is a matter of national competency according to national legislation and (3) with regard to the procedural aspects of exclusions according to Article 38 there seems to be some room for improvement with a view to creating transparency concerning the decisions for exclusions as well as establishing a harmonized approach to the communication procedures for exclusions. In relation to the latter, the Working Party was of the view that issues such as a detailed reasoning for exclusions, the permanent or temporary nature of exclusions as well as appeal possibilities should be included in the communication from Customs authorities. The Working Party recommended that the TIRExB continue its work on this issue with a view to developing a set of guidelines for the communication of exclusions according to Article 38 (TRANS/WP.30/218, paras.27-29).

3. At its one-hundred-and-tenth session, the Working Party was informed by Mrs. N. Rybkina, Chairperson of the TIRExB, TIRExB had considered the issue and confirmed the view of the Working Party that the question concerning reasons for exclusions according to Article 38 is a matter of national competency and that the TIRExB was in the process of developing a best practice for communicating exclusions according to Article 38. Once the best practice has been finalized by the TIRExB, it will be transmitted to the Working Party for consideration (TRANS/WP.30/220, para.28).

4. In January 2006, the TIRExB finalized the underlying example of best practice which is reproduced in the annex. The Working Party may wish to comment on the example with a view to submitting it to the TIR Administrative Committee for adoption.

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Annex

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. 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:

- duly 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 below<sup>1</sup>.

## **B. EXAMPLE OF BEST PRACTICE**

6. The competent authorities of the Contracting Party where an infringement 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.

7. If a decision is taken to implement Article 38.1, the person being excluded should be informed without delay. Such information should 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<sup>2</sup>:

- 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;
- Registration No(s) of road vehicle(s) (if applicable);
- Identification No(s) of container(s) (if applicable);
- Description of the goods;
- 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);

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<sup>1</sup> 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.

<sup>2</sup> A specimen of information is given in the appendix.

- Information on possible appeal procedures (deadline, appeal bodies, possible suspension of the exclusion in case of appeal, etc.).

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

8. The information should be transmitted to the excluded person by the fastest available means of communication (fax, electronic mail, etc.). Within one week, this information 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.
9. 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).
10. 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 above informed of these changes.
11. 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.
12. 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 sanctions in compliance with the association's internal rules, for example, suspend the issuance of TIR Carnets.

APPENDIX

**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)

before \_\_\_\_\_ (deadline for appeal, if any) possibly, by registered mail

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

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

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)