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**ECONOMIC COMMISSION FOR EUROPE**

INLAND TRANSPORT COMMITTEE

Working Party on Customs Questions affecting Transport

(One-hundred-and-ninth session, 31 January – 4 February 2005,  
agenda item 7 (b) (i))

**REVISION OF THE TIR CONVENTION  
IMPLEMENTATION OF PHASES I AND II OF THE TIR REVISION PROCESS  
AND EXAMPLES OF BEST PRACTICES**

**Submitted by the Government of Turkey**\*

**GUIDE FOR THE EXCLUSIONS ACCORDING TO ARTICLE 38 OF THE TIR  
CONVENTION**

**A. INTRODUCTION AND BACKGROUND**

1. It is well known that the deletion of Explanatory Note 0.38.1 of the TIR Convention was discussed during the meetings of the Working Group on Customs Questions affecting Transport (WP.30) and the TIR Administrative Committee on the grounds that the note in question was being used as a negative argument against Customs with the claim that drivers' faults were the cause for breaches of the Convention where transport operators were involved. In spite of some possible negative effects touched upon by the Turkish delegation, the Convention was amended and the Explanatory Note was deleted.

2. In the meantime, several decisions on the exclusion of Turkish transporters have rendered

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\* The present document has been submitted after the official documentation deadline by the Transport Division due to resource constraints.

it necessary to make an assessment of those decisions, and it has been deemed appropriate that the following explanation and procedure be taken into consideration for the preparation of a Guide for the uniform application of the said amendment by all Contracting Parties and thus for the prevention of possible abuses.

## **B. DECISION MAKING PROCEDURE**

### **Article 38, paragraph 1**

“Each of the Contracting Parties shall have the right to exclude temporarily or permanently from the operation of this Convention any person guilty of a serious offence against the Customs laws or regulations applicable to the international transport of goods.”

### **The deleted Explanatory Note to Article 38, paragraph 1**

“A business enterprise should not be excluded from the TIR system because of offences committed by one of its drivers without the knowledge of the management.”

3. On the basis of Article 38, paragraph 1, it is obvious that first of all the driver possessing the vehicle, the TIR Carnet and goods shall be kept liable for violating the TIR Convention. Furthermore, by the deletion of the Explanatory Note to Article 38, paragraph 1, the liability may be extended to the transport operator. Certain rules shall be required for the extension of such a liability to the operator without neglecting the principle of personal criminal responsibility. In case the operator is punished for the offence without considering a legal procedure, the principle of personal criminal responsibility shall be violated. Bearing this in mind, the Turkish Customs Administration is of the view that Customs administrations should take the decision with regard to the temporary or permanent exclusion from the TIR system under Article 38, paragraph 1 through the implementation of the following procedure.

4. First of all, it is imperative that the offence under Article 38 be defined. To this end, turkey considers that it would be more suitable that the “serious offence against the Customs laws or regulations applicable to the international transport of goods” that may be committed in the course of the TIR transport should be subdivided into two separate categories, as “Customs Smuggling” and “Customs Fraud”, in compliance with the classification and explanations referred to in Article 1 (b), (c) and (d) of the Nairobi Convention of the World Customs Organization. In this context, it would also be appropriate if two separate procedures were implemented accordingly.

#### **(a) Customs Smuggling**

5. “The following shall be deemed as Customs smuggling:

- smuggling of drugs and raw materials thereof,
- offences where residues harmful to the environment and human health are involved,
- smuggling of arms and ammunitions.

Any violation except the above shall be taken as “Customs fraud”.

6. Establishing a serious offence regarding the TIR Carnet shall not be adequate for extending this offence to the operator. In this regard, the operator should not be kept liable for the offence without its fault, heavy fault or intentional act concerning that offence. Provided that it proves the relevant connections, the Customs administration may take the decision for temporary suspension with regard to the operator benefiting from the TIR system. Such a decision shall be notified (including reasons) to the operator within 2 months.

7. The operator shall have the right to appeal to the court within 2 months following the notification of the decision. In case the operator does not appeal to the court, the decision of the Customs administration shall be final, and thus the operator shall be permanently excluded from the TIR system.

8. In case the operator appeals to the court, the decision of the court shall prevail. Where the court judges that the decision of the Customs administration is compliant with the Convention and domestic legislation, the operator shall be permanently excluded from the TIR system. Where the decision of the Customs administration is not deemed appropriate, the decision for “temporary suspension” shall be revoked, and the operator shall continue to benefit from the TIR system.

**(b) Customs Fraud**

9. The following procedure shall apply to the serious offences which are not covered by the above-mentioned smuggling offences, and which may be committed by individuals by evading, wholly or partly, the payment of import or export duties and taxes or the application of prohibitions or restrictions laid down by Customs law or by obtaining any advantage contrary to Customs law.

10. Following the proof of fault, heavy fault or intentional act committed by the operator, the Customs administration shall notify the operator accordingly. The operator should submit its defence at the Customs administration within 1 month after the pre-notification by the Customs administration.

11. Where necessary, the Customs administration shall appeal to the court for the exclusion of the operator from the TIR system in considering the defence of the operator, and shall act in accordance with the decision of the court.

12. The operator shall continue to benefit from the TIR system unless a court decision is taken regarding the offence.

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Annex

**EXCLUSIONS UNDER ARTICLE 38**

**CUSTOMS SMUGGLING**

- Smuggling of drugs and raw materials thereof
- Offences where residues harmful to the environment and human health are involved
- Smuggling of arms and ammunitions

- ↓
- Fault
  - Heavy Fault
  - Intentional Act

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Customs Decision on temporary suspension  
(Notification -including the reasons- to the Operator)

↙ ↘

Operators appeal  
to the court

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Operator does not appeal  
to the court

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Approval of the  
Customs Decision

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Annulment of the  
Customs Decision

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**Operator's permanent  
exclusion from  
the system**

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**Operator continues to benefit from the system**

**CUSTOMS FRAUD**

- Fault
- Heavy Fault
- Intentional Act

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Customs' pre-notification to the Operator  
(including the reasons)

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Operator submits its defence to Customs

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**Customs appeal to the court  
and further actions in accordance  
with the court's decision**

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