

Technical note on the WTO Trade Facilitation Agreement

Article 2.1: Opportunity to comment and information before entry into force

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CHAPTER 2 CONSULTATIONS, AND ENTRY INTO FORCE

Opportunity to comment and information before entry into force: Article 2.1

When introducing or amending trade-related laws and regulations, very often legislators do not consult with traders to understand their views and problems.

As a result, traders and other stakeholders are neither informed nor they are given the opportunity to comment on new or amended rules which will affect their business operations.

Enabling traders to provide inputs at an early stage of the legal process and to access information on legislative proposals prior to the entry into force is crucial for tackling the challenges and constraints faced by traders.

Members must make publicly available new or amended trade-related laws or regulations and provide interested stakeholders opportunity to comment well before entry into force.

The measure

<p>ARTICLE 2 OPPORTUNITY TO COMMENT, INFORMATION BEFORE ENTRY INTO FORCE AND CONSULTATION</p> <p>1 Opportunity to Comment and Information before Entry into Force</p> <p>1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit.</p> <p>1.2 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit, are published or information on them made otherwise publicly available, as early as possible before their entry into force, in order to enable traders and other interested parties to become acquainted with them.</p> <p>1.3 Changes to duty rates or tariff rates, measures that have a relieving effect, measures the effectiveness of which would be undermined as a result of compliance with paragraphs 1.1 or 1.2, measures applied in urgent circumstances, or minor changes to domestic law and legal system are each excluded from paragraphs 1.1 and 1.2.</p>

Understanding the measure

What is covered?

Scope and objective

The measure applies to rules enacted by national legislative bodies (laws enacted by parliaments) as well as to secondary legal acts (regulations, rules, orders, etc.) issued by executive or administrative bodies.²

The measure does not specify which agency should issue the legal instruments thus they can be issued by any border or regulatory agency involved in the movement, release and clearance of goods, including

² <http://www.tfafacility.org/article-2>

customs, sanitary and phytosanitary authorities, among others. The only requirement is that such laws and regulations should be of general application.

Thus, relevant stakeholders will have the opportunity to comment on the following legislative proposals before entry into force:

- 1) New laws and regulations related to movement, clearance and release of import, export and transit goods;
- 2) Amendments to such laws and regulations.

Core obligation

Article 2.1 requires WTO Members to grant traders and other interested parties reasonable and adequate time to provide comments on new or amended trade legislation. In addition, Members are requested to publish the new and amended laws and regulations or to make information about them publicly available, as early as possible before these laws and regulations enter into force.

The use of the word 'shall' in each provision indicates that the implementation is mandatory for all Members. However, the addition of the double qualification, 'to the extent practicable' and 'in a manner consistent with its domestic law and legal system' grants flexibility in implementation.

Exemptions

Article 2.1 lists some items which are exempted from prior publication and discussion before the entry into force. The first exemption is changes to duty rates or tariff rates. This discourages rent-seeking behaviours of traders arising from the advantage of having prior knowledge and may lead to adverse impacts on the economy. For example, traders – knowing of an intended reduction in duty or tariff rates – may prefer to wait until the reduction in duty and tariff rates is fully in force before importing a good, causing revenue losses for the government. The other exemptions include changes that are non-detrimental to traders' interests (i.e. minor changes to domestic law and legal systems) or even a benefit (i.e. measures with relieving effect).

What is not covered?

It is not specified how many days, weeks or months should be provided to the traders and interested parties to comment, or should occur between the publication of laws and the entry into force. The timing is left to the discretion of each WTO Member to determine on a case-by-case basis.

The measure does not specify the mode of publication or the mechanisms through which traders and other interested parties can provide their comments. These may include online platforms, public hearings, ad hoc meetings and press releases, among others.

Benefits and opportunities for stakeholders

Businesses and other interested stakeholders can share their views and experience of trade constraints during the legislative phase of new or amended legislation, enabling proposals to address their real concerns.

Access to information regarding future changes in laws and regulations will also help traders to comply with new or amended laws and regulations. An early publication of the laws and regulations before the entry into force will also reduce incentives for corruption, as traders will be allowed appropriate time to be acquainted with the new norms and adapt and plan their operations in a timely manner.

Not least, more private sector participation in drafting legislation will improve relationships between traders and government agencies, fostering enhanced confidence and collaboration.

Implementation

Implementation checklist

The following checklist may be used to estimate the level of compliance with the measure:

- A national implementation framework (legislative or administrative law, etc.) has been drafted and endorsed to:
 - i. Provide the modalities and timeframes for notifying and giving opportunity to traders and interested parties to comment on new or amended laws concerning the movement, release and clearance of goods;
 - ii. Ensure that all new or amended trade-related laws and regulations are published as early as possible before their entry into force.
- In practice, traders and interested parties have real opportunities to comment on new or amended trade-related laws and regulations in accordance with the domestic legal system.
- In practice, new or amended trade-related laws and regulations are published as early as possible before the new laws or regulations are enforced.

Preparing a national implementation plan

The following template may be used as the basis for a national implementation plan:

Implementation sequence	Actions suggested
	Preparatory phase
	Determine whether a national legal and administrative mechanism exists to facilitate the implementation of this measure.
	If one or various mechanisms exists, determine its characteristics and scope of action.
	If there is no existing mechanism, analyse country needs and decide which type of mechanism will be more suitable to ensure the implementation of this measure.
	Set-up phase
	If necessary, adopt a legal framework to implement the measure.
	Analyse and change existing workflows and business processes to find solutions and mechanisms for sharing information on new or amended laws and regulations prior to entry into force.
	According to the scope of action and responsibilities of the mechanism, assign appropriate financial and human resources.
	Management and follow-up phase
Nominate an agency responsible for monitoring and evaluation.	
Periodically review and implement modification or upgrades to the system, including online platforms, where applicable.	
Average time for implementation	Two years
Leading implementation agency	The ministry in charge of trade is most commonly chosen as the leading implementation agency.

Key challenges

Lack of government commitment and public-private dialogue can prevent setting up legal frameworks which allow information sharing and opportunities to provide feedback before new or amended laws become

enforceable. Lack of coordination among public institutions represents an additional challenge, as a large number of agencies need to collaborate, share information and responsibilities before the required trade information can be presented for public comment.

Key factors for success

A legal or administrative framework which allows laws and regulations to be published in the public domain prior to entry into force and open for comment from interested parties is an essential prerequisite for this measure. A robust mechanism of public-private dialogue and engagement should also be established to ensure that there is open exchange of ideas and collaboration. This dialogue could take place in the NTFC.

Once the measure has been implemented, it will be necessary to launch a public awareness campaign to reach as many traders and other interested stakeholders as possible.