

Technical note on the WTO Trade Facilitation Agreement

Article 6.3: Penalty disciplines

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Penalty disciplines: Article 6.3

Often the rationale behind the nature and amount of penalties for breaches of customs laws, regulations and procedures is unclear and unjustified, leading to conflicts of interest and corruptive behaviour.

Recognizing that penalties are an important aspect of the administration of trade regulations, the TFA aims to reduce the arbitrary imposition of penalties and avoid any conflict of interest in their assessment and collection, requiring that such penalties are imposed on the person responsible for the breach in a fair and transparent manner.

Penalties imposed for legal or administrative breaches must be fairly grounded on objective facts and must be commensurate with the severity of the infringement.

Information on imposed penalties must be provided to the person responsible for the breach.

The measure

<p>ARTICLE 6 DISCIPLINES ON FEES AND CHARGES IMPOSED ON OR IN CONNECTION WITH IMPORTATION AND EXPORTATION AND PENALTIES</p> <p>3 Penalty disciplines</p> <p>3.1 For the purpose of paragraph 3, the term ‘penalties’ shall mean those imposed by a Member’s customs administration for a breach of the Member’s customs laws, regulations, or procedural requirements.</p> <p>3.2 Each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws.</p> <p>3.3 The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.</p> <p>3.4 Each Member shall ensure that it maintains measures to avoid:</p> <p style="padding-left: 20px;">(a) conflicts of interest in the assessment and collection of penalties and duties; and</p> <p style="padding-left: 20px;">(b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.</p> <p>3.5 Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying the nature of the breach and the applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed.</p> <p>3.6 When a person voluntarily discloses to a Member’s customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.</p> <p>3.7 The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1.</p>	
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Understanding the measure

What is covered?

Core obligation

Members are required to impose fair penalties, proportionate and in a transparent way, for any breach of a customs law, regulation, or procedural requirement. It also requires Members to impose the penalty only on the person(s) responsible for that violation. There shall be no breach of trust and an incentive for imposition of penalty.

Modalities for imposing penalties

The penalties are determined on a case by case basis using only those specific facts and circumstances in which the breach arose. They must be proportionate with the magnitude and severity of the infraction and not disproportionately determined on arbitrary criteria.

Conflict of interest

Measures to avoid conflict of interest in assessment of duties and penalties must be maintained. Imposition of unduly harsh penalties must not become an incentive for cash rewards for the customs official.

Providing complete information to the person

Members have an obligation to provide the following information in writing to the person(s) who has breached customs laws, rules, regulations or procedures:

- The nature of the breach and applicable law; and
- The amount or range of penalty prescribed for the breached law.

Voluntary disclosure by the person committing the breach

When the person causing the breach voluntarily discloses the infringement before it is detected by the authorities, the TFA encourages Members to consider this as a potential mitigating factor in the process of determining the penalties. This specific provision is not mandatory but leaves the decision to Members.

Penalties on traffic in transit

The last paragraph of Article 6.3 makes clear that all the provisions contained in the Article must also apply to penalties imposed for breaches committed during traffic in transit.

What is not covered?

The text is silent on the criteria for defining the facts and circumstances which should determine the amount and range of penalties. The text is also silent on the processing times of penalties.

Benefits and opportunities for stakeholders

This measure will strengthen traders' understanding of the nature of breaches in customs rules and the reasons for imposing penalties, encouraging better compliance in future operations and reducing their overall costs of doing business. An explanation in writing will not only enhance the quantity and quality of information available to traders but will also constitute the basis for any appellate purpose of traders. It will also enhance credibility and accountability of customs authorities.

Implementation

Implementation checklist

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

- Penalties are only imposed on the persons responsible for the breach.
- Penalties are proportionate with the specific facts and circumstances which gave rise to the breach.
- Measures preventing any conflict of interest in the assessment and collection of penalties are devised and implemented.
- Written explanations are provided to the offender regarding the nature of the breach and the applicable law, regulation or procedure under which the amount or range of the penalty has been prescribed.
- Substantive efforts are undertaken to ensure that voluntary disclosure of a breach is accepted as a potentially mitigating factor.

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
	Conduct a review of existing laws, regulations and procedures and range of penalties.
	Ascertain whether the processes in place identify legal breaches and impose penalties as established under the country's legal system, in a way which does not encourage conflicts of interest or personal gains.
	Ascertain if a system for providing written information on the penalties imposed to the person in question is in place. If not, envisage a system/mechanism to provide written explanations.
	Using these findings, prepare a proposal to revise the process for collection of penalties.
	Set-up phase
	Update legislation and administrative instruments to determine the amount of penalties commensurate with the severity of the breach.
	Implement the legal or administrative mechanism which provides written information to the affected person.
	Management and follow-up phase
Set up an internal mechanism for monitoring application of penalty disciplines.	
	Periodically review penalties imposed and, where possible, assess information for future compliance, using ICT-enabled-systems
Average time for implementation	Three and a half years.
Leading implementation agency	Customs is most commonly chosen as the leading implementation agency.

Key challenges

Lack of an appropriate legal or administrative framework which determines fair penalties and provision of written explanations to the offender is a key challenge. Customs officers might not have the capacity to determine the correct facts and circumstances of the infringement for imposition of the penalties. Absence

of policies against conflicts of interest in determining penalties may reflect an inclination of customs authorities to maintain the status quo.

Key factors for success

The availability of human resources management policies and tools will assist governments to train staff on criteria and methods to determine penalties, including the adoption of ethical behavior to identify and reject any conflicts of interest. An ICT-enabled system that ensures a reasonable period of time between case detection, determination of the penalty and finalization of the case will also have a positive impact. A review mechanism is also essential to monitor whether the amount and range of penalties imposed are proportionate with the breach committed and reduce the number of penalties over time.