

KYOTO CONVENTION

GENERAL ANNEX GUIDELINES

Chapter 5

SECURITY



WORLD CUSTOMS ORGANIZATION

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1. Introduction

A security or a collateral is frequently required by the Customs to ensure that the declarant discharges any obligations undertaken to Customs. The primary aim of security is to secure the payment of duties and taxes. In other instances security may also be required to secure the fulfilment of any other obligations the declarant or operator may have in regard to a Customs procedure or practice or any other requirements that may be specified by Customs. National legislation must therefore contain provisions that enable Customs to take a security under any appropriate procedure or practice. Since providing a security is often expensive and the costs of obtaining the security are normally added to the cost of the international movement of the goods, it is essential that provisions relating to security be clear and transparent for traders. This way economic operators will be informed of the requirements and the financial liabilities involved in any transaction.

National legislation should include provisions detailing the manner in which the amount of security is determined, the forms in which it may be provided and the discharge of the security once the obligations are fulfilled. Uniform provisions will also provide equality of treatment to all operators throughout the Customs territory.

When Customs require security to ensure payment of duties and taxes and any other obligations, the security is generally provided by the person who is liable or may become liable for these obligations. This is usually the declarant. However, in many circumstances Customs will allow security to be provided by another person, such as a third party who is authorised to deal with the Customs on behalf of the declarant.

The requirement for security to ensure the discharge of an actual or potential obligation to Customs is not obligatory in all cases, and there may be circumstances where this requirement is optional. When the requirement is compulsory, the amount required as security is usually equal to the actual or the estimated amount that may arise from the operator's obligation to Customs. When it is optional, Customs would require a security only when they ascertain that the discharge of the obligations is not assured. Customs would normally take such a decision on a case-by-case basis and should likewise limit the amount of security to the actual obligation to Customs.

This Chapter contains the basic principles relating to security required by Customs.

2. Requirement and forms of security

Standard 5.1

National legislation shall enumerate the cases in which security is required and shall specify the forms in which security is to be provided.

This Standard requires that the cases in which security is required should be enumerated in national legislation. This legislation should also specify the forms in which security is to be provided.

Security is required by Customs to ensure that obligations deriving from a particular procedure will be fulfilled. This is essential, for example, where duties and taxes are deferred or where goods are provisionally released to the declarant pending final clearance. Provisional release may also be based on a provisional declaration or pending the production of certain documents which would permit a concessional rate of duties and taxes. The cases enumerated in national legislation will normally specify the range of situations where Customs require a security and the conditions under which such security will be required. The obligations to Customs may be broad and general or they may be specific.

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Examples of a general obligation would be the requirement for security from a warehouse operator, an international transporter of goods or a person authorised for the inward processing procedure. Customs also normally consider an operator who carries out a number of transactions as having a broad or general obligation to Customs and will frequently accept a security covering all his operations.

The obligation is specific when the security is required on a transaction basis, such as release of goods on a provisional declaration. In this example the security would be specific to that particular declaration for the specific purpose of ensuring that the declaration is completed within a specified period.

The form in which security is usually provided is the deposit of cash or negotiable securities, or given by an approved surety (generally a bank or an insurance company). It may also be given in the form of a bond or, in exceptional cases such as importation by public institutions, government departments or local authorities, by a simple undertaking.

When national legislation stipulates that the security must be in the form of a cash deposit or payment deemed equivalent, the cash deposit would be required in the national currency. In most administrations a guaranteed cheque, or other means of payment recognised by Customs as equivalent, is acceptable in lieu of a cash deposit. When a security is given by cash deposit, it is the usual practice that Customs will not pay interest on the amount of the deposit when the security is discharged.

Where the security is given in the form of a surety, the guarantor undertakes, in writing, to be responsible jointly and severally with the declarant who is to discharge the obligation to Customs and to pay the secured amount of an undischarged obligation. The guarantor is normally a third party and is required to be established in the Customs territory and approved by Customs.

Customs always retain the right to refuse approval of the guarantor or the type of security proposed where they have a reasonable doubt that the obligation will be discharged within the prescribed period.

In addition to cash deposits and surety, the Customs may also accept other forms of security if these provide equal assurance that the obligations to Customs will be discharged.

In some administrations Customs allow what is known as a flat rate security. In this type of security a guarantor is allowed to furnish a single security for a specified amount laid down in national legislation. This flat rate guarantee covers the payment of duties and other charges which may become due in the course of a Customs operation carried out under the guarantor's responsibility, irrespective of who the declarant may be. A flat rate security must normally be lodged with a specified Customs office that is responsible for acceptance of this form of security.

Once Customs accepts the guarantor's undertaking, they authorise the guarantor to issue a flat rate security voucher or vouchers under the terms of the security to persons who intend to act as declarants in a Customs operation. The guarantor thus becomes liable to Customs for the amount laid down in national legislation in respect of each flat rate security voucher. The voucher is presented to the Customs office where the Goods declaration is lodged and it is retained at that office until the obligation is discharged. The guarantor is permitted to exclude certain Customs operations or certain goods, for example those presenting a higher risk of fraud, when issuing vouchers to a declarant. In such cases the guarantor is required to make a specific mention of these limitations on the vouchers.

Examples of other forms of security that may be acceptable by Customs are :

- a mortgage, a charge on land or a right pertaining to immovable property;
- the cession of a claim or the pledging, with or without surrendering possession, of goods, securities or, in particular, a savings bank book or entry in the national debt register;
- the assumption of joint contractual liability for the full amount of the Customs obligation by a third party approved by Customs and, in particular, the lodging of a guaranteed bill of exchange; and
- participation, subject to payment of a contribution, in a general guarantee scheme administered by Customs.

Customs will decide under what circumstances these types of security can be used.

3. Amount of security

Standard 5.2

The Customs shall determine the amount of security.

This Standard provides that it is Customs who will determine the amount of security. While the national legislation can enumerate the cases where security is required, whether such security is compulsory or optional, and the forms of security that are acceptable, the amount of security usually depends on the requirements and obligations that arise in each case. However, to ensure uniformity in determining the amount of security in various categories of cases, Customs must set out clear instructions on how the amount of security is to be calculated.

In cases where national legislation specifies that the security is compulsory, the Customs can fix the amount at a level equal to :

- the precise amount of the duties and taxes due to Customs, where it can be established with certainty at the time the security is required;
- any other amount specified in national legislation; or
- the maximum amount, as estimated by Customs, of the obligations which have been or may be incurred.

National legislation usually will allow cases where no security should be required. These may be for certain operations or industries, for certain Customs procedures or practices, for certain types of goods or for certain levels of duties and taxes. Optional security would be required where Customs determine that other factors are present in these cases and the risk of the obligations being fulfilled is increased. For example, the goods may involve a high risk to the revenue, the person concerned may not be in good standing in meeting Customs obligations, or a one-time transaction may involve greater need for revenue control. Where national legislation stipulates that security is optional and Customs consider that a security is required, the amount determined should not exceed the level set out for compulsory security.

In certain instances, even though a security is not required, Customs may still require an undertaking from the person concerned to ensure that the obligations which are legally required to be fulfilled are complied with.

Where Customs establish that the security provided does not ensure or is no longer certain or sufficient to ensure the discharge of obligations within the prescribed period, they would require the person to choose either to provide additional security or to replace the original security with a new one.

4. Choice of forms of security

Standard 5.3

Any person required to provide security shall be allowed to choose any form of security provided that it is acceptable to the Customs.

This Standard provides that the person concerned should be allowed to furnish security in the form that he chooses. This will normally be the form that is least expensive. However, the form of security must be one of those specified in national legislation, and the form of security must be acceptable to Customs.

Customs therefore have the right to not accept a form of security when they believe that this will not ensure the discharge of obligations to Customs within the prescribed period, or if it is incompatible with the proper functioning of the Customs procedure concerned. In normal practice, however, the cases where Customs do not accept a form of security selected by a declarant or operator is the exception rather than the rule.

In certain instances Customs may find it advisable to limit the forms of security that are acceptable based on the standing of the declarant or operator. In other cases, such as where the goods are considered a high risk to the revenue, Customs may require a cash deposit instead of a simple undertaking. However, Customs should usually accept an alternative form of security if it will ensure the discharge of the obligations at the same level. Customs may require the form of security selected to be maintained for a specific period.

5. Waiver of security

Standard 5.4

Where national legislation provides, the Customs shall not require security when they are satisfied that an obligation to the Customs will be fulfilled.

The person who is liable for the obligations to Customs is normally required to provide the security. This Standard provides however that, where national legislation allows, a security should not be required if Customs are satisfied that an obligation will be fulfilled.

In some countries a waiver of security may need to be specified in national legislation. Providing for a waiver of security, in either the national legislation or in other regulations, would facilitate trade by reducing the costs to traders that are incurred in arranging for security. Since these added costs would normally be reflected in the overall costs relating to the import/export of goods, a waiver could also benefit the national economy. Similarly a waiver of security in cases where there is a low risk of the obligations to the Customs not being met will not only benefit the national economy but also reduce the administrative costs to the Customs administrations.

Many national legislations therefore provide that if the party responsible for an obligation is a governmental body, security can be waived since there would be no danger that the obligation will not be met. Similarly, Customs are empowered to waive the requirement for security when it would be disproportionate to any real danger of failure to meet the particular obligation, for example when the amount at stake is very low or in certain circumstances subject to the declarant or operator meeting the requirements for a waiver, e.g., an authorised trader or for certain types of goods.

Many national legislations generally allow security to be waived for :

- journeys by sea and air,
- the carriage of goods on designated routes, including waterways,
- carriage by pipeline, and
- operations carried out by designated railway companies.

National legislation may also allow any person to apply for a security waiver from Customs for specified operations. The Customs would then consider granting a waiver to persons who :

- are established in the Customs territory where the waiver is applied for;
- are regular users of the Customs procedure concerned;
- maintain a financial position that can meet their commitments;
- have not committed any serious infringement of Customs or fiscal laws; and
- undertake to pay any claims in response to the first written request from Customs.

Additional conditions may be stipulated in national legislation.

The security waiver does not normally apply for goods whose total value exceeds an amount specified in national legislation or which present significant risks because of high import duties and taxes involved.

The Customs office that grants the waiver can issue one or more copies of a security waiver certificate to each approved applicant.

Although waiver of security is recommended in many instances as a trade facilitation measure, in some instances providing security could actually offer a greater facilitation. For example where Customs administrations apply audit based controls for special procedures, the provision of security may actually improve trade facilitation by replacing the need for traditional physical controls. Certain traders or operators may be authorised to carry out operations substituting a security and selective audits of their records by Customs in place of physical controls to ensure compliance.

6. General security

Standard 5.5

When security is required to ensure that the obligations arising from a Customs procedure will be fulfilled, the Customs shall accept a general security, in particular from declarants who regularly declare goods at different offices in the Customs territory.

This Standard provides for Customs to accept a general security instead of a separate security in each instance, especially from declarants who declare goods regularly at different offices in the Customs territory. Customs can also allow two or more operations to be covered by a general security. These facilities will enable declarants to reduce the costs of providing individual securities and will enable Customs to monitor the securities in a more centralised and efficient manner. If necessary, Customs can also take specific measures to temporarily disallow a general security when certain goods carry a strong risk of fraud.

Customs usually have a standard procedure for granting a general security in which they base the amount of the security on the volume of the operations carried out by the applicant and determine at which Customs office the general security is to be furnished. This office will determine the amount of the security, accept the guarantor's undertaking, issue an authorisation to the declarant allowing him to carry out the Customs operations within the limits of the guarantee, and maintain the security. The authorisation may be withdrawn if the conditions under which it was issued are no longer met.

Normally any person who has obtained authorisation for a general security should be issued with one or more copies of a security certificate. Each Goods declaration submitted under this security would then include a reference to the security certificate. In some countries the Customs offices are responsible to carry out the necessary checks in order to satisfy themselves that security has been provided.

When the certificate is issued, or at any time during its validity, the declarant may be required to specify on it the person or persons authorised to sign Goods declarations on his behalf. The particulars should include the surname and forename of each authorised person and their signature. Each nomination of an authorised person must also be acknowledged by the declarant's signature. The declarant can delete the name of an authorised person from the certificate at any time. Customs, when presented with a security certificate, should regard any person named on it as the authorised representative of the declarant.

A security certificate is only valid for a specified period, although the Customs office authorised to receive and maintain the security may grant an extension. In the event the security is cancelled, the person concerned is required to immediately return any valid security certificates to the designated Customs office.

The amount of a general security should only be fixed at a level equal to the full amount of duties and taxes when it is intended to cover Customs operations for goods presenting a high risk of fraud. In all other cases, Customs may set the amount of the guarantee at a lower percentage of the duties and taxes for persons :

- who are established in the Customs territory where the security is provided;
- who are regular users of the Customs procedure concerned;
- whose financial situation is such that they can meet their commitments; and
- who have not committed any serious infringement of Customs or tax laws.

Wherever possible, the general security should be kept to a minimum amount that will cover all the considerations of national requirements.

Where a security amount has to be determined for new operators, Customs should, in collaboration with the person concerned and based on available data, estimate the quantity, value and duties and taxes applicable for the goods to be placed under the Customs procedure over a given period. By extrapolation Customs can then determine the likely value of the duties and taxes due during a period that represents the average duration of stay of the goods under that Customs procedure.

When the general security applies to obligations that will vary in the amount of liability over time, the amount of the security should be set at a level high enough to enable the obligations to Customs to be covered at all times.

For a transaction covered by a general security, Customs may require additional security if it believes that acceptance of that transaction may place the revenue in jeopardy or otherwise hamper the enforcement of Customs law.

Customs should carry out regular reviews of the amount of each general security and should, if appropriate, adjust that amount.

7. Level of security

Standard 5.6

Where security is required, the amount of security to be provided shall be as low as possible and, in respect of the payment of duties and taxes, shall not exceed the amount potentially chargeable.

This Standard requires that the amount of security be kept as low as possible. This applies whether the security is general or specific, as described for Standard 5.5 above, and is based on the scope and risk involved in the obligations to be fulfilled and the amount of money potentially involved. It also specifies that when the security is furnished to secure the payment of duties and taxes, its amount must not exceed the amount potentially chargeable.

This implies that the basis used to fix the amount of security should not take into account any penalties potentially chargeable or include other concerns that would raise the amount of security unnecessarily. Similarly, the amount of security should not include interest for delayed payment that may be charged in the event of the declarant failing to fulfil all his obligations.

One of the methods that the Customs may use to determine the amount of the security for a single declarant or operator is to take account of the amount of duties and taxes paid during the previous period of the same duration by the person concerned. In the event of changes, for example, in the volume of importations or the rates applicable, the amount of the security may be adjusted accordingly. In certain cases, such as temporary importation of goods that are classified under different tariff headings and liable to different rates of duties, Customs can also determine the amount of the security on the basis of an average single rate for the duties and taxes. This single rate method of calculation can be applied for a number of Customs procedures and offers advantages to both Customs and the trade.

8. Discharge of security

Standard 5.7

Where security has been furnished, it shall be discharged as soon as possible after the Customs are satisfied that the obligations under which the security was required have been duly fulfilled.

This Standard requires that Customs should release the security as soon as the obligation has been discharged or can no longer arise. It does not, however, relate to any delays in the discharge of security for which Customs is not responsible, such as in a delay of the discharge of a guarantee by a bank.

If part of the obligation has been discharged, and the remaining obligation only applies to part of the secured amount, a commensurate amount of the security may be released if requested by the person concerned, provided the amount of security is sufficient to justify this action.
