

The Voice of Freight Forwarders and Customs Agents in Europe

Brussels, September 16th 2005

Draft implementing provisions concerning new security and safety measures

Observations of CLECAT

Introductory observations

1. Regulation 648/2005 is conceived to contribute to a securer supply chain. CLECAT supports this objective and accepts the additional efforts entailed as long as they are feasible, balanced, effective and relevant.

The Regulation does not offer any additional facilitation to compensate for the extra burden. Any facilitation granted in the context of the AEO status, at this stage, is intended to relax the *new* safety and security requirements contained in the Regulation.

Regulation 648/2005 constitutes the first stage in a more comprehensive and longer term reform of the Customs Code. Much as we endorse the basic objective of the Regulation, we have to recognize that the benefits for trade are saved up for the second stage. We look forward to the second stage, which we trust will facilitate the *existing* customs rules.

2. We feel that many of the requirements for AEO status will be problematic for many companies, especially small to medium sized enterprises (SMEs). In our sector, for example, whilst these requirements may suit the current operational processes of some of the large multinational freight intermediary companies, many SMEs may not be able to meet them, except at significant disproportionate cost to their business.

3. CLECAT supports all efforts intended to approximate customs procedures and practices in the European Union. European customs should act as one. All traders and economic operators should enjoy level playing field. This requires clear and enforceable rules. Many of our observations below can be seen against this background.

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Many details in the preliminary draft implementing rules are referred to guidelines. As a consequence part of our assessment should depend on these guidelines as well. We look forward to contribute to this discussion too.

4. For reasons which are unclear the new article 793 3a seems to introduce an unacceptable disparity of treatment between different categories of economic operators in the freight intermediary sector. Freight forwarders and logistics operators appear excluded from this text, yet they also move goods under a single contract, depending on the requirements of their customers.

5. The preliminary draft implementing rules do not address a number of complex but extremely important matters concerning operators' liability for the provision and the accuracy of data.

6. Regulation 648/2005 provides that Article 5a(2), Article 13(2) 2nd subparagraph, Article 36a(4), Article 36b(1), Article 182a(2) and Article 182d(1) shall be applicable from 11 May 2005. All other provisions shall be applicable once the implementing provisions on the basis of the Articles referred to in the second subparagraph have entered into force. *However, electronic declaration and automated systems for the implementation of risk management and for the electronic exchange of data between customs offices of entry, import, export and exit, as stipulated in Articles 13, 36a, 36b, 36c, 182b, 182c and 182d, shall be in place three years after these Articles have become applicable.*

Without well functioning automated systems for the implementation of risk management and for the electronic exchange of data between customs offices, the provisions applicable from the date the implementing provisions enter force will be very difficult to apply in practice. Moreover, disparity between Member States that have their systems in place and those that have not may result in distortion of competition among E.U. operators.

Therefore we are of the opinion that the implementing rules should not enter into force until the day these systems for risk management and for the electronic exchange of data will be in place. Alternatively we invite the Commission to clarify how it is intended to cover the transition period.

Detailed comments

1) Art. 4d 2

- Given that the ability of EU Member State (MS) Customs Administrations to swiftly exchange structured data-sets with one another, through an integrated IT system, is integral to the management of risk, for the purposes of effectively controlling 'third country' cargo movements to and from the EU. It is vital that attention be paid to system fall-back arrangements, for those occasions when communication links are disrupted, so that goods continue to be cleared. Where risk assessments are unable to be carried out as normal due to IT system glitches we would suggest that there be an agreed time-frame by which economic operators can be assured that clearance will be effected (e.g. 4 hours), bearing in mind the time-sensitive nature of much cargo.
- We would also raise a specific concern here about the discretion permitted MS customs administrations to make bi-lateral arrangements concerning the data exchanged for risk assessment purposes. Whilst it is appreciated that arrangements should have a certain degree of flexibility incorporated, there is an obvious danger in this case of inconsistencies in MS data requirements getting out of hand and distorting traffic flows.

2) Art. 4f 2

- We would be happier if the wording here was such that it did not leave scope for interpreting the provisions in such a way as to give rise to the possibility of MS introducing pre-defined random inspection quotas.

3) Art. 14b 2 - "The applicant shall provide a central point for access to all information required by the customs authorities..."

- We feel that this requirement will be problematic for many companies, especially small to medium sized enterprises (SMEs), and therefore needs re-considering. In our sector, for example, whilst this requirement may suit the current operational processes of some of the large multinational freight intermediary companies, many SMEs may not be able to meet this provision, except at significant disproportionate cost to their business, in terms of IT system changes etc. This is because many companies typically centralise the accounts function and data, but keep operational files at the local branch level for operational reasons.

4) Art. 14b 3 stipulates that Customs authorities may require additional information from the applicant. Art. 14b 1 however already states that the application must contain all the particulars necessary for the granting of the status.

- We appreciate that the authority is entitled to demand *clarifications* if the application is incomplete or unclear, however the expression "*additional information*" is a bit confusing in our opinion, as it appears to contradict 14b 1.

5) Art. 14d last paragraph provides that the application shall be rejected if the applicant is subject to *penal* proceedings following an irregularity.

- We assume that this provision addresses "*criminal*" proceedings and therefore suggest replacing the term "*penal*" by "*criminal*". We fear that the term "*penal*" may lead to confusion, divergent interpretation and consequently unequal treatment.

6) Art. 14e (second indent)

- The text here should take account of all relevant freight intermediaries in a generic fashion rather than refer to just air and shipping lines.

7) In accordance with art. 14f, compliance of an applicant who has been established for less than 3 years shall be judged on the basis of the records and information that are available.

- We are of the opinion that the criteria for this assessment should be detailed as much as possible, in order to guarantee maximum harmonisation and level playing field among all operators in the E.U.

8) The conditions outlined in art. 14g look very stringent.

- We fear that under these circumstances only very few SME's (traders and operators) will be in a position to comply, due to lack of resources or because the conditions do not

balance the benefit. Much depends on the precise interpretation, including indications about the level of technical sophistication of the resources required.

- Of particular concern here is 14g c the reference to the “track and trace of goods”. It is important to be very clear about what is meant by this phrase, because it is very seductive to regulatory authorities and implies more than is often ordinarily deliverable in practice. Given that the vast majority of supply-chains involve a number of parties, whose operations can vary markedly in terms of technology intensity and compatibility, it would be more reasonable, so as not to discriminate against SMEs, to require that a robust electronic goods audit trail be in place.

9) Art. 14h provides that the applicant for AEO status must prove his solvency for the past 3 years and *provide evidence that he will be solvent for the current and next year*.

- It is not possible to provide *evidence* that one will solvent in the future. Any evidence can only relate to the present and the past. We therefore suggest deleting this paragraph. It should also be borne in mind that in some jurisdictions mechanisms exist for the unscrupulous to manipulate insolvency procedures to force proceedings upon another party unfairly. There is also an issue of commercial confidentiality which creeps in here.

10) Art. 14i

- The requirement 1f “*the economic operator implements measures allowing a clear identification of his suppliers and of his customers in order to secure the international supply-chain*” raises a major concern about what in practice this will mean. Account must be taken of current commercial practice here and commercial confidentiality must be respected by whatever practical arrangements are put in place.
- The requirements of this provision should apply the principle of *equivalence* where relevant proven security programmes are extant in MS and already cover parts of the supply-chain. For example: regulated agent / known shipper regimes, ISPS / SOLAS in the maritime sector, and so on. Therefore an amendment to the text to allow this would be welcome.
- As regards (2) we would comment as per our comments at 14e above.

11) Art. 14j stipulates that the European Commission shall adopt guidelines for the purpose of ensuring the uniform interpretation of the criteria for the granting of the status of an authorised economic operator and the uniform application of the audit based on these criteria as well as guidelines for the withdrawal of the certificate.

- CLECAT endorses the progressive harmonisation of procedures and practices in the E.U. as a key objective of the customs reform. We are not sure however if guidelines are the most appropriate instrument to guarantee harmonised implementation.

12) Art. 14i stipulates that the customs authority of the issuing Member State can accept, at its own responsibility, evidence provided by a recognized professional person in respect of the conditions and criteria referred to in art. 14e-14i.

- We understand that this art. is designed to allow Member State authorities to call on independent services for advice. For clarity we suggest replacing the word “accept” with

“request”. Furthermore we believe there should be a definition of the title “recognised professional person” (recognised by whom, how?) assuming one does not exist elsewhere in the code.

13) Art. 14m2 stipulates that the AEO Certificate shall be issued within 60 calendar days following submission of the application but that this period can be extended by a further period of 30 calendar days.

- CLECAT insists on respecting the 60 days deadline. We appreciate that perhaps at the start the administrations will have to process a lot of applications and that therefore for a certain period of time they may have difficulty to meet the 60 days deadline. Once the system is running however there should be no need for the 30 days extension any longer.
- As an alternative to the 30 days extension, Member States could also grant a provisional authorization subject to official endorsement.

14) Art. 14m 3

- We presume that any decision in this matter can be appealed in accordance with the framework provisions of the current and any future CCC.

15) Art. 14o provides in paragraph 4 that the customs authorities shall re-assess the compliance with the conditions and criteria to be met by the AEO on a regular basis. Paragraph 6 stipulates that *if the customs authority of a Member State fails to carry out the re-assessment ... the AEO certificate will cease to be valid in the other Member States.*

- We strongly suggest deleting this paragraph. Inserting into a legal text a provision with the aim to regulate a situation arising as a result of the authority not executing it, may not be the right approach. Making economic operators victims of a situation which is beyond their control is not fair in itself, let alone if none other than the authority is at fault.
- If the paragraph is left as it is, compensation for loss of business must be granted to companies for the period that they are deprived of their prerogative.
- Furthermore the text does not mention that the operator should be informed of the fact he has lost the status.

16) Art.14p 1 - *“The AEO status shall be suspended, if a non-compliance with the conditions or criteria for the AEO status or an irregularity have been detected or where information on a criminal offence or an irregularity has been received.”*

- We feel this provision as currently worded is too harsh. International supply-chains are complicated to administer and therefore account should be taken, in the drawing up this provision, of the significant scope for ‘innocent error’ and mistake. This leads on to a concern about the vagueness of the word ‘irregularity’ being used in this context. What are to be regarded as ‘irregularities’ and ‘serious irregularities’ (Art. 14q 1) requires definition.

- Any decision to suspend AEO status, especially on the strength of mere receipt of information on a criminal offence or an irregularity, should be subject to appeal on the part of economic operator concerned.
- Also prior to suspension, the matter of concern should be brought to the attention of the economic operator involved, who would then be given a reasonable period of time (30 days?), dependent on the nature of the issue, to regularise matter. Only then, if the matter of concern has not been satisfactorily addressed, should suspension of status proceed.
- This point is all the more important when read in conjunction with *Art. 14q 5*, which prevents an economic operator, from whom AEO status has been withdrawn, re-applying for AEO status within three years of the date of such a withdrawal.

17) Art. 14p paragraph 2 provides for a 30 days suspension of the AEO status in case of non-compliance, in order to enable the economic operator to take the required measures to regularise the situation. **Art. 14p paragraph 6** provides that the competent customs authority can suspend the status for a further 30 calendar days if the AEO is unable to regularise the situation within 30 calendar days but can provide evidence that the conditions can be met if the suspension period is extended.

- In order to safeguard level playing field among operators in the E.U., we suggest replacing in art. 14p6 the word “*can*” by “*shall*”, so that it reads, “*The competent customs authority shall suspend the status for a further 30 calendar days*”. We see no reason for leaving up to the discretion of Member States whether or not to accept *evidence*.
- This observation is all the more important in the light of the severe **art. 14q5**, providing that the economic operator cannot submit a new application within 3 years from the date of withdrawal.

18) Art. 14r 1 - “*The Authorised Economic Operator shall inform the competent customs authority of all events which could affect his status ...*”

- This statement is too open-ended and requires qualification. Potentially it could mean that an AEO had to declare to a customs authority every new: customer, business contract, personnel change, system, procedural change and so on, in case it might be considered germane to the AEO authorisation at some point. This Article is far too burdensome as currently worded.

19) Art. 14s deals with the AEO database, which should be accessible to the Commission and the customs authorities of the Member States.

- We are of the opinion that for an efficient supply chain management it is necessary that economic operators are able to consult the database as well. The database should be conceived to take due account of issues related to confidentiality. Technically this should not be an issue.

20) Art. 183a - see our comments to art. 791e

21) Art. 183b

- Whilst acknowledging the 'political' rationale for the time-limits proposed in this Article for the carriage of goods by sea (i.e. the need for the EU's regime to mesh with the USA's '24 hour manifest rule') this results in too much of a disparity between modes. Assuming the right resource is in place, meaning an IT control system with real-time processing to rapidly profile goods, a minimum of 2 hours prior to carriage, should be sufficient, import and export, for all modes.
- Also this provision does not indicate which party has the responsibility to lodge the declaration in question. Here it is important to ensure that 'authorised third parties' (authorised that is by their principals, usually, but not always, EU-based importers and exporters) are permitted to make such declarations. Apart from ensuring that the amendment is commercially neutral in this respect, without this facility the requirements are likely to be unworkable.

22) Art. 183c 1

- Goods movement can be complicated with a number of variables to consider and 'juggle', therefore commercial uncertainty resulting from how regulatory requirements are applied should be minimised, consequently any changes to time limits by customs authorities should be notified to the economic operator in a timely fashion.

23) Art. 183c 3

- We appreciate the possibility of being able to use a *transit declaration* as a *summary declaration*.

24) Art. 183d paragraph 3 stipulates that in the cases referred to in Art. 183b, par. 1, point (a), the customs authorities shall notify the economic operator if following a risk assessment the goods cannot be loaded. Such notifications should be issued within *reasonable time* after the risk assessment has been finalised for these goods".

- For maximum harmonisation and in order to guarantee level playing field among economic operators in the European Union, we suggest defining the 'reasonable time' more precisely.

25) Art. 261, 264, 270 and 373 provide that if an AEO who benefits from customs simplifications ("AEO-C") applies for the underlying simplifications in a Member State, the customs authorities in that MS shall only examine the criteria mentioned in paragraph 2, second indent of the respective articles. **Art. 261, 264, 270 and 373 paragraph 2, second indent** provides that the authorization shall be refused if it is only used occasionally in the MS concerned.

- We are unsure why there should be a concern about the frequency with which a particular authorisation is used. Surely this is a commercial matter for the economic operator concerned, rather than one for customs authorities, unless of course, there is non-compliance.
- At any event, in our opinion, the frequency of the use that is made of the authorization should be established on the basis of the operations in the E.U. as a whole, instead of separately in each of the MS.

26) Art. 791e paragraph 1 defines the particulars, which need not to be supplied by AEO's, benefiting from security and safety facilitations. **Paragraph 2** clarifies the meaning of 'facilitation' in this context.

- We regret that the AEO Safety and Security will not benefit from a substantial reduction of data to be supplied in the context of a security summary declaration.

27) The new Art. 793 3a reads:

"(The customs office of exit shall be)

in the case of goods exported by rail, post, air and sea, the customs office competent for the place where the goods are taken over under a single transport contract for transport out of the customs territory of the Community by railway companies, the postal services, express couriers, the airlines or the shipping companies;"

This paragraph is unacceptable as it stands for the following reasons:

- Railway companies, shipping companies and airlines (and road transport carriers) all benefit from a clear definition of their transport documents (bill of lading, air waybill and CIM/COTIF bill, CMR note), which are referred to in the respective International Conventions covering the contract of carriage (Warsaw-Montreal, Hague-Visby, CMR, Bern, etc). The same cannot be said for a "postal transport document" or for an express/courier consignment note. As regards express operators there is not even a clear cut definition of their activities.
- CLECAT cannot accept different treatment of categories of operators unless there are clear and objective reasons based on the nature of the goods or the type of movement. The latter is clearly not the case here because freight forwarders and logistic operators that seem to be excluded from the list, equally move goods under a single transport contract, as and if this suits the purpose of the service the client requires.
- The paragraph addresses the specific situation where goods are moved by rail, air or sea under a single transport contract, which is a debatable concept. Even if the list of operators completing the paragraph were exhaustive and the definition of a single transport contract were given, which is clearly not the case, it would not serve the purpose for which it is intended, i.e., in our view, to facilitate intermodal transport and enhance the efficiency of the operations in ports, railway terminals, airports and inland ports (which are forgotten, why?). We appreciate the effort of the legislator to accommodate the necessities of the wider use of intermodality, but we fail to see the reason why this accommodation should be limited to a certain section of users.

For the above reasons, we propose to rephrase the paragraph as follows:

"(The customs office of exit shall be) in the case of goods exported by road, rail, post, air, sea or intermodal techniques, the customs office competent for the place where the goods are taken over, under a single transport contract, for transport out of the customs territory of the Community."

28) Art. 793 7 provides that where the customs office of exit establishes that goods are missing, it shall note the copy of the declaration presented and inform the customs office of export. Where the customs office of exit establishes that there are goods in excess, it shall refuse exit to these goods until the export formalities have been completed.

- In the case of air transport, goods are often offloaded (for instance in order to give priority to passenger hold baggage) or replaced (to have a better weight/volume ratio) at the very last minute. Art. Regulation 648/2005 (new article 36 b.5) provides that the person who lodges the summary declaration shall be authorized to amend the particulars of the summary declaration after it has been lodged. We fear however that this will be problematic where the summary declaration or the export declaration (containing the necessary particulars for risk analysis) *is lodged by the trader or his customs representative* (freight forwarder or a customs agent). In case, which party will be held liable for the accuracy of the information provided?

29) Annex 30A – data elements

- The dataset exceeds the dataset recently adopted by the WCO.
- We do not see the logic in requiring both the goods description *and* the commodity code.
- The added value for security risk analysis of some of the data-elements in our opinion is questionable. These include the data-elements “freight costs” and “transport charges – method of payment”.
- The vast amount of data required in the security summary declaration, raises the issue of liability for the provision of the data and for the accuracy of the data provided. The proposed implementing rules shed no further light to this complex issue. We are of the opinion that only the owner of the data can be responsible for their accuracy.
- Moreover, neither the Regulation, nor the preliminary draft implementing rules acknowledge the problems related to data confidentiality in cases where data have to be passed on from one operator to another. It should be borne in mind that increasing the visibility of the data flow that accompanies goods movement may prove counter-productive and have the unintended effect of assisting the very parties governments are seeking to undermine and counter i.e. organised crime and terrorists. For example whereas currently the legitimate movement of high value items e.g. mobile phones, excise goods, computer chips and so on, can to a certain extent be disguised, in terms of the information transmitted about them to other parties involved in the supply-chain. In future this is less likely to be possible. For the very data which assists regulatory authorities with their control and targeting will also assist criminal elements and terrorists (i.e. the requirement to supply more consignment data, in more detail to more parties, more frequently).