

March 5<sup>th</sup> 2007

## SUGGESTIONS FOR AMENDMENT OF THE EUROPEAN COMMISSION PROPOSAL FOR A MODERNISED CUSTOMS CODE<sup>1</sup>

CLECAT represents the interests of about 19000 companies, which are employing about one million people all over the European Union. All these companies offer customs related services to their customers, either as a stand alone activity (customs agents), or as a part of a wider package of logistic services (freight forwarders and logistic operators). The Members of CLECAT are multinational companies, global players, as well as SME's and even family businesses.

We would like to draw attention to some discrepancies in the Commission Proposal for a Modernised Customs Code, which in our opinion may entail legal controversy and useless insurance coverage absorbing credits that companies need to make productive investments.

These are our suggestions for amendment, followed by an explanatory note and detailed justification.

### **Article 4(23)**

MCC Proposal	CLECAT suggestion for amendment
<i>'Holder of the procedure' means the person who makes the declaration, or on whose behalf the customs declaration is made, or the person to whom the rights and obligations of that person in respect of a customs procedure have been transferred."</i>	<i>"Holder of the procedure' means the person on whose behalf the customs declaration was made or the person to whom the rights and obligations of the abovementioned person in respect of a customs procedure have been transferred.</i>

<sup>1</sup> Commission Proposal for a Regulation of the European Parliament and of the Council laying down the Community Customs Code (Modernized Customs Code) - Com (2005) 608

## **Article 9(2)**

MCC Proposal	CLECAT suggestion for amendment
<p><i>Without prejudice to the possible application of administrative or criminal penalties, the lodging of a summary declaration or customs declaration, including a simplified declaration, or notification, or the submission of an application for an authorization or any other decision, shall render the person concerned responsible for the following:  ... </i></p> <p><i>The first subparagraph shall apply also to the provision of any information required by the customs authorities.</i></p> <p><i>Where the declaration or notification is lodged, the application is submitted or requested information is provided by a representative of the person concerned, the representative shall also be bound by the obligations set out in first subparagraph.</i></p>	<p><i>Without prejudice to the possible application of administrative or criminal penalties, the declarant, or the person submitting a notification, an application for an authorization or any other decision in his own name shall be responsible for:  ... </i></p> <p><i>In the case of indirect representation, the person on whose behalf a notification, an application for an authorization or any other decision is submitted shall also be responsible.</i></p> <p><i>The first subparagraph shall apply also to the provision of any information required by the customs authorities.</i></p> <p><i>(deleted)</i></p>

## **Article 50 (3)**

MCC Proposal	CLECAT suggestion for amendment
<p><i>Article 49 (2) and (3) shall apply. However, in the case of non-Community goods as referred to in Article 189, the debtor shall be the person who lodges the re-export notification and, in the event of indirect representation, the person on whose behalf the notification is lodged.</i></p>	<p><i>Article 49 (2) and (3) shall apply. However, in the case of non-Community goods as referred to in Article 189, the debtor shall be the person who lodges the re-export notification in his own name, and, in the event of indirect representation, the person on whose behalf the notification is lodged.</i></p>

## Article 61.4 second paragraph

MCC Proposal	CLECAT suggestion for amendment
<i>The guarantee provided for a specific declaration shall apply to the customs debt in respect of all goods covered by or released against that declaration, whether or not that declaration is correct.</i>	<i>The guarantee provided for a specific declaration shall apply to the customs debt, as defined in Article 48, in respect of all goods covered by or released against that declaration.</i>

## Article 66.2

MCC Proposal	CLECAT suggestion for amendment
<i>The guarantor shall undertake in writing to pay the secured amount of a customs debt. The undertaking shall also cover, within the limits of the secured amount, amounts of import or export duties payable following post-release verification</i>	<i>The guarantor shall undertake in writing to pay the secured amount of a customs debt, as defined in Article 48.</i>

## article 17 (5)

MCC Proposal	CLECAT suggestion for amendment
<i>Without prejudice to provisions laid down in other fields which specify the cases in which, and the conditions under which, decisions are invalid or become null and void, the customs authorities who issued a decision may annul, amend or revoke it where it does not conform with the customs legislation or with guidelines or explanatory notes for its interpretation.</i>	<i>Without prejudice to provisions laid down in other fields which specify the cases in which, and the conditions under which, decisions are invalid or become null and void, the customs authorities who issued a decision may annul, amend or revoke it where it does not conform with the customs legislation or with guidelines or explanatory notes for its interpretation.</i>  <i>Any annulment, amendment or revocation of a decision shall not have retroactive effect such that the interests of the person to whom the decision was addressed and who has already applied it, are in any way prejudiced</i>

# EXPLANATORY NOTE – JUSTIFICATION

## LIABILITY IN CASE OF REPRESENTATION

Liability, in the Customs Code, rests on the concept of "*declarant*". We strongly support the European Parliament amendment in first reading re-inserting the definition of the term "*declarant*". The E.P. amendment concerned clarifies the Commission Proposal everywhere the word "*declarant*" is used.

The E.P. amendment concerned reads:

*(New article 8a): 'Declarant' means the person making a summary declaration or a customs declaration in his own name or the person in whose name a customs declaration is made.'*

Where a representative is acting in his own name (indirect representation), he/she is the declarant and assumes the corresponding liabilities. His/her principal (the person on whose behalf the indirect representative is acting) is severally liable. Where the representative acts in the name of another person (the principal), this other person is the declarant and assumes the corresponding liabilities. Where a representative is acting in the name of a principal (direct representation), its acts bind the principal and the third party directly to each other and the representative as such is not bound to this third party. Direct/indirect representation is a contractual arrangement, i.e. it is up to the parties in contract to decide in consultation whether the representative will act in his own or in his customer's name. The above mentioned definition, which corresponds to the definition in the current Community customs code, honours this principle of contract law.

We advocate for the Community customs code to employ the term 'declarant' instead of a description wherever this is possible, because it clarifies the respective liabilities of the representative and his customer. The definition of declarant as in the new article 8a, however, only covers the person who makes a customs declaration or a summary declaration, it does not cover the person who submits a *notification*, an *application for an authorization or any other decision*. As a result, where a notification, an application for an authorization or any other decision is submitted through a representative, it is not possible to refer to the definition of "declarant" in order to define the respective liabilities of the representative and/or his/her principal. Therefore, the definition of the liability must be made explicit in the Code each time the expression is used.

We observe that the responsibilities of both the indirect *and* the direct representative are duly and sufficiently covered in article 9(1) and 51. Article 9(1) provides that *any* person directly involved in the accomplishment of customs formalities shall provide the customs authorities with all the requisite documents and all the requisite assistance at the request of the customs authorities and within any time limit specified. Article 51 covers the liability of *any* person involved in case of wilful misconduct or gross negligence.

## EXTENSION OF THE SCOPE OF THE GUARANTEE

The issue of extending the scope of the guarantee to cover non-declared or mis-declared goods and amounts of duties which fall to be paid following 'a posteriori controls' was discussed at the Customs 2007 Conference in Budapest. For the purpose of the discussion, the Commission had drafted a working document (TAXUD/2005/1210 -"A simpler and fairer approach to Customs Debt").

In this Working Document it is stated that "implementing provisions will have to be adopted for the new approach to be effective, that it is not the Commission's intention to increase the overall level of the guarantees and that it is therefore necessary to find a mechanism whereby the interests of the operators are safeguarded". The paper also acknowledges the fact "that it will be difficult, by definition, to determine beforehand the amount of duty likely to become due following a post-clearance verification, or as a result of a false declaration".

In article 61 or 66 there is no reference to the Committee procedure, which makes room for implementing provisions relevant to this particular issue and it is doubtful whether the more general reference to the Committee procedure in Article 194 (c) can be used for that purpose.

As it stands the text will lead to varying and false interpretation, which will inevitably result in actions before the Court of Justice.

By extending the scope of the guarantee to cover amounts of duties released against incorrect declarations or payable following post-release verifications, the concept of 'guarantee' is transferred in effect into a compulsory insurance. Guarantees and insurances are conceptually distinct and should not be confused: guarantees are there to cover an ascertained debt while insurances are there to spread a risk. The only person who can be responsible for a debt is the debtor. It is not possible to spread the risk of possible future financial damage among the operators. If the authorities feel the need to seek protection against possible future financial damage by spreading a risk, this protection should be sought from a third party, not from the trade.

## **ANNULMENT, AMENDMENT OR REVOCATION OF A DECISION RETROACTIVELY**

Article 17.5 allows for the annulment, amendment or revocation of a decision retroactively. This may have serious consequences for traders in cases where the decision has already been applied.

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