CLECAT european voice of freight logistics and customs services •

POSITION PAPER

RE: CLECAT comments on the UNION CUSTOMS CODE (MCC RECAST) PROPOSAL

Brussels, October 23rd 2012 (last revision)

CLECAT represents the interests of 20 national organisations of European freight related service providers[1]. Multinational, medium and small freight forwarders and customs agents are all part of CLECAT's membership, making it the most representative association of its kind. Our members voice the interests of more than 19.000 companies employing in excess of 1.000.000 staff. In rough figures European freight forwarders and Customs agents clear 95% of all goods in Europe and handle 65% of the cargo transported by road, 95% of the cargo transported by air and 65% of the goods transported by sea. CLECAT also has a voice on rail freight, inland waterways and intermodal transport. Its members make extensive use of IT and dedicated terminals and warehouses as the main tools to respond to customers' requirements. CLECAT works in close cooperation with FIATA, the World Federation of Freight Forwarders and is the exclusive voice of our sector on European issues.

CLECAT has been involved in the consultation on amendments to the existing Customs Code (Regulation 2913/92) and implementing provisions (Regulation 2454/93), the Modernised Customs Code (MCC - Regulation 450/2008) and draft implementing provisions as well as the development of the supporting IT.

In view of the upcoming discussions in the European Parliament and Council CLECAT is pleased to provide its comments on the Commission's Proposal to amend the MCC (UCC - Union Customs Code – doc. COM (2012) 64 final).

1. Comments on the reasons which lead to the proposal to amend Regulation (EC) No 450/2008.

In the Explanatory Memorandum to the UCC proposal the Commission gives three reasons which lead to the proposal to amend Regulation 450/2008 (MCC) before it becomes applicable.

1.1. The first reason is that *"The implementation of a major part of the processes to be introduced depends on the definition and the development, by the Commission, the national customs administrations and the economic operators, of a wide range of electronic systems. This requires a complex set up of actions between the Member states, the trade community and the Commission, notably important investments in new EU wide IT systems and supporting activities as well as an unprecedented effort from the business community to operate according to new business models. It is now apparent that only a very limited number or even no new customs IT*

[1] Means services of any kind relating to the carriage (performed by single mode or multimodal transport means), consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods. Freight Forwarding Services also include logistical services with modern information and communication technology in connection with the carriage, handling or storage of the Goods, and de facto total supply chain management. These services can be tailored to meet the flexible application of the services provided.

systems may be introduced in June 2013, the latest legal date for the implementation of the MCC."

CLECAT is aware of the extreme complexity of setting up the supporting IT system to support the implementation of the MCC. As much as in the technical aspect, the challenges lie in the harmonisation of processes, as a prerequisite for building EU wide applications. This requires thorough analysis, debate and eventually major investments from the side of the Commission, the Member States and the trade community. The developments of new customs IT systems must be based on a visionary *integrated* programme. Such an integrated programme should have a clear and ambitious objective. The building blocks towards the achievement of this should be developed over time with this ambition in mind. Here it is crucial to avoid intermediary, half way solutions based on short or medium term ambitions which do not fit in this integrated strategy. The integrated strategy should be driven by the future needs of customs and trade, with the purpose of striking the right balance between compliance and trade facilitation. The modernisation of the customs environment in the EU should be driven by the needs, not by short term technical realism, if this technical realism is not part of an overall strategy.

CLECAT is of the opinion that, in this respect, the Commission has taken the right decision. The timeline for developing and rolling out the supporting IT systems were turned out to be unrealistic and, even more importantly, there was no comprehensive and integrated master programme. **IT development should be based on a balanced integrated IT master plan, in which trade facilitation has a prominent place.**

1.2. The second reason which lead to the proposal to amend Regulation 450/2008 relates to "*the commitment made by the Commission to propose amendments to all basic acts in order to align them with the new provisions of the Lisbon Treaty concerning delegation of power"*

The vast majority of the Commission Acts will be adopted in accordance with the new delegation procedure.

It is entirely up to the co-legislators to agree or not to such empowerment. CLECAT would want reassurance to be **involved in the dialogue as a partner at all stages of the consultation process,** both for the proposed Union Customs Code and for the implementing procedures that are required in support of it**.** CLECAT hopes and trusts that the new approach will not negatively affect proper trade consultation.

1.3. The third reason which lead to the proposal to amend Regulation (EC) No 450/2008 relates to the fact that "*The joint work on the implementing provisions with Member States experts and trade representatives revealed the need to adjust some provisions of the MCC which are either no longer in line with changes introduced since 2008 to current customs legislation or have revealed (e.g. regarding the temporary storage of goods or a customs declaration through an entry of data in the declarant's records) difficult to implement through sound measures and workable business processes. The objective was nevertheless to limit such adjustments to what is absolutely necessary to ensure coherence in the process."*

It is correct that the work on the implementing provisions with Member States has revealed inconsistencies: some provisions were no longer in line with changes introduces since 2008 *or have revealed difficult to implement through sound measures and workable business processes*.

CLECAT understands the rationale and unless explicitly mentioned otherwise below generally supports these adjustments.

1.4. As quoted above, in its Explanatory Memorandum the Commission states that *The objective was nevertheless to limit such adjustments to what is absolutely necessary to ensure coherence in the processes*

The creation of a modernised customs environment, referred to as the Modernised Customs Code is a project that started ten years ago. In the meantime security related concerns in particular crossed the path of facilitation and today we experience a financial crisis of historic proportions.

It is regrettable that the Commission did not use the Recast of the MCC as an opportunity to introduce additional tangible benefits which would encourage legitimate and reliable economic operators to apply for AEO (Authorised Economic Operator) status.

2. Comments on individual articles

2.1. Article 6 (3) – Electronic automatisation

With the aim of giving room to a phased implementation on the basis of an integrated programme, Article 6 (2) provides for derogations from the general rule that "*all exchanges of data, accompanying documents, decisions and notifications between customs authorities and between economic operators and customs authorities required under the customs legislation, and the storage of such data as required under the customs legislation, shall be made using electronic data-processing techniques.*" Derogations from the general rule are possible on a transitional basis where "*the electronic systems which are necessary for the application of the provisions of the Code are not yet operational, for transitional periods ending on 31 December 2020 at the latest"* (subparagraph (c)). Next to this, derogations are possible on a permanent basis (subparagraph a) and on a temporary basis (subparagraph b).

On top of this, Article 6 (3) provides for a *general* and *unconditional* derogation, which in the opinion of CLECAT has no ground: Article 6 (2) (a), (b) and (c) cover all that is needed in terms of derogations on a permanent, temporary and transitional basis. Article 6 (3) which provides that "*the Commission may adopt decisions allowing one or several Member States to use means of exchange and storage of data other than electronic data-processing techniques*" is nothing less than a safe conduct for Member States not to respect their commitment. Moreover, from a trader perspective, and from the perspective of EU customs integration, it is important to avoid automated and manual processes running alongside.

In view of the above arguments CLECAT advocates for the deletion of Article 6 (3)

2.2. Article 83 (2) – AEO Benefits

Article 83 (2) provides that *"Where a comprehensive guarantee is to be provided for customs debts and other charges which may be incurred, an economic operator may be authorised to use a comprehensive guarantee with a reduced amount or to have a guarantee waiver provided that he fulfils the following criteria laid down in Article 22(b) and (c)"*

A person that fulfils the criteria laid down in Article 22 (b) and (c) has a satisfactory system of managing commercial and, where appropriate, transport records, which allows appropriate customs controls, and proven solvency. Yet, article 83 (2) limits the use of a comprehensive guarantee with reduced amount or a guarantee waiver to guarantees covering customs debts which *may be* incurred. It does not apply to guarantees covering debts which *have been* incurred, and in respect of which payment has been

deferred. Extending the guarantee reduction or waiver to cover debts which have been incurred would constitute a *major* benefit to trade. In spite of the fact that this adjustment may not be "*absolutely necessary to ensure coherence in the processes*" (see our point 1.4) we see no objective reason to refuse it. Especially in these difficult economic times there is no reason for blocking considerable financial resources with the purpose of covering a risk which in practice does not really exist: operators complying with the conditions for AEO status have gone through an extensive process to demonstrate that they are solvent, and reliable.

CLECAT advocates for amending article 83 (2) as follows:
Where a comprehensive guarantee is to be provided for customs debts and other charges ~~which may be incurred~~, an economic operator may be authorised to use a comprehensive guarantee with a reduced amount or to have a guarantee waiver provided that he fulfils the following criteria laid down in Article 22(b) and (c)"

2.3. Article 118 (a) – Security I

This article empowers the Commission to adopt delegated acts *specifying the rules on the procedure for lodging an entry summary declaration*. These rules include the identification of the person or persons responsible for lodging specific data. The empowerment replaces the definition of the person responsible for lodging the (safety and security) entry summary declaration in MCC article 88.

CLECAT understands the rationale behind the proposed change because it anticipates new rules which are likely to be introduced with the aim of improving "*the quality of the data available for safety and security related risk analysis*":

At present the ENS (security entry summary declaration) essentially takes the form of a "cargo (manifest) declaration", as defined in the WCO (World Customs Union) Safe Framework of Standards. Regulation 648/2005 identifies the carrier as the person responsible for the lodgement of the ENS. This concept was carried over to the MCC.

We understand that EU risk analysis experts are now calling for a re-definition of the ENS data, to include more detailed *trade transaction related* data, with the intention to come to a result that is closer to a "goods declaration" (as defined in the WCO Safe Framework of Standards). On the basis of its normal business activities *the carrier does not have these data* and, primarily for reasons of confidentiality of commercial data, is not in a position to obtain them. Therefore, whilst we acknowledge the authorities' prerogative to decide on the value of data-elements in terms of risk analysis, such re-definition of data-elements unavoidably calls for a re-definition of what party is responsible for submitting which data elements at what time. Data must be provided by the commercial party in the supply chain that owns the data on the basis of its normal business operations. Transport related information - "cargo (manifest) declaration" data must be provided to customs by the carrier (or its representative), trade transaction related information - "good declaration data" - such as the identification of the importer/exporter, the buyer and the seller or detailed (coded) goods descriptions must be provided by the importer (or its representative or another person, like a freight forwarder, that has the information on the basis of its normal business operations).

A multiple filing system as recommended by the WCO Safe Framework of Standards and successfully implemented in many parts of the world is built on the principle that information needs to be collected from the person who has it available and holds the appropriate right to submit it. It is a system that was adopted after experience has proven that this was the preferred way to obtain quality information for risk assessment.

CLECAT members are convinced that this approach is the only sustainable one and the only one that offers a reliable long-term perspective of success. This approach will also avoid lengthy legal discussions, should single filing ever become questionable from a constitutional point of view by EU Member States. CLECAT believes that it is in the Union's and the Member States' interest to align themselves to international best practices and to avoid possible future controversy.

As the representative of freight forwarders and third party logistic operators **CLECAT supports the deletion of the definition of the person responsible for lodging the entry summary declaration as in MCC Article 88.**

Still, it may be argued that a matter as important as the definition of the persons responsible for lodging data constituting the entry summary declaration should be defined in the UCC. **CLECAT supports such definition in the UCC, provided the above considerations are fully appreciated** and as long as there is some flexibility for future adjustment. CLECAT strongly advises however not to re-introduce the definition as defined in the MCC Article 88. In the light of anticipated future requirements in terms of data CLECAT is of the opinion that MCC Article 88 is not workable in a future customs regime.

2.4. Article 124 (4) – Security II

In accordance with Article 124 (4), *where non-Union goods presented to customs are not covered by an entry summary declaration, and except where the lodging of such declaration is not required, the holder of the goods shall lodge such a declaration or a customs declaration replacing it immediately.*

The holder of the goods at the time the goods are presented is generally the carrier. In a multiple filing approach the carrier may not have all the information required. The terminal operator in general will certainly not have the information either, and may not be in a position to obtain it (from the parties responsible for lodging the entry summary declaration), again for reasons of commercial confidentiality.

There is a clear interdependency between this article and the above discussed Article 118 (a) which empowers the Commission to adopt delegated acts *specifying the rules on the procedure for lodging an entry summary declaration.* The rules for lodging an entry summary declaration at the time of presentation, in our opinion can be considered as part of the *rules on the procedure for lodging an entry summary declaration* and therefore could be dealt with through a conferral of implementing powers according to Article 118 (a). Alternatively article 129 could be amended to include the relevant empowerment. In both cases Article 124 (4) can be deleted.

If it is decided, as discussed above, to define the person(s) responsible for submitting the data in the UCC, article 124 (4) should be aligned to that definition.

CLECAT therefore suggests, either to delete the Article 124 (4) and refer the rule to a Commission act, or, if it is decided to define the parties responsible for submitting the data in the UCC, to align Article 124 (4) to that definition.

2.5. Article 138 (2) and (3) – Centralised clearance

Article 138 deals with centralised clearance, i.e. the possibility for trade to lodge a customs declaration at the customs office supervising the place where they are established, irrespective of where the goods are presented.

The corresponding article in the MCC provided that it was the supervising customs office that would grant (or refuse) the release of the goods and that the presentation customs office would normally carry out no examinations other than for security and safety purposes or the ones justifiably requested by the supervising customs office. The benefit for trade is that, if there are no specific security concerns which require intervention at the place where the goods are presented, normally they need to deal with only one customs office: the customs office supervising the place where they are established and where the declaration is lodged.

Article 138 (2) changes this approach, in that it will be the presentation customs office (instead of the supervising customs office), which will be responsible for granting release. Article 138 (3) now provides that the controls which the presentation customs office may do will no longer be restricted to controls for safety and security purposes.

In this way a large part of the benefits will be lost.

CLECAT therefore suggests restoring the provisions as in the MCC and amending Articles 138 (2) and (3) as follows:
(2) *The customs office at which the customs declaration is lodged or made available shall carry out the formalities for the verification of the declaration, and the recovery of the amount of import or export duty corresponding to any customs debt and for granting release of the goods.*
(3) *The customs office at which the goods are presented shall, without prejudice to its own controls for security and safety purposes, carry out any examination justifiably requested by the customs office at which the customs declaration has been is lodged and shall allow release of the goods, taking into account information received from that office.*

2.6. Article 91 (1) and (2) - Limitation of the customs debt

Article 91 (1) and (2) of the Commission's UCC (MCC Recast) Proposal reads:

> *1. No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred.*
> *2. Where the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the three year period laid down in paragraph 1 shall be extended to a period of ten years.*
> *3. Where an appeal is lodged under Article 37, the periods laid down in paragraphs 1 and 2 shall be suspended, for the duration of the appeal proceedings, from the date on which the appeal is lodged.*

CLECAT proposes that the limitation period in the case of 'customs debts incurred as a result of an act which at the time it was committed was liable to give rise to criminal court proceedings' (paragraph 2), shall be reduced from ten to five years. A limitation period as long as ten years feeds legal uncertainty, and in a modern customs environment unnecessarily increases cost and administrative burden.

To summarise:

- CLECAT agrees with the Commission's decision to amend the MCC (UCC), mainly in the points of deadline extension and update of the implementing provisions according to recent changes. IT

development should be based on a balanced integrated IT master plan, in which trade facilitation has a prominent place.

- CLECAT is keen on being fully involved as a partner at all stages of the consultation process for both the UCC and the implementing procedures.
- CLECAT regrets that the Commission did not seize the opportunity to introduce additional tangible benefits in the UCC Recast that would encourage legitimate and reliable economic operators to apply for the Authorised Economic Operator (AEO) status.
- In regards to the person(s) responsible for lodging an entry summary declaration (ENS), CLECAT supports the usage of a multiple filing system as recommended by the WCO Safe Framework of Standards. This approach would avoid that parties in the supply chain would have to compromise their legitimate and long-established proprietary and confidential business arrangements.
- CLECAT supports the idea that all data exchanges should be made using electronic data-processing. From a trader perspective, it is important to avoid automated and manual processes running alongside (deletion of article 6 (3)).
- As far as centralised clearance, CLECAT suggests going back to the original MCC article, where the supervising customs office would grant or refuse the release of goods, and the presentation customs office would carry only security and safety examinations. This will affect article 138 (2) and (3).
- CLECAT proposes a limitation of the Customs debt period, described on article 91 (2), from ten to five years.

CLECAT hopes that the European Parliament and the Council will take into account the issues outlined above. The European Parliament and the Council have a key role to play in ensuring the final Code creates a European customs system which is sustainable whilst creating benefits for industry.

CLECAT also calls on the European Parliament and Council to reaffirm their commitment to the objectives and spirit of the UCC.