UNICE
THE VOICE OF BUSINESS IN EUROPE

21 September 2004

Consultation on "the new Community Customs Code"

UNICE preliminary comments on the draft of a modernised Community Customs Code

General comments

UNICE fully supports the objective of simplifying and modernising customs legislation and procedures in the EU and worldwide. European business welcomes efforts to that end, including the streamlining of customs procedures as one of the main features of the draft of a modernised Community Customs Code (Document TAXUD/458/2004 Rev 3). UNICE believes that the new Customs Code should contribute to promoting trade facilitation, adapting rules to a modern electronic environment on an EU-wide basis and result in the necessary simplifications reducing the costs for business.

UNICE particularly welcomes the modifications concerning:

- harmonisation of security standards,
- establishment of a one-stop shop for customs and other administrative formalities,
- a common status of authorised operator for all Member States,
- harmonisation of the conditions for obtaining customs regimes and procedures for all European operators and limitation of practices which cause distortions of competition between economic operators in the different Member States.

The current proposal for a modernised Customs Code raises however also concerns in particular regarding:

- the latitude that would be given to the different customs administrations for its implementation, which would still run the risk of diversions of traffic due to possible divergences in its interpretation as well as in its application;
- the willingness to transfer to operators ever more responsibilities and administrative tasks linked to customs and security. UNICE believes that a clearer vision is needed on the overall customs clearance process and the real modernisation and simplification in operation of the economic regimes.

UNICE would also like to underline the following general questions:

- For UNICE, the new code should be adopted and come into force at the same time as the implementing provisions. Without knowledge of the implementing regulation, it is very difficult to fully assess the concrete implications of the proposed changes. It therefore urges the Commission to work in parallel on the implementing measures in close cooperation with the interested parties
- UNICE is concerned to note the proposals to transfer many points from the code to the implementing provisions. This means that approval arrangements will be dealt with by the customs code committee and will no longer be subject to parliamentary supervision. This relates in particular to the administrative penalties, status of authorised economic operator and arrangements for security checks.
- In the comments that accompany the code, there is frequent reference to the Kyoto Convention, as there is in certain articles of the code. UNICE is surprised to note that the code does not incorporate all the provisions of this Convention on operator protection in relation to omissions and inaccuracies.
- The Single European Authorisation (SEA) should be clearly included in the new Community Customs Code. SEA is extremely important for companies established in several Member States. These enterprises need a clear definition/scope of SEA in Community legislation. A separate title/chapter of the code should therefore be devoted to this important subject

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Comments on articles

Article 1 - Mission of customs

UNICE believes that it is essential to reincorporate in the code's mission in the proposed new article 1 (REV3) the two points included as indents 8 and 9 on maintaining dialogue with operators in order to ensure that their needs are taken into consideration, and to take account of changes prior to publication of texts as well as to promote transparency by posting laws, regulations and rulings free of charge on the Internet.

Article 4 -Definitions

It is questionable whether, for instance, limitation of the customs procedures in article 4 to three procedures ("release for free circulation", "special procedures" and "export") represents a true simplification if the "special procedures" in Title VIII are then subdivided into numerous individual procedures.

This article should also provide for a proper definition of "customs representative" with a reference to article 9, clarifying his nature, tasks and minimum requirements.

Point 2: Fiscal representation should be included in those companies which use a representative without having a permanent establishment.

Point 26: UNICE argues in favour of establishment of a risk analysis system at European level, based on strong coordination by the Commission, in order to limit the risk of operators being treated differently depending on the Member State concerned.

A definition on "safety and security" is missing.

Article 6 – Memorandum of Understanding

An MOU should be seen as an instrument to promote trade facilitation. Good cooperation which is beneficial to both sides should be reinforced. But it is only fruitful and leads to the desired success if it takes place on a voluntary basis. UNICE does not regard statutory provisions or requirements for memoranda of understanding as necessary. It is concerned by the access to customs participants' IT systems by public authorities via such memoranda. Giving access to the economic operators computer systems should not be included in the memorandum of understanding.

Article 7 – Provision of information by customs authorities

Considering the impact of the Community Customs Code for all companies and services providers, economic operators should be formally associated with the Commission work.

Article 8- Provision of information to the customs authorities

An obligation on the parties in the customs relationship and their representatives is introduced to provide truthful, correct and accurate information to customs authorities. The article, however, does not seem to provide (according to para 2) any sanction for infringement of this obligation, while article 46 does so provide when the debt in incurred. How are articles 8 and 46 interconnected? We suggest that para 2 of article 8 is rewritten in clearer terms.

Article 10 – Authorised economic operator

The inclusion of the authorised economic operator (AEO) in the Customs Code must be seen as a positive development. The status of authorised operators must be recognised in all EU Member States in order to be in line with the single market objective and benefit from facilitation procedures irrespective of the state in which the customs office of entry or exit is situated.

The status of authorised economic operator must confer genuine advantages for operators of all sizes. In particular, authorised operators must be eligible for all simplifications in customs procedures. The

AEO should be waived from the obligation to submit (summary) declarations upon arrival or departure of the goods. Neither should it be necessary to present the goods to customs during the physical goods movement.

UNICE believes that the costs entailed by the new system (summary declaration, changes to computer systems and new organisation for customs clearance) for operators should have to be minimised and have to be compensated by a particular effort on the part of the Commission and customs administrations to bring about simplification using a cost-benefit approach.

Clear criteria should be available for safety and security. The criteria should be harmonised preferably at global level but in any case they should be accepted by all EU Member States. The type and extent of simplified procedures should depend on the level of compliance. The European Commission should therefore consider a mechanism and criteria for classifying and certifying economic operators. Such a framework and the results thereof should be accepted and recognised by all Member States.

UNICE believes that the AEO will be a major step forward in the customs area. It will enable companies to make their import/export process much more efficient, at the same time freeing resources on the side of customs to concentrate on the real risks. The approval for authorised operators should be valid for all EU countries and be used for all customs, administrative, and security formalities.

Article 11 – Decision relating to the application of customs rules

Point 4: The provision that the custom authorities may annul, amend or revoke any decision that does not conform with the interpretation of the rules of customs is a far too open-ended and subjective criterion and stretches the meaning of the CC too much. The current texts on revoking decisions are very specific, however the proposed text could mean that customs authorities could revoke any decision at all times. This proposal should be modified, because it would create uncertainty and completely undermine the value of decisions like classification or origin decisions.

Point 5: The proposed text on the validity of customs decisions throughout the territory of the Community is a great improvement in the completion of the EU single market from the customs perspective.

Article 14 – Classification and origin decisions

The text should mention the need for origin decisions to be valid in the whole of the EU and not only in one Member State.

Moreover, the proposed text states that the classification or origin decisions are valid for a period of three years, while currently they are valid for six years. Shortening the period will frustrate long-term contracts, as business needs to rely on these decisions.

Article 19 – Administrative penalties

The text foresees administrative penalties for infringement of the customs rules. However, nothing is said regarding appeal by economic operators against sanctions neither on establishment of guarantees to protect them against a discretionary decision. Appeal procedures should be included in line with the WCO Kyoto Convention.

Article 20 – Customs controls

According to the proposed text, customs controls shall be based on risk analysis. Guidelines should be prepared as to how the risk analysis is conducted. Business should be associated to the elaboration of these guidelines.

Article 22 – Currency conversion

Currently, it is easily possible to have real-time access to rates of exchange. It is therefore unnecessary for customs to publish separate rates of exchange, because they might not reflect as

effectively as possible the current value of each currency. Furthermore, the extra rate of exchange that is proposed to be published by the customs authorities could constitute a new administrative burden for business.

Article 24 – Simplification

Economic operators should be associated to the simplification process.

Article 27 – Acquisition of origin

A reference to the conditions for obtaining non-preferential origin comprised in the current article 24 has been deleted.

UNICE calls for re-incorporation in the new proposed article 27 (TAXUD/458/2004-Rev3) of the end of the paragraph from the current article 24 of the Community Customs Code regarding non-preferential origin. This covers the conditions for grant. i.e. "last substantial transformation economically justified, carried out in a facility equipped for this purpose and resulting in production of a new product or representing and important stage of production". This rule currently in force must be maintained until an agreement is reached in WTO.

Article 38 – Comprehensive guarantee

UNICE welcomes the introduction of a section which maps out the criteria for having a comprehensive guarantee reduction or waiver based on the existing transit provisions. These criteria must not, however, exclude SMEs.

Article 46 – Non-compliance

The merger of situations where a customs debt is created from articles 202, 203, 204 and 206 in the proposed article 46 is very welcome. This essentially makes it possible to offer relief on operations which have had no effect on ascertaining the duty. Nevertheless, UNICE is concerned that this positive approach would be nullified by customs authorities which apply a restrictive interpretation of the concept of "gross negligence" in the implementing regulation. This would require appropriate clarifications in the implementing regulation.

Paragraph (4) is in contradiction with the notion of direct or indirect representation. This article should not place a question mark over the principles set out in article 9.

Article 58 - Post clearance recovery

This article is comparable to article 220 of the CCC. However, in the proposed text the passage concerning "an error by the customs authorities" is no longer included. This means that national courts of law no longer play a role. National customs authorities could upon request decide on cases that concern less than € 500,000, but these would have to be reported to the EC. Should the custom authorities deny the request it would be possible to appeal the decision in a national court of law. However, this would make the entire procedure extremely complicated.

Article 59 – Communication of the debt

The deadline of ten days given in point 3 to the debtor of the customs debt to make his views known to the customs authorities would be too short. A one-month deadline would be more realistic.

Article 62 – Deferment of payment

UNICE supports the proposal to abolish the possibility for Member States to charging fees for the granting of deferment of payment, as a way to promote trade facilitation.

Article 67 – Repayment and remission of duty: General provisions

Paragraph (3): The debtor of a customs debt must pay this debt without delay or late payment will result in late interest. In the converse case, where duty has been collected wrongly, this does not give the right to compensation unless the reimbursement period exceeds three months. This text seems very imbalanced and does not fit in with a framework of good governance. It should include an obligation on administrations to reimburse these sums as soon as they are certain of the existence of the claim on the treasury. Where there is a possibility of reimbursement of the customs debt, the reimbursement deadline must be set at 60 days maximum with late interest (payment periods are currently 8 months to one year).

Article 71 – Equity

The notion of good faith by importers is key. Companies must not be held responsible for a foreign administration or an inattentive exporter.

Summary declaration

UNICE believes that the summary declarations must not jeopardise the simplified customs clearance procedures in companies. Moreover, the timetable for implementation of the summary declaration should be adapted so that its management by customs administrations can be computerised under an electronic environment.

The text is not very clear because it is difficult to determine who would be responsible for the data included in the summary declaration. Another issue is to make sure that the data correspond exactly to physical flows.

The possibilities to amend the declaration "a posteriori" are almost non-existent; and it is not clear what would happen in case of an error noted by the importer on the data of the declaration. How could they be rectified to establish a correct import declaration?

It appears also to be difficult to evaluate the practical feasibility of the proposed changes. It is necessary to review the articles of the code and its implementing provisions (in the committee procedure) simultaneously, in order to clarify what information would have to be included in the prior declaration, who is supposed to provide it, when, to whom, and where this information would have to be submitted.

It is important that practical solutions are found through specific arrangements on the implementation decisions that can prevent new trade barriers between EU and EFTA -EEA 3 being introduced.

Customs declaration

Articles in this chapter (Arts. 89 to 93) should make a reference to prior declaration presented to an entry office in the EU. Supporting documents should be accepted in an electronic configuration.

Article 99 - Partial examination

The article states that, once the goods have been cleared, the declarant can no longer contest the representativeness of the sample taken by customs, in accordance with the European Court of Justice (Decision 4 March 2004, Derudder). In fact, the Court stated that the declarant (or his representative) who attended the drawing by the customs authorities of a sample from the imported goods without opposing the representativeness of such a sample, could contest such representativeness, if asked by customs to pay supplementary import duties following the analysis effected by the authorities, but with two exceptions. To the exception provided for by the Code and represented by the goods clearance, one should add the provision that, once the clearance is granted, the same goods have not been altered in any way, with the onus of the proof on the declarant. Article 99 should therefore include also this second exception.

Article 104 – Simplified declaration

It is not clear whether the simplified declaration may coincide with the summary declaration of Article 74. If not, why would it be necessary to provide the same information twice? If the customs would waive the simplified declaration, would the waiver also apply to the summary declaration? If the goods would be released on the basis of the simplified declaration, would the release count for all customs procedures? The CCC should make it possible for economic operators to assign the goods definitively to any customs procedure after the release. The final customs procedure should therefore not be included in the simplified declaration.

The simplified procedures in article 104 relate to both imports and exports. Nevertheless, it seems necessary to draw some distinctions between imports and exports:

a) Imports

At least for imports, indication of the customs procedure should be obligatory only on submission of the supplementary declaration. This should be enshrined in the code. In this way, the event of an erroneous notification involving a payment, no waiver or refund would be necessary. Both the operator and the customs administration would be spared the administrative work involved in granting a waiver or paying a refund. This would be an important step towards modernising the Customs Code.

Hitherto, with the entry procedure, entry in the books of the operator's system have been regarded as the declaration. This provided the possibility and the legal basis for the good to be transferred at the same time as the entry is made. This possibility should continue to exist for an "authorised operator", with this not being linked to access to the participant's system.

b) Exports

In the area of exports, too, the "authorised operator" must be able to dispense with individual declarations without granting access to the participant's system. Instead of individual declarations, there should be an aggregate declaration. Without this possibility, the planned and indispensable dispensing with individual declarations for "authorised operators" in the framework of the advance notification would be pointless. Here, too, the implementing regulation for the Customs Code must make provision for a declaration without reply message.

Articles 113,120 and 147

It is important not to limit recourse to equivalence in order to preserve the interest of these regimes of special procedures. If UNICE can understand the Commission's reservations, controls should possibly be strengthened but the application of this principle should not be restrained. Operators should not be penalised by restricting the current possibility of using equivalence.

Article 114 – Application and authorisation

This approach leaves much discretion for national initiative. Economic operators must be treated identically in all Member States, in particular regarding agricultural products.

Article 163 – Export procedure

The proposed export procedure is stricter than the current procedure. It seems that non-Community goods that leave the customs territory of the Community also would need to be reported. This means that also for goods in a customs warehouse that are shipped outside the Community an export declaration would have to be lodged. This would mean an extra and heavy administrative burden for business.

Final provisions

UNICE might supplement these preliminary comments as the debate develops. It offers its assistance and technical expertise in bringing the modernisation of the Community Customs Code further. In that context, as the impact of the proposed changes would be significant for all companies and services providers, it calls for the operators to be formally associated with the Commission work.

One possibility could be the creation of an *ad hoc* group bringing together administrations and operators entrusted with the task of analysing the text, notably with regard to the Community Customs Code's implementing provisions.
