

UK P&I CLUB



# Legal Briefing

DECEMBER 2010

COMMUNITY CUSTOM CODE

## European Union Advance Cargo Declaration Regime



UK P&I CLUB  
IS MANAGED  
BY **THOMAS  
MILLER**

# About us

*This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members*

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director Chao Wu.

As part of Thomas Miller that virtual team can also call on executives who support the UK Defence Club and the experience and expertise that serves the largest defence mutual in the world, with over 3,500 owned and time chartered ships entered.

If you have any enquiries regarding the issues covered in this briefing please contact the team via Chao Wu and we will be pleased to respond to your query. The team also welcomes suggestions from Members for P&I related legal topics and problems which would benefit from explanation by one of these briefings.

## **Chao Wu**

Legal Director



Chao has a doctorate in law and is based in London as Legal Director, where she is responsible for giving general legal advice, including guidance on the legal aspects of P&I Club documentation, and on the legal aspects of cover for Members' contractual arrangements. She represents the Club on various subcommittees and working groups of the International Group of P&I Clubs. Chao speaks Mandarin, French and Shanghainese.

**Direct line: +44 207 204 2157**

**Email: [chao.wu@thomasmiller.com](mailto:chao.wu@thomasmiller.com)**

## THE AUTHOR

### **Domenico Ferrara**

Claims executive



Domenico joined Thomas Miller in 2010 after spending two years working in another International Group P&I Club handling P&I and Defence claims mainly for Italian, Greek and Cypriot shipowners. He is a qualified Italian lawyer and expected to qualify in England and Wales shortly. He also holds a Master's degree in Maritime Law from Southampton.

**Direct line: +44 20 7204 2327**

**Email: [domenico.ferrara@thomasmiller.com](mailto:domenico.ferrara@thomasmiller.com)**

# Equality of protection of goods shipped through EU customs

*The European Union Advance Cargo Declaration Regime, effective January 1st, 2011, will affect all freight imported into and exported out of Europe, as well as transshipment cargo.*

EU regime is laid down in Regulation 648/2005, which was implemented by Regulation 1875/2006 and then amended by Regulation 312/2009. These regulations are all part of the Community Custom Code (CC) as laid down in Regulations 2913/92 and 2454/93 and therefore referred as Customs Code Implementation Provisions (CCIP). The aim of the regime is to ensure an equal level of protection through customs controls for all goods shipped into, out of or through the EU and appear to have some elements in common with the US regime that was introduced following the terrorist attack of 9/11.

The aim of this legal bulletin is to provide a general overview of the regime and its scope, and answers to the most common questions that would assist Members in understanding the relevant issues on how the Regulation will be enforced.

## General overview

In 2009, the European Commission adopted Regulation 312/2009 aiming at increased security for shipments entering or leaving the EU and with the intention of providing greater facilitation for compliant operators.

A better risk analysis for goods entering or leaving the EU has been introduced. For traders with a status of Authorised Economic Operators, there would be some benefits in that less cargo information elements will need to be declared. The regulation requires customs authorities to exchange information electronically on imports and exports with an aim at informing each other on potential risks or (terrorist) threats.

[Under the Regulation, with effect from 1 January 2011, any failure [by an economic operation, such as a shipping company, to comply with the obligations laid down in the European Union Advance Cargo Declaration Regime will be subject

to penalties imposed by the individual EU Member States according to the national legislation.

The EU Advance Cargo Declaration Regime creates a layer in addition to existing customs legislation, either laid down in the Community Custom Code or in application in accordance with national legislation.

The amendment to the Customs Code brought about by the new regulation covers four major changes:

- It requires traders to provide customs authorities with information on goods prior to import into, export from, or transshipment via, the EU. This information, moreover, needs to be submitted electronically and within well-prescribed time limits.
- It may provide traders with a status of Authorised Economic Operators with certain facilitations.
- It introduces a risk-assessment amongst EU Member States supported by computerised systems for goods entering, leaving or transiting EU customs territory.
- It implements an EU database enabling the consultation of all national registration numbers (EORI).

## Scope of application of the EU Advance Cargo Declaration regime

- It will apply to import, export or transit of the goods.
- A ship operator (normally the carrier) or its representative (i.e. ship agent) will have to declare cargo information in advance to the customs office solely in case of import or export of goods.

- All shipping sectors are covered but there are different provisions for each of these sectors.
- Time limits within which a ship operator/its representative will have to submit an advance cargo declaration are different for deepsea containerised shipping, deepsea bulk shipping, shortsea shipping and combined transport.

### What cargo information is to be submitted?

- The cargo information to be submitted in advance to the customs office is set out in Annex 30 A to Regulation 1875/2006.
- In case of import of goods, the ship operator or its representative must declare cargo information, in advance, to the customs office of first entry in the form of an “Entry Summary Declaration” (ENS), except if an ENS exemption would apply.
- In case of export of goods, the ship operator or its representative must declare cargo information, in advance, to the customs office of exit either in the form of a customs declaration for export, re-export or outward processing, or, in case such customs declaration does not apply or there is no exemption, in the form of an “Exit Summary Declaration” (EXS).

### Who is liable to declare specific cargo information in advance?

- The ship operator is the person liable to declare cargo information in advance to the customs office. They must ensure that such declaration has been done. They can either themselves declare cargo information in advance to the customs office, or their representative (i.e. ship agent) can do so on behalf of the ship operator.
- In case of combined transport, such as trucks carried on board a ferry, the advance cargo declaration must be done by the truck company or truck driver and not by the ship operator.
- In case of “vessel sharing arrangements”, the advance cargo declaration must be done by the bill of lading issuing carrier and not by the ship operator. (See below).
- In containerised shipping, both deepsea and shortsea, a third party (typically a freight

forwarder) is expected to declare cargo information in advance to the customs office instead of the ship operator. The freight forwarder can only do so provided that the ship operator has been advised thereof beforehand (knowledge) and that the ship operator has agreed thereto (consent).

- The person who declares cargo information in advance to the customs office must include in his declaration – be it an ENS or a custom declaration or EXS – his so-called “Economic Operator Registration and Identification” (EORI number). If it is the ship operator he must include its EORI number. If it is a third party (freight forwarder), that party must include its EORI number.
- If an advance cargo declaration has been done, the person who made this declaration will receive from the customs office a receipt called the “Movement Reference Number” (MRN). If an advance cargo declaration has been done by a third party (e.g. a freight forwarder), the carrier will receive an MRN as well provided that the carrier has been identified by means of his EORI number in the ENS submitted by the third party to the customs office in an EU Member State and that the carrier has an IT connection to the computer system of that EU Member State.

### Who is the “Carrier” under the Regulation?

Problems might arise in respect of who can be identified as “carrier” and consequently, who is ultimately liable to issue the declaration.

A general idea of “carrier” has been given by the Customs Code Committee in their “Guidelines on entry and summary declarations in the context of Regulation (EC) 648/2005”.

According to paragraph 4, “*Article 36b CC establishes that the operator of the active means of transport on or in which the goods are brought into the customs territory of the community is responsible for filing of an ENS (Entry Summary Declaration). The operator (or “the carrier” – our emphasis) is the person who brings, or who assumes responsibility for the carriage of the goods into the customs territory of the community.*”

The paragraph follows by saying that there are some types of transport arrangements where the

ENS filing obligation lies with a person other than the operator of the active means of transport.

*“In the case of **maritime or air traffic involving vessel sharing** or similar contracting agreements between the involved carriers, the obligation to file an ENS lies with the carrier who has contracted and issued the bill of lading or an air waybill, for the carriage of the goods into the territory of the Community on the vessel or aircraft subject to the arrangement”.*

*“in the case of **“combined transport”** (e.g. a truck carried on a ferry) where the means of transport entering the customs territory of the Community (the ferry) is only transporting another means of transport which, after entry into the customs territory of the Community, will move by itself as an active means of transport (the truck), the obligation to file an ENS lies with the operator of that other active means of transport (the trucking company)”.*

To summarise, the responsibility to declare the required cargo information in most cases rests with the entity which has assumed the responsibility of the carriage or has issued the bill of lading *“for the carriage of the goods into the territory of the Community on the vessel”* (as carrier/ship operator) or his representative, with exceptions for combined transport and vessel sharing.

Third parties (such as freight forwarders) are entitled to file the information instead of the carrier but the carrier will ultimately still remain liable. The main process is the pre-arrival filing of the entry summary declarations (ENS) for all EU bound shipments on the means of transport. The ENS must be filed to the first office (country) of entry in EU. The customs office will analyze the cargo information received in advance with an aim at identifying potential serious safety and security risks. In case of import of goods, the carrier will also have some additional obligations. The carrier will have to submit an “Arrival Notification” (AN) and in cases of diversion, the carrier will have to submit a “diversion request”. Advance cargo declarations must be done electronically.

### **What IT system is to be used?**

The first step in the full computerization of the EU customs will be the so called “electronic customs project”. Customs authorities will be required to exchange information electronically on exports between the customs offices involved in the procedure.

Once all Members States are connected to the Export Control System, Community exporters will receive the proof of exports immediately after the exit of goods, enabling all related processes to be speeded up.

Regrettably, as EU did not have the competence to establish one single EU-wide computer system, the declaration will be different in each individual member state and no specific guidelines have been provided in order to comply with the EU Advance Cargo Declaration. To this end, some companies have decided to centralise the input via their main office setting out a single computer system for all their branches/offices/agents; others have decided to use a common provider, whilst others have simply issued circulars with their guidelines.

Even though all of the above might be valuable solutions, it appears difficult to predict which is the most appropriate. However, given that the new regime will require shipping companies to exchange data with customs authorities, it would be advisable for Members to review their IT systems now so that they ensure compliance with customs authorities IT systems in countries they may trade to. Furthermore, on the basis of different systems for each single state, it appears also advisable to ask local agents to liaise with the IT Manager appointed by each individual Member State who acts as a contact person versus the shipping company or his representative.

### **Conclusion**

It is difficult to predict how each Member State will enforce the Community Customs Code and respond to the constant increment of information lodged by traders.

Much co-operation will be required and it can be envisaged that there may be a transitional period during the initial implementation of the new regime where allocation of responsibility may be unclear. Further enquiries on this briefing can be directed to Domenico Ferrara (tel: +44 20 7204 2327 email: domenico.ferrara@thomasmiller.com).

# Practical examples on the application of the Advance Cargo Declaration Regime

## Bulk cargo

A vessel operated by Alpha Ltd, the carrier, loads cargo in bulk at Santos for carriage to Taranto, Italy. Alpha issues a bill of lading to the shipper with whom it enters into a contract of carriage of the goods loaded on board the vessel.

An ENS must be lodged electronically, for the whole cargo carried by the vessel, at the custom office of Taranto, [Art 184a (1)(b) CCIP applies]. Under Article 36b (3) CC, the responsibility for the lodgement of the ENS for the bulk cargo lies with the company that operates the vessel carrying the goods into the customs territory of the Community. In bulk shipping, the person who will act as operator of the vessel (“carrier”) and therefore will be responsible for the lodgement of the ENS will depend on the contractual agreement. (For the purpose of this example, Alpha is pursuant to the charterparty to be the operator of the vessel).

Article 5 CC allows any other person to lodge the ENS on behalf of the Alpha as representative of ship agent.

At least four hours before arrival in Taranto, Alpha, as carrier, must lodge (by itself or through its representative/ship agent) an ENS to the customs authority at the port for all of the cargo for which it has been issued bills of lading. Alpha will be liable for the accuracy and relevance of the declaration.

The customs office of Taranto will, immediately upon receipt, register the ENS and notify the carrier electronically of the MRN (Movement Reference Number). Then it will carry out risk analysis on the ENS in accordance with Article 184d CCIP.

Upon arrival of the vessel, Alpha, as carrier, has the duty to lodge an arrival notification in a manner acceptable to that custom office [Article 184g CCIP– different in each Member State]. Such notification must contain all the necessary information to allow identification by the customs office of the ENS. A specific ENS must be lodged for each Bill of lading issued – three bills of lading mean three ENSs to be lodged. The identifying information can take the form of either an “Entry Key” (i.e. mode of transport at the border: the IMO

vessel number: and the expected date of arrival at the first Community port as declared in the ENS), or a list of all the MRNs for all the ENSs (the latter appears to be advisable when just few ENSs are to be lodged).

All of the goods discharged at Taranto must be presented to the customs authorities and must be covered by a **summary declaration of temporary storage**, which must be lodged with the customs authority no later than at the time of presentation of the goods [Art 186 CCIP]. The summary declaration consists of a reference to ENS, supplemented by whatever information is requested by the customs office of Taranto.

In case of diversion of the vessel to another port in the same Member State, e.g. Ravenna, no advice of change of route is required [Art 183d CCIP]. Advice to and between the ports is left to the national system.

If the vessel diverts to a new first port in a Member State not declared in the ENS, e.g. FOS, the vessel operator has the duty to immediately notify the customs office at Taranto of the diversion, by using the **diversion notification** message [Art 183d CCIP] to identify all the ENSs lodged at that port by Alpha. The custom office at Taranto will then notify the custom office at FOS and pass on any positive risk information [Art 184e CCIP]. An ENS cannot be amended after a diversion notification has been acknowledged by the customs office of the first entry declared in the ENS. No ENS needs to be lodged with the customs office at FOS, nor an ENS required to be lodged in any subsequent port in the Community on the vessel itinerary.

There is a different procedure in case the vessel calls firstly at a Community port, then at a non-Community port (i.e. Alexandria), and then again at a Community port (i.e. Barcelona). In this case, a new ENS must be lodged with the customs office in Barcelona which must cover all the cargo carried on board (not only the parcel loaded in Alexandria).

The liability and procedure for lodging the new ENS remains as described above for the lodgement of the ENS in Taranto.

## Containerised Cargo

A vessel operated by Beta Limited (Carrier) is fixed for the carriage of containers from Hong Kong to EU ports. The vessel first EU port of call is Naples. Beta issues bills of lading to the shippers with whom it enters into a contract directly for carriage of goods on the vessel. Beta also issues bills of lading to Speedy Limited (freight forwarder) as a shipper. Speedy will have issued its own bills of lading e.g. to exporters as shippers.

An ENS must be lodged electronically for all cargo carried on board at the customs office of Naples [Art 184a (1)(a) CCIP], which must also include all goods remaining on board at Naples to discharge at subsequent ports in the EU or elsewhere.

Under Art 36b (3) CC, the responsibility for the lodgement of ENS for the containers lies with Beta as carrier. Speedy is not, for the purpose of this provision, deemed to be the carrier. Under Art 5 CC, ENS can be also lodged by Beta's representative or agent.

Art 36b(4) CC also provides that Speedy might lodge the ENSs, rather than Beta, for the shipments under Speedy control. However, as Beta is obliged by EU law to check that this is done, Speedy can only lodge the ENS instead of Beta with the knowledge and the consent of the latter.

At least 24 hours before commencement of loading in Hong Kong, Beta (or its representative), as carrier, has the duty to lodge an ENS to the customs authorities of Naples for all the containers for which it has issued master bills of lading, including those containers for which Speedy has issued its own bills of lading. The parties, however, might contractually agree that Speedy (forwarder) would lodge the ENS for those containers for which Speedy has issued its own bills of lading.

The lodging of the ENS by Speedy must include the identity (EROI No) of Beta (carrier) and a reference to the master bill of lading issued to them by Beta.

As noted, the parties might have agreed that Speedy is responsible for lodging the ENS before the time limit of 24 hours before commencement of loading. If so, the lodgement of the ENS renders Speedy liable for its accuracy and relevance to the goods it is intended to cover [Art 183(1) and 199 CCIP]. The Customs office of Naples has the duty,

immediately upon receipt, to register each ENS and electronically notify the declarant of the MRN.

(For the ENSs lodged by Speedy, notification of the MRNs would also be sent to Beta, provided that the ocean carrier has been identified by its EORI number in the ENSs lodged by Speedy and has an electronic interface with the customs office of Naples. If not, the notification of the MRN will not be sent to Beta.)

Notification of the MRN will provide evidence for Beta that an ENS has been lodged and its obligation under Art 36b (3) CC has been met<sup>1</sup>.

The customs office at Naples has the duty to carry out risk analysis on the ENSs upon receipt [Art 184d CCIP]. Any negative feedback related to the containers for which the ENRs were lodged by Speedy will be notified to both companies (Speedy and Beta).

Upon arrival at the calling port, Beta, as vessel operator, must lodge with customs office at Naples an arrival notification in the manner accepted by that customs office [Art 184g CCIP]. The **arrival notification** must contain information to allow the identification of all the ENSs lodged for all the cargo on board in the same form reported above ("Entry Key" or list of all the MRNs for all the ENSs).

All the goods discharged must be presented to the customs authorities and must be covered by a **summary declaration of temporary storage**. This must be lodged with the customs authority no later than at the time of presentation of the goods. The summary declaration consists of a reference to ENS, supplemented by whatever information is requested by the customs office of Naples.

Goods remaining on board for discharge at subsequent EU and non-EU ports are not to be presented to customs at Naples [Art 189 CCIP]. If goods are presented at Naples for which no ENS has been lodged, the customs office shall require the carrier, Beta, to lodge such declaration immediately [Art 184c CCIP].

Even in this scenario it is possible that the vessel can be diverted to another port in the same State or a different EU Member State. In case that such diversion occurs, the same procedure as set out in the bulk cargo scenario, will apply.

<sup>1</sup> In case Speedy subsequently makes amendments to its ENS, such amendments will be also notified to the ocean carrier.

**UK P&I CLUB** 

**UKDC**  
**UK DEFENCE CLUB**

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**Thomas Miller P&I Ltd – London**

Tel: +44 20 7283 4646 Fax: +44 20 7283 5614

**Thomas Miller (Hellas) Ltd – Piraeus H1**

Tel: +30 210 42 91 200 Fax: +30 210 42 91 207/8

**Thomas Miller (Americas) Inc – New Jersey**

Tel: +1 201 557 7300 Fax: +1 201 946 0167

**Thomas Miller (Hong Kong) Ltd – Hong Kong**

Tel: + 852 2832 9301 Fax: + 852 2574 5025

[www.ukpandi.com](http://www.ukpandi.com) / [www.ukdefence.com](http://www.ukdefence.com)