WORLD SHIPPING COUNCIL COMMENTS ON NEW DRAFT
ARTICLE DA-IV-08 CONCERNING THE SUBMISSION OF ENS
PARTICULARS IN MARITIME TRAFFIC

November 21, 2014

The proposed changes to the EU Entry Summary Declaration (ENS) filing regime are amongst the most important modifications being developed via the UCC Implementing and Delegated Acts (IAs / DAs). WSC appreciates the opportunity to comment on the recently revised article DA-IV-1-08\(^1\) on “Other cases and persons required to submit particulars of the entry summary declaration”.

WSC understands that other Title IV chapter 1 provisions central to the filing of ENSs are also being re-drafted by the Commission. Because the proposed changes can only be properly comprehended in their entirety, we would welcome an opportunity to provide comments on those provisions as well.

Hereunder follow our comments on draft article DA-IV-1-08, about which we have a number of concerns.

1. **Definitions of Terms**

The draft does not include definitions of several terms used in the new draft, including: 1) transport contract, 2) NVOCC, 3) freight forwarder, or 4) consignee. This is likely to present complexities, ambiguities, and problems. For example:

- What is a “transport contract” issued by a freight forwarder? Does it involve/require/equate to a bill of lading? Freight forwarders have contractual relations with shippers that do not involve bills of lading or the forwarder taking on “carrier” responsibilities. Would it be correct that such contracts are not the “transport contracts” of interest here? Is it correct that what is meant is a “contract of carriage” involving a bill of lading, whereby the issuing forwarder takes on carrier legal responsibilities, a/k/a NVOCC responsibilities?

\(^1\) Version distributed to members of the Trade Contact Group on Monday November 17, 2014.
• It is not clear why the draft uses both “NVOCCs” and “freight forwarders” as terms (especially in Paragraph 2(a). It is generally understood that when a freight forwarder issues its customer a bill of lading (a “house” bill), it is acting as a “carrier” or “NVOCC”. A forwarder that arranges for transportation for a shipper but does not issue the shipper a bill of lading will not be acting as an NVOCC or carrier. Thus, if “transport contract” means a contract of carriage in the form of a bill of lading, a clear and commonly understood distinction between forwarder and NVOCC can be made, but that is not clear at present under European law. By using both terms simultaneously, it is unclear what the draft is intending to accomplish, particularly when the term “transport contract” is undefined.

• We note that the current definition of ‘carrier’ in Article DA-I-1-01’s definitions highlights this issue. It defines carrier as “a person transporting goods for another person”. That is exactly what a freight forwarder becomes when it issues a “house” bill of lading to its shipper customer and acts as an NVOCC (which is why the second C in NVOCC stands for “carrier”.)

• A “consignee” is generally understood to mean the party to which goods are consigned for delivery by the transport contract bill of lading; however, if the purpose of this draft is that under the Commission’s draft regulation this party will be expected to provide the identity of the “buyer” and “seller” of the goods, it misunderstands the term, and such an approach would be unworkable. The consignee may not be a party to the contract governing the sale of the goods. The consignee may have no knowledge of the buyer and seller of the goods. The consignee may have no contractual relationship with the carrier or forwarder filing the ENS other than being the party that takes delivery of the goods. (Discussed further below)

2. Which Freight Forwarder ENSs Are To BeFiled?

The intent of the draft legal provisions appears to be to require freight forwarders to file ENSs for shipments where they have entered into “transport contracts”, which we believe should be clarified to mean “issued bills of lading” and assumed responsibility to their customer to deliver the goods.

An important, related question, however, is whether the Commission intends to require ENS filings only at the “lowest” house bill level, or to require ENS filings for all bills of lading, including forwarder-to-forwarder bills of lading that are not at the lowest house bill level.

A legal requirement to provide ENS filings at the “lowest” house bill level would avoid Customs receiving multiple ENS filings from different forwarders covering the same goods. (See, e.g., the concept proposed in WSC’s November 10 submittal to the Commission.) If the

2 See, e.g., the WCO’s SAFE Framework of Standards.
legislation requires ENS filings for all carrier and all forwarder/NVOCC bills of lading, there will be overlapping ENSs, as we have previously discussed with the Commission staff. Presently, the draft Paragraph 1(a) states that “each person issuing a transport contract shall be required to submit necessary particulars pertaining to its transport contract”, which -- in contrast with Paragraph 1(b) which refers to consignments “at lowest level of transport contract” -- would appear to mean that all forwarder-to-forwarder bills of lading would have to generate ENS filings, in addition to ENS filings at the “lowest” house bills of lading. Is this the intent?

3. Carrier Obligation to Identify “Other Persons” Responsible for Filing ENSs

The current draft paragraph 3 presents several problems. This draft paragraph proposes to obligate the “carrier” to provide the “identity of other persons” responsible for submitting the remaining particulars of the entry summary declaration....” To the extent it is intended to mean ocean carrier, we note the following:

i. As we have previously noted, a carrier under the existing EU legal regime cannot know whether a forwarder is acting as an agent on behalf of a shipper or as an NVOCC issuing house bills of lading. The only solution we can identify for this dilemma (which we proposed in our November 10 submission) is for the legislation: a) to require the forwarder to inform the ocean carrier when the forwarder is issuing its own transport contract/bill of lading to shippers for the same goods being transported under the ocean carrier’s bill of lading (and thus acting as an NVOCC), and b) to require the carrier in such cases to include in its entry summary declaration the identity of that forwarder.

ii. With respect to shipments where the ocean carrier has issued a bill of a lading to a freight forwarder/NVOCC, the only “other” person that the ocean carrier can reasonably identify as submitting “remaining particulars” will be its freight forwarder/NVOCC customer (subject to the issue discussed in the bullet point below). An ocean carrier cannot reasonably be expected to identify other persons that may need to file ENSs if it has no business relationship with those persons. In the case of a co-loaded container, there will be multiple forwarder/NVOCCs that would be “responsible” for filing ENSs, but the ocean carrier is in no position to have direct knowledge of, or privity of contract with, those parties.

Paragraph 4 seems to recognize there is an issue here by imposing an obligation on forwarders/NVOCCs to identify co-loading forwarders; however, Paragraph 3 should be amended to clarify that the ocean carrier is not responsible for identifying co-loading forwarders with whom it is not doing business, but only the “master” forwarder with whom it is doing business.

iii. With respect to shipments where the ocean carrier has issued a bill of a lading to a shipper that is not a freight forwarder/NVOCC (a “straight” bill), the carrier can
under current law file all the data elements required in an ENS, because the data can all be drawn from the carrier’s bill of lading. With the existing ENS data elements, there should never be an application of the new draft Paragraph 3 for “straight” bills, because there would be no need for anyone other than the carrier to submit any “remaining particulars”. However, we understand that this important fact of the current regime may change under the new legal framework. If the Commission’s new rules require, as is presently proposed in document DIH 14-003 Annex B-DA, data that is not typically part of a bill of lading (e.g., “buyer” and “seller” data) to be submitted, a very different situation is created.

“Buyer” and “seller” data is not data that a carrier knows or needs as part of its business. It is not data that should be compelled to be provided to a carrier. Nor should the carrier be compelled to include such data in its ENS filing. Nor could a carrier reasonably be held responsible for its accuracy. Furthermore, such data may be business confidential, and the carrier’s shipper customer may not want to share it with the carrier. In that event, the draft regulations provide that the “other person” responsible for filing the “buyer” and “seller” data would be the “consignee”. This is likely to present serious problems. As discussed in more detail below, the consignee may or may not be the party that has entered into the transport contract with the carrier. It may or may not know the carrier’s bill of lading number in the carrier’s ENS, or that the container is even being readied for vessel loading at the foreign load port. The consignee may or may not be a party to the sales transaction and may or may not know the buyer and seller information. It may be business confidential information, which a shipper or a consignor does not want to share with the consignee. Yet, the draft regulation says the only “other” party to file the data in this case is the “consignee”.

We strongly urge reconsideration of this approach, and, as discussed below, strongly recommend that “buyer” and “seller” information not be required data elements in ENSs. The only entity that can consistently and reliably provide “buyer” and “seller” information is the importer. Other aspects of this issue are discussed below.

4. **Consignees and “Buyer” and “Seller” Data**

We believe the Commission staff understands that ocean carriers and freight forwarders are not appropriate parties to possess or file “buyer” and “seller” information, which is certainly correct. “Buyer” and “seller” data is not part of a bill of lading or a transportation contract. There is no need for carriers to have or know this information, and transport providers are not parties to the sales agreements covering goods arriving within the EU. We understand from Commission staff, however, that the draft legislation intends to try to obtain “buyer” and “seller” data via ENS filings nonetheless.
If the reference in the draft Paragraphs 2(b) and 5 is for the intent and purpose of establishing a regulatory structure to obtain “buyer” and “seller” data from consignees, it will not work. There would be many problems with such a concept as set forth in the current draft, including the following:

a. The consignee is a party named on a transportation contract. A transportation contract is not a contract involving the sale of the goods. The consignee may or may not be the importer. It may or may not have knowledge of who the buyer and seller of the goods are. The consignee may or may not be the party that has contracted for transportation services from the carrier, and thus may or may not have any business relationship with the carrier. The carrier may have no communication with the consignee before vessel loading.

Does the draft regulation actually intend to compel unspecified persons to disclose “buyer” and “seller” information to consignees that do not otherwise know it, or in the alternative to carriers issuing the bills of lading?

b. Which consignee? As noted above, the draft provisions would require an ENS to be filed for every bill of lading, including forwarder-to-forwarder bills of lading. There will be many consignees, particularly in forwarder/NVOCC controlled shipments.

The ocean carrier has no insight into, and no right to know, the identity of the consignee on a freight forwarder/NVOCC’s bill of lading, and logically there can be no obligation on ocean carriers to provide consignee information from house bills of lading issued by forwarder/NVOCCs.

c. A master forwarder may have no insight into the identity of a consignee on a co-loading forwarder/NVOCC’s house bill of lading.

d. What happens when the goods are sold in transit? Is it assumed that the consignee, or other party that has filed the buyer and seller data, will know of that transaction and amend its ENS submittal?

e. Is every consignee in the EU required to have an EORI number?

5. Conclusion

Today’s ENS filing system is relatively straight-forward and simple. Ocean carriers file the ENSs using their bill of lading data. In order to obtain additional advance cargo data, the ENS filing system can be amended to require forwarder/NVOCCs to file ENSs based on the data in their bills of lading, and such a system, while more complicated, could be designed to work without significant disruption or problems for European commerce.
The Commission runs a great risk if it tries to transform the ENS filing system from one that captures bill of lading data from carriers (ocean carriers and NVOCCs) to one that captures non-bill of lading data and adds additional ENS filings from potentially thousands of different, non-carrier parties -- many of whom may have no contractual relationship or pre-vessel loading communication with the ocean carrier bringing the goods into a European port.

If, notwithstanding the above recommendation not to amend the ENS system to try to collect “buyer” and “seller” information, the Commission proceeds with this approach, then we very strongly recommend that, at the very minimum, the system not require ocean carriers to be aware of or responsible for the ENS filings of forwarders and consignees. To impose such a requirement on ocean carriers would be a nightmare for the carriers, their customers, and European commerce.

An ocean carrier, which has filed its ENS in a timely manner and has not received a Do Not Load message, should be able to load the container onto the vessel for its stated itinerary. If, for example, a co-loading forwarder/NVOCC or a “consignee” of a shipment in the container has not properly filed the data required in the new regulation, Customs should not impose any obligation or penalty on the ocean carrier, so long as the carrier did not load the container onto the vessel in contravention of a Do Not Load message.

We have consistently and repeatedly advised the Commission that requiring an ENS filing to include “buyer” and “seller” data contravenes the principles and structure of the World Customs Organization’s SAFE Framework and will not work.

If “buyer” and “seller” data is regarded as essential to obtain prior to vessel loading, then the only party we can identify in a position to provide it would be the importer. This was also the conclusion of the World Customs Organization and the only government in the world that requires advance buyer and seller data.

The current draft regulation presents so many questions and problems that we urge the Commission and Member States to take another approach, and to slow down and discuss -- with ocean carriers, freight forwarder/NVOCCs, and shippers in an open, transparent and unhurried manner -- how a new regulatory regime could be constructed that would meet the EU’s advance cargo data needs without disrupting European maritime commerce.

If the Commission nevertheless proceeds with the draft regulations, we repeat our very strong recommendation that, at the very minimum, the system not require ocean carriers to be aware of or responsible for the ENS filings of forwarders/NVOCCs and consignees.

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