



## **Why the European Commission’s Proposed Amendments to the ENS Filing System Need Further Clarification Before Adoption**

*January 12, 2015*

Today, ocean carriers make all entry summary declaration (ENS) filings and have all the required data for such filings, because the ENS data required by existing EU law can all be drawn from the ocean carrier’s bill of lading.

The Commission’s proposal includes two fundamental sets of changes to this system. Both are reflected in Article DA-IV-1-08a.

First, the Commission proposes that forwarders/NVOCCs issuing bills of lading must file ENSs in addition to the carrier’s ENS. This will remedy a shortcoming in the existing regime that has been recognized since its creation in 2006. This change raises a number of significant implementation questions that have not yet been clearly addressed, but it should be feasible.

Second, the Commission is proposing to capture in the ENS filings two specific, additional data elements – the “buyer” and “seller” of the goods. These are not data elements from a carrier’s transport contract/bill of lading and are data that a carrier may have no business reason to possess. Recognizing these constraints, the Commission proposes to require the consignee to file the particulars, if that information is not available to or has been provided to the carrier.

The questions involving the freight forwarder/NVOCC filing requirement primarily deal with the mechanics of complying with that new requirement. How those process related questions are answered, however, is important, because if the new system is not implemented carefully, it has the potential to substantially and negatively affect the EU’s international maritime commerce.

The questions involving the proposal that the ENS filing (either via the ocean carrier or forwarder/NVOCC filing, or, if not there, in a “partial filing” by the “consignee”) must include information about the “buyer” and “seller” of the goods from the underlying purchase and sale transaction are of a different nature.

The unresolved issues are significant and are most certainly not appropriate for addressing at some later time through “soft law” guidelines, as the Commission has suggested to WSC. The resolution of the unanswered questions will affect the 28 EU Member States’ Customs authorities, ocean carriers, freight forwarder/NVOCCs, and shippers. The resolution of these questions will determine what kind of additional regulatory burdens are placed on European maritime commerce through the proposed new cargo security regime. The resolution of these questions should be determined with full transparency and participation of all affected parties prior to the proposed regulation’s adoption. If the task of improving the EU’s advance cargo risk assessment system is worth doing – and WSC agrees that it is – then it is worth doing right.

We discuss the two sets of issues: the process related mechanics for forwarder/NVOCC and consignee filing, and collection of “buyer” and “seller” information, separately below. We begin with the issue of collecting “buyer” and “seller” information from the consignee.

### **1. Buyer and Seller Data and the “Consignee” Proposal**

In response to comments from WSC that it is inappropriate to require carriers and forwarder/NVOCCs to provide in their ENS filings the identity of the “buyer” and “seller of goods because this is not information a transport provider has or needs and is not part of its transport contract with a shipper, the Commission has stated: *“the ENS and related data requirements have never been and are not considered as equivalent of the transport contract.”*

The fact is that the data in an ENS filing, up until this proposal, has always been data from the carrier’s transport contract/bill of lading, and current ENS data particulars can be readily obtained from the information in the carrier’s contract documentation system. That is the case with similar advance cargo data filing regimes that exist around the world.

The Commission’s present proposal to require “buyer” and “seller” data in an ENS filing is a novel and unique divergence from this previously accepted and understood approach. This divergence is in conflict with the World Customs Organization’s SAFE Framework of Standards, and it creates issues which have not been satisfactorily addressed.

WSC does not argue that the Commission may not seek the information that it believes is essential from a Customs risk management policy viewpoint; however, the Commission is proposing a system that is fundamentally different from existing advance cargo security systems around the world, and is proposing to require information from entities that in many instances will not have knowledge of the information that they are required to provide. The proposal to require “buyer” and “seller” data in an ENS is a “short cut” and an artifice whose only logic is to avoid developing a system that collects the desired data from the party that actually knows it.

The Commission and EU Member States should understand and explain how the issues set forth herein will be addressed so that traders can understand what they will be required to undertake in order to arrange for the transportation of the EU’s international maritime commerce.

### **A. “Essentiality” of Buyer and Seller Data**

If “seller” and “buyer” data is not considered necessary from the customs risk management policy viewpoint for cargo arriving in the EU via international air transport, why is it “considered essential” for goods being transported to the EU by sea? The Commission has provided no justification for this discriminatory regulatory treatment. What is the justification?

### **B. “Consignee” as a Filer of Buyer and Seller Data**

The EC's premise for making the consignee the default filer of “buyer” and “seller” particulars, if that data has not been provided or made available to the carrier or the forwarder/NVOCC for inclusion in their ENS filings, is stated to be that the “consignee is a party to the contract of sales”. We have advised the Commission that this is not necessarily the case, but the Commission continues to disagree. The Commission is incorrect -- and that error is the basis of difficulties that will arise.<sup>1</sup>

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<sup>1</sup> In its response to WSC’s statement that “A ‘consignee’ is generally understood to mean the party to which goods are consigned for delivery by the transport contract bill of lading,” the Commission has responded that: *“The term of the final/ultimate consignee and its role in the cross-border supply chain is not limited to the transport service contract; it is a party to the contract of sales as well as party to the transport service contract. Such consignee is the person actually receiving the goods i.e. the final recipient of the shipment.”* The Commission has gone on to state: *“the consignee, being defined as a party to the sales contract, should know to whom the goods are to be transferred and be able to obtain the necessary data from that person, if the consignee do not already have it.”* The Commission’s response appears to imply that a consignee identified in a contract of sale can be used interchangeably with the consignee identified in the carrier’s transport contract as evidenced in its bill of lading. This is erroneous. The error is evidenced by the fact that the Commission’s response to WSC refers to the WCO Data Model data element R060, which is the “ultimate consignee” – a party that may not be known to the ocean carrier, instead of referring to WCO Data Model data element R015, which is the “consignee” and which is known to the carrier (and which is the data element regarding “consignee” that the WCO recommends be made part of advance cargo security information to be provided by ocean carriers and forwarders/NVOCCs). The Commission is presumably aware of the distinction between “consignee” (referring to it as the “intermediary consignee”) and the “ultimate consignee”. It is, therefore, inappropriate for the Commission to proceed as if there were no substantive or material difference between “consignee” and “ultimate consignee”. A consignee in an ocean carrier’s transport contract bill of lading is the party named as consignee on that bill of lading and nobody else. That party may or may not be a party to the contract of sale of the goods. That party may or may not be the “final” recipient in Europe of the goods. The “final” recipient may be a party with whom neither the ocean carrier nor the consignee named on the bill of lading has a business knowledge or relationship.

The Commission cannot change or wilfully ignore the jurisprudence of transport contracts and define a consignee in a carrier’s transport contract as “a party to the sales contract” governing the sale of the goods. Nor is it legitimate to use broad definitions of “consignee” lifted from documents not created with the current purposes in mind in order to suggest that the entity named on the carrier’s bill of lading as the consignee is thereby made a party to the sales contract. Nor is it legitimate to ignore the definition of “consignee” in the WCO document that explicitly has been developed for these purposes -- the WCO’s SAFE Framework of Standards -- and replace it with an entirely different definition of “ultimate consignee”

For an ocean carrier filing an ENS, the consignee is the party named as consignee on the ocean carrier's bill of lading and the party to which goods are consigned for delivery.<sup>2</sup>

- That party may or may not be the carrier's shipper/customer. For example, the transport contract may be between the carrier and the consignor. While the transport contract may be with the consignee, that is not necessarily the case.
- Similarly, the consignee on a carrier's bill of lading may or not be a party to the contract governing the sale of the goods.

Consider the following example of a straight bill of lading (i.e., no forwarder bill of lading is involved):

A shipper/consignor of widgets contracts with an ocean carrier to transport a container of 1,000 widgets to a warehouse in Germany. The carrier does not know who the buyers of the goods are or will be. The warehouse is the consignee on the carrier's bill of lading. The carrier's transportation obligation is completed upon delivery of the container to the warehouse. The warehouse is not a party to the contract(s) for the sale of the goods. Once delivered, the goods will be removed from the container and subsequent arrangements will be made for their storage and/or delivery to buyers. For this container of goods, there are three different buyers of 250 widgets (A, B, and C) and 250 widgets do not yet have a buyer. Those buyers are competitors.

In this example, the Commission's proposal would:

- Require the consignor/shipper to inform the carrier who the buyers of the goods are so that this information can be included in the carrier's ENS filing -- when the carrier may have no reason to know or need to know that information and cannot know if the information provided is correct; or
- Require the consignor/shipper to inform the consignee/warehouse who the buyers of the goods are so that this information can be filed by the consignee. In this case, the warehouse company (like the carrier in the above alternative option) now has been informed of the identity of the three parties buying the goods, and that 250 widgets do not presently have a buyer, although the consignee cannot know if the information provided is correct.

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taken from the WCO data model The issues involved here are factual – who has what information when? – and they cannot be resolved by rote application of definitions from documents adopted for different purposes.

<sup>2</sup> Reflecting this, the definition of data element 3/5/-1 “consignee” to be provided in the carrier's ENS filing reads: “party to whom goods are actually consigned” (document DIH 14/003 REV 3, dated October 17, 2014).

In neither instance will the carrier or the consignee, respectively, be in a position to verify the second-hand information that has been provided to it. Furthermore, the Commission's proposed regulation would compel the disclosure of this potentially business confidential information either to the carrier, which may have no legitimate business reason to know it, or to the warehouse, which may have no legitimate business reason to know it.<sup>3</sup>

### **C. Definitional Confusion Regarding “Lowest Level of Transport Contract”**

Article DA-IV-1-08a (1) (b) proposes that the “consignee” shall file the “buyer” and “seller” particulars: “where particulars concerning goods in a consignment at the lowest level of transport contract are not contained in that contract and cannot be obtained by the carrier or any person referred to in point (a)”. We seek clarification of what this means.

#### **(i) “Lowest Level of Transport Contract”: Straight Bills**

In cases where the ocean carrier is issuing a “straight” bill of lading to its customer and there is no forwarder/NVOCC bill of lading:

- Is it understood and agreed that the ocean carrier’s bill of lading is the “lowest level of transport contract”?
- Is it understood and agreed that the “particulars” regarding “buyer” and “seller” of the goods will not be contained in an ocean carrier’s transport contract/bill of lading with a shipper?
- Is it correct that, under the Commission’s proposal, the “consignee” which is to file the “buyer” and “seller” particulars, and which should be identified in the ocean carrier’s ENS filing as such (if this data has not been provided or made available to the carrier for inclusion in its ENS filing) is the consignee named on the ocean carrier’s bill of lading?

#### **(ii) “Lowest Level of Transport Contract”: Forwarder/NVOCC Bills (No Co-Loading or Multiple Forwarder Shipments in the Container)**

In cases where an ocean carrier issues a bill of lading to its customer that is a forwarder/NVOCC, which in turn issues “house” bills of lading to its customers:

- Is it understood and agreed that the forwarder/NVOCC bill of lading is the “lowest level of transport contract”?
- Is it correct that in this case, the “consignee” that is to file the “buyer” and “seller” particulars (if the ENS of the forwarder/NVOCC does not include this data) is the consignee named on the forwarder’s/NVOCC’s bill of lading?

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<sup>3</sup> We presume the Commission and Member States would be comfortable with a “mirror image” requirement imposed on European exporters by foreign jurisdictions, which would require EU exporters to inform ocean carriers and forwarder/NVOCCs or their bill of lading consignees about the identity of the buyers of their goods.

- Is it correct that the ocean carrier has no regulatory responsibility with respect to the *forwarder/NVOCC's* filing of ENS particulars, other than to identify the forwarder/NVOCC in the carrier's ENS filing as filer of the "ENS particulars"?
- Is it correct that the ocean carrier has no regulatory responsibility with respect to any *house bill consignee's* filing of ENS particulars?

***(iii) "Lowest Level of Transport Contract": Forwarder/NVOCC Bills (Co-Loading or Multiple Forwarder Shipments in the Container)***

In cases where an ocean carrier issues a bill of lading to its customer that is a forwarder/NVOCC (a "master" forwarder), which in turn issues "house" bills of lading to other forwarder/NVOCCs:

- Is it understood and agreed that the other forwarders/NVOCCs' bills of lading are the "lowest level of transport contract"?
- In such cases, does the ocean carrier need to be aware of the ENS filings of the lowest level forwarder/NVOCC?
- In such cases, does the master forwarder need to be aware of the ENS filings of the lowest level forwarder/NVOCC?
- In such cases, does the ocean carrier need to be aware of the ENS filings of consignees from the lowest level forwarder/NVOCC?
- In such cases, does the master forwarder need to be aware of the ENS filings of consignees from the lowest level forwarder/NVOCC?

We believe the answer is "no" to the last four questions, but seek confirmation of that.

## **2. Questions of Clarity About When a Carrier Can Load a Container**

Article IA-IV-1-04 (1) provides that "the customs authorities shall complete the risk analysis within 24 hours of the receipt of the entry summary declaration or particulars of the entry summary declaration submitted by the carrier in accordance with Article 127 (6) of the Code". This is critically important because it informs an ocean carrier that it may load a container 24 hours after it has received confirmation from Customs that *its* ENS filing was received unless the carrier within that 24 hour window receives a Do Not Load (DNL) message ("red light" system).<sup>4</sup>

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<sup>4</sup> For this reason, and for the sake of consistency, the last sentence of Article IA-IV-1-04 (5) should be amended to read (proposed new language in cursive): ".....within 24 hours of the receipt of the entry summary declaration *or particulars of the entry summary declaration submitted by the carrier in accordance with Article 127 (6) of the Code*".

Because the Commission's new proposal provides that additional parties (forwarder/NVOCCs, and perhaps "consignees" at both straight bill and house bill levels) will be filing ENS particulars for shipments being transported by the carrier, it is necessary to be clear about when the ocean carrier may load the container for transportation to the EU. Specifically, is it still 24 hours after receipt of the ocean carrier's ENS filing (absent a DNL), or is it now dependent on the timing of other ENS filings? If the former, we do not foresee a problem. If the latter, then it is unclear how the system will, or in fact could, work without disruptions to the EU's maritime trade.

**A. For shipments where the carrier's customer is a forwarder/NVOCC**

We understand from the Commission that "the carrier will only need to provide the identity of the person, with whom it enters into a direct transport contract (i.e., identity of freight forwarder with whom it signs master bill of lading)". It is then up to the forwarder/NVOCC to file the required ENS particulars, and the forwarder/NVOCC is responsible for the timely submission, completeness and accuracy of its ENS filing. This part of the proposed system appears to be understood and accepted. What is not clear is whether the ocean carrier must receive an MRN receipt from the Customs authority that has received the forwarder/NVOCC's ENS filing as condition for loading the forwarder/NVOCC controlled container.<sup>5</sup>

Ocean carriers recognize the need to receive an MRN for their ENS filings with Customs. The ocean carriers firmly believe that they should not be required, for each container they transport for a forwarder/NVOCC, to receive an MRN from Customs confirming a receipt of an ENS filing from that forwarder/NVOCC or from consignees of that forwarder/NVOCC that may file ENS particulars. Ocean carriers thus request:

1. Confirmation that ocean carriers do not need to receive an MRN confirming Customs receipt of an ENS filing from their forwarder/NVOCC customer;
2. Confirmation that the ocean carrier may load a container onto the vessel if it has not received a DNL message within 24 hours of when the carrier filed its ENS, and that the carrier has no obligation to wait 24 hours from the time any forwarders/NVOCCs may file ENSs for the same shipment.
3. If the ocean carrier were to receive an MRN receipt of the forwarder's filing -- which we do not support, that MRN message will not include the ocean carrier's master bill of lading number to allow the carrier to confirm that its bill has an associated forwarder ENS. The MRN is a stand-alone message that does not include the carrier's bill of lading number or other similar identifier. Similarly, the carrier will not know how many ENS filings the forwarder/NVOCCs will be making and therefore how many MRNs will be generated.

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<sup>5</sup> A reference number or "MRN" is an electronic receipt generated and sent by the Customs authority receiving the ENS filing to the filer of the ENS. Under current practice, as the carrier is the single ENS filer, it is the recipient of the single MRN. As additional parties become filers of ENSs, it is important to define what parties must be in receipt of what messages from Customs.

If the carrier would need to receive an MRN receipt of the forwarder's/NVOCC's ENS filing, how would it know which forwarder MRNs are associated with which carrier ENS filings, and would it need to know that all forwarder filings had been made and, if so, how would the carrier know this?

4. In cases where the forwarder/NVOCC with whom the ocean carrier is doing business enters into transport contracts with other forwarders/NVOCCs, the ocean carrier will not be privy to those arrangements. The Commission has helpfully confirmed that ocean carriers would have no regulatory need to be aware of such other forwarder/NVOCCs or their ENS filings. To ensure that we correctly understand the regulatory intent, we request confirmation that the carrier would have no need to receive from either Customs *or its forwarder/NVOCC customer* any confirmation that the other forwarder/NVOCCs with whom that "master" forwarder/NVOCC is doing business have submitted their required ENS filings.

**B. For shipments where a consignee will file buyer/seller data**

In cases where a consignee files additional ENS particulars (i.e., the "buyer" and "seller" of the goods), the following issues need to be addressed or clarified:

1. Is there a regulatory requirement that the consignee agree to be the filer of these particulars, and if so, who is to obtain such agreement? (E.g., the carrier's shipper customer may be the consignor, and if "buyer" and "seller" data is to be communicated from the consignor to the consignee for filing, should the agreement to file this data be obtained by the consignor, as the carrier's transport contract and business relationship may not be with the consignee?)
2. When a consignee will be filing buyer and seller data, does the carrier need to wait any longer than 24 hours after the carrier has made its ENS filing in order to load the container? Is it correct that the 24 hour window commences after the carrier has filed, and that a new 24 hour clock is not created by the consignee's filing?
3. Is it correct that there would be no regulatory obligation on the carrier to receive Customs' confirmation of receipt of the consignee's ENS filing?<sup>6</sup> If that is not correct, what obligation does a carrier have with respect to a consignee's ENS filing in addition

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<sup>6</sup> We believe this a correct understanding based, inter alia, on the Commission's statement in its response to WSC: *"There is no relevance and no need for the consignee to have a contractual relationship with the carrier or freight forwarder as to be able to fulfil its obligation (which is either providing data to the carrier or freight forwarder, depending who issued the lowest bill of lading, or choosing to submit data by itself). The only necessary element needed is the knowledge of the consignee who is the carrier/freight forwarder that issues the lowest bill of lading."* If the "only necessary element needed" is the knowledge of who the carrier is, then this implies there is no need for the carrier to know if the consignee has filed ENS particulars. We seek confirmation that this is correct. In addition, an MRN receipt of a consignee's ENS filing would not include the ocean carrier's master bill of lading number to allow the carrier to confirm that its bill of lading has an associated consignee ENS filing.

to the carrier indicating in its ENS filing that the consignee (as identified in the carrier's bill of lading) will be filing the buyer and seller particulars?

4. Where consignees of freight forwarder/NVOCCs are to file additional ENS particulars, is it correct that the ocean carrier has no regulatory obligation to know of such filings or to have an MRN confirming receipt of such filings – either directly or via the forwarder/consignee with whom the carrier has entered into a transport contract?

### **3. Addressing the Tsunami of MRNs that Would Be Generated from the Current Proposal**

An issue that has not been given full or proper consideration is the massive number of MRNs that Article IA-IV—1-03 (3) would generate if and when ENS filing are expanded to include all freight forwarder/NVOCC filings and “partial” ENS filings from consignees of carriers and forwarders/NVOCCs. Today, only ocean carriers file the ENSs and the MRN messages have a clear purpose and are manageable in number. Under the proposed regulation and Article IA-IV—1-03 (3), there would be tens of millions of additional ENSs filings<sup>7</sup> and tens of millions of additional MRNs generated that have no clearly defined utility or purpose, with no clear linkage to the ocean carrier's bill of lading or its ENS filing. In view of the above discussion and the unanswered questions and utility of all these MRS, we recommend that the Commission, Member States and traders consider whether Article IA-IV—1-03 (3) can be deleted in whole or in part.

### **4. Summary**

As noted above and in previous WSC comments to the Commission, we respectfully submit that the Commission has not properly understood the term “consignee” in the context of containerized maritime commerce transported by ocean carriers. It is simply incorrect to assume that a consignee on an ocean carrier's bill of lading is also a party to the sale of the goods. It is therefore also incorrect to assume that the “consignee” will always be a reliable and knowledgeable “default” party that can be counted on to file “buyer” and “seller” data if such data has not been provided or made available to the carrier for inclusion in its ENS filing.

If the Commission's final regulation were to require shippers/consignors to provide the identity of the “buyer” and “seller” of the goods being transported to ocean carriers and to forwarder/NVOCCs, or the consignees on their bills of lading, this would be an act of regulatory coercion unique in global commerce and inconsistent with the WCO SAFE Framework. Further,

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<sup>7</sup> Presently, approximately 13 million ENS are lodged annually by maritime carriers almost exclusively at the bill of lading level. Assuming that 60% of these bills of lading are with forwarders/NVOCCs and, further, assuming a house bill/master bill ratio of 5:1 (which is the ratio used in the so-called SWOT analysis by Unit A5), the annual number of forwarder/NVOCC ENS filings may be approximately 40 million on top of the ENS filings undertaken by maritime carrier. This total number of approximately 50 million ENS annually would be even higher if consignees were to file the “buyer” and “seller” information in separate ENS filings.

in such an approach, the filing carrier cannot know if the buyer and seller data it is provided for ENS filing purposes is accurate, and cannot know if the buyer or seller changes during transit. The proposed regulation in effect would be forcing this business information to be provided to persons that may have no business reason or need to know it.

In addition to this “buyer” and “seller” data issue, there are still too many unanswered questions about how the proposed regulation would actually work in practice, as the questions above try to illustrate. Shippers, carriers, forwarder/NVOCCs, and the various national Customs authorities will all have a strong interest in knowing how the above questions about the functioning of the proposed system will be answered. We respectfully submit that the answers to those questions should be determined and known before the regulations are adopted.

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