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Tobacco Europe position on the Customs Reform

Tobacco Europe AISBL[1] represents the common views of major European–based tobacco and nicotine products manufacturers which includes British American Tobacco (BAT), Imperial Brands (IMB), and Japan Tobacco International (JTI).

We welcome the customs reform and would like to present our position that follows the guiding principles of a collaborative mindset across jurisdictions and organisational siloes, common standards, interoperability between systems, a data-driven culture, and flexibility to learn and adapt. The proposed near-term solutions are fully in line with the conclusions of the Wise Persons Group report and the EU Commission proposal.

We also believe that a greater collaboration between the private and public sector (EU customs and law enforcement authorities) can benefit the process for reforming the Union customs legislation and drafting the revised Delegated and Implementing Acts of the modernised Union Customs Code.

Our Key Points

- **Removal of the customs duty 'de Minimis' threshold**: e-commerce has created new distribution channels for illicit and counterfeit traded goods. A decrease of the customs duty 'de Minimis threshold' can contribute to the reduction of the illicit trade supply chains. We therefore welcome the EU Commission proposal to remove the EU 'de-minimis' threshold and we call on the EU Member States and the EU Commission to implement this recommendation as soon as possible. The EU Customs Reform proposal also introduces a simplified customs tariff for business to consumer (B2C) online transactions. We support the exclusion of tobacco products subject to harmonized excise duty. However, Chapter 24 of the CN contains products which are either tobacco raw materials (not subject to excise duty, but with a high risk from an illicit trade perspective) or products subject to non-harmonized excise duty in various EU Member States. The reference to Chapter 24 in the Bucket E of Annex I, Part One, Section II "Special Provisions" seems to indicate that raw materials for tobacco products and products subject to non-harmonized excise duty from Chapter 24 of the CN can be imported into the EU using the B2C simplified tariff. We would have preferred that the entire chapter is kept out of the simplifications mechanism put forward by the Commission for B2C ecommerce transactions, but at the same time we acknowledge this may be solved if an updated Tobacco Excise Directive will come into place and which will very likely include most products from chapter 24.

  The removal of the "de minimis" threshold for e-commerce is also in line with the conclusions from OECD's study on E-Commerce Challenges in Illicit Trade in Fakes[2] where one of the suggested approaches is for "the need for economies to apply the WTO-TRIPS Article 60 de minimis exemption only to goods accompanying incoming passengers and not to mail importations and small parcels ".

[1] https://www.tobacco-europe.eu/

[2] E-Commerce challenges in Illicit Trade in Fakes. Governance Frameworks and Best Practices, 2021

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In addition, OECD's study on "Misuse of Small Parcels for Trade in Counterfeit Goods[3]" identified that the attractiveness of small shipments as a vehicle for illicit trade is also affected by the special treatment that many countries have established for low value shipments

The Commission's proposal to reform the customs code is consistent with the EU's Free Trade Agreements, OECD recommendations and the WTO agreements, including the WTO Trade Facilitation Agreement (WTO TFA). The technical arguments are further elaborated below in Annex 1.

- **Creation of the EU customs data hub and customs digitalization.** The centralised EU Customs Data Hub is an ambitious move towards streamlining customs processes. At the same time, it is essential to approach this transformation with careful consideration of potential risks. The complete replacement of the current EU-27 IT systems with the Hub raises several concerns, particularly in the realms of data security and system reliability. There are many questions e.g. what measures will be implemented to ensure continued functionality in the event of system downtime or failure? How will competitive information be safeguarded to prevent unauthorised access or leaks? In addition, given that Trust & Check Traders will need to give real-time access to their electronic records, it is paramount to establish robust security nets to protect both company-specific and personal information. Ensuring data privacy and protection, and building robust defences against potential hacks or errors, should be at the forefront of this transition. While the overall concept aligns with existing authorisations and frameworks, the real-time access requirement introduces new vulnerabilities that must be meticulously addressed to preserve the integrity, trust and smooth functioning of the customs system. Therefore, as the EU moves forward with these innovations, we welcome a detailed risk assessment, along with the implementation of strong security protocols that are integral to the development process, ensuring that the advancements in customs enhance efficiency without compromising security and privacy. We believe the creation of the EU customs data hub is a huge step forward and look forward to the Commission's proposal on smooth transition and collaboration with the industry players to achieve this objective.

  The EU Commission in collaboration with the EU Member States and the private sector should evaluate and determine the new and emerging technologies which support the customs union in controlling the safety and security risks associated with e-commerce. These new and emerging technologies may include blockchain and artificial intelligence (AI) solutions. In addition, a solution to connect existing EU IT systems (such as track & trace) to the EU customs data hub should be put in place.

- **Trust & Check Trader and Trusted Supply Chains**: the introduction of the 'Trust & Check Trader' status a promising development. It will benefit the EU companies and provide further simplifications from customs formalities. The concept of "self-assessment" and the change of EU customs approach from "transaction-based" to a "process-oriented" system can benefit EU companies. Although self-assessment concept is provided under UCC, this has not been fully implemented across the EU. Therefore, we believe that the Trust & Check Traders should be able to benefit of 'self-assessment' as soon as possible and not later than 2028. The customs

[3] Misuse of Small Parcels for Trade in Counterfeit Goods

simplifications such as centralised clearance should be made available for Trust & Check Trader and Trusted Supply Chains dealing with excisable goods.

- **Timeline – acknowledging past challenges and looking at the future:** the Commission should consider the need of implementing the outstanding measures under the UCC Work Programme[4], before embarking on new, expansive measures. Failure to first deliver by 2025 on its existing commitments raises concerns over the practical feasibility of the new proposed measures. Whereas the long-term vision of the proposal and its aim to modernise the Union customs system is welcomed, it should be aligned with an understanding of the present reality, where many essential initiatives under the Work Programme have yet to be completed or even started. Therefore, a balanced approach that prioritises the implementation of the current legislation is essential, as this approach would ensure that the system is not over-burdened and progress is made in a responsible, gradual and systematic manner. The ambitious goals set forth must be carefully considered against existing commitments, in a way for the EU to develop a customs framework that not only aligns with its visionary goals but also fosters a stable and smooth-functioning internal market.

- **Reduction of the temporary storage of non-Union goods (Article 86.5)**: the proposed reduction of the temporary storage time for non-Union goods from 90 days to three or six days is a fundamental shift that threatens the operational efficiency of economic operators. We strongly advocate for the retention of the current 90-day temporary storage regime or, at minimum, the inclusion of explicit provisions that detail the circumstances under which the proposed time limit may be extended. This drastic change is, de facto, a termination of the existing regime and poses several challenges:
  - Lack of flexibility: the reduction severely limits the flexibility that economic operators require to make informed decisions about the future of non-Union goods. Real-world logistics and decision-making processes often in response to market dynamics, such as changes in demand or market conditions, in general take longer than three to six days, and thus necessitate of a more flexible and realistic approach.
  - Potential economic impact: drastically shortening the storage time could lead to increased operational costs and rushed decision-making, all of which are detrimental to our business and the broader internal market. Under the proposed scenario, economic operators may need to rush decisions to avoid the constraints of moving non-Union goods into customs warehouses, potentially leading to errors, increased costs and logistical inefficiencies that result in customer dissatisfaction, economic loss and that may, ultimately, discourage operators from engaging in international trade.
  - Customs warehouse constraints: the proposal to convert temporary storage locations into customs warehouses overlooks the fact that not all goods may meet the requirements for such warehousing. A one-size-fits-all solution may not be feasible in view that customs warehouses often have specific requirements related to the type of goods they can store; thus, this could inadvertently create barriers for certain types of non-Union goods. For

[4] Work Programme relating to the development and deployment of the electronic systems provided for in the UCC.

economic operators, the process of moving goods into customs warehouse could involve additional documentation, inspections and the need to comply with other regulations, leading to increased costs, greater administrative burden and delays.

- Lack of clarity in regulation: the ambiguity surrounding the circumstances that may allow for an extension of the storage time limit raises serious concerns. Without clear provisions, businesses may face uncertainties and inconsistencies in how the regulation is applied across different jurisdictions.

- **Alignment of VAT, excise and customs rules:** As the EU advances with the implementation of centralised customs clearance, a critical divergence between VAT, excise and customs provisions is emerging, threatening the coherence and efficiency of the Customs Union. One area where this disconnect is particularly pronounced is in the application of Customs Procedure 42.[5] Unless import VAT law, including Procedure 42, is aligned with the proposed customs rules, customs clearance and VAT handling will inevitably drift apart. This misalignment can create administrative burden and confusion among traders and customs authorities alike and hamper EU efforts to implement centralised clearance. So far, this alignment has been envisioned in the area of e-commerce but not yet captured in the broader context of centralised clearance, therefore, we urge the Member States and the Commission to address this gap in the regulation as a matter of urgency.

- **Simplification of guarantees (article 169):** the proposed shift in where customs debt arises, from the location where the customs declaration is lodged to the place where the importer or exporter is registered, aims to simplify procedures for economic operators, and enhance the ability of customs authorities to control and audit importers. However, realising these benefits fundamentally necessitates the ability to establish guarantees that are valid throughout the entire Union. While this is a prerequisite for centralised clearance and has been foreseen in the past, it remains unimplemented and unfeasible as of today. Such a transformation would require not only interconnected data flows via the EU Customs Data Hub but also specific authorisations allowing this type of guarantees. Without these elements, the handling of guarantees may not be simplified as intended. Thus, while the direction of the proposal is promising, we urge Member States and the Commission to enable the use of such guarantees, in a way that enhances efficiency without compromising the integrity and coherence of the customs system.

- **Shift in compliance responsibility (Title II):** The proposal intends to transition compliance responsibility from the declarant and carrier to the importers (including deemed importers) and exporters. This shift has the effect of reducing obligations on customs brokers and risks lessening the due diligence they exercise, thereby increasing the risk of compliance issues. Under the pre-existing UCC regulations, customs brokers were subject to comprehensive liability through "should have known" clauses, which produced a higher level of diligence and held them accountable if they failed to observe regulations that they reasonably should have been aware

[5] Customs Procedure 42 is applicable for simultaneous release for free circulation and home use of goods which are the subject of a VAT-exempt supply to another Member State and, when applicable, an excise duty suspension. The VAT and excise duty are then being due in the destination Member State.

of. The proposed shift reverts to pre-UCC status, reducing liability on representatives and may inadvertently foster an environment where negligence or malpractice is more likely. Consequently, it's essential that Member States and the Commission recognise this potential drawback and, instead, ensure that customs brokers share a balanced mix of responsibility with importers and exporters. This approach would ensure that the customs system operates with the necessary efficiency and integrity, without compromising the safeguards that have been established to minimise non-compliance.

- **Definition of the "importer" (article 5.12):** the definition of the importer now aligns with the definition of the exporter, as established in (EU) 2018/1063. Given past challenges in identifying the exporter and the guidance issued by the Commission to facilitate the exporter definition interpretation, we would welcome similar guidance to assist customs authorities in interpreting and applying the importer definition effectively.

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Annex 1: EU Commission proposal for de minimis removal is compliant with EU's Free Trade Agreements and the WTO agreements, including the WTO TFA.

1. **<u>WTO Trade Facilitation Agreement (TFA) of the WTO and the General Agreement on Tariffs and Trade (GATT)</u>**

The TFA contains provisions for the treatment of "Expedited Shipments". This measure regulates documents and goods imported by air express-delivery operators and other expedited shippers.

WTO Members are mandated to establish special facilitative procedures[6] to allow the expedited release of at least those goods entered through air cargo facilities. Members may permit only those persons or companies who fulfil certain criteria to apply for expedited customs release treatment.

Criteria for application for expedited release treatment shall be published by WTO members. Article 8.2,paragraph d) of the WTO TFA requests Members "*to provide, to **<u>the extent possible</u>**, for a de minimis shipment value… for which customs duties and taxes will not be collected,...*" The wording "to the extent possible" is key to interpreting this commitment as non-binding. This means that any threshold for low-value goods a WTO Member applies to provide duty-free treatment is not mandatory, as article 8.2 is only a best endeavours provision.
This would make it very difficult for a WTO panel of experts to find the EU in violation of commitments under the TFA.

The European Commission's proposal is similar to the special classification provisions Canada has in place to simplify the procedure to allow low-value shipments to pay duties. Canada has in place three generic Most-Favoured Nation (MFN) tariff rates found in Chapter 98 of Canada's Customs Tariff (0%, 8% and 20%). The European Commission's proposal has four buckets that indicate the duty to be paid depending on the HS two-digit classification of the good (5%, 8%, 12% and 17% for the most sensitive products, such as meat, cereals, sugar and food preparations).

As many MFN tariffs in the EU on agriproducts are specific or mixed (ad valorem + specific duty), there is a possibility that goods end up paying more than bound rates at the WTO. This would be inconsistent with at least paragraph 1 of Article II of GATT 1994:

> 1. "Each contracting party shall accord to the commerce of the other contracting parties' treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

Canada recognizes that its system may entail applying tariffs above MFN levels. However, as the simplified procedure offers the option to apply for easier procedures, including avoiding classifying a product beyond the two-digit level, while maintaining the MFN tariffs available for importers deciding to follow the usual processes, the EU Commission's bucket proposal -and Canada's scheme as well- is not considered to be inconsistent with Article II of GATT 1994.

[6] See article 8.1 and 8.2 of the WTO Trade Facilitation Agreement

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2. Existing EU FTA's are not impacted by EU Commission proposal on de-minimis

The EU does not have commitments to eliminate tariffs on non-originating goods valued below a specific threshold in its Free Trade Agreements.

Notwithstanding the above, it is useful to distinguish between commitments for expedited shipments or distance sales, and the commitments made for small packages and those for digital trade, as there are some provisions in FTAs. Almost all the agreements signed by the EU include a provision to consider as originating without further questioning or verification those goods shipped in small packages not exceeding 500 euros that claim to be originating. For example, in the FTA between the EU and Japan:

> "ARTICLE 3.20. Small consignments and waivers
>
> 1. Products sent as small packages from private persons to private persons or forming part of travellers' personal luggage shall be admitted as originating products provided that such products are not imported by way of trade(1), have been declared as satisfying the requirements of this Chapter [Origin] and if there is no doubt as to the veracity of such a declaration.
> 2. Provided that the importation does not form part of importations that may reasonably be considered to have been made separately for the purpose of avoiding the requirement for a statement on origin, the total value of the products referred to in paragraph 1 shall not exceed: (a) for the European Union, 500 euros in the case of small packages or 1,200 euros in the case of products forming part of travellers' personal luggage. The amounts to be used in other currency of a Member State of the European Union shall be the equivalent in that currency of the amounts expressed in euro as at the first working day of October of each year. The amounts shall be those published for that day by the European Central Bank, unless a different amount is communicated to the European Commission by 15 October of each year, and shall apply from 1 January of the following year. The European Commission shall notify Japan of the relevant amounts.
>
> *(1) The imports which are occasional and consist solely of products for the personal use of the recipients or travellers or their families shall not be considered as imports by way of trade if it is evident from the nature and quantity of the products that no commercial purpose is in view."*

Considering that the EU Commission proposal is addressing the B2C transactions, the existing FTA provisions for goods sent between private consumers (as described above) are not impacted.

Even if the EU intends to include in a 'de-minimis' provisions in certain FTAs which provides duty free treatment for products valued below a certain threshold -, such obligation can be established. Canada has already implemented 'de-minimis' provisions through US- Mexico-Canada (USMCA) agreement. In this regard, Canada applies a higher threshold for goods shipped -not necessarily originating- from Mexico or the US of 150.01 Canadian dollars, while for the rest of the world is 20.01.