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Discussion paper

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ICC recommendations on Mutual Recognition of US-EU Trade Partner Programs for Border Security

Prepared by the Commission on Customs and Trade Regulations in consultation with the Commission on Transport and Logistics

ICC welcomes the development of a Roadmap between the United States and European Union towards Mutual Recognition of Trade Partnership Programs, which was announced in March 2008, with a target for eventual achievement of mutual recognition (MR) in 2009. A U.S.-E.U. mutual recognition agreement is an important business priority, which would cover about forty percent of global trade and, now that the E.U. security programs have fixed dates for implementation, could serve as a basis for the long-term development of trusted trader privileges. Business understands that this is a continuing dialogue process and encourages both U.S.-E.U. customs administrations to engage industry in development of the Roadmap so that the eventual mutual recognition could meet the aspirations of both customs and the private sector. This is especially critical as it is likely that a U.S.-E.U. mutual recognition agreement will set a precedent that could help to provide both improved supply chain security and global trade facilitation.

Concerns

At this point, our understanding of the Roadmap process and goals is relatively limited and we hope that governments will soon share full details with the private sector. We welcome the recent publication of the "Abridged External Partner Version" of the roadmap. This document reflects the need to obtain business community input on the Roadmap, but reports no progress in having done so. The absence of meaningful dialogue between the designers of the MR program and the business community has raised concerns in several areas. For example, government officials have told us that the agreement will result in mutual recognition of validations but that it will not remove the need for duplicative registration processes on both sides of the Atlantic. Nor has there been much information about the benefits that MR will provide to companies. We remain concerned that the benefits of participating in the E.U.'s Authorised Economic Operator Programme (AEO) and U.S. Customs and Trade Partnership against Terrorism, (C-TPAT) have not been accurately quantified and tracked. Without an accurate method to quantify and measure benefits to industry, any assumptions regarding cost-benefit impact on industry to implement new requirements are speculative. ICC members also have great concerns about the impact of these programs on small and medium sized enterprises (SMEs) and to assure the suitability of these programs to all supply chain entities. The costs of implementation and compliance may be such that many SMEs will be unable to participate, which could impact their competitiveness. The Roadmap process should have more input from the SME community. Therefore, we strongly urge the

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governments to share the complete Roadmap with the private sector, and also the side-by-side comparison of U.S.-E.U. supply chain security programs, and to provide meaningful opportunities for business engagement.

Background

The International Chamber of Commerce (ICC) has participated actively in the constructive public/private dialogue fostered by the World Customs Organization on the broad array of security and facilitation issues relating to the SAFE Framework.

Throughout that dialogue, ICC has maintained that achievement of a mutual recognition process for companies implementing the Framework procedures is a top priority. Mutual recognition is necessary to capture the trade benefit of a world standard for security and trade facilitation, i.e., that:

- A supply chain partner accepted as an AEO by a customs administration that participates in the Framework will not be subject to multiple verifications of its status by participating Administrations or other AEOs, i.e., that an AEO would not be subject to multiple inspections or verification by each AEO with which it does business;
- Supply chain partners will be able to apply for AEO status in their own participating countries; and
- A supply chain partner accepted as an AEO by a customs administration that participates in the Framework will be afforded program benefits by all participating administrations, including those that are phasing in implementation.

Simplification, harmonization and standardization of procedures and practices are the sine-qua-non for achieving mutual recognition. Failure to achieve reasonable uniformity would also create counterproductive, costly, and inefficient effects by subjecting AEO traders to many different and conflicting or redundant national approaches.

This is a huge challenge and a key issue for business. In this regard ICC has continued to urge WCO members to minimize any supplementation of the WCO AEO Guidelines with separate national criteria.

While the ultimate goal is to establish a multilateral system of mutual recognition, we recognize the practical reasons for a temporary resort to bilateral or regional solutions. We are encouraged by the announcements U.S.-New Zealand, U.S.-Jordan, and U.S.-Canada mutual recognition agreements, which demonstrate the feasibility of this approach.

A great value of E.U.-U.S. mutual recognition would be to have it in place, with legal certainty, as quickly as possible, to minimise the need of companies on both sides of the Atlantic to undergo duplicative validation processes. Pending completion of the roadmap, the E.U. and U.S. authorities should issue guidance for both business communities and/ or introduce flexibilities in their programs to avoid the situation that companies would have to undergo two sets of security certifications.

Benefits

Both programs, AEO and C-TPAT, lack substantial benefits for participating companies. A lower risk score resulting in fewer controls and inspections —as provided under both programs—is not a sufficient benefit and does not correspond to the high level of security that companies have demonstrated during the application/validation procedure. Even the E.U.'s eventual benefit of a



reduced data set for pre-arrival and pre-departure declarations is not enough, because reliable companies still have to provide data for every single transaction. From a business perspective, a waiver of individual pre-arrival /pre-departure declarations respectively, a real “green lane,” for AEO/C-TPAT companies would be a significant benefit. Another approach would be to have a reduced audit program for industries that are already strictly controlled, such pharmaceuticals under the “Good Manufacturing” and “Good Laboratory” practices. Unfortunately, neither the E.U. nor the U.S. has intensified their work on such simplifications.

Moreover it is indispensable to provide real and concrete benefits for the high costs firms will need to take on in obtaining AEO preferences. Both governments need to take a more realistic and measurable approach to defining ancillary benefits of participation. Where there is a reasonable nexus between enhanced supply chain security under an AEO program and the objectives of non-import regulatory regimes, governments should explore the extension of benefits to those spheres. For example, some governments grant license exemptions for export, re-export or transfer of most technologies to “validated end-users” for civil applications. Because security of the supply chain is important to the maintenance of control over licensable goods, participation in an AEO program could confer privileged status in the application of such programs. We urge continued development of such programs and the granting of privileged status to AEO companies in eligibility and certification under them.

Structural Asymmetries that Impede Attainment of Mutual Recognition Must be Addressed

1. Failure of the C-TPAT program to deal directly with export security. The scope of the E.U.’s AEO program includes both import and export processes, while C-TPAT focuses solely on the security of goods imported into the U.S. To the extent that AEO is concerned with the export security of goods originating in the territory of the E.U. as well as those arriving in its territory, it may in this regard provide relatively more protection to its trading partners that have programs like C-TPAT than it receives in return from such partners.

This asymmetry should, however, not be allowed to derail or delay the accomplishment of mutual recognition. First, the difference between the two programs may be more apparent than real. Both programs are concerned with the security of goods originating in third countries. Moreover, while C-TPAT does not explicitly address export security, its requirements provide implicit protections in that they require domestic manufacturing locations to comport with essential physical, personnel, and IT security measures. If one party requires adjustments to the program of the other to facilitate mutual recognition, the need for such adjustments should not be allowed to delay mutual recognition, but rather should be allowed to take place over a reasonable period of time, with mutual recognition given, provided that reasonable progress continues to be made.

2. Treatment of groups of related companies under common control. C-TPAT provides for a single application and security verification process for groups of related companies subject to common internal security requirements that are enforced through a robust internal compliance process within the group. In contrast, AEO will require each separately incorporated legal entity in such a group to file a separate application and undergo a separate verification process. ¹ It is important that any system of mutual

¹ We appreciate that the E.U.’s AEO Guidelines would allow subsidiaries of a common parent that apply common procedures to use a common questionnaire response in connection with each of its filings. Each entity still would need to file separately, but using a common questionnaire response. Customs authorities would be required to “arrange their AEO application processes, including consultation procedures, where necessary, with other customs administrations, accordingly.” (http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/AEO_guidelines_en.pdf at Section II: 3:3) While this is a helpful revision, the Guidelines still envision a process of multiple applications, with



recognition provide group-wide benefits in cases when benefits are conferred by the host jurisdiction on the basis of a security verification process that examines security at the level of the group rather than the level of individual legal entities.

Beyond the question of mutual recognition, where related companies are governed by common procedures enforced through a robust internal compliance process within the group, a single AEO application and verification process should be implemented with a lead customs administration to which the others would defer. Consultations by the lead authority with the customs administrations of other Member States would still be appropriate, but there would be one decision made by a single authority, based on a single verification process.

The one-decision/one verification process/single authority approach would have many advantages both for the group of related importers and for the Member State administrations. While establishment of investment entails legal requirements in each host Member State, a much more efficient use of administration and company resources could be gained through a more flexible coordination among E.U. members.²

Interoperable Electronic Systems and “single window”

There should be interoperability in terms of software and electronic messaging between the U.S. and the E.U. (and among E.U. Members), coupled with the single window facilitation so that electronic data elements only need to be submitted one time. However, achievement of interoperability may take some time and a MR agreement on validation should not be held up to wait for this result.

Confidentiality of Proprietary and Sensitive Data

Business remains very concerned about safeguards to protect sensitive and proprietary data; for, example, U.S. business has reservations about sharing export data with foreign jurisdictions. Equally, E.U. business has these concerns about the potential publication in the U.S. of data received in customs declarations under the “Freedom of Information Act.” Mutual Recognition should adhere to WCO guidelines and “ensure the confidentiality of commercial and security sensitive information and that information provided be used solely for the purposes for which it was provided;” [Section F (a.) of the WCO AEO Guidelines].

Data Requirements

Every effort should be made to have minimum and identical requirements of the same data elements. The total data set required for each consignment is a huge amount of data, which would entail substantial investment in larger data management capacity that would be particularly burdensome for SMEs. Companies need sufficient and realistic periods to adjust and build their systems to accommodate changes in data requirements.

Interface with large regional trade partners

E.U.-U.S. Mutual Recognition would emphasize logistics disadvantages (especially with regard to road transport) with significant neighboring trade partners outside the agreement such as

multiple independent reviews in all 27 Member States.

² For more detailed information please see “ICC Recommendations on the Administration of the AEO Program in the European Community: Parent-Subsidiary Companies with Common Systems and Procedures”



Mexico, Switzerland and Norway. These countries should either be included in the agreement or be brought into separate MR agreements in parallel time frames. Achievement of MR agreements with other significant trade partners, such as Japan, Brazil, China and India, should be accelerated. E.U. and U.S. authorities should report periodically on the progress of such negotiations, for example, about progress in the EU/China agreement on customs cooperation and mutual assistance that entered into force on April 1, 2005, and the AEO mutual recognition provisions included in the subsequent 'Smart and Secure Trade Lane' pilot project (September 2006).

Stability of the MR requirements

Security programs are still evolving, e.g., with the U.S. requirement for additional "10+2" data. Business needs a transparent, predictable and consultative process for the development of security measures. If new measures are continually introduced, the adjustment costs will be higher and implementation will be less effective. In addition, there should be a guarantee that AEO status will not be quickly obsolete due to new regulations or legislation, e.g. 100% scanning legislation.

Costs and Discrimination

Costs must be kept to a minimum and discriminatory burdens should be avoided. Mutual recognition of national security programs should involve equivalency in content, process of attainment and revocation, in order to avoid discrimination.

Risk Management

Mutual Recognition (and all programs to enhance the security of traded goods) should be based on a multilayered risk management approach, as embodied in the WCO SAFE Framework rather than scanning of each individual shipment. National authorities should avoid over-dependence on scanning technologies that can add significant costs and delays to trade. Inspection and scanning should focus on "high risk" cargo in the context of a comprehensive, multi-layered, risk management approach.

Flexibility for SMEs

The ICC has hundreds of thousands of small and medium sized operators in its membership. An E.U.-U.S. agreement on mutual recognition must make AEO/C-TPAT status available to SMEs by including flexibility to minimize cost burdens and requirements such as those for data and demonstrating financial viability. Specifically small and medium sized enterprises should have the possibility of a simplified questionnaire and administrative procedures to obtain AEO/CTP AT status. For many the existing AEO European statute, as currently drafted, appears burdensome and difficult and often more demanding than C-TPAT.

Conclusion

Terrorists win if trade is significantly disrupted. Therefore implementation of the E.U. security programs and their interface with the U.S. security requirements should be managed with flexibility to avoid disruptions and new burdensome costs that would distort trade flows. Mutual recognition should be achieved as soon as possible.

Mutual recognition does not necessarily mean full harmonization in every detail, but the necessary trust in each other's system. Despite some differences in detail, business firmly believes that both C-TPAT and AEO companies are reliable partners of customs authorities and deserve a



high level of trust under both programs. If a company has been checked by customs and demonstrated that it meets stringent security criteria—in the U.S. or in an E.U. Member State -- it has a legitimate expectation to be accepted as a trusted partner by all customs administrations under both programs.

It will be important to incorporate business views in the development of the E.U.-U.S. MR agreement, for example, to shape the program to accommodate both SMEs and larger companies, and to ensure suitability for all supply chain entities. We look forward to opportunities to provide business perspectives as you move forward. In this regard it would be very useful if the results of the side-by-side comparison of the U.S.-E.U. supply chain security programs and the complete “Roadmap” for achieving MR could be shared with the private sector, so that we may better understand the scope and depth of any differences that need to be addressed.

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About ICC

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy, and helps business corporations meet the challenges and opportunities of globalization. Business leaders and experts drawn from ICC’s global membership establish the business stance on broad issues of trade and investment policy as well as on vital technical subjects. ICC was founded in 1919 and today it groups thousands of member companies and associations in 130 countries.