EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION

The Director-General

Brussels
TAXUD/SQ/IK/MS
taxud.a.1(2020)722625

Subject: **Case REM 01/2019 on remission of customs duties concerning imports by City Jet into Ireland of aircraft without proper end-use authorisation**

Dear Sir / Dear Madam,

In relation with case REM 01/2019 forwarded by the Irish authorities to the Commission to be considered under Article 120 ("equity") of the Union Customs Code (UCC), please find below the position taken by the Commission.

Based on the analysis of the case (see in the annex), the Commission cannot take a decision on the file on the basis of Article 120 UCC, as it considers, on the basis of the information at its disposal, that the file has first to be assessed under Article 86(6) UCC ("special rules for calculating the amount of import duty").

The Commission takes the view that the conditions for the operator to benefit from favourable treatment granted by way of Article 86(6) UCC could be considered as fulfilled.

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The Commission also notes that the application of Article 86(6) UCC is a matter falling under national responsibility, while, at the same time, the Commission in its role of "guardian of the treaties" ensures that the Treaties themselves, and any decision taken to implement them (secondary legislation), are properly applied.

Given the fact that the Commission is not competent to take a decision on the incurrence of the customs debt, it sends the file back to the Irish competent authorities, recommending the application of Article 86(6) UCC, taking into account the attached analysis.

If other Member States face cases comparable in fact and law to this one, involving the same operator under the same circumstances as described in the current case, they are also invited to consider applying the attached recommendation.

The application of Article 86(6) UCC, which should have led to a notification of EUR 0 in customs debt, is related to a customs debt incurred through non-compliance. Taking into account that the customs debt benefitting from exemption has incurred pursuant to Article 79 UCC, this leaves open the possibility to apply penalties for non-compliant behaviour, if deemed necessary.

Yours sincerely,

(e-signed)
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Annex

A. Background

On 29.05.2019, the competent authorities of Ireland forwarded to the European Commission a file of application for remission of customs duties concerning company CityJet ("the operator") on the basis of Article 116(3) of Regulation 952/2013 establishing the Union Customs Code ("UCC"), together with Article 98 of Commission Delegated Regulation 2446/2015. The file has been received on 06.06.2019. At the request of the Commission and in order to fulfil the requirement under Article 98(2)(b) of Commission Delegated Regulation 2446/2015, additional documents have been provided by Ireland on 14.06.2019. The file was accepted by the Commission on 14.06.2019 as a case of remission and was registered under the reference number REM 01/2019.

According to Article 98(5) of Commission Delegated Regulation 2446/2015, in order to be able to take a decision, the Commission has requested additional information from Ireland on 25.07.2019. The Commission has received from the Irish Customs the requested additional information on 16.08.2019. According to Article 100(2) of Commission Delegated Regulation 2446/2015, the period for the Commission to take a decision has been extended by the same period of time as the period between the date on which the Commission sent the request for additional information and the date on which it received that information.

The file involves a request for remission concerning customs duties in the sum of EUR 1,130,556.84 concerning customs debt incurred due to the operator's failure to comply with the conditions for end-use concerning (full) civil aircraft.

The present case centres on the importation by the operator of two aircraft into Ireland on 16 June 2016 and 15 September 2017, respectively, as part of a larger importation of 22 aircraft into the European Union. Customs duty suspension under the end-use procedure was claimed on the customs import declarations in respect of the two aircraft, however, the operator's authorisation for end-use at the time did not include full aircraft, but only aircraft parts, due to the following circumstances.

As the first aircraft was destined to arrive into Helsinki (Finland) in March 2016, on 14 March 2016, the operator wrote to Revenue Customs Nenagh ("RCN", Irish Customs&Revenue) seeking to expand its end-use authorisation to include Finland. In the answer from RCN on 14.03.2016, it is mentioned that "the authorisation is for the import of aircraft parts only" and Irish Customs undertook to consult the Finnish authorities about including Finland on the authorisation.

On 29 March 2016, the operator was subsequently contacted by an official in the VIES, Intrastat and Mutual Assistance ("VIMA") Office in Irish Customs&Revenue, who noted that two aircraft had been registered with the Irish Aviation Authority and requested data so that "SADs" could be completed. The following data was requested so that they could complete "SAD": owner, VAT registration number, commodity code, country of consignment, country of origin (manufacture), mode of transport, invoice value, statistical value, net mass.

The operator stated in its answer to VIMA that, on the basis of previous advice received from Irish Customs, it knew that the aircraft cannot be cleared in Ireland and that "this is

a Finnish Customs Import SAD and would only have to clear customs in Finland not Ireland". VIMA stated in its answer that the SAD is for statistical purposes, making reference to Extrastat reporting and Commission Regulation (EC) No 113/2010, but without giving any answer to the question related to the registration in Finland, and without clarifying the scope of the "SAD" document they were using. A subsequent message from VIMA further stated "SAD completed". It was only discovered in March 2018 that VIMA was using "SAD" for documents concerning statistical purposes only, which is different from the usual meaning of the "SAD" ("single administrative document") for customs purposes.

Subsequently, in the period until March 2018, every time new aircraft were registered by the Irish Aviation Authority on the operator's name, the Irish Customs (VIMA) would request and the operator would send information in order for the "SAD" to be completed. The aircraft were not declared in the Member States where they first arrived, but the requested information for "SAD" was sent to VIMA, as part of Irish Customs&Revenue.

On 14 September 2017, the operator acquired an aircraft which landed in the EU at Dublin. A particular circumstance (aircraft crew's access to the airport) made the operator depart from the practice it had used up until that moment (sending the information to VIMA), and engaged a customs agent (which, in turn, engaged a subcontractor) to prepare and file an SAD. In the course of entering the SAD – this time the proper *customs* SAD – the subcontractor experienced difficulties and these were communicated to the operator. The operator consulted the Irish Customs (Revenue Customs Dublin Airport – RCDA) and received guidance on how the SAD should be completed. In the end, the SAD was completed by the subcontractor and a copy of the SAD was also forwarded to RCDA and acknowledged. The RCDA did not raise the issue of the end-use authorisation.

In March 2018, the operator entered sale and leaseback transactions in respect of 6 of the 22 Bombardier CRJ900 aircraft. As part of the process, the purchasers requested copies of the SADs. The operator contacted VIMA and requested copies of the SADs. VIMA did not initially provide assistance. The operator then sought the SAD entry numbers. VIMA responded that the SADs completed were solely for statistical purposes and it has become clear at that moment that in fact for several previously imported aircraft no proper *customs* SADs were filed.

The operator asked for disclosure under Freedom of Information Act and VIMA offered in September 2018 the information with the following explanation: "the terminology used by staff is that an "SAD" has been input, please note this is separate and distinct from the importation/clearance document "Single Administrative Document" (SAD) lodged on the AEP system. No Single Administrative Document is generated from this input".

Subsequently, in order to correct the situation, on 1 May 2018 the RCDA directed the operator to declare each aircraft in the EU Member State it first landed in.

On 11 June 2018, the agent and the subcontractor drew up an SAD for an aircraft imported in June 2016, accepted by the RCDA. The question of the end use authorisation was still not raised. SADs were also filed retroactively in Sweden, Denmark and Finland.

After SADs have been lodged retroactively in Sweden, Denmark and Finland (03.09.2018), the Finnish authorities were the first to ask for the end-use authorisation.

The first authorisation presented was valid starting with 29.03.2018, and could not be used for the imports taking place before that date. Moreover, this authorisation was only for aircraft parts. The second authorisation presented was valid from 20.01.2015 to 19.01.2018, but again only for aircraft parts. The latter was retroactively amended to include aircraft, and communicated to Finnish Customs on 15.10.2018. However, the retroactive amendment was only effective from 08.10.2017.

Separately, the Swedish Customs authority sought a copy of the end-use authorisation. On 19 September 2018, they also highlighted that the end-use authorisation did not extend to aircraft.

On 30 October 2018, following a post clearance check carried out by the Irish Tax and Customs ("Revenue") on the declarations in respect of the two aircraft which landed in Ireland on 16 June 2016 and, respectively, on 15 September 2017, Revenue raised a customs debt of EUR 1,130,556.84 in respect of the importation of the two aircraft. The operator has requested remission of the customs debt. Having assessed the operator's application for remission, Irish Revenue was satisfied that the requirements for remission are met and that remission of the customs debt in question should be granted to the company on the ground of equity, as provided for in Article 116(1)(d) and Article 120 of the UCC.

Given the fact that the amount of the customs debt exceeds EUR 500,000, the file has been submitted regularly to the Commission on the basis of Article 116(3) UCC, together with Article 98 of Commission Delegated Regulation 2446/2015.

In Sweden, an appeal has been initiated in respect of three aircraft, suspended until the Irish remission application has concluded. In Finland, the subject matter is currently filed and pending at the first appellate body i.e. the Rectification Board, which will also refrain from issuing its decision until the Commission's stance on the Irish decision is further communicated. Procedures are also pending for the rest of the aircraft in Denmark and the United Kingdom.

B. Examination of the request

According to Article 116(1)(d), in connection with Article 120 UCC, repayment or remission of import or export duty shall be granted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor. In general, it concerns situations where the debtor is not responsible for creating the particular situation and where it would not be equitable to require that the duties are paid.

1. The incurrence of the customs debt

Firstly, before considering a case under Article 120 UCC, it needs to be established that a customs debt of a certain amount has been incurred and, in case it has been incurred, that the customs debt has not been extinguished.

In what concerns the incurrence of the customs debt, the present case relates to two aircraft, the situation being slightly different for each of them from a customs debt incurrence point of view.

For the first plane, we are faced with an import without declaration, followed by the lodging of a retroactive declaration with the mentioning of the authorisation, which did not at that time cover full aircraft.

Consequently, it could be argued that a debt has been incurred pursuant to Article 79(1)(a) as the import has been made without a declaration, and 79(1)(c) as the operator has not been in a possession of any valid end-use authorisation. The retroactive end-use authorisation for full aircraft could not cover this import, since it could not go back more than one year from the date of the request of the prior end-use authorisation, according to Article 172 of Commission Delegated Regulation 2446/2015.

For the second plane, there was a customs declaration. Nevertheless, similarly to the first plane, as the end-use authorisation was valid for aircraft parts only and not for full aircraft, there was an incurrence of a customs debt pursuant to Article 79(1)(c) UCC.

2. The application of Article 86(6) UCC

At this stage of the analysis, consideration has to be given to Article 86(6) UCC, which provides for the possibility to maintain favourable tariff treatment – in this case customs duty at 0% – even if there has been non-compliance with certain obligations.

Article 86(6)

Special rules for calculating the amount of import duty

[…]

6. Where the customs legislation provides for a favourable tariff treatment of goods, or for relief or total or partial exemption from import or export duty pursuant to points (d) to (g) of Article 56(2), Articles 203, 204, 205 and 208 or Articles 259 to 262 of this Regulation or pursuant to Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty such favourable tariff treatment, relief or exemption shall also apply in cases where a customs debt is incurred pursuant to Articles 79 or 82 of this Regulation, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception.

As a preliminary remark, it is to be noted that there is a difference between the regime granted under the Community Customs Code (CCC) by way of Article 212a and the one applicable at present through Article 86(6) of the Union Customs Code (UCC). According to Article 212a CCC, preferential tariff treatment could have been granted on the grounds of the goods' end-use only on condition that the behaviour of the person concerned involved neither fraudulent dealing nor obvious negligence and that the operator produces evidence that the other conditions for the application of favourable treatment, relief or exemption have been satisfied. The reference to "obvious negligence" contained in former Article 212a has been deleted from the Modernized Customs Code and, subsequently, from the UCC in order to base the granting of the relevant favourable tariff treatment, relief or exemption only on objective criteria, other than in cases of deception. This applies more precisely to the modifications brought by Article 86(6) UCC, which replaces Article 212a CCC.

On the basis of Article 86(6) UCC, the conditions that need to be satisfied so that Article 86(6) can be applied are the following:

a) The condition of existence of favourable tariff treatment, relief or exemption

At the time of the imports in question, there were two CN (Combined Nomenclature) codes related to "airplanes and other aircraft", 8802 40 00 10 "*For civil use*" and 8802 40 00 90 "*Other*"[1]. The customs duties for aircraft imported under CN code 8802 40 00 10 were fixed at 0%. The tariff preferential treatment of 0% duty applied to all imports of civil aircraft, under condition of presenting the end-use authorisation[2]. In practical terms, preference code 140 had to be entered in box 36 of the SAD and the operator's end-use authorisation number had to be added.

This preferential treatment originates from the Convention on International Civil Aviation dated 7 December 1944 and the Agreement on trade in civil aircraft signed in Geneva dated 12 April 1979[3]. The EU has no legal status at the International Civil Aviation Organization (ICAO) established by the Convention on International Civil Aviation, it is only an ad-hoc observer in several ICAO bodies. Therefore, the tariff measures applied by the EU in the application of the Convention on International Civil Aviation are autonomous measures. Article 56(2)(g) UCC thus applies in connection with Article 56(2)(f) UCC, which refers to autonomous measures (and not Article 56(2)(d), which refers to preferential measures contained in international agreements).

Article 86(6) UCC is applicable to imports falling under Article 56(2)(g) UCC, also "*in cases where a customs debt is incurred pursuant to Articles 79 or 82 of this Regulation, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception*".

We need to see if, without the failure which led to the incurrence of the customs debt, the goods would have benefitted from the favourable treatment invoked by the applicant.

For this purpose, we need to look into the importance of the end-use authorisation in the context of the rules laid down concerning the imports of aircraft into the EU. The regime is based on a declaration for release for free circulation with end-use leading to a favourable tariff treatment as long as end-use is complied with.

In accordance with Article 12 of the Convention on International Civil Aviation dated 7 December 1944, every aircraft flying over or manoeuvring within a Member State's territory and every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Therefore, in order for the aircraft to fly, they need to be duly entered on a register of a Member State. The concerned aircraft have been duly registered

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1 The CN codes refer to TARIC as of 01/01/2016:

"*8802 40 Aeroplanes and other aircraft, of an unladen weight exceeding 15 000 kg :*

8802 40 00 10 For civil use

8802 40 00 90 Other"

2 See, for example, Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Part one, Section II, B - OJ L 285, 30.10.2015.

3 Article 2 of the Agreement on trade in civil aircraft (1979 Agreement as amended) is contained in Annex 4 to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 by representatives of the European Community and Member States. 1986 Protocol amending the Annex to the Agreement on trade in civil aircraft. Geneva, 02/12/1986 – L71, 17/03/1980, p. 58.

with the Irish Aviation Authority (IAA) and the Irish competent authorities have been notified according to the IAA rules.

By the very registration of the aircraft with the IAA, the aircraft have demonstrated the conditions necessary in order to be considered for civil use. Subsequently, the operator has presented also to the Commission the proofs of such registration.

It is, therefore, argued that regarding an aircraft, the registration under the authorised civil aviation authority is the key condition for being considered for civil use and, consequently, to benefit from relief from customs duties. This has also been indirectly confirmed later, by the change in the EU legislation, which has excluded the end-use authorisation from the conditions for civil aircraft to benefit from 0% customs duties as of 1 January 2018 in accordance with Commission Implementing Regulation (EU) 2017/1925[4]. It could be, therefore, concluded that the requirement to hold an end-use authorisation for civil aircraft, which have been already duly registered with the national aviation authority, was of purely administrative nature.

The condition regarding the necessity to hold an end-use authorisation was worded as follows: "Relief from customs duties shall be subject to the conditions laid down in the relevant provisions of the European Union *with a view to customs control of the use of such goods* (see Articles 291 to 300 of Commission Regulation (EEC) No 2454/93 (OJ L 253, 11.10.1993, p. 1))"[5] – emphasis added. This wording shows that the end-use authorisation was essentially intended for the sake of customs control, and not as a substantive condition for the duty relief to exist. In the present case, as from the registration of the aircraft with the IAA, the Irish authorities were always in possession of the information to allow them to verify that the conditions were met for the aircraft to be considered as civil aircraft.

Since all aircraft imported by the operator into the EU – not only those imported in Ireland, but the entire 22 aircraft lot – have been registered for civil use with national aviation authorities, the aircraft have fulfilled the material condition for qualifying for favourable treatment, although they lacked the additional formal confirmation by way of an end-use authorisation.

By consequence, as from the registration with the IAA, the aircraft should be considered as qualifying for favourable treatment in the meaning of Article 86(6) UCC.

b) The condition that the customs debt was incurred pursuant to Article 79 or 82

Article 86(6) UCC is applicable to imports falling under Article 56(2)(g) UCC applied in connection with Article 56(2)(f) UCC, also "*in cases where a customs debt is incurred pursuant to Articles 79 or 82 of this Regulation, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception*".

Given the fact that the customs debt is incurring pursuant to Article 79(1)(a) UCC where the import has been made without a declaration, and pursuant to Article 79(1)(c) UCC

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4 Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Part one, Section II, B, points 1, 2 and 4 – OJ L 285, 30.10.2015 and its Recital 5

5 Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Part one, Section II, B, points 1, 2 and 4 - OJ L 285, 30.10.2015.

where the operator has not been in a possession of any valid end-use authorisation, the customs debt has incurred in the present case under Article 79 UCC.

Article 86(6) UCC may also apply when there are several situations of incurrence under Article 79(1) UCC, as the purpose of this article is to offer the possibility to maintain the favourable treatment, relief or exemption for the operator provided it has been acting without deception and in the case where the goods can be proved to qualify for the requested favourable treatment.

c) The condition that the failure which led to the incurrence of the customs debt did not constitute an attempt at deception

An importer cannot benefit from the favourable treatment provided by Article 86(6) UCC if the failure which led to the incurrence of the customs debt constituted an *attempt at deception*.

The operator was convinced that VIMA would collect the information he would normally put in a single administrative document and make the declarations on the operator's behalf. A subsequent message from VIMA further stated, "SAD completed". There was no indication in the correspondence that VIMA was a separate entity from the Irish Customs. VIMA, by stating that they had completed the "SAD", left the operator to believe that the procedural requirements were correctly completed, as "SAD" in the common understanding in the customs framework designates the "single administrative document".

After discovering the problem of the lack of proper customs SADs, on 11 June 2018, the operator has drawn up an SAD for an aircraft imported in June 2016, accepted by the RCDA (Irish Customs). The problem of the missing end-use authorisation for full aircraft was not identified.

The Irish customs authorities were provided by the operator with complete information in a timely manner whenever requested to do so, before and after the misunderstanding was identified. At the same time, EU national customs authorities are deemed trustworthy when consulted, so that the operators do not have to bear the additional burden of inquiring in several Member States in order not to risk becoming financially liable. The operator did not have other contacts on this case with the Irish Customs, nor with other authorities from EU Member States, therefore this was the only channel through which the operator was informed about the steps to make for the imports of the aircraft into the EU.

It must be borne in mind that, where the customs authorities have concluded that it could not be established that there was deception on the economic operator's part, it is for the Commission, when it intends to depart from the position taken by the national authorities, to prove, on the basis of relevant facts, that there was in this case deception on the part of that operator. The Commission has not found any elements that would imply that the operator has acted with deception.

The Commission considers the condition of absence of an attempt at deception from Article 86(6) UCC in relation with the file submitted to it by Ireland as fulfilled. As the application of Article 86(6) UCC is a national competence, every Member State faced with similar imports will have to assess the subjective element of Article 86(6) UCC –

lack of attempt at deception – separately, based on the UCC and the EU Court of Justice case law.

The CETA Agreement

In addition to the above, it must be noted that, for the imports covered by the CETA Agreement[6], specifically those taking place after its provisional entry into force on 21 September 2017, the issue of the end-use authorisation is mute. Starting from that date, the customs duties concerning imports from Canada were set at 0%, regardless of the fact whether the aircraft were for "civil use" or "other".

6 Council Decision (EU) 2017/37 of 28 October 2016, OJ L11/1, 14.01.2017