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## **COMMENTS ON THE DRAFT MAC PROTOCOL**

### **Working paper on Administrative Authorities and a Proposal to extend the scope of application of the MAC Protocol to milking machines**

(Presented by Germany)

#### **Administrative Authorities**

1. The draft MAC Protocol contains several provisions dealing with administrative authorities. All but one of these provisions apply only if the relevant Contracting State has made a declaration pursuant to Article XXVII. These provisions are Article IX(6), Article X Alternative A(8) and Article X Alternative C(9) draft MAC Protocol.

2. Only one provision of the draft MAC Protocol concerning administrative authorities applies irrespective of a declaration made pursuant to Article XXVII. This provision is Article VIII(5) draft MAC Protocol. The relevant draft paragraph reads:

“[5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities [including but not limited to tax and customs authorities and transport infrastructure authorities] expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.]”

3. The Legal Analysis prepared by the UNIDROIT Secretariat expounds that during the second session of the Committee of Governmental Experts “consensus was not reached [...] on whether to retain the provisions referring to administrative authorities”. The Legal Analysis elucidates further that the phrase “including but not limited to tax and custom authorities and transport infrastructure authorities” had to be additionally sub-bracketed, because a compromise could not be reached on whether to retain it.

4. It is Germany’s view that the sub-bracketed phrase should be deleted. As the Legal Analysis rightly points out it appears not to be possible to identify all relevant types of administrative authorities that could conceivably be addressed by such a provision. The question of identifying the relevant authorities should therefore be left to the Contracting States and its interpreting courts who know their own legal order best and are better equipped to point out the relevant authorities. The sub-bracketed phrase furthermore creates the risk of an overly broad interpretation that taxes and

customs duties may not be levied on mining, agricultural and construction equipment which is to be exported by the secured creditor.

5. Additionally Germany is of the opinion that Article VIII(5) draft MAC Protocol should not only be subject to any applicable *safety* laws and regulations but subject to *all* applicable laws and regulations. During Germany's consultations in preparation for the upcoming Diplomatic Conference it became clear, that the current drafting of Article VIII(5) draft MAC Protocol could necessitate significant changes to German law, as under current German law administrative authorities are not tasked with giving assistance to creditors of security interests in mining, agricultural and construction equipment. It is Germany's understanding that this situation is not unique to German law but quite similar in several other federally organized States. The deletion of the word "safety" would ensure that Contracting States could retain their current administrative law and would not have to modify it in order to make it compatible with the MAC Protocol.

6. Therefore Germany proposes the following drafting of Article VIII(5) draft MAC Protocol:

"[5. Subject to any applicable ~~safety~~ laws and regulations, a Contracting State shall ensure that the relevant administrative authorities ~~{including but not limited to tax and customs authorities and transport infrastructure authorities}~~ expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.]".

7. The scope of Article VIII(5) draft MAC Protocol could also be limited by other means such as providing for the possibility of an opt-in or opt-out by declaration for Contracting States. An opt-in or opt-out would avoid any inconsistency with the other provisions on assistance by administrative authorities mentioned before or contained in the other Protocols. If these other means of limiting the scope of Article VIII(5) draft MAC Protocol would be preferable for other States, Germany would be open to discuss these alternative solutions favourably and possibly lend its support thereto.

### **Milking Machines**

8. Additionally, Germany would like to propose the Harmonized Commodity Description and Coding System code 8434.10 (HS code 8434.10) for inclusion in the draft MAC Protocol Annex 2. The proposed HS code 8434.10 addresses milking machines.

9. During consultations with German stakeholders in the relevant sectors the question was raised if it would be possible to include the HS code for milking machines (HS code 8434.10) in Annex 2 to the draft MAC Protocol. According to our information the HS code for milking machines has not previously been examined.

10. The HS code 8434.10 covers milking machines. Milking robots form a sub-category of milking machines. Milking robots seem to satisfy all the carefully drafted criteria laid out in paragraph 12 of the UNIDROIT document DCME-MAC – Doc. 6 (July 2019):

- The proposed HS code covers equipment which is used in the agricultural sector.
- Milking robots are of high value. According to the information received one milking robot costs between 140.000 euros (about USD 155,000) and 180.000 euros (about USD 200,000).
- Milking robots already have individual serial numbers which allows for them to be uniquely identifiable and an international interest to be registered against them.
- Milking robots and milking machines in general form complete equipment rather than parts. The parts of milking machines are covered by another HS code (8434.90).
- Milking robots are used on-site for a specific dairy cattle building. They are used for production, rather than postcultivation, post-extraction processing or refining.