

Update on EU Export Controls – 2008 (a)

Developments in EU Export Control Law (2007/2008)

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In comparison with the report on developments I gave at last year's conference, the number of developments to report on this year from the European Union are generally fewer and of less immediate impact.

Firstly we have no new Member States to report. At this time last year the EU was still getting used to the idea of a Union of 27 Member States, with the latest additions being Romania and Bulgaria who joined the EU as full Member States on 1 January 2007.

There have been legislative changes – but fewer than perhaps we would have expected at this time last year. In relation to the EU Dual-Use regime, new legislation was introduced in October 2007 to update the EC Regulation 1334/2000 to take account of internationally agreed changes to the scope of coverage of the list of dual use items. These were changes made to Wassenaar, MTCR and Nuclear Supplier Group in 2006.

These changes arise as a result of international agreements and therefore the impact of the changes in the EU rules should be no different from these same changes when made in the USA. It is worth mentioning here that some changes did produce more unexpected and unwelcome difficulties in application. I am thinking here particularly of the extension to 2B350 which results in the inclusion of "fluoropolymers" which was ultimately regarded by industry here in the USA as too wide in scope - catching many different products including well known brands such as Teflon.

The main focus of my update however is not in fact an export control issue as such – but a development in EU customs law that will be very familiar to a US audience. It is the introduction of a major reform to EU customs law through the entry into force on 1 January 2008 of the rules creating the Authorised Economic Operator (AEO) status. A US audience will immediately see from the following description that the EU AEO is the counterpart of the CT-PAT (Customs Trade-Partnership Against Terrorism). Counterpart yes but amended to reflect the different nature of the EU customs regime.

What is AEO?

AEO is an EU accreditation procedure to prove security of an international

supply chain. The introduction of AEO from 2008 will therefore have an impact on all business's that move goods in and out of the EU. Once approved, an AEO will be able to move their goods more efficiently, subject to the minimum of border, security and Customs related controls. Ultimately, it will also allow simplified customs operations when the new Community Customs Code is introduced.

There will eventually be three types of AEO certification available:

1) AEO Security

This will benefit business by ensuring clearance of most customs controls relating to security and safety at the border of the EC, or when the goods leave the customs territory of the EC.

2) AEO Fiscal

This will enable business to benefit from simplifications for customs procedures, reliefs and facilitations under the revised customs legislation.

3) AEO Security and Fiscal

This will enable business to benefit from both simplifications provided for under the revised customs rules and from facilitations of customs controls relating to security and safety.

A clear picture is already forming regarding the impact of not having AEO accreditation in the future. AEO accredited businesses will see very little impact from security and border formalities on their supply chain.

Correspondingly, non-AEO businesses will see a significant increase in security checks and border formalities as they will be deemed to have insecure supply chains. This is indeed the objective of the AEO scheme - to focus controls on those movements that pose the greatest risks.

Authorisation

As with so much in EU Customs law and procedures, the AEO accreditation will take place at a national level. Applications must be made by the relevant national entity to its home Member State customs service.



It follows from this that only companies established in the EU can apply for AEO status.

Applicants are intensively audited by the national customs authority to confirm that they:

- have sound systems that will identify imports and exports;
- allow the movements to be advised before they take place;
- report all movements and associated declarations electronically;
- confirm the security of consignments from loading to unloading; and
- allow post activity audits to be made.

Once granted in its Home Member State, the AEO will be valid throughout the EU. Note that the application is in principle limited to the a single company only. Special attention needs to be paid to structuring applications for groups of companies operating in different EU Member States and for a single company with customs activities in a number of Member States.

The standard position is that each legal entity (whether or not part of a group) which is involved in customs activities must make their own application for AEO status. Only in this way would the entire group supply chain be capable of being accredited as AEO.

Where one legal entity carries out customs activities in more than one Member State, only one AEO application is made. Various criteria are applied to determine in which Member State the application should be made. The criteria broadly focus on identifying the Member State in which the company undertakes its main customs related activities.

Who will recognise it?

AEO status will be recognised by all national customs authorities in the 27 Member States of the EU. As the authorisation is valid throughout the EU, Member States have the opportunity to oppose an application during the approval process, but once approved they must allow the holder simplified procedures because they are a low risk entity.

When will it be available?

Applications for AEO Security are now being accepted and examined in the UK and some other Member States. The first approvals should be made in 2008. Applications for AEO Fiscal should begin to be accepted during 2008 and should be available from 2009.

Relevance for Export Control

The process of accreditation has only just started. Companies making an application will be reviewed and audited by the national customs authority based on a standard 50 page questionnaire. The initial focus for making an

application for AEO status therefore becomes undertaking of an internal audit to identify compliance with the questionnaire and/or where there are data gaps.

These questions can be divided into a number of categories : purely factual questions, questions which can be answered by reference to other accreditation or certifications held, accounting issues, IT issues and in addition direct questions on legal liability. Some of the questions in effect require the applicant to make a wholesale admission of liability for past breaches of customs laws or procedures.

I particularly like the following question which is at section 2.02 and is described simply as "Irregularities" : *"Specify any fiscal or non-fiscal irregularities as regards customs law and procedures as well as other relevant legislative obligations in respect of the import, export and transport of goods."*

Section 2.02 is one of the sections of the Questionnaire which contains an express reference to military and dual-use goods which it refers to generically as "high-risk goods".

Overall AEO raises two fundamental issues of importance for export control purposes: firstly, it underlines the need for export control compliance within an organisation to be an integral part of customs compliance rather than a related but sometimes isolated function; and secondly the AEO accreditation phase requires applicants to review and make substantial disclosures in terms of their reporting compliance to the customs authorities rather than to the national Export Control authority.

We are only at the start point of establishing the AEO system. As noted above the actual benefits and variations within the system will be brought into effect over a number of years. Undoubtedly, AEO will have a substantial impact on the practice of export control compliance within the EU and for this reason it merits in my mind being placed at the top of the list of most important developments in export control law in the EU over the last year.

Footnotes:

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