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WOLFFGANG Hans-Michael, Prof. Dr. iur;
Dean on the Faculty of Law,
Director of the Münster Master studies in
Customs Administration, Law and Policy,
University of Münster/Germany

NATZEL Julia M., Dr. iur,
Research Fellow,
Department for Customs and Excise,
University of Münster/Germany

**THE AUTHORISED ECONOMIC OPERATOR
IN THE EUROPEAN UNION**

Abstract

The European Community recently introduced the legal concept of the “Authorized Economic Operator” (AERO) into its customs law. In accordance with the SAFE Framework of the World Customs Organization the basic aim underlying this concept is to increase security in international trade whilst facilitating legitimate trade. To achieve this, the customs authorities are to carry out a detailed assessment of the reliability of economic participants and where the results are positive, grant them the status of “Authorized Economic Operator”. Holders of the certificate will have benefits in the form of customs simplifications and/or security facilitations. This approach establishes “strategic partnerships” between customs and the economy. Customs controls can be carried out more precisely which will enhance their effectiveness. The provisions relating to the AEO did enter into force on 1 January 2008.

Key words: Economical operators, foreign economic activity, European Union, Customs Law, international trade.

Introduction

The “Authorised Economic Operator” (AEO) is an important, if not the most important development in modern European customs law. The AEO is a legal entity which was created by Regulation (EC) 648/2005 [1] (the so-called “security amendment” [2]) in May 2005 and contained in Art. 5a of the European Customs Code. Following long and detailed discussion – Michael Lux the Director of the Customs Procedure Department of the EU Commission observed “never before has a proposal for the implementation provisions been discussed so intensively or given rise to so much controversy” [3] – the representatives of the Member States on the Customs Code Committee (cf. Art. 247, 247 a CC) accepted the implementation provisions proposed by the Commission on 23 October 2006. Thereupon the Commission issued Regulation (EC) 1875/2006 Amending the Implementation Provisions on 18 December 2006 [4]. The new provisions did enter into force on the 1 January 2008 – with some exceptions [5].

Problem statement

The introduction of the AEO will have considerable practical effects on all those involved in customs procedures. Customs authorities and economic participants must prepare themselves for these changes. The purpose of this contribution is to introduce and explain these changes. It provides an overview of the following subjects: the basic concept underlying the AEO (I), legal foundations (II), different classes of AEO authorization (III), substantive (IV) and procedural (V) certification criteria, issuing procedure (VI), advantages of AEO status (VII) and, finally, the revocation of AEO certification (VIII).

Research results

I. Basic Concept

In accordance with the SAFE Framework [6] of the World Customs Organization the basic aim underlying the AEO is to increase security in international trade and, at the same time, facilitate legitimate trade. In order to achieve this, customs authorities are to carry out a detailed examination of economic participants on the basis of established criteria and, if the results are positive, grant them the status of “Authorised Economic Operator”. Holders of the certificate can claim benefits in the form of customs simplifications and/or security control facilitations.

II. Legal Foundations

The AEO is contained in Article 5a CC, which contains terms of basic importance and authorises the Commission to issue implementation provisions. The latter now include the Amending Regulation contained in Art. 14a – 14x. In addition, the Commission issues Guidelines [7] which ensure a harmonised application of the authorization requirements in all Member States and supersede the regulations issued by national authorities. Finally, the Commission is planning to issue additional “Explanatory Notes” which will aid interpretation by means of practical examples.

The authorization to issue implementing provisions contained in Art. 5 a CC became effective seven days following the publication of the Amending Regulation (i.e. 11 April 2005). The other provisions of Art. 5a CC will enter into force after the accompanying implementing provisions. [8] Art. 14a – 14x CCIP will apply from 1 January 2008 with the exception of the provisions in Art. 14b (2) (3) CCIP which enter into force on 1 July 2009 [9].

III. Classes of AEO Certification

There are three AEO certificates (Art. 14 a (1) CCIP):

The first option is the “AEO-Customs Simplifications” certificate which is designed for economic participants who wish to claim the benefits of customs simplifications.

The second certificate is “AEO-Security and Safety”. This facilitates customs controls when importing and exporting goods in or from the customs territory of the Community.

The final option is a combination of these certificates in the form of the “AEO-Customs Simplifications/Security and Safety” and is intended for economic participants who wish to profit from customs simplifications and facilitation of security controls.

IV. Substantive Certification Criteria

The substantive criteria for obtaining AEO status depend on the certification applied for (cf. Art. 14a (1) CCIP).

The following five criteria are common to all three certificates:

- Economic participants situated in the customs territory of the Community (1.)
- Absence of grounds for refusing certification (2.)
- Appropriate record of compliance with customs requirements (3.)
- A satisfactory system of managing commercial records (4.)
- Proven financial solvency (5.)

This list is exhaustive with regard to “AEO-Customs Simplifications”. However, “AEO-Security and Safety” as well as the combined certificate “AEO-Customs Simplifications/Security and Safety” impose a further requirement: i.e., the economic participant must also maintain appropriate security standards (6.)

Economic Participants Situated in the Customs Territory of the Community

The applicant must be an “economic participant established in the customs territory of the Community” (Art. 5a (1) (1) CC).

Art. 1 (1) 12 CCIP [10] defines an economic participant as any “person” pursuant Art. 4 (1) CC, who “during the course of his business is involved in activities covered by customs legislation”. Accordingly, natural and legal persons as well as associations engaged in customs-related activities can apply for certification. In effect, this definition encompasses all stakeholders in the supply chain. Unlike the “person responsible for exports” in foreign trade law, an economic participant is the undertaking itself and not an individual employee. This corresponds to the aim of the provision which is to confirm the reliability of undertakings.

The economic participant must also be established the customs territory of the Community, i.e. he must be resident or have its headquarters there. There is a limited

exception to this rule for airline or shipping companies which have a regional office in the community customs territory” in Art. 14g (b) CCIP with regard to applications for the “AEO-Security and Safety” certificate.

Grounds for not accepting an application

Two further criteria of certification result from Art. 14f (2) CCIP which specify cases in which an application may not be accepted.

First, the economic participant may not be convicted of a serious criminal offence linked to its economic activity (Art. 14f (b) CCIP). This also applies to the representative of the economic participant subject to the qualification that only infringements of customs rules are relevant (Art. 14f (c) CCIP). Germany, like other states in the EU, does not recognise criminal liability for legal persons or undertakings according to the principle “societas delinquere non potest” and so this provision has little importance for economic participants. Second, the economic participant may not be subject to insolvency proceedings at the time of the submission of the application (Art. 14 f (b) CCIP).

Appropriate record of compliance with customs provisions

The central condition for certification is the “appropriate record of compliance with customs rules” (Art. 5a (2) (1) CC, Art. 14h CCIP). This criterion aims to make a prognosis of the economic participant’s future customs compliance on the basis of its existing record of compliance.

The term “customs requirement” is broadly interpreted and includes all provisions relating to international trade in goods whose compliance is monitored by the customs authorities [11].

The examination of customs compliance according to Art. 14h (1) (a) – (d) CCIP is not limited to the economic applicant making the application. The assessment considers many other aspects including persons in charge of the applicant company (sub-section (b), first alternative) who are members of the board, i.e. the organ authorised to represent the company. Persons who exercise control over the economic participant are also to be considered (sub-section (b) second alternative), i.e.

the members of the supervisory board of a PLC. The assessment also examines persons in the applicant company who are responsible for customs matters (sub-section (d)). Finally, the applicant's legal representative in customs matters must also be examined (sub-section (c)).

Compliance with customs rules is considered "appropriate" provided there have been no serious or repeated infringements (Art. 14h (1) (1) CCIP). The importance is to be determined according to the number and size of customs-related operations (Art. 14h (1) (2) CCIP). The interpretation of all AEO provisions must also consider the "specific characteristics" of the economic participant in question (Art. 14a (2) CCIP). Therefore, if the company carries out multi-faceted and complex activities the economic participant will be treated with greater leniency during the application process than an economic participant which trades in a limited and constant range of goods or goods which affect sensitive interests protected by prohibitions and restrictions. Until the creation of a uniform, pan-European system, the assessment systems of national administrations will be used as sources of information such as DEBBI, the decentralised assessment system for economic participants [12]. However, when considering the undefined legal term "appropriate compliance with customs rules" customs authorities cannot exercise discretion capable of limited judicial review [13].

Reference is made to the record of compliance during the past three years (Art. 14h (1) (1) CCIP). If an economic participant has been established for less than three years, the customs authorities will assess him using available information. In this case, a close monitoring of the relevant economic participant will take place during the first year after issue (Art. 14q (5) (2) CCIP).

Satisfactory System of Managing Commercial Records

A further requirement is a "satisfactory system of managing commercial records and, where appropriate, transport records" (Art. 5a (2), (1), 2nd indent CC, Art. 14i CCIP). This aims to enable customs authorities to carry out an *ex post* control of the business operations. A proper management of records also prevents mistakes being made. Persons directly involved in the transportation of goods must carry their

transportation documents with them [14]. They must also be included in the commercial records [15].

The accounting system must be consistent with national legal standards (Art. 14i (1) (a) CCIP). In Germany, traders are required to maintain accounting systems according to §§ 238 ff. HGB. Customs authorities are to be granted physical and electronic access to accounting records (Art. 14i (1) (b) DVO). In addition, an administrative organization is required which reflects the type and size of business, a satisfactory system for the handling of licenses and a logistical system that – with the exception of the “AEO-Security and Safety” – distinguishes between Community and non-Community goods (Art. 14i (1) (c), (d), (b) CCIP). The examination also includes the archiving of the company’s records as well as the security measures in place to protect the applicant’s computer system from unauthorised intrusions and secure documentation (Art. 14i (1), (f), (h) CCIP). Finally, the economic participant must ensure that its employees are made aware of the need to inform the customs authorities whenever compliance difficulties are discovered and establish suitable contacts to inform the customs authorities of such occurrences, e.g. by informing a contact partner (Art. 14i (1) (h) CCIP). On the other hand, the obligation to take anti-corruption measures was not included in the final version of the provisions.

Proven Financial Solvency

The first drafts of the CCIP only required proven financial solvency for “AEO-Customs Simplifications” and therefore for the combined certification “AEO-Customs Simplifications/Security and Safety” as well. However, Art. 14a (1) (1) CCIP now imposes this requirement on applications for all AEO certificates.

Concerning “AEO-Customs Simplifications”, the purpose of this requirement is to ensure that the economic participant has the necessary financial means to meet its customs debts and thereby complete customs procedures. Its relevance with regard to “AEO-Security and Safety” is that financial difficulties make it more likely that customs regulations will be infringed e.g. owing to an inaccurate declaration of goods. In the Regulation laying down criteria for risk analysis as regards agricultural

products [16] one criterion for determining the choice of a person for controlling goods is their “financial situation” due to a high risk of fraud [17].

Substantively, a good financial standard is required which enables the economic participant to satisfy its commitments (Art. 14j (1), (2) CCIP). Like the German Insolvency Regulation (§ 17) solvency is determined on the basis of an appropriate financial statement. Art. 14j (1) (2) CCIP requires the economic participant’s business activity to be taken into account, thereby reflecting Art. 14a (2) CCIP which applies in relation to all certification requirements. This enables particular (indebted) public legal entities as well as airline companies, which are often supported by the state, to obtain AEO certification as well.

If the economic participant has been established for less than three years the customs authorities will also make a judgement on the basis of the available records and information (Art. 14j (2) CCIP), which again results in a close monitoring during the first year after issue (Art. 14q (5) (2) CCIP).

Appropriate Security Standards: An Additional Requirement for “AEO-Safety and Security” and “AEO-Customs Simplifications/Security and Safety”

Economic participants who apply for “AEO-Security and Safety” or “AEO-Customs Simplifications/Security and Safety” must satisfy the additional condition of “appropriate security standards” with regard to buildings used in connection with the operations to be covered by the certificate (Art. 5a (2) (1), 4th indent CC, Art. 14k, 14n (1) (1) CCIP).

Art. 14k (1) CCIP lists the relevant security requirements. They are also specified in greater detail in Part 5 of the Guidelines where they are divided up according to the function which an economic participant performs outside the supply chain. Accordingly, rules governing the unloading and control of imported goods do not only affect e.g. producers and exporters [18]. Art. 14a (2) CCIP plays an important role with regard to security standards because, as an expression of the proportionality principle, it states that the specific characteristics of the economic participant, (particularly its size), must be taken into consideration when assessing the certification requirements.

The security and safety standards require buildings to be protected by materials which resist unlawful entry by third parties as well as prevent unauthorised access to cargo areas (Art. 14k (1) (a), (b) CCIP). Security measures should be in place for the handling of goods (Art. 14k (1) (c) CCIP). This particularly applies to the handling of import or export licenses and the separate handling of goods subject to such restrictions (Art. 14k (1) (d) CCIP). In addition, the economic participant must be able to clearly identify its business partners (Art. 14k (1) (e) CCIP). Finally, he must carry out periodic background checks on employees working in security sensitive positions, ensures their active participation in security awareness programmes and conduct security screening on prospective employees (Art. 14k (1) (f), (g) CCIP).

In order to avoid duplicating assessments in the interests of increasing administrative efficiency, certain existing security certificates are recognised provided they impose identical or at least comparable requirements. This also applies to security certificates which have been issued on the basis of international conventions, ISO standards or European Standards Organizations as well as on the basis of Community legislation (Art. 14k (4) CCIP). The latter, in particular, affects the planned certification as “Secure Operator” on the basis of the “Regulation on Enhancing Supply Chain Security” [19]. If an undertaking which performs activities such as the security control of goods for an airline company obtains certification as a “Regulated Agent” [20] there is no need for an additional security examination with regard to the relevant premises (Art. 14 k (3) CCIP).

An airline or shipping company not established in the Community which can apply for the “AEO-Security and Safety” certificate on the basis of the exception in Art. 14g (b) CCIP must satisfy the special requirements of Art. 14k (2) CCIP.

V. Procedural Certification Requirements

Concerning procedure, the economic participant must submit an application for an AEO certificate (Art. 14c CCIP). Annex 1 C of the CCIP contains the relevant specimen.

The application is to be submitted to the customs authorities in the Member State where the applicant's main accounts relating to the customs arrangements involved are held and where at least part of the operations to be covered by the AEO certificate are conducted (Art. 14d (1) (1) (a) DVO). If accounts are maintained electronically, the customs authorities of the Member State are competent in the area where the main accounts are accessible, the general logistical management activities are conducted and at least part of the operations to be covered by the AEO certificate are carried out (Art. 14d (1) (1) (b) CCIP). Physical accounts can therefore be substituted by those available electronically in combination with an administrative centre to prevent interference. If these two provisions do not suffice to establish the competent customs authority and the physical or electronic accounts are held in a different state from the place where business operations are carried out, competence is to be determined on the basis of the place where the accounts are held (Art. 14d (2) CCIP).

Art. 14d CCIP deals with competence at international level, i.e. it determines the competent Member State. The location of the competent customs authority within the Member State as well as the relevant department and instance is determined according national law pursuant to Article 60 CC, as part of the national administration organization.

The application for AEO certification must include all documents which are necessary in order to assess whether the certification requirements have been satisfied (Art. 6 (1) CC). If the relevant documents or premises are found in another Member State this information must provided in the application form (Art. 14d (3) (4) CCIP). In addition, the economic participant is obliged to provide a readily accessible central point or nominate a contact person within the undertaking in order to make available to the customs authorities all further information (Art. 14d (6) CCIP). The date is to be submitted to the customs authorities by electronic means, if possible (Art. 14d (7) CCIP).

VI. Procedure for Issuing AEO Certificates

Once the application for the AEO certification has been submitted the customs authorities shall examine whether or not the conditions for issuing the certificate have been met (Art. 14n (1), sentence 1 CCIP). Regarding the examination of accounts, financial solvency and the maintenance of appropriate security and safety standards pursuant to Art. 14i, 14j, 14k CCIP, the customs authorities may base their decision on the conclusions provided by experts in the relevant fields (Art. 14n (2) CCIP). This refers to private reports and certificates provided by the parties in particular, those by auditors, surveyors and, where applicable, IT service providers concerning the assessment of data processing facilities. Considering that the AEO certificate applies throughout the Community, the customs authorities of all other Member States are to be consulted before it is issued (Art. 14l, 14m CCIP). When examining compliance with security standards it is possible to examine only a representative portion of the premises subject to the requirements of Art. 14n (1) (2) CCIP.

Generally speaking the customs authorities have 90 calendar days to examine whether or not the application requirements have been met (Art. 14o (2) sentence 1 CCIP). This deadline can be extended by a further period of 30 calendar days (Art. 14o (2) sentence 2 CCIP). If the reason for the delay in decision-making is due to the fact that the economic participant is making adjustments in order to satisfy the certification requirements, a further extension of unlimited duration is possible (Art. 14o (3) CCIP). The period for making a decision will be 300 calendar days during the transition period of 24 months following the introduction of the AEO regulations (i.e. until 1. January 2010) [21].

If the economic participant satisfies the requirements of the certificate applied for, the corresponding AEO certificate will be automatically issued - i.e. without any discretion on the part of the customs authorities. It is recognised in the whole Community customs territory (Art. 14q (2) CCIP) and its validity is unlimited (Art. 14q (3) CCIP). In order to ensure continued compliance with the certification requirements, a re-assessment of the economic participant will take place in the case of major changes to the relevant Community legislation and where there is a

reasonable indication of non-compliance (Art. 14q (5) (1) CCIP). Besides the specific grounds for examination, the customs authorities continuously monitor the AEOs (Art. 14q (4) CCIP). During the first year after issue, there will be close monitoring of economic participants which have been established for less than three years (Art. 14q (5) (2) CCIP).

VII. Advantages of the AEO Status

The AEO status grants its holder legal and economic advantages.

Legal Advantages. The legal advantages depend on the type of AEO certificate.

a) “AEO-Customs Simplifications”

The certificate “AEO-Customs Simplifications” – and thereby the combined certificate “AEO-Customs Simplifications / Security and Safety” – grants advantages in two respects: facilitations regarding customs controls as well as simplified procedures.

Facilitation of Customs Controls

In accordance with the basic concept underlying the AEO – that customs withdraws monitoring in the case of economic participants which have been examined and found to be reliable – the holders of AEO status are granted facilitations with regard to customs controls on the basis of Art. 14b (4) CCIP. In this way, customs controls are reduced (Art. 14 (4) (1) CCIP) since the AEO certificate is regarded as a risk-reducing factor for purposes of the risk analysis of the goods or documents subject to control according to Art. 4f CCIP. For this reason, the AEO will generally not be subject to controls. There are exceptions in the case of indications of an specific risk – these could result from the type or properties of the goods, their origin as well as the participation of non-certified economic participants in the supply chain [22] - or control obligations set out in other Community legislation (Art. 14b (4) (1) sentence 2 CCIP). Spot checks are also made which meets the requirement to include a “random element” when selecting goods to control [23]. Otherwise, the status of AEO could also be used to carry out illegal acts.

If a control of goods covered by customs declaration of an AEO is required, it is to be carried out as a matter of priority before the control of other persons (Art. 14b (4) (2), sentence 1 CCIP).

Finally, at the request of the economic participant, these customs controls can be carried out at a place which is different from the place of the customs office involved (Art. 14b (4) (2) sentence 2 CCIP).

Simplified Grant of Simplified Procedures

In addition, the certificate “AEO-Customs Simplifications” leads to the simplified grant of simplified procedures [24]. AEO certification currently does not grant an automatic right to simplified procedures. However, the AEO status serves to reduce the extent of the examination when applying for the grant of some simplifications. Criteria already examined when granting the AEO certificate will not be re-examined (Art. 14b (1) CCIP). The examination is confined to the other specific certification criteria. Exactly which authorization criteria are dispensed with is specified in the individual elements of authorization [25]. As a rule, examinations of the personal reliability as well as the accounts which allow an effective supervision of the economic participant are dispensed with [26].

The current possibilities of procedural simplification by the application for individual certifications will initially continue. Customs simplification will only be granted exclusively or largely to holders of “AEO-Customs Simplifications” once the Modernised Customs Code has been introduced in 2009 [27]. The present solution represents an “interim provision”.

b) “AEO-Security and Safety”

The “AEO-Security and Safety” certificate as well as the combined status of “AEO-Customs Simplifications / Security and Safety” grant their holders the following advantages: facilitations of customs controls, advance notification of a control of goods as well as a reduction of the data elements to be submitted for summary declarations. The latter two advantages will only apply from 1 July 2009 [28].

Facilitations of Customs Controls

As is the case with “AEO-Customs Simplifications”, the status of “AEO-Security and Safety” also grants facilitations in the form of reduced and priority controls which can take place at a location designated by the AEO (Art. 14b (4) CCIP). Depending on the type of certification these benefits relate to security controls. (cf. Art. 14a (1) (b) CCIP).

Advance Notice of the Control of Consignments

Provided that it does not jeopardize the carrying out of controls – e.g. owing to interference – the economic participant can be informed of an imminent control of goods (Art. 14b (2) (1) CCIP). This predictability allows the economic participant to adapt its plans to the changed situation - i.e. delays owing to the physical control of goods. Art. 14b (2) (2) sentence 1 CCIP makes clear that a control without advance notice is still possible.

Reduction of Data Requirements in Summary Declarations

In addition, the holder of the AEO-Security and Safety is granted the possibility to submit a reduced set of data elements in the case of summary entry and exit declarations pursuant to Art. 36a, 182a CC (Art. 14b (3) (1) CCIP). The grant of this security facilitation remained controversial. Industry representative demanded a total exemption from a summary declaration. However, this would have frustrated the aim of the advance selection of goods to control by means of risk analysis (Art. 13 sec. 2 CC; Art. 4 f – 4 j CCIP) which is based on information submitted with the summary declaration. For a long time, representatives of Member States could not decide which data elements should be dispensed with. The required data is now listed in Table 5 of Annex 30 A CCIP (Section 2.5).

Art. 14b (3) (3) CCIP stresses that the rule does not affect the submission of additional data elements required by international agreements.

Economic Advantages

Besides legal advantages the status of AEO also offers economic advantages.

On the one hand, these result from the legal advantages. Accordingly, they can offer savings on staff and overhead costs e.g. owing to lower and more predictable border wait times as well as the reduced processing time for applications.

Measures taken in order to obtain the AEO certification can lead to economic advantages for the AEO, e.g. through the improvement of internal operations, the avoidance of damage as well as the reduction of insurance premiums.

The most important economic advantage, however, lies in the fact that the AEO status resembles a seal of quality. By granting the status, the customs authorities are confirming that they regard the economic participant in question, following a thorough examination – including the examination of characteristics relevant to private transactions – to be reliable and therefore trustworthy. This elevates the AEO to a preferred trading partner for other persons and thereby grants him a competitive advantage [29].

The certification as an AEO is therefore a worthwhile investment for global players.

VIII. Revocation of the AEO Certificate

The revocation of an AEO certificate is regulated in Art. 14r – 14v CCIP.

Accordingly, the AEO certificate is suspended if the economic participant no longer meets the requirements of its AEO status, the customs authorities have sufficient reason to believe that a criminal offence was committed in connection with the infringement of the customs rules or at the request of the economic operator in accordance with Art. 14 r – 14 u CCIP. First, the AEO is given the opportunity to regularise the situation exception where a criminal act has been committed. The legal consequence of suspension is a temporary cessation of AEO certification [30].

If the measures taken fail to regularise the situation, the economic participant has been subject to legal proceedings owing to a serious infringement of the customs rules or at the request of the economic participant, the AEO certificate will be permanently revoked according to Art. 14v. As a result, the economic operator will

not be permitted to submit a new application for three years – except where the he has requested the revocation (Art. 14 v (4), 14f (d) CCIP).

If the economic participant does not comply with an obligation imposed by an AEO certificate – in particular, the obligation to inform the customs authorities of changes potentially relevant to the continuance of certification in accordance with Art. 14w (1) CCIP – the AEO certificate can be revoked according to Art. 9 (2) CC. The withdrawal and revocation according to Art. 8, 9 CC are blocked by Art. 14r – 14v CCIP as *lex specialis* whose special provisions – opportunity to regularise the situation, initial suspension, imposition of a period of ineligibility – cannot be undermined.

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RAKOCZY Bartosz,

Ph. D. in Environmental Law

Professor of the University of Gdańsk

Head of the Environmental Law Department

UMK in Toruń

Assistant Professor at the Public Economic and

Environmental Law Department University of

Gdańsk Legal Counsel