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## Customs Flash

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We are pleased to present the latest edition of the Deloitte Customs Flash in Switzerland – a Deloitte "hot topic" newsletter focusing on updates related to customs and international trade developments in Switzerland and the European Union.

### Irregularities in Transit Procedure leading to Customs debt and import VAT

On May 15, 2014, the European Court of Justice ('ECJ') issued its decision in case C 480/12 with respect to the late presentation of goods placed under the external Community Transit procedure as well as potential implications for customs debt and import VAT.

The ECJ was asked whether the mere failure to present the goods (which were placed under the NCTS Transit procedure) within the prescribed time limit to the office of destination is automatically considered as an "unlawful removal" or rather as a "non-fulfilment" of an obligation related to the customs procedure.

While an "unlawful removal" and a "non-fulfilment" of an obligation might seem very similar, the consequences can be very different. A customs debt can in general be incurred in a variety of ways. The aforementioned ECJ case deals with two of these, namely the qualifications of "unlawful removal" of goods from customs supervision (article 203 of the Customs Code) and the "non-fulfilment" of an obligation related to the customs procedure (article 204 of the Customs Code). As those qualifications are mutually exclusive, an irregularity can only be considered as a "non-fulfilment" once it has been duly established that it does not qualify as an "unlawful removal".

The main difference between these qualifications is the resulting consequences. An "unlawful removal" will always lead to a customs debt, whereas for a "non-fulfilment" of an obligation, a customs debt can be avoided when the irregularity has "no significant effect on the correct operation of the customs procedure in question". For this reason, it is very important to determine the nature of the irregularity that has taken place.

In this specific case, the question brought before the ECJ

asked if merely exceeding the prescribed time limits in the Transit procedure should be regarded as an “unlawful removal” or as a “non-fulfilment” of an obligation.

Due to previous ECJ case law, there was extensive discussion on what could qualify as an “unlawful removal” (and therefore be excluded from qualification as a “non-fulfilment”). Further to the recent case, the concept of “unlawful removal” should now be interpreted as (1) “any act or omission the result of which is to prevent, only for a short time, the customs authorities from gaining access to goods under customs supervision and from carrying out the required monitoring”. Furthermore, the removal of the goods must (2) “entail a risk of entry into the economic networks of the European Union”.

Only when those two conditions are fulfilled simultaneously, the disappearance of the goods can be qualified as an “unlawful removal”, and a customs debt will arise based on article 203 of the Customs Code. On the late presentation of goods placed under the external Community Transit procedure, the ECJ ruled that the goods were not at risk of ending up in the European economic market, as they were nevertheless presented at the office of destination, albeit belatedly.

After duly considering the non-application of article 203 of the Customs Code, the ECJ can then determine whether a customs debt could be incurred on the basis of article 204 (i.e. the “non-fulfilment” of an obligation). As mentioned before, it is possible in “non-fulfilment” to prevent a customs debt if the irregularity has no significant effect on the correct operation of the customs procedure or if the irregularity is mentioned in one of the get-out clauses laid down in article 859 of the Implementation Provisions to the Customs Code (‘CCIP’). The delayed presentation of goods is an irregularity for which a get-out clause is included in article 859 CCIP, as it is deemed not to have any “significant effect” on the correct operation of the customs procedure in question.

With this decision, the ECJ limits the definition of “unlawful removal” and finally gives “non-fulfilment” a distinctive role in the generation of a customs debt. Previously, most irregularities could qualify as a removal due to the broad definition. Now, whenever the disappearance of goods does not entail a risk of entry into the economic networks of the EU, or whenever the irregularity falls within one of the get-out clauses of article 859 CCIP, it should instead be qualified as “non-fulfilment”. When this is the case, and the irregularity has “no significant effect” on the correct operation of the customs procedure or it has been captured by the legally foreseen get-out clauses, it becomes possible to prevent the generation of an actual customs debt.

Finally, the ECJ also ruled that import VAT is due, both in the case when the customs debt is incurred based on article 203 and when the debt is based on article 204 of the Customs Code.

## What does it mean for you?

The answer to the question whether both a customs debt

based on article 203 as well as a debt based on article 204 of the Customs code is a taxable event for VAT purposes, can differ from one Member State to another.

In other words, the concrete impact of the ECJ decision should be assessed locally based on each Member State's own administrative practice. The importance of this case lies in the fact that if an irregularity is to be considered as an "unlawful removal", a customs debt will always be incurred and import VAT will be due. If however an irregularity qualifies as "non-fulfilment" and the irregularity has no significant effect on the operation of the customs procedure or is captured by a get-out clause, then no customs debt will arise nor will import VAT be due.

## What to do?

Whenever there is an irregularity which has "no significant impact" or is included in the get-out clause of article 859 CCIP, the ECJ confirmed that customs debt and import VAT may not be incurred if the irregularity qualifies as "non-fulfilment". Previously, this may have been qualified as removal and consequently would have led to inevitable customs debt and import VAT.

Should an irregularity arise, it is recommended to check if this irregularity is included in a get-out clause of article 859 CCIP. If it is included, the irregularity should qualify as a "non-fulfilment" rather than "removal" and there is still a possibility to prevent generating customs debt and import VAT. This can be prevented by building a solid file for the Customs authorities. Robust control over your supply-chain is essential in accomplishing this.

Deloitte can assist with supply-chain control increase in order to reduce the risk of irregularities by setting up administration procedures and measurements of internal control.

Any questions concerning the items in this publication or assistance required in relation to these new rules? Please contact your usual tax consultant at Deloitte or one of the contacts listed in this newsletter.

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