

Customs & Global Trade Newsletter

News you can count on

Volume 1, number 4
13 August 2013



The Authorised Economic Operator (AEO) concept

Blessing or curse?

Fewer physical inspections and handling by Customs administrations, the so-called 'green lane', financial guarantee waivers, reductions or rebates and priority treatment are a few examples of the benefits promised to 'he who has proven to be in control', the Authorised Economic Operator (hereafter: AEO). Although some benefits seem to be made available, perception is reality. Five years after the introduction of AEO in the EU, a comment from AEO's is that they have experienced an increase in inspections by the Customs administrations rather than a decrease. As a result, some of them question if the additional costs sustained and efforts made by AEO's in meeting the prescribed AEO requirements are disproportionate to the benefits. As a result, some companies may choose to not apply for AEO certification. Can the AEO concept be deemed a curse or would there be another side to the story?

In this article we will address the incentive for the AEO concept, as well as the purpose and the scope. Subsequently, we will focus on how the AEO programme is perceived in the EU by both the (Dutch) Customs administration and the economic operators and the influence of jurisprudence in this regard. We will address the upcoming changes in the customs

legislation¹ related to AEO and lastly, we will discuss the trends with regard to AEO in the EU and the world.

Safe Framework of Standards

Who does not recall 9/11, 2001? This act of terrorism exposed the vulnerability of controls on the logistic infrastructure and provided an incentive for governments around the world to increase international cooperation to improve security.

Customs administrations have always played an important role in the fight against cross-border crime and terrorism. However, due to the improvement of the global logistic infrastructure and continuous increase of transports around the globe, Customs administrations have become more and more dependent on one another to get better grip on international supply chains. Also, the increase of global trade and thus the number of shipments has forced Customs administrations to revisit their way of keeping supervision, without compromising security.

In order to support the cooperation, the global customs community, in conjuncture with the World Customs Organisation (hereafter: WCO), developed the SAFE Framework of Standards to Secure and Facilitate Global Trade (hereafter: SAFE Framework)². The SAFE Framework provides a regime for administrations and governments that want to enhance their security but still want to facilitate international trade. The SAFE Framework is founded on two main pillars; Customs-to-Customs network arrangements and Customs-to-Business partnerships.

- *Customs-to-Customs network arrangements*: Customs administrations must work co-operatively with common and accepted standards to maximise the security and facilitation of the international trade supply chain;
- *Customs-to-Business partnerships*: The establishment of a partnership between the Customs administrations and the private sector in order to involve the individual companies to improve the safety and security of the international trade supply chain.

The first pillar is mainly effectuated by stimulating the development of IT systems that would facilitate improved ways of keeping supervision. This further automation is also embedded in the new upcoming customs legislation as one of the main pillars, with the year 2020 as the aim of having the IT systems up and running by the various Member States.

The second pillar aims at aligning with existing business processes and safety standards, by engaging partnerships with 'trusted' economic operators. Aligning with existing business processes, rather than checking individual shipments, seems to be a win-win situation for the Customs administrations. On the one hand, this approach contributes to resolving the resource issues on the side of the Customs administrations, since effectively this means that the larger part of the control measures are shifted from the Customs administrations to the economic operators. The idea behind it is that the economic operators know the operations best and thus may identify irregularities (from a safety perspective) in most cases sooner than any Customs administration would. The important question here is, what incentive do economic operators have to take this task upon them?

The second pillar culminated in the introduction of the AEO concept. Global standards for launching an AEO programme were established in the SAFE framework, with the aim of

¹ Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008

² http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/normes_wco_en.pdf

having Customs administrations eventually formalise mutual recognition arrangements (hereafter: MRAs) with other Customs administrations, contributing to the Customs-to-Customs network arrangements.

“Achieving AEO programme compatibility and mutual recognition is in essence a harmonisation and simplification of Customs procedures, and thus contributes to balancing supply chain security and facilitation.”³

As of June 2012, 94% of the WCO have signed Letters of Intent committing to implement the SAFE framework. The latest edition of the AEO Compendium identifies 24 operational AEO programmes, 8 AEO programmes that are to be launched, and 9 Customs Compliance programmes, for a total of 40 programmes.⁴ The coverage of AEO programmes continues to spread, with the aspiration by countries launching an AEO programme to conclude MRAs with its major trading partners, which is considered to be one of the major benefits for AEO's. An overview of the current and negotiated MRAs is included below.

Concluded MRAs (19)

Date	Country
June 2007	New Zealand – USA
May 2008	Japan – New Zealand
June 2008	Canada – USA
June 2008	Jordan – USA
June 2009	Japan – USA
July 2009	EU – Norway*
July 2009	EU – Switzerland*
June 2010	Canada – Japan
June 2010	Canada – Korea
June 2010	Canada – Singapore
June 2010	EU – Japan
June 2010	Korea – Singapore
June 2010	Korea – USA
January 2011	Andorra – EU**
May 2011	Japan – Korea
June 2011	Korea – New Zealand
June 2011	Japan – Singapore
May 2012	EU-USA
June 2012	China - Singapore

*The agreements between the EU and Switzerland, EU and Norway, and EU and Andorra, are not traditional MRAs of AEO. The mutual recognition aspect of those agreements applies only to indirect export cases, as customs security measures in relation to the movement of goods do not exist between them.

MRAs being negotiated (10)

China – EU
China-Japan
Japan - Malaysia
China-Korea
Hong Kong, China – Korea
India-Korea
Israel-Korea
New Zealand – Singapore
Norway - Switzerland
Singapore - USA

Number of MRAs per country

Country	Signed	In negotiation
Andorra	1	0
Canada	4	0
China	1	3
EU	5	1
Hong Kong, China	0	1
India	0	1
Israel	0	1
Japan	6	2
Jordan	1	0
Korea	5	4
Malaysia	0	1
New Zealand	3	1
Norway	1	1
Singapore	4	2
Switzerland	1	1
USA	6	1

It may be clear that mutual recognition is only of value for the AEO's if the benefits deriving from the respective AEO programs are indeed implemented and tangible for the AEO's. This is one of the main points of attention as the trading community is of the view that the quality and extent of benefits is an important AEO implementation issue. To justify the

³ Compendium of Authorised Economic Operator Programmes 2012 edition, page 8.

⁴ Compendium of Authorised Economic Operator Programmes 2012 edition, page 6.

requisite expenses needed to obtain AEO accreditation, benefits should be tangible and measurable.

The AEO programme in the EU

Too high expectations lead to disappointment. The Dutch Customs administration, responsible for supervising the biggest port in the EU, has always been a frontrunner on facilitating in customs simplifications. Far before the introduction of the AEO programme in the EU in 2008, a large part of the economic operators had obtained licenses for customs simplifications provided for in the EU customs legislation, such as the local clearance procedure, whereby the 'interference' by the Dutch Customs administration was minimal. Although complete financial guarantee waivers were not possible, substantial reductions were possible, if an economic operator had proven to be in control. All in all, there already was quite some facilitation before the introduction of AEO in the EU, which may have contributed to perceiving the benefits of AEO as minimal. In this regard, 'marketing' AEO with a strong focus on the benefits might not have been the best strategy applied by the EU Customs administrations, among which the Dutch Customs administration.



Becoming an AEO means engaging a partnership with the Customs administration, that is built on 'trust'. However, this 'trust' is referred to as 'organised trust'. Customs administrations still require something tangible to verify if a company is in control. Normally this would be documented procedures and measures of internal control from the AEO in relation to all the aspects covered by AEO.

However, the methodology applied by the different Customs administrations to assess AEO applicants and AEO's vary.

This makes it hard for economic operators with business units spread around the EU to manage their 'customs control framework' consistently. From a practical point of view, the trade community was also faced with different AEO application procedures per Member State. Especially companies with business units spread around the EU faced a difficult task when complying with the individual requirements. Although the European Commission in its best effort provided for a harmonised self-assessment questionnaire (SAQ) in 2010 to be used to guarantee a uniform approach throughout the EU, there are still Member States, such as the Netherlands, that require a deviating application.

In the Netherlands, the AEO application mainly consists of a Summary AEO self-assessment form that shows the results of the AEO self-assessment performed by the applicant by means of scores between 0 to 5 (i.e. best practice), without any underlying documentation on how the score was established. Particularly short after the introduction of AEO, AEO certificates were found to be granted relatively 'easy', which, logically, also had to do with some inexperience on the side of the Customs administration and lack of resources. After gaining experience, the Customs authorities became stricter in assessing if all requirements were met, whereby it has not been uncommon that 'the level of being in control' by AEO's, that were initially granted the AEO certificate, was second guessed in case of periodical evaluation. As a result, the Customs administrations launched individual improvement plans requiring these AEO's to better themselves in order to retain the AEO status. As a consequence of the expectations awakened by the Customs administrations, the concerning companies logically perceived these intensive controls as a burden, whereas the Customs administrations expect AEO's to have their customs and security procedures in place, including an ongoing monitoring system. Communication seems to be the key.

Although interpretations of the AEO requirements vary per Member State, only few discussions seem to arise from the compliance part. The security part however, sometimes does seem to cause some misunderstanding. Customs administrations are no security

experts (yet), therefore this aspect may be harder to cope with. The same thing goes for the customs manager who will usually be responsible for the AEO application.

Furthermore, the scope of AEO focusses on the entire supply chain, rather than the individual businesses that are part of the supply chain. Apart from the individual responsibilities on customs and security matters, AEO's are expected to also contractually agree on applying their AEO standards with their business partners in the same supply chain to enhance his supply chain security. For example, an AEO asks for a security declaration reflecting both 'parties' respective business models, roles and responsibilities, where appropriate. It seems that this extension of 'corporate responsibility' has not yet become the second nature of economic operators.

As of 1 January 2012, it became mandatory for economic operators to comply with the AEO (compliance) standards, in order to retain particular customs simplifications.⁵ This change in legislation provided an important incentive for economic operators to comply with the AEO (compliance) standards. The local clearance procedure was likely to be the most relevant customs simplification in this regard. This allows the application of customs procedures based on the economic operator its record keeping, e.g. together with a periodical customs declaration, rather than having to lodge individual customs declaration on a consignment basis. Losing this facility would be a major setback for economic operators.

Incentive for transparency by the AEO's

Although it is not explicitly required by customs legislation, Customs administrations tend to interpret the Customs-to-Business partnerships in such a way that businesses are expected to pro-actively report irregularities. One can strive for best practices, but it is a Utopia to believe that no irregularities will take place. Also, there are commercial interests to take into account as irregularities may also concern business partners. Based on the partnership between Customs administrations and AEO's, one would expect that voluntary disclosure would be appreciated by the authorities and 'rewarded' in a way that no penalties are imposed or duties are levied in cases where it is clearly justifiable. In our view, this would provide an incentive for being transparent as an AEO towards the Customs administrations.

Customs administrations may be inclined to do so, however, the current customs legislation offers little to no room for such a discretionary power. This strict application of customs legislation, confirmed in recent court cases from the European Court of Justice, Döhler (C-262/10) & Eurogate (C-28/11), seems to be at odds with the AEO concept. In both Court cases, it was established that a customs debt had occurred due to non-compliance with formalities, while it was clear that there had been no material loss, because the whereabouts of the concerning goods was perfectly clear.

Upcoming changes in the customs legislation

With the upcoming changes in the customs legislation, it is no longer optional to obtain the AEO certification as such, for making use of certain customs simplification, but this becomes mandatory. However, as the Customs administrations treat license holders of customs simplifications that require compliance with the AEO (compliance) requirements (it is not mandatory to be certified for AEO) the same as AEO's, this change will have minimal effect.

The new customs legislation includes some further identification and clarification on certain aspects of the AEO requirements and benefits, which presumably will contribute to a more harmonised approach.

⁵ Commission Regulation (EC) No 1192/2008 of 17 November 2008

For example, article 322-07 of the Modernised Customs Code Implementing Provision (hereafter: MCCIP)⁶ fully describes the reduction of the level of guarantee and/or a guarantee waiver, based on the compliance with certain requirements set in the MCCIP⁷. These changes will provide the AEO certificate holder with a better overview of what he can expect .

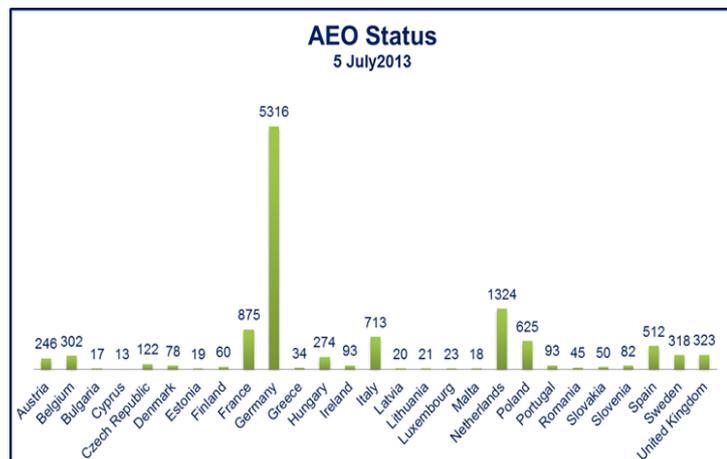
Another example, in which the new customs legislation should contribute to a more harmonised approach, is Article 123-05 MCCIP. Article 123-05 MCCIP further clarifies the requirements a company must comply with when they want to receive certain customs simplifications (e.g. authorised consignee (article 513-12 MCCIP)). The codification can result in a better understanding of the requirements with the AEO's and AEO applicants and, in addition, can result in a better and a consistent application by the different Customs administrations.

Last, but not least, an upcoming change in the new customs legislation will be the codification of the benefits for the AEO. These benefits have been recorded in the articles 123-02 to 123-02c of the MCCIP, such as a favourable risk assessment of the AEO certificate holder⁸, subject to lesser physical and documents based controls by the Customs administrations⁹. It is, as of yet, unclear what the potential impact of this codification will be. In the future, we could possibly see legal disputes around AEO's deriving rights from these codified benefits.

Besides restructuring and clarifying the current requirements, a new requirement for companies that deal with customs formalities is formally introduced in the upcoming customs legislation, namely the 'practical standards of competence or professional qualifications directly related to the activity carried out'.¹⁰ This new requirement is in line with the findings of evaluations of AEO's, where it is concluded that the available customs knowledge is often inadequate.

Trends

There is a big difference between the Member States, with regard to the number of companies that are AEO certified, which we believe is caused by various factors. Germany is without a doubt the front runner, with the Netherlands being the first runner up. Besides the scale of the German economy, one of the main factors that we believe is the reason for the high number of AEO's, is because in Germany a lot of economic operators make use of a customs warehouse type D, that requires the use of the local clearance procedure. As said, this local clearance procedure requires compliance with the AEO (compliance) standards.



⁶ Modernised Customs Code Implementing Provision, draft version 25-11-2011, TAXUD/MCCIP/2010/100-3

⁷ For example: When an AEO complies with the provision set in article 123-06(a) and (d) MCCIP the AEO will receive a 30% guarantee reduction. If the AEO complies with the provision set in article 123-06(a),(d) and (g) MCCIP, a reduction of 50% applies.

⁸ Article 123-02c MCCIP

⁹ Article 123-02a MCCIP

¹⁰ Article 123-08 MCCIP

Striking is the relatively low number of AEO's in the UK. The UK Customs administration seems to be 'renewing' its focus on AEO by organising annual conferences for which it encourages business to attend. The next conference on AEO/Customs compliance is planned for 19 and 20 November 2013 in London.

Whereas the focus of the Customs administrations was primarily on the AEO applications, we now see a clear shift with the Dutch Customs administration towards checking any monitoring is done to keep the AEO up-to-date.

As indicated, the first pillar of the SAFE framework, the Customs-to-Customs network arrangements, is mainly effectuated by stimulating the development of IT systems that would facilitate improved ways of keeping supervision. The European Commission is supporting the Member States in getting their IT system in line with the requirements of this Customs-to-Customs network. However, we also see that this will take quite some time and money, in an era where governments are short of money. It is to be seen if important steps are made in the near future. This increases the risk that different levels of speed will occur between the customs authorities of the Member States and that customs authorities cannot keep up with the IT developments that take place on the business side. This will effect creating a level playing field for companies that have to deal with various customs authorities.

Conclusion

The AEO concept is certainly not a curse, however, it is too soon to call it a blessing. Part of the trade community perceives the additional costs sustained and efforts made by AEO's in meeting the prescribed AEO requirements to be disproportionate to the benefits. The Customs administrations, however, are of the opinion that the standards required are not too much to ask for and, for the greater part, should be part of the standard business processes regardless of the AEO application. Just like between people also this 'marriage' between Customs administrations and businesses requires efforts, mutual trust and clear communication on what to expect, to achieve the ultimate goal, which is a safe and secure trade lane with minimal barriers. In the longer term the AEO concept is expected to bear its fruit and, considering the increasing flows of containerised traffic and growing emphasis on (national) security, further implementation of the AEO concept on a global scale seems inevitable in order to apply efficient and effective means to ensure full supply chain control and security. Having said that, we believe that one can only achieve this if there is a win-win situation for both parties involved.

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