Withdrawal, revocation and suspension of AEO certification

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Abstract

The benefits and advantages of Authorised Economic Operator (AEO) status have been examined and discussed widely. However, the withdrawal, revocation and suspension of AEO certification have not been as closely examined. This paper addresses a range of issues that relate to European Community law and in particular, to the way in which German and Austrian regulations are applied. It is concluded that there are far-reaching legal and factual consequences that go beyond the provisions of the relevant customs legislation and suggests that any company that holds an AEO certificate or has applied for it needs to ensure that it satisfies the conditions of the certificate at the time of application and in the years thereafter.

1. Introduction

For some time, well-known experts in customs law have tackled the question as to what benefits are related to the AEO status of economic operators. They stress that, amongst many advantages for the economic operator, the most important is the much quicker customs clearance of their goods for importation and that it will profit the reputation of their company if they can point to the fact that they and their contractors in the supply chain have Authorised Economic Operator (AEO) status, which guarantees the security of their supply chain.

However, until now not much attention has been paid to what will happen if the AEO certification is withdrawn, revoked or suspended.

This article addresses the following questions:

1. Can AEO certification be regarded as an 'administrative act' pursuant to national fiscal legislation?
2. Is AEO certification to be interpreted as a 'customs decision' pursuant to the European Community (EC) Customs Code (CC) and the Customs Code Implementing Provisions (CCIP)?
3. Do the provisions of national fiscal legislation and/or EC legislation allow the withdrawal, revocation or suspension of certification?
4. How is it possible to appeal against withdrawal, revocation or suspension?
5. What are the legal and factual consequences of withdrawal, revocation or suspension of AEO certification:

5.1 for the AEO?

5.2 for the AEO's contracting partner in the supply chain?

5.3 concerning a possible obligation to inform other customs administrations on the basis of the consultation procedure?

5.4 concerning a possible obligation to inform administrations of third party states which have entered into agreements of mutual recognition of the AEO status of their economic operators?

5.5 concerning a possible breach of competition law if the former AEO continues to promote their company with AEO status despite its withdrawal, revocation or suspension?

2. The legal character of AEO certification

2.1 A 'decision' pursuant to German and Austrian tax administration law?

The question of whether AEO certification is based on national tax administrative law in these two countries requires consideration of the German *Abgabenordnung* ('Fiscal Code' - AO)[1] and the Austrian *Bundesabgabenordnung* ('Federal Fiscal Code' -BAO).[2] Section 118 AO states the following:

> Definition of 'administrative act':
>
> An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed towards a group of people defined or definable on the basis of general characteristics or relating to the public law character of a matter or its use by the public at large.

There can be no doubt that AEO certification is both a 'decision' and a 'sovereign measure' because it is issued by the customs authorities. As the certification is granted to a certain natural or legal person, it also regulates an 'individual case'. Customs legislation forms part of German fiscal law in accordance with Section 3 (3) AO, indicating that import and export duties referred to in the CC are 'taxes' in accordance with the AO. Owing to the fact that fiscal law forms part of public law, the certification of AEO status represents a sovereign act of an authority to settle an individual case in the field of public law. This certification also produces some external legal effects, such as simplified customs controls and therefore has direct legal effect on the outside world.

Therefore, it can be confirmed that the certification as AEO satisfies the conditions of an 'administrative act' pursuant to Section 118 AO.

The legal situation in Austria is similar. According to Section 92 BAO, transactions by the fiscal authority are issued in the form of a decision, where for individual persons:

(a) rights or obligations are constituted, amended or repealed, or

(b) facts relevant for tax law are established, or

(c) the existence or non-existence of a legal relationship is established.

According to Section 1 (1) BAO, this law also applies to matters of import and export, subject to the provisions of customs legislation. The mirror-image provision to Section 1 (1) BAO in the national Austrian customs legislation is Section 2 (1) of the *Zollrechtsdurchführungsgesetz* ('Austrian Customs Implementing Act' - ZollR DG),[3] which states *inter alia* that the provisions of general fiscal law also apply to all matters of European Union (EU) and national law relating to the cross-border movement of

goods not covered by the CC (that is, other import or export duties) and other cash benefits, to the extent that the customs administration is responsible for enforcement in accordance with federal law or other legislation and that there are no provisions to the contrary.

As AEO certification confers rights on the person concerned and is issued to a single person, it falls within the scope of Article 92. According to relevant Austrian literature and case law, a decision is an individual, sovereign, external administrative act (normative or confirming act).[4] This act therefore corresponds to the German administrative act.

To summarise, German and Austrian law offers a legal basis for granting certification for AEO status. In the following discussion, however, the question of whether these national rules may be applied at all or whether they are overruled by supranational rules of Community law is examined.

2.2 Customs decisions pursuant to the Customs Code, future Modernised Customs Code and its Implementing Provisions

Article 4, no. 5 CC defines the term 'customs decision' as:

> [A]ny official act by the customs authorities pertaining to customs rules giving a ruling on a particular case, such act having legal effects on one or more specific or identifiable persons.

This definition resembles a fiscal 'administrative act' in German tax law and the related concept under Austrian law. The certification of AEO status satisfies the requirements for a 'customs decision'. It is a measure issued by the customs administration in the field of customs legislation. Since this measure is not issued in relation to private activities but on the basis of a public relationship between economic operators and Customs, it is also represents a sovereign act. That it concerns the field of customs legislation can be deduced from the fact that the conditions for granting AEO status are directly enshrined in Community customs law, (that is, Article 14a ff. CCIP). The decision by the customs authorities concerns an individual case, that is, a specific person. The certification is issued in response to an application by a specific economic operator. The holder and beneficiary of AEO status is the person to whom the decision is addressed. The benefits are claimed by the operator externally, since the AEO will always insist that the customs administration grants that operator the benefits associated with certification. The operator will therefore claim the benefits and the customs administration will grant them externally. Certification does not only produce internal administrative effects.

Therefore, AEO certification also satisfies the conditions for a customs decision pursuant to Article 4, no. 5 CC.

2.3 Applicability of national legislation

As stated above, the granting of AEO status represents both an 'administrative act' and a 'customs decision' in accordance with German-Austrian law and Community customs legislation respectively. This should not be taken to mean that it is possible to use both provisions as a legal basis for certification: it could be the case that national provisions will be overruled by supranational Community law. Community customs law takes precedence over national law as higher-ranking law in accordance with Article 288 of the Treaty on the functioning of the EU.[5]

Early in the history of the EU, the European Court of Justice (ECJ) ruled that national administrations were obliged to apply Community law in the interests of the proper functioning of the EC. In its decision of 15 July 1964,[6] the ECJ ruled that where the relationship between the national and the Community law was concerned, the incorporation of Community law into national law effectively prohibited Member States from introducing *a posteriori* unilateral measures. This ruling was justified by the argument that it would threaten the realisation of the Treaty's goals, if Community law was applied in Member States differently, according to their *a posteriori* legislation. The primacy of Community law was confirmed

by Article 189 which stated that Community regulations were binding and directly applicable in each Member State. Therefore the law created by the Treaty could not be circumvented by any national legislation whatsoever, if the legal basis of the Community was not to be challenged.

This view was supported by later decisions of the ECJ.

In case 48/71,[7] the Court had to decide how long national provisions demanding a progressive duty by Italy for the export of goods of artistic, historical, archaeological or ethnographic interest which did not comply with Community Law remained effective.

In its decision of 13 July 1972, the ECJ decided that a national provision found to be non-compliant with Community legislation would not be effective even if its annulment or amendment would lead to problems, for example, in relation to the legislative procedure. To hold otherwise would imply that the application of the Community norm would be subordinated to the law of individual Member States. As far as the application of Community law was concerned, applying a national provision in spite of this ban had been found to contravene the Treaty. In order to achieve the objectives of the Community, all rules of Community law had to be applied in the same way across the entire territory of the Community, free of any obstacles created by the Member States. Accordingly, Member States had transferred their rights and responsibilities to the Community and thereby limited their sovereignty; this process could not be obstructed by national provisions.

With regard to agricultural policy, the ECJ held on 26 February 1976,[8] that a national provision relating to agricultural prices applicable to levels of trade already regulated by the system of Community prices contravened Community law.

Gerhard Reischl, the Advocate General, expressly stated in his opinion of 21 January 1976, that the national administrations did not have any regulatory powers in those cases where Community authorities had taken appropriate legal measures themselves. National measures could not endanger the objectives and the functioning of the common market. In the decision of 7 July 1976,[9] which concerned the validity of national Italian regulations regarding the registration of foreigners, the ECJ held that the primacy of Community law over national law applied in all matters.

According to the ECJ,[10] the principle of the primacy of Community law, provisions of the Treaty and the directly applicable legal acts of the institutions result in each and every conflicting provision of national law becoming inapplicable once the former enter into force, and the introduction of new national provisions is to be avoided if they contravene provisions of Community law. If national legislative acts in those areas where the Community has legal competence were to be held valid, they would deny the unconditional and irrevocable obligation of the Member States under the Treaty and call into question the very foundation of the Community. The Court called on every national judge to ensure the full effectiveness of Community law by setting aside conflicting provisions of national law. The ECJ also upheld the primacy of Community law by its ruling of 21 May 1987[11] and declared that this principle applied to all decisions taken by Community institutions in accordance with their competences and addressed to Member States.[12]

From the foregoing it can be concluded that non-harmonised national law or national law which is identical in wording is not invalid but rather inapplicable to the extent that the matter in question is regulated by the Community Code.[13] That said, the latter also allows national provisions to be applied in relation to certain legal questions. This is supported by the fact that the CC directly refers to national law, by the legal power given to customs authorities to settle certain matters and finally, by the exercise of administrative discretionary power in cases where the CC allows the customs authorities to make a discretionary decision. Since the CC does not contain any details on how this discretion is to be exercised, customs authorities can have recourse to the legal standards which govern the legal area in question.[14] In addition, national law can also be applied in cases where the CC uses undefined terms whose content

cannot be deduced from the text of the CC itself or if terms are used that have been modelled on German legal concepts such as the definition of a 'customs decision' in Article 4, no. 5 CC.

It is not expected that the Modernised Customs Code (MCC) will make any changes to this interpretation. Although the operative provisions of the MCC do not define the term 'customs decision', a definition is contained in recital 12 which states:

> All decisions, that is to say, official acts by the customs authorities pertaining to customs legislation and having legal effect on one or more persons …

This essentially corresponds to the definition of 'customs decisions' in the applicable CC so that the statements above also reflect the legal situation under the MCC.

3. Does national tax administration law and Community customs legislation allow the withdrawal, revocation and suspension of AEO status?

3.1 Revocation, withdrawal and suspension under national tax administration law

In principle, the grant of AEO status is valid indefinitely. However, events may arise which require the certificate to be reviewed. Customs administrations have two options to verify that the conditions for AEO status are still satisfied, namely, reassessment and monitoring.

Reassessment is currently regulated in Article 14q (5) sub-para. 1 CCIP and serves to verify that the AEO still meets the conditions at a certain point in time. It will usually be carried out if the legal situation changes or if there is evidence that the holder of the certificate does not meet or no longer meets its conditions.

In addition, the customs administration can perform monitoring. This possibility is provided by Article 14q (4) CCIP which permits checks to be carried out on an ongoing basis and in the absence of a special event.

In Germany, the provisions of the AO mean that it is not possible to cancel or withdraw an AEO certificate.

Withdrawal is regulated by Section 130 (2) AO, which states:

> (2) An administrative act which gives rise to a right or a substantial advantage in legal terms or confirms such a right or advantage (that is, a beneficial administrative act) may only be withdrawn where:
>
> 1. it has been issued by an authority without requisite jurisdiction over the subject-matter,
> 2. it has been obtained by unfair means such as deceit, threats or bribery,
> 3. the beneficiary has obtained the administrative act by providing information which was essentially incorrect or incomplete,
> 4. the beneficiary was aware of its illegality, or was unaware thereof due to gross negligence.

The revocation of a certificate is regulated by Section 131 (2) AO which states:

> (2) A lawful and beneficial administrative act, even if invalid, may be revoked in whole or in part with *ex nunc* effect only if:
>
> 1.revocation is permitted by law or a right of revocation is reserved in the administrative act itself,
>
> 2. the administrative act is combined with an obligation which the beneficiary has not complied with at all or on time,

3. the revenue authority would be entitled, as a result of subsequent changes in circumstances, not to issue the administrative act and if failure to revoke it would endanger the public interest.

Section 130 (3) shall apply accordingly.

German law does not regulate the suspension of the AEO certificate, however. In addition, Articles 124 (3) and 125 AO regulate the invalidity of an administrative act and AEO certificate in the same way.

Unlike Germany, Austria does not regulate the cancellation and withdrawal of decisions in either the BAO or the ZollR DG. In the working instruction regulating the AEO, the revocation and suspension of AEO certificates are directly based on the corresponding provisions in Community law. The revocation or suspension of the AEO certificate is made by a decision issued in accordance with the rules of the BAO (that is, a revocation or suspension order).

3.2. Revocation, withdrawal and suspension under Community customs legislation

Articles 8 and 9 CC contain provisions concerning the withdrawal and revocation of favourable customs decisions. Granting AEO status is clearly a favourable decision.

Withdrawal and cancellation are definitive measures. As far as procedural simplifications are concerned, it is important that AEOs do not lose certification permanently should the conditions for certification not be fulfilled. Furthermore, the requirement that a three-year period elapse before a new application for AEO status can be submitted is related to revocation in accordance with Article 14v (4) CCIP.

The CCIP therefore allows temporary suspension besides cancellation and withdrawal.

It should also be noted that owing to the law rule of specialty, the general rules of Articles 8 and 9 only apply in the absence of any special arrangements. However, with the provisions of Article 14r ff. CCIP, a special rule is in place.

a. Suspension

AEO status can be suspended for three different reasons:

Non-compliance with the conditions or criteria for AEO certification. Article 14r (1) (a) CCIP provides the first reason for suspension, namely, where the customs authority establishes that the operator does not comply with the conditions or criteria for the AEO certificate. This also covers cases where the conditions did not exist at the time of the certification (although the German version suggests something different). The English version of Article 14r refers to 'non-compliance' but does not specify the relevant point in time. The same applies to the French version which speaks only of 'le non-respect of the conditions ou Critères de Délivrance du certificat AEO a été établi'.

Sufficient reasons to believe that a criminal act took place. If the customs authorities have sufficient reason to believe that an act that gives rise to criminal court proceedings and is linked to an infringement of the customs rules, has been perpetrated by the AEO then the certificate can be suspended in accordance with Article 14r (1) (b) CCIP. This provision covers both customs offences *per se* and criminal offences in connection with customs offences such as fraud, money laundering or the forgery of documents.

However, the customs authority may decide not to suspend the AEO status if it considers an infringement to be of negligible importance in relation to the number or size of the customs-related operations and does not cast doubt on the good faith of the AEO.

Request for suspension of AEO status. The third reason for suspension is on request of the AEO. This possibility is contained in Article 14u (1), 1st sentence CCIP.

In accordance with Article 14r (1) sub-para. 3 CCIP, the customs authorities are to communicate their

findings to the economic operator concerned before taking a decision. The latter is entitled to correct the situation and/or express their point of view within 30 calendar days, starting from the date of communication.

In the event of non-compliance with the conditions for an AEO certificate, the operator may take measures such as remedying safety deficiencies, improving customs processes, reorganising their accounts or restoring solvency. However, such measures are not possible in the event of the second reason for suspension, that is, where the customs authorities have sufficient reason to believe that an AEO has committed an offence (Article 14r (1) (b)).

If the operator fails to eliminate the reason for suspension within a period of 30 days, the customs authority will suspend the AEO certificate. The period of suspension depends on the reasons. In the case of non-compliance with the relevant criteria, the suspension will generally last 30 calendar days. If the economic operator concerned cannot regularise the situation within this period but proves that the conditions can be met if it were to be extended, the issuing customs authority is to suspend AEO status for a further 30 calendar days in accordance with Article 14r (4) CCIP. Multiple extensions of 30 calendar days are also possible.

b. Revocation

Revocation in accordance with Article 14v CCIP comes into consideration if the economic operator is to be deprived of AEO status permanently. There are three main reasons for revocation:

(i) Where the AEO fails to take the necessary remedial measures within the suspension period in accordance with Article 14 (1) letter (a).

In this case, the economic operator has failed to take the necessary remedial measures needed to comply with the requirements of the relevant AEO certificate and therefore does not meet the certification requirements.

(ii) Where serious infringements related to customs rules have been committed by the AEO and there is no further right of appeal in accordance with Article 14v (1) (b).

In this case, a prior suspension is not necessary and the certificate can be immediately revoked.

A mere 'connection with an infringement of the customs rules' is insufficient justification for revocation, however. The conviction must have been in relation to a 'serious' customs offence. However, the customs authority may decide not to revoke the AEO certificate if it considers that the infringement(s) are of negligible importance in relation to the number or size of the customs-related operations and they do not raise doubts about the AEO's good faith.

It should be noted that the conviction must relate to the economic operator. In many Member States (including Germany), companies cannot be convicted of a criminal offence. Accordingly, it is only possible to revoke the AEO status under Article 14v (1) (b) CCIP in relation to natural persons and not economic operators organised as a legal person or group.

(iii) Upon the request of the AEO.

The AEO may also apply for the revocation of its status under Article 14v (1) sub-para. 1 (d) CCIP. However, Articles 14r to Article 14v CCIP do not cover the situation where the operator fails to comply with the obligations imposed by the AEO certificate – particularly the obligation to inform the customs authorities of changes relevant to certification in accordance with Article 14w (1) CCIP.

In such cases, revocation will be based on Article 9 (2) CC. However, a less drastic alternative would be to ensure the enforcement of the relevant obligation (for example, by a request to perform the obligation concerned under the threat of revocation).

c. Withdrawal

It is questionable whether Article 8 (1) CC applies in cases where the AEO certification was issued illegally owing to incorrect or incomplete facts and the operator knew or should have known the inaccuracy or incompleteness of the facts. The fact that there is no preliminary procedure in accordance with Article 14r CCIP is acceptable. However, a withdrawal pursuant to Article 8 CC would not trigger the three-year period stipulated by Article 14v (4) CCIP and this would work to the economic operator's advantage. The withdrawal of the certificate in accordance with Article 8 CC absent the three-year period would therefore contravene the aim of Article 14v (4) CCIP.

3.3 Applicability of national legislation

The comments made above regarding the applicability of national law are also true here: accordingly, national law is only applicable if there are gaps in Community law.

4. Appeals against suspension, revocation and withdrawal of AEO status

All methods of annulling AEO status (that is, suspension as referred to in Articles 14r, 14u CCIP and revocation under Articles 14v CCIP and 9 CC) represent decisions pursuant to Article 4, no. 5 CC, which can themselves be appealed against and revoked. However, the CCIP does not regulate such cases: Articles 8 and 9 CC deal exclusively with favourable rather than unfavourable decisions; therefore it is necessary to apply national law in order to fill this regulatory gap. In Germany, it is possible to withdraw an unlawful revocation of the certificate in accordance with Section 130 AO and to revoke a lawfully issued certificate in accordance with the requirements of Article 131 AO. In Austria, the provisions of the BAO concerning the correction and annulment of decisions are largely overruled by Community law (that is, the provisions on revocation in the CC and CCIP). However, it may be possible to correct spelling and calculation errors (Section 293 BAO).

The economic operator is clearly in need of legal protection if the customs authorities decide to suspend or withdraw the AEO certificate. Accordingly, the operator can lodge an appeal in accordance with the procedural rules in Articles 243-245 CC: Articles 243 and 244 CC contain the basic rules and Article 245 CC refers to national law.

There are two stages to an appeal: in the first stage, the plaintiff can lodge an appeal in accordance with Article 243 (1) sub-para. 1 and (2) (a) as well as Article 245 CC in conjunction with Section 347 (1) 1st sentence no. 1 AO (for Germany). At the second stage of an appeal, the operator may lodge a claim before the court in accordance with Articles 243 (1) sub-para. 1 and (2) (b) as well as Article 245 CC in conjunction with Section 40 (1), 1st alternative of the 'Fiscal Court Act' (FGO). The aim at both stages is to withdraw the suspension or revocation of the AEO certificate. As the addressee of the suspension or the revocation, the operator is directly and personally affected by such a measure and therefore entitled to lodge an appeal. The appeal will be justified if the suspension and revocation were ordered illegally.

Austria provides an extensive two-stage appeal in accordance with Sections 85a to 85f of the ZollR DG. The first stage is to lodge an appeal and the second to lodge a complaint to be decided by the *Unabhängiger Finanzsenat* ('Independent Financial Panel').

The operator may also seek to prevent revocation by applying for an injunction against the enforcement of the revocation decision. In Germany, it is possible to request the suspension of enforcement in accordance with Article 244, 245 CC in conjunction with Section 361 (2) 1st sentence AO and Section 69 (2) 1st sentence of the FGO from the customs authority which issued the decision to revoke the certificate. Austrian legislation contains a similar provision.

The economic operator seeking to oppose the revocation of AEO status must establish two reasons against suspension, that is, reasonable doubts as to the legality or the threat of significant damage. Concerning the first reason, there will be a 'reasonable doubt' if a summary review reveals circumstances which support and oppose legality. It is not necessary that the latter prevail. Doubts concerning legality can be either factual or legal in nature. Concerning the former, it is unclear whether facts relevant to the decision actually have to exist; as far as doubts of a legal nature are concerned, a distinction should be made between interpretation and validity. There will be doubts about interpretation if the legal situation is unclear, if the legal issue in question has not been decided by superior courts or if judicial literature questions the legal grounds for the decision. There will be doubts about validity if the legal norm upon which the decision was based is considered invalid.

The second reason for suspension in accordance with Article 244 (2), 2nd alternative CC requires the suspension of AEO status to cause significant damage to the person concerned.

The ECJ[15] requires 'serious and irreparable damage'. This requirement will be satisfied if the situation resulting from the immediate implementation of suspension cannot be reversed by annulling the contested decision in the main proceedings.[16] In addition, according to the settled case-law of the Court, the condition of 'irreparable damage' requires the judge hearing an application for interim measures to examine whether the possible annulment of the contested decision by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely, whether suspension of operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed.[17]

As a rule, purely financial losses are not regarded as constituting an 'irreversible' situation. Rather, examples of consequential damages would be an irreversible loss of market share or the risk that a company would become bankrupt.[18] The reference to 'might' suggests that a 'reasonable degree of probability' concerning the occurrence of loss will suffice.[19]

In terms of loss resulting from the deprivation of AEO status, a distinction must be drawn between disadvantages caused by the loss of the legal benefits connected with AEO status and those caused by the withdrawal of AEO status itself (see below).

A reason not to suspend AEO status will be made if the operator can claim reasonable doubts as to the legality of suspending AEO status, the impending loss of market share or a risk of bankruptcy. In this case, the customs authority will decide not to revoke or suspend AEO status.

Although the rejection of an application for suspending enforcement is a decision pursuant to Article 243 (1), sub-para. 1 CC, the suspension procedure of Article 244 CC is independent with the result that the provisions of Article 243 CC relating to the regular procedure do not apply.

5. Legal and factual consequences of revocation, withdrawal or suspension of AEO status

5.1 In relation to the AEO

The annulment of AEO status will result in many legal and factual disadvantages.

The loss of simplified customs controls will have financial consequences in the shape of extended waiting periods and the increased costs of personnel and materials. Any penalties incurred by late deliveries payable in accordance with Section 338 of the *Bürgerliches Gesetzbuch* (German Civil Code) will result in a financial disadvantage. However, this is reversible. Accordingly, there is no 'serious and irreparable damage' in this respect. The same applies to the obligation to submit regular records in accordance with the prior notification procedure.

Concerning the facilitations for AEO-C a distinction must be made between the currently applicable CCIP and the MCC which will enter into force in 2013. Currently, even operators who do not possess AEO status can obtain authorisation for simplified procedures. Following the entry into force of the MCC, however, some simplifications will only be granted to AEOs. Operators who do not have this status or fail to obtain the status will suffer considerable economic disadvantage in relation to their competitors on the market who do, owing to the latter's competitive advantage. Accordingly, operators who lack AEO status are likely to receive fewer orders from potential partners than AEOs.

Currently, the legal advantages of AEO-C certification are simplified customs controls (Article 14 (b) (4) CCIP) and authorisations for using simplified procedures (Article 14b (1) CCIP).

The withdrawal of simplified customs controls means that the economic operator will be checked more often and not given any priority treatment. The person concerned will also be tied to the jurisdiction of the customs authority in question. Above all, economic operators who are suspected of being unreliable should expect more frequent checks.

As far as legal consequences are concerned it should be noted that, regardless of status, AEO-C simplifications already issued and authorisations for simplified procedures in accordance with Article 14s (2) CCIP will basically continue to apply. In particular, operators who apply for AEO-C status will be those who already benefit from procedural simplifications on the basis of previously issued individual authorisations. Since AEO certification does not form the basis for these individual authorisations, the suspension of AEO status will not have any direct impact on their validity. The fact that AEO-C status is not connected to individual authorisations for simplified procedures is confirmed in Article 14o (5) CCIP, which states that the rejection of an application for AEO status will not result in the withdrawal of existing authorisations. In addition, Article 14s (3) CCIP states that those individual authorisations granted on the basis of the AEO-certification and whose conditions are still fulfilled will not lose their effect because AEO-C status only means that the conditions already checked during the AEO-application will not be re-examined.

In the event that AEO-C status is suspended, the conditions for the individual authorisation of procedural simplifications will often not be met either. In this case, an individual authorisation pursuant to Article 14s (2) CCIP, issued without reference to AEO-status, will be revoked in accordance with Article 9 (1) CC.

In accordance with Article 14s (1) CCIP, suspension will not apply to any customs procedures already started before the date of the suspension.

Once the MCC enters into effect, a withdrawal of the legal benefits granted by AEO-C status will cause even greater disadvantages because certain authorisations will only be granted to holders of AEO-C certificates. Suspension will have the effect of eliminating such simplifications. For example, the future simplified procedure will require AEO-C status. Operators who do not have this status will have to declare each export of goods to the customs office individually and completely, thereby eliminating the possibility of entry in the records. Suspending AEO-S status will have the effect of cancelling all facilitations related to security-relevant controls and the possibility of transmitting a reduced set of data to the customs authority on the basis of prior notification in accordance with Article 15b (3) CCIP.

Therefore, the greatest disadvantages will be suffered by those AEOs holding AEO-C and AEO-S certificates. However, partial suspension of the latter is also possible if the relevant conditions are no longer fulfilled. Accordingly, customs simplifications may remain unaffected.

Suspension will also lead to the loss of economic benefits by depriving economic operators of the seal of quality associated with AEO status. This suggests that an operator is unreliable thereby damaging its reputation. Accordingly, third parties will be less likely to contract with such operators and may even cancel existing contracts due to the fact that dealings with non-AEOs could adversely affect their

own risk rating. The economic disadvantages are therefore considerable and in some cases could even endanger a company's continued existence.

Revocation of AEO status takes effect immediately after the day of its notification (Article 14v (2) 1st sentence). Partial revocation is also possible; in this case revocation will be limited to security aspects.

In the event of revocation, an economic operator will be prevented from submitting a renewed application for AEO status for three years in accordance with Article 14v (4) CCIP, unless the suspension or revocation was requested by the economic operator itself.

5.2 In relation to contracting-partners in the AEO's supply chain

The absence of AEO status will have very important repercussions for the AEO's partners. They should expect less favourable risk assessments owing to the cancellation of the AEO-status of their partners in the supply chain. As a result, they themselves may no longer fulfil the requirements of other international partnership programs such as the United States C-TPAT (Customs-Trade Partnership Against Terrorism) program. In this case, the only solution would be to place fewer orders from the former AEO or to cancel existing contracts.

5.3 Regarding a possible obligation to inform other customs administrations under the consultation procedure

All information about revocation, withdrawal and suspension is exchanged via the economic operator system, so that all Member States are informed about changes. This is necessary because the AEO certificate takes effect throughout the EC. All customs authorities of other Member States have to be informed of all decisions relating to AEO certification by means of the AEO information and communication system laid down in Article 14x CCIP.

The withdrawal of the legal effects of AEO status is regulated in Article 14r (2) 2nd sentence, (3) 2nd sentence, Article 14u (1) sub-para. 2 CCIP. In accordance with the wording of the text, the extension of the suspension period as referred to in Article 14r (4) CCIP is not subject to the obligation of mutual information. However, this gap is to be filled through the analogous application of the notification obligation as stipulated in Article 14r (1) sub-para. 2, 2nd sentence CCIP in relation to the initial suspension.[20]

As far as a request for suspension is concerned, Article 14u (2) sub-para. 2 CCIP expressly provides that the customs authorities of other Member States are to be notified of a prolongation of the period to regularise the situation using the communication system referred to in Article 14x.

In case of the withdrawal of suspension or the full or partial revocation of AEO status, the customs authority is to inform the customs authorities of other Member States in accordance with Article 14t (1) sub-para. 1, 1st sentence, and Art. 14t (2) sub-para. 1 CCIP. The customs authorities must also inform the customs authorities of other Member States of the revocation of AEO status in accordance with Article 14v (4) CCIP.

5.4 Regarding a possible obligation towards third countries which have concluded an agreement on mutual recognition of the respective AEO status of their economic operators with the EU

The EU has already completed a series of agreements on the mutual recognition of AEO status and others will be signed in the near future. The exchange of information on changes (revocation and suspension) of AEO certificates forms an essential component of these agreements.

5.5 Regarding an infringement of competition law if the former AEO continues to advertise this status

a. Under national law

Germany protects the rights of market competitors by the *Gesetz gegen den Unlautern Wettbewerb* (Act Against Unfair Competition - UWG).[21] Section 5 deals with misleading commercial practices:

> (1) An unfair practice shall be deemed to have occurred where a person adopts a misleading commercial practice. A commercial practice is misleading if it contains untruthful information or other information suited to deception regarding the following circumstances:
>
> …
>
> 3. the nature, attributes or rights of the entrepreneur such as his identity, assets, including intellectual property rights, the extent of his commitments, his qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process…

If a company advertises itself as an AEO despite the fact that the certificate has been suspended or revoked, it will be guilty of a misleading commercial practice insofar as the fraudulent advertisement of AEO status and any related authorisations is capable of deceiving another party into contracting with the former AEO. Competitors on the market can oppose this by applying for an order to cease and desist in accordance with Section 8 UWG. In addition, the former AEO will be ordered to pay damages under Section 9.

In Austria Section 1 (1) of the *Bundesgesetz gegen den unlauteren Wettbewerb* (Federal Act against Unfair Competition - Austrian UWG)[22] provides that a person who in the course of business applies an unfair practice or other unfair act likely to distort competition to the detriment of companies to a not insignificant degree or who adopts an unfair practice which contravenes the requirements of professional diligence and which, with regard to the product in question, is capable of influencing the economic behaviour of the average consumer affected by the practice or act can be ordered to cease and desist the same and, if at fault, to pay damages.

In accordance with Section 1 (3) of this Act, 'unfair practices' refers in particular to practices which are misleading pursuant to Section 2. According to the latter:

> A commercial practice will be deemed misleading if it contains inaccurate information (Section 39) or is otherwise likely to deceive market participants in relation to the product concerning one or more of the following points and that will cause the market participant to take a transactional decision he would not otherwise have taken:
>
> …
>
> 6. the person, the attributes or the rights of the contractor or his representative, such as his identity and assets, his qualifications, status, authorisations, memberships or relations and ownership of industrial, commercial or intellectual property rights or his awards and distinctions …

In this respect, misleading information regarding the status and authorisations of the company will also constitute a misleading practice.

b. Under European law

Directive 2005/29/EC regulates the legal relationship between consumers, entrepreneurs and competitors at European level.[23] Article 5 prohibits 'unfair commercial practices'. Such practices are those that are misleading (Art. 5 (4)). According to Article 6 of the Directive, a practice will be deemed to be 'misleading', if it contains false information and is therefore untruthful. If a company advertises itself

as holding AEO status despite the fact that this information is incorrect, it will be guilty of an unfair commercial practice. The Directive does not impose any sanctions but states in Article 11 that Member States are to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with its provisions in the interest of consumers.

6. Conclusions

Revocation, withdrawal and suspension of AEO status are permitted under Community law. However, such measures have far-reaching legal and factual consequences that go beyond the provisions of the relevant customs legislation. Considering these consequences, any company that holds an AEO certificate or has applied for it must ensure that it satisfies the conditions of the certificate at the time of application and in the years thereafter.

Endnotes

1 Tax code as amended by the notice of the 1 October 2002 (Federal Law Gazette I S. 3866; 2003 I p. 61), most recently by Article 2 of the Act of 30 July 2009 (Federal Law Gazette I S. 2474).

2 Federal Act on General Provisions and the Procedure for Taxation (Federal Fiscal Code - BAO) Federal Law Gazette No. 194 / 1961 as amended by Federal Law Gazette I no. 58 / 2010.

3 *Zollrechtsdurchführungsgesetz* (Federal Act on Supplementary Rules for the Implementation of Customs Legislation of the European Community ('Customs Law Implementation Act' ZollR DG), Federal Law Gazette No. 1994 / 659 Federal Law Gazette I no. 34/2010.

4 Walter/Mayer, Verwaltungsverfahrensrecht, Tz. 379) Administrative Court 15.9.1995, 92/17/0247; 11.12.2000, 2000/17/0237.

5 OJ EU, no. C 115 v. 9 May 2008, p. 47.

6 Case 6/64, EuGHE 10, 1251.

7 Case R 48/71, DöV 1973, 410.

8 Case 88 to 90/75, EuGHE 1976, 323.

9 Case R 48/71 and 118/75, EuGHE 1976, 1185.

10 ECJ from 9.3.1978, case 106/77, EuGHE 1978, 629.

11 RS 249/85, EuGHE 1987 2345.

12 Opinion of the advocate of General Carl Otto Lenz of 5.12.1986, EuGHE 1987, 2301.

13 Henke Reginhard / Huchatz, Wolfgang: Das neue Abgabenverwaltungsrecht für Einfuhr- und Ausfuhrabgaben, ZfZ 1996, 226, 228.

14 Henke Reginhard / Huchatz, Wolfgang, op. cit., 230.

15 ECJ, 17.07.1997 - Case C-130/95, *Bernd Giloy v. HZA Frankfurt am Main-Ost*, Coll. 1997, I-4291 (Marginal Number. 35 et seq.) = ZfZ 1997, 335 (337 f.).

16 ECJ, 19.07.1995 - Case C-149/95 P(R), *Commission v. Atlantic Container*, ECR 1995, I-2165 (Marginal Number 22).

17 ECJ, 19.07.1995 - Case C-149/95 P(R), *Commission v. Atlantic Container*, ECR 1995, I-2165 (para. 50); ECJ, 17.07.1997 - Case C-130/95, *Bernd Giloy v. HZA Frankfurt am Main Ost*, ECR 1997, I-4291 (para. 36) ZfZ = 1997, 335 (337).

18 ECJ, 23.05.1990 - Case 51 and 59 / 90 R, *Como Tank v. Commission*, ECR. 1990 I-2167 (para. 24); CFI, 07.11.1995 - Case T-168/95 R, *Eridania Zuccherifici v. Council*, ECR 1995, II 2817 (para. 42).

19 ECJ, 17.07.1997 - Case C-130/95, *Bernd Giloy v. HZA Frankfurt Main Ost*, ECR 1997 I-4291 ff. (para. 39) =ZfZ 1997, 335 (338) from 19.07.1995 - Case C-149/95 P(R), *Commission v. Atlantic Container*, ECR 1995, I-2165 (para. 38).

20 Natzel, Der Zugelassene Wirtschaftsbeteiligte, Münster 2007.

21 Act Against Unfair Competition (Federal Law Gazette I p. 254).

22 Federal Law Gazette. No. 448 / 1984 amended by Federal Law Gazette I no. 79 / 2007.

23 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006 / 2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), Journal No. L 149 of 11/06/2005 p. 0022-0039.

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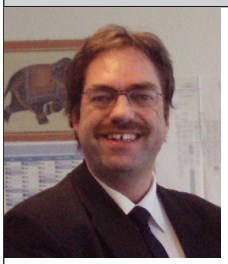

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