VAT Repayment Delayed Unlawfully

Alicja Sosnowska v Dyrektor Izby Skarbowej we Wroclawiu, ECJ, 10th July

Proportionality tests for delays in making a VAT repayment to the trader

In a Polish case the taxpayer made a repayment return for January 2006 and applied for her refund to be paid within the 60 days set down under national law.

The local tax office refused, since she had been trading for less than 12 months and had not lodged a security deposit with the tax office. Under national law the tax office was able to rely instead on an extended repayment period in those circumstances of 180 days.

On reference to the ECJ the first issue was whether, in order to make inquiries, a Member State could extend the period for repayment. The Court noted that whilst a Member State had a certain freedom to manoeuvre in applying conditions to making refunds, such could not undermine the principle of neutrality by making the taxable person bear the VAT. This in turn implied repayment of the excess due in liquid funds in a reasonable time. Here the conditions imposed were more onerous.

The Court noted that a Member State could take legitimate steps to protect its financial interests, citing *Garage Molenhide* (1997), *Halifax* (2006) and *Kittel* (2006). But such measures had to be pro-

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portionate and the least detrimental to the objectives of the Directive, citing *Molenhide*, *Teleos* (2007) and *Netto Supermarkets* (2008). Repayment provisions which were more onerous for one category of taxpayers without affording them the opportunity to show the absence of avoidance or evasion so as to be able to take advantage of the less onerous conditions were disproportionate, citing *Ampafrance & Sanofi* (2000).

Here there was no provision in national law allowing the trader to show absence of avoidance, so as to be able to use the less onerous provisions, instead the law was general in applying to all new traders. Likewise Polish law was not compatible in using an automatic period of 180 days for repayment, some six times longer than for monthly returns and three times longer for standard returns. The Court held that the Polish authorities had offered no argument capable of explaining why such a different timescale was necessary to prevent tax avoidance or evasion for a monthly return period, especially where national law allowed the standard time for repayment to be extended for specific inquiries.

The Court dismissed the possibility of lodging a security deposit, as it did not affect the previous considerations, nor was the deposit proportionate either to the excess to be repaid or the size of the taxpayer. In particular such a deposit was likely to entail a considerable financial risk to a new business. The reality was that the security deposit just replaced the financial burden of the repayment being tied up for 180 days with the burden of the deposit being tied up.

The second issue was whether the national provisions were special derogating measures for simplifying collection under Article 27(1) of the Sixth Directive (now Article 395(1) of the 2006 Directive). But the national measures were not authorised by the European Commission and so fell outside that Article.

Comment: A robust approach by the ECJ to a Member State delaying a repayment, with implications for suspected MTIC or similar cases. In particular the Court considered 180 days disproportionate and similarly dismissed the alternative security provisions.

HMRC v Waste Recycling Group Ltd

Landfill tax not due on material used as cover or for road at landfill sites

The taxpayer WRG is the representative member of a group providing waste management services at 60 landfill sites across the UK. It sought a refund of £2.1 million of landfill tax for inert materials used either to provide cover of the daily waste or for the construction of roads on its sites on the basis such were not a taxable disposal as waste. Under section 40, Finance Act 1996 landfill tax is charged on the disposal of waste at a landfill site at the rate of £24 per tonne for active waste, or £2 per tonne for inactive waste. WRG used soil or building rubble not suitable for recycling and received by it from others as waste at its sites, which WRG then used, or recycled as inert cover or for roads.

The Court referred to the previous landfill authorities of *Darfish* (2000) and *Parkwood Landfill* (2002) at length. The first issue was whether there was a section 40 disposal by WRG of the material used for daily cover and roads, for which all four conditions in section 40(2) had to be satisfied: disposal of waste, by landfill, at a landfill site, from October 1996, and under *Parkwood* satisfied at the same time.

WRG conceded that there was a disposal by way of landfill as defined in section 65(1), Finance Act 1996, although the Court queried whether the disposal was 'by way of landfill', as required and pointed out that section 65(4) specifically made provision for deposited waste being covered by earth, or other inert material as here. Material used for road covering might even less be thought to be disposed of.

The Court, assuming there to have been a disposal at all, considered whether WRG intended to discard the materials under section 64(1), Finance Act 1996, which precluded the retention and use of the materials for the purposes of WRG as owner. The Court held that the intention of the original producer of the inert waste, such as building rubble, was not relevant. There is no principle that material once waste always remains so just because the original owner threw it away, because that is not the relevant time to be considered under section 40(2). Hence the passing of title in the material (from persons who considered it waste) to WRG (which then used it for beneficial purposes) was relevant. Here the clear use made by WRG of the material was conclusive of it's intention at the relevant time under section 40, regardless of the terms on which WRG had acquired the material. The Court held that the materials used by WRG were not a taxable disposal under section 40(2)

Comment: Although landfill tax is not a mainstream tax, the approach by the Court sheds light on the approach to the whole range of levies and similar 'green' or 'eco' taxes. The social essence of landfill tax is to tax material dumped as waste in order to reduce waste overall. Here WRG recycled builder's waste into a useful material beneficial in the operation of its landfill sites and not simply dumped.

As part of his regular series Eamon Mc Nicholas, barrister, of 3 Temple Gardens Tax Chambers, presents another round-up of recent cases. The views expressed are general and not intended as advice. (email Eamon@EamonMcNicholas.com; tel 020 7583 6264)

Readers are invited to submit ideas for articles they would like to write - please email articles@theiit.org.uk

Ordinary Distortion is Acceptable

Ian M Harris, VAT & Taxation Advice Office, Leicester City Council, provides some further thoughts on the recent Advocate-General's Opinion on local authority off-street parking and distortion of competition

In Issue 99 of *Indirect TaxVoice* (July 2008), at page 6, I considered the recently released Opinion of the Advocate-General (A-G) in *Isle of Wight Council and others* Case C-288/07, in which the High Court had referred questions to the European Court of Justice on the interpretation of the phrase 'significant distortion of competition' in what, at the time, was Article 4(5) of the Sixth VAT Directive 77/388/EEC (but which is now Article 13(1) of the EC Principal VAT Directive 2006/112/EC, although the wording remains unchanged).

Regular readers will recall that the Isle of Wight Council, along with three other local authorities as co-appellants in what is effectively a test case, argue that the provision by a local authority of off-street parking should be outside the scope of VAT by dint of Article 4(5). In particular, this requires the appellant authorities to show that such treatment would not lead to a significant distortion of competition with private-sector providers of similar services.

After protracted litigation, in 2006, at a second hearing, the VAT Tribunal finally ruled (decision 19427) that no significant distortion of competition would arise in the circumstances, taking the view that such must be measured by reference to the local market and not, as contended by HMRC, the position judged nationwide by reference to the activity of car parking itself.

HMRC, unsurprisingly, appealed against this decision to the High Court (EWHC 219 (Ch)), which, in February 2007, referred three questions to the ECJ concerning the meaning of significant distortion of competition and how such is to be measured.

The A-G's Opinion

In June 2008 A-G Poaires Maduro delivered his Opinion on the questions referred to the effect that:

* whether there would be a risk of distortion of competition were bodies governed by public law to be treated as 'non-taxable persons' for VAT purposes must be determined on the basis of the activities concerned
* the term 'would lead to' includes both actual and potential competition insofar as the possibility of the latter is real and
* the word 'significant' means a distortion of competition that is out of the ordinary.

There is little argument over the second and third points but is the A-G correct in his Opinion on the first?

Measuring competition

The A-G's Opinion is that, in determining whether or not a significant distortion of competition would arise as a result of affording a local authority non-VATable treatment for an activity undertaken, regard must be had to the activity itself and not the market within which the authority undertakes that activity.

In effect, the nature of the activity in question, and whether it is susceptible to competition in its widest sense, must be taken into account, not any peculiarities present in the local market as experienced by any individual local authority.

This is broadly HMRC's stance: that significant distortion of competition means an effect on competition that is sufficient as to be felt at a national level.

The A-G thus expressly rejects analysis of the local market and arguments under competition law, opining instead that the concept of significant distortion of competition, in the second sub-paragraph of Article 4(5), is solely a concept of VAT law by which Member States are to determine the VAT treatment of public bodies.

Perhaps this logic may be flawed, though The A-G arrives at this position as a consequence of his overriding view that the four separate sub-paragraphs of Article 4(5) are so closely interrelated that an interpretation applied to one of them must necessarily apply equally to the others. The A-G justifies this stance by making the point that, in order to fall within the second or third sub-paragraph of Article 4(5), it is first necessary to come within the ambit of the first sub-paragraph; if that is so, it is then necessary to fall outside the third sub-paragraph before the second sub-paragraph is engaged (stick with me, it will become clearer!).

Having persuaded himself, the A-G then delves into the operation of the third sub-paragraph in order to determine how the second sub-paragraph should be interpreted. The third sub-paragraph of Article 4(5) imposes mandatory VATable treatment on a schedule of activities, as listed at Annex D, even when these are undertaken by a public body acting as such (that is, under a special legal regime which ordinarily would lead to such activities falling outside the scope of VAT).

The A-G is then swayed by the fact that the third sub-paragraph determines those activities always

to be treated as VATable solely by reference to the activities themselves – that is, without recourse to any consideration of the circumstances under which they might be undertaken by individual public bodies. Put succinctly, it is the nature of the activity that determines mandatory VATable treatment. The A-G concludes from this that the same interpretation must be applied to the second sub-paragraph and that, in determining whether any given activity undertaken by a public body might create a significant distortion of competition, what therefore matters is the nature of that activity and not any consideration of the way it is undertaken by reference to market conditions.

The A-G further justifies this interpretation by noting that the purpose of the third sub-paragraph of Article 4(5) is to ensure that those activities listed in Annex D are always treated as being within the scope of VAT, so as not to create a significant distortion of competition.

However, this perhaps suggests a flawed approach, as it is the second sub-paragraph of Article 4(5) that contains the significant distortion of competition criterion, not the third. Indeed, if the A-G's Opinion is correct, the implication is that either the second or the third sub-paragraph of Article 4(5) is superfluous; either the significant distortion of competition criterion in the second sub-paragraph ought to be sufficient on its own to ensure any activities listed in Annex D likely to create such would be denied non-VATable treatment, or all that is needed is an expanded list in Annex D of all those activities perceived as likely significantly to distort competition.

In fact the position might be better understood by reference to A-G Alber's Opinion in *Câmara Municipal do Porto* Case C-446/98. This too concerned car parking provided by a local authority: Porto City Council in Portugal. Referring back to the benchmark *Carpaneto* case (*Commune di Carpaneto Piacentino and others* Joined Cases C-231/87 and C-129/88), A-G Alber took the view that the third sub-paragraph of Article 4(5) seeks merely to ensure that certain activities, as listed in Annex D, the importance of which are pre-eminent by reference to their subject matter alone, are always treated as being within the scope of VAT, even when undertaken by a public body acting as such. Importantly, inclusion within Annex D is based on the nature of the activity in question and its perceived importance to the EU-wide economy and not on the basis of some supposed significant distortion of competition.

Furthermore, A-G Alber noted that the third sub-paragraph of Article 4(5) amounts to an exception to an exception; the first sub-paragraph of Article 4(5) constitutes the exception from the general rule, permitting activities undertaken by a public body acting as such to be treated as outside the scope of VAT, the third sub-paragraph then overriding that exception in respect of those activities listed in Annex D, which thus revert to the basic rule and are subject to VAT. As such, the third sub-paragraph must be construed strictly and, in A-G Alber's view, must therefore be interpreted as applying to the activities listed in Annex D and those only; that list is thus exhaustive and not exemplary and if an activity is not listed therein it is not within the power of Member States or the ECJ to treat that activity, by reference to the importance of the activity's subject matter alone, as falling within the scope of the third sub-paragraph.

Pertinently, off-street parking is not listed in Annex D and the implication is therefore that the EU legislature does not consider such to be of sufficient importance, by reference solely to the subject matter of the activity, to merit its inclusion, presumably because the impact of the provision of off-street parking by public bodies can adequately be determined by reference to whether competition would be significantly distorted – that is, under the second sub-paragraph of Article 4(5) – without the need to make such VATable in all cases.

So if off-street parking is not of sufficient importance to the EU legislature, by reference to its subject matter, to merit inclusion in Annex D, thereby always falling within the scope of VAT, to adopt an interpretation that, in effect, does just that - as proposed by A-G Poiares Maduro - surely cannot be correct.

So if off-street parking is not of sufficient importance to merit inclusion in Annex D, thereby always falling within the scope of VAT, to adopt an interpretation that, in effect, does just that surely cannot be correct

Rather, if an activity does not merit inclusion in Annex D because it is not perceived as being of sufficient importance to justify VATable treatment in every case under the third sub-paragraph of Article 4(5), whether or not that activity must, nevertheless, be subject to VAT when undertaken by a public body acting as such must be determined by reference to the second sub-paragraph. This can only imply a transactional analysis as to whether not doing so would create a significant distortion of competition, which surely means by reference to accepted principles of competition law.

Indeed, it is curious that, having expressly rejected principles of competition law in arriving at his Opinion on the first point, in relation to the second and third points the A-G was 'happy' to use just those principles to inform his Opinion, notably opining that 'barriers to entry' to a market are as potentially distortive as competition with existing providers – a concept well known in both EU and domestic competition law.

Furthermore, in recent cases concerning Article 4(5) and the application of the significant distortion of competition criterion in the second sub-paragraph, the ECJ has shown a marked pre-

paredness to consider this in the light of competition law rather than confining itself to VAT law principles, as the A-G seeks to do.

Of most relevance in this respect is *Hutchison 3G UK Ltd and others* Case C-369/04. When considering whether treating the auction of 3G telecommunications licences by the Government as non-VATable would lead to a significant distortion of competition, the ECJ felt it necessary to refer to the competition law decision in *Diego Cali e Figli Srl* Case C-343/95.

And in *Götz* Case C-408/06, the 'milk quotas case', the ECJ ruled that, when considering whether or not there would be a significant distortion of competition, reference must be made to the geographic area within which the public body acts – that is, local market conditions.

Implications

Whilst the ECJ does not always follow the A-G's Opinion, notwithstanding the foregoing comments, it is widely anticipated that it probably will in this case (or at least that it will arrive at a similar conclusion). A decision is expected on 16 September. So is that the end of the argument as far as Isle of Wight Council and its co-appellants (and indeed the other 130 or so local authorities with claims lodged) are concerned?

Not necessarily - as a colleague recently commented, there is still 'a glimmer of hope'!

It will be for the High Court to decide whether treating off-street parking provided by a local authority as outside the scope of VAT creates a significant distortion of competition by reference to the nature of the activity itself (rather than by reference to the local market, which was the approach adopted by the VAT Tribunal).

Car parking is notoriously inelastic in supply and demand; one rarely chooses where to park by reference to whether the charge is liable to VAT, the decision more usually being dictated by where one wishes to visit

However, car parking is notoriously inelastic in supply and demand; one rarely chooses where to park by reference to whether or not the charge is liable to VAT, the decision more usually being dictated by the physical location of the car park and where one wishes to visit.

This was, in fact, precisely the point taken by the Tribunal and all the A-G's Opinion suggests is that the point should be considered in a somewhat wider context. Indeed, as the A-G opined, the 'nationwide' approach proposed has great merit in being simple to carry out.

Given that none of the 130 or so local authorities involved is likely to reduce its parking charges even if non-VATable treatment is permitted, given that the overwhelming majority of their customers are private individuals with no interest in whether the charge includes VAT or not, and given that it is invariably location and not price that determines where those customers park, a good economic argument might still be possible that treating local authority off-street parking as non-VATable will not create a significant distortion of competition, whether that is measured on a nationwide 'activities' basis - as favoured by the A-G (and HMRC) - or by reference to the local market.

Competition arguments

Ultimately, as alluded to in an earlier article in this series, for there to be a significant distortion of competition arising from treating local authority off-street parking as non-VATable, there must be a VAT-driven impact on such competition vis a vis private-sector providers of off-street parking which, to quote the A-G's Opinion, is 'out of the ordinary'.

Indeed, let us not forget that it is clear from the terms of Article 4(5) that competition as a result of treating local authorities as 'non-taxable persons' in such circumstances as that envisaged is acceptable, even that a distortion of that competition is acceptable; only if that distortion of competition is significant is non-VATable treatment denied under the second sub-paragraph.

Putting this in context, one of the points made in *Waterschap Zeeuws Vlaanderen* Case C-378/02 is that it is an inevitable consequence of treating activities undertaken by public bodies as outside the scope of VAT per Article 4(5) that there will be an impact on private-sector providers of similar activities who are required to charge VAT. Given this, the meaning of 'significant distortion of competition' in the second sub-paragraph of Article 4(5) must refer to something more, some additional consequence, over and above this inevitable and foreseeable consequence.

In essence, what *Waterschap* seems to be saying is that, as Article 4(5) permits public bodies not to charge VAT on their activities, this inevitably results in their being able to 'undercut' private-sector suppliers required to charge VAT and that there is therefore bound to be a distortion of competition. Non-VATable treatment should only be denied pubic bodies in situations where that distortion of competition is out of the ordinary, not merely the natural consequence of the public body not charging VAT.

And, as suggested, few customers are concerned as to whether their parking charge includes VAT or not; if indeed they are concerned at the price at all (which evidence suggests is generally less important than the location of the car park) it is rather how that price compares in gross terms with other nearby car parks, which is hardly likely to constitute an impact that is 'out of the ordinary'.

Multi-Annual Strategic Plans

The European Union Commission has drawn up, in close cooperation with Member States, a multi-annual strategic plan (MASP), aimed at creating a European electronic environment consistent with the operational and legislative projects and developments scheduled or under way in the areas of customs and indirect taxation.

The Commission has drafted a vision statement and a plan, which aims at establishing a list of implementation actions and a timetable to be agreed by all the participants involved. The document is to serve as a basis of discussion with Member States and traders that will result in a commonly agreed action plan and timetable, allowing the dedicating of resources at both EU and national level. It is the intention to digitise all existing manual procedures. The United Kingdom has its own MASP, the purpose of which is to ensure that some existing UK customs procedures will link with the EU MASP.

Details of the proposed changes are contained in several documents on the HMRC and EU websites but neither site gives the overall picture and the purpose of this article is to summarise that overall picture.

The vision statement

Because of lack of space I will just summarise the vision statement and readers should read the entire document, to find out what is in store for them, up to 2011, in addition to the changes to software required for SAD (Single Administrative Document) Harmonisation.

The Commission and the Member States will aim at achieving by 2011 that:

* electronic data exchange between customs offices is possible throughout the Community where required for any customs procedure or any other purpose (such as pre-arrival declarations)

* an importer can lodge his summary and/or customs declaration in electronic form from his premises, irrespective of the Member State in which the goods are entering the Community

* an exporter can lodge his export declaration in electronic form from his premises, irrespective of the Member State from which the goods are leaving the Community

* the collection and the repayment/remission of import duties will, in principle, be handled by the customs office responsible for the place where the importer/exporter is established and keeps his customs records

* the selection of goods for customs controls at border and inland customs offices is based on risk analysis using international, Community and national criteria, the Community criteria being electronically exchanged between the Member States

* Authorised Economic Operators (AEOs), including customs agents, can, at their request, operate throughout the Community on the basis of a single authorisation granted in one Member State, according to Community-wide established criteria; this includes the use of facilitations, a common reference for operators and common quality standards, as well as the existence of a common AEO database accessible by customs offices throughout the Community

* traders have access to an information portal and a single electronic access point for import and export transactions, irrespective of the Member State in which the transaction starts or ends, and even if the transaction involves agencies other than customs (single window, one-stop-shop)

* all existing and future computerised systems related to customs will be part of the e-Customs MASP, with the aim of an integrated architecture (for example, TARIC (the Tariff), NCTS (new computerised transit system), etc). Fiscal computerised systems (such as VIES (VAT number validation) and EMCS (excise movement and control system) will be taken into account and links will be created where necessary.

by Ernest Grayston

Links

Information on the Electronic Customs project can be found at http://ec.europa.eu/taxation_customs/customs/policy_issues/electronic_customs_initiative/index_en.htm.

JCCC Information Paper 54/05 provides information on the European Commission's MASP, including the key deliverables and their proposed delivery dates, as outlined at Annex A. There is no separate heading for MASP on the HMRC website. Go to http://www.hmrc.gov.uk. On the page under 'business & corporations', click on 'Import & export'. In the search field on the top of the page, type 'MASP'. Eight papers on MASP will be displayed, including JCCC Information Paper 54/05.

Action plan

At a high-level seminar on the implementation of the MASP for e-Customs in Poland on 6 to 8 April

2005 the Member States committed themselves to introducing electronic services, within the framework of e-Europe and in particular e-Government. Their commitments were embodied in an action plan.

Drivers for MASP

In addition to the electronic transformation of international trade transactions, MASP also aims to simplify procedures for legitimate trade through the streamlining of processes, removal of disparities in operational procedures between Member States and the introduction of new facilitations, such as Centralised Clearance and AEO. Application of MASP will also improve security and protect society through the tightening of some customs controls, particularly in relation to the protection of external borders.

When will MASP be introduced?

MASP will be introduced in stages between now and 2010 or 2011. Indicative implementation dates are given at Annex A of JCCC 54/05; these are not yet confirmed but are the UK's possible timeline on the Commission's proposals for the introduction of the various elements of MASP.

Individual elements

MASP is split into two different programmes of change: legislative reforms and the introduction of IT (information technology) systems.

Legislative reforms

These will be delivered in two separate stages: an amendment to the current Community Customs code and a full rewrite of the Community Customs Code (Code) and the Implementing Provisions (IP). The Code is now entitled 'Modernised Community Customs Code' (MCCC). It has been finalised. The first draft of the IP has recently been released for consultation.

The modernisation of the Code is designed to streamline the legislation whilst simplifying procedures for traders. A key element is to move the emphasis for customs activities away from paper-based procedures to electronic communication techniques. In order to facilitate this it provides the legal vires for the introduction of the MASP IT changes.

Security amendment

This aims to secure and facilitate the supply chain. It introduces AEO status, pre-arrival/departure information, data-sharing and community-wide electronic risk-management procedures.

The security amendment also gives the legal vires for the introduction of the Import Control System (ICS), the Export Control System (ECS) and the Risk Management Framework (RMF). Please see Annex A of JCCC Paper 54/05 for details.

IT changes

There are several separate IT systems proposed within MASP, all designed to promote the use of electronic communications between customs administrations and traders. The proposals will also help the Member States to act as a single administration by facilitating the electronic exchange of data.

ICS and ECS

Put simply, part of the MASP is the introduction of electronic systems allowing customs clearance in cases where more than one Member State is involved. This objective has already been achieved with regard to transit – in the form of NCTS – apart from the TIR procedure (shortly to be included), and is already being pursued with regard to ECS, which will form the basis of a community-wide Automated Export System (AES). The next logical step is to introduce ICS, which could later form the basis of a Community-wide Automated Import System (AIS).

The EU is implementing ECS to computerise indirect exports (where an export leaves the EU from another Member State other than the Member State of export). Overall, the functionality of ECS equates with the current manual processes relating to the travelling SAD copy 3 (TC3) and return of exit confirmation to the Office of Export.

ECS1a (Fiscal) – the UK operating as an Office of Exit for indirect exports from other Member States went live in September 2007.

ECS1b (Fiscal) – the UK operating as an Office of Export using Customs Handling of Import and Export Freight (CHIEF) messaging and ECN+ network is due for delivery on 1 July 2009.

ECS2 - Full integration of ECS stages 1a and 1b with pre-departure declarations and the implementation of the Safety and Security (S&S) Regulations is due for joint delivery with ECS1b on 1 July 2009.

Provision of ECS details

In the UK Tariff Volume 3 Part 1, paragraph 1.10.7, page 1-26 are listed the information that will be required when ECS goes live. It can be optionally supplied prior to ECS being fully introduced, presumably so that operators can be trained beforehand.

ECS - UK functionality

ECS is a message-based system, similar to NCTS, where exports declared at an Office of Export in one Member State (for example, in Dublin) will result in a message being sent electronically to the Member State where the identified Office of Exit (for example, in Liverpool) is situated. When the goods subsequently exit the EU, an update is sent to the originating Member State. Within the UK this message data will be held on a specific ECS database and future stages of ECS will link this database to CHIEF.

As other Member States introduce ECS Office of Export functionality, both ECS messages and paper EADs will be received in the UK as intended Office of Exit (indicated by the optional use of SAD box 29). EADs referred to as part of ECS1a are therefore those generated by other Member States and must accompany the export goods to the UK.

Handling EADs received in the UK

Under ECS1a EADs from other Member States will be handled in exactly the same way as TC3s are currently handled - by the creation of a C21 export entry, under CPC 100043. The C21 must be input to CHIEF prior to export loading but the

Movement Reference Number (MRN) of the EAD is to be shown in box 44 of the electronic C21.

Once the goods have been shipped from the UK, EADs should be sent to the National Clearance Hub (NCH) at Salford with appropriate commercial evidence of exit (for example CHIEF X2 prints, inventory system screen dumps, bills of lading, AWBs, manifests, etc). The NCH will scan the EAD MRN into the UK ECS database and, if satisfactory, this will update the ECS system in the originating Member State. This process is described in JCCC Information Paper 32/07 and JCCC Information Paper 36/07.

Purpose and scope of ICS

The purpose of ICS will be:

* to allow for the exchange of data between customs offices of entry and import for safety and security checks in accordance with the forthcoming changes to the Code

* to allow for the exchange of data between the importer and the customs administrations

* to allow for a seamless flow of data between ICS and other systems (AES, NCTS, etc)

* to allow for the placing of the goods under a customs procedure in cases where the initial customs declaration (or notification in the case of local clearance) is made in a different Member State than the supplementary deceleration

* to allow for the tracking of the goods during their movement within the EU customs territory.

The scope of ICS will be thus:

* an importer lodges an electronic pre-arrival declaration in the Member State where he is established and the customs office of entry is in another Member State

* an importer lodges the initial electronic customs declaration at the customs office of entry in one Member State and is established in another Member State where he will lodge the supplementary declaration, or at the customs office of the Member State where he is established

* goods are transferred between Member State under a suspensive procedure (such as customs warehousing).

Such a system would make the use of special accompanying documents (such as T5) in most cases superfluous.

The system does not cover transactions involving customs offices within the same Member State, unless a Member State chooses to use ICS for such cases too.

The system will be used for both complete and for simplified declarations. However, in both cases only a reduced data set will be exchanged. The exchange of data will be based on the new legislation for the SAD, as well as the data elements to be laid down for the summary declaration. It is intended to merge the data elements for the summary declaration with those for:

* the incomplete declaration

* the simplified declaration procedure and

* the notification under the local clearance procedure.

This data should be the same for all Member States and will form the basis of the data exchange between customs offices in different Member States.

Where it is possible to use the data from ECS or NCTS, the system should be able to do so.

Common domain

The ICS shall cover the information exchange between customs offices in different Member State, where such exchange is stipulated under the MCCC and the IP, except cases covered by NCTS or ECS.

A merger of these systems can be considered at a later stage if this should turn out to be appropriate.

The common domain covers the following data exchanges:

* to inform the customs office of import or entry of a pre-arrival declaration received

* to inform the customs office of import or entry of an initial customs declaration that will have to be matched with a supplementary declaration

* to inform customs offices involved in the control of movements between two Member States of the departure and arrival of goods, as well as the control results upon arrival where NCTS and ECS are not applied.

External domain

The information exchange between the person making the declaration and customs could be organised as follow:

* each Member State offers either a private-based or public-based common portal that can be used by traders established there (even if the goods enter into the customs territory in another Member State but lodging their declaration in that Member State – for example, because the customs office of entry is in that Member State)

* the Commission offers a common portal that combines the common portals of the Member States.

Supplementary requirements

Apart from defining the data elements and the rules for data exchange, it will be necessary to:

* establish and maintain a database of customs offices (which can be based on the list established for NCTS)

* establish and maintain a central database or interlinked national databases of AEOs, so that the customs office of entry can check whether the declarant is authorised to use the simplified procedure, or a customs procedure requiring an authorisation (such as inward processing), or is considered to be a low risk with regard with regard to safety and security checks

* to provide for a system that handles the authentication of declarations and documents

* create a link with NCTS and ECS, in order to achieve a seamless flow of data, TARIC, tariff quotas and other customs-related systems and databases.

Next steps

Once agreement has been reached on the scope of ICS and the data elements needed for the exchange, it will be necessary to develop functional and technical specifications (FTSs). It is suggested to develop this in the 'e-Customs' project group, operating under C2007, consisting of experts from volunteering Member States and traders.

CHIEF replacement

Aligned with MASP from a UK perspective are plans for the replacement of the CHIEF system. CHIEF is the UK's import/export customs declaration processing system. The development of this has been delayed pending the changes to the Code and the EU MASP project.

An extract from JCCC Information Paper 40/05:

'A key aim of the Customs and International Trade Blueprint was the replacement of the declaration functionality hosted within the CHIEF system. During 2003 a feasibility study was undertaken that identified potential options to delivery. However, at the time, the modernisation of the Customs Code and EU e-Customs developments were at an early stage and were not reflected within this feasibility study. Subsequently the merger of HM Customs and Excise and the Inland Revenue added additional corporate pressures that meant the Department may not be able to deliver a full "end-to-end" service within the required timeframes. As a result, in order to protect business as usual, in May 2004 the Department announced a three-year extension to the CHIEF contract to January 2010.

'Frontiers Freight Solution Project

'Now that the EU has published its Multi-Annual Strategic Plan (MASP) and the structure of HMRC is becoming clearer the CHIEF Replacement Feasibility Study is being revisited. Work on CHIEF Replacement is now being taken forward under the title of the Frontiers Freight Solution (FFS) Project. The FFS will re-evaluate the findings and conclusions of the previous CHIEF Replacement Feasibility Study particularly in the context of the MASP and the new Departments corporate technical architecture.

'The FFS Project has already commenced and will be seeking to assess whether the conclusions reached in 2003 remain valid. It is expected that this FFS Feasibility will complete in October 2005. The Project team will engage with the trade throughout to ensure that their views are considered.'

MASP deliverables

These are listed in Annex A to JCCC Information Paper 54/05:

Security Amendment
Includes Pre-Arrival/Departure Information and Authorised Economic Operators.

Modernised Code
The rewrite of the Code and IP is designed to modernise and streamline the legislation and aims to: reduce the large variety of procedures and regimes; make electronic declarations the rule and other declarations the exception; make Community-wide decisions the rule and not the exception; enable Customs administrations to act as if they were a single administration and be able to share data electronically with other competent authorities.

It also introduces new simplification for traders, such as Centralised Clearance and Guarantee Waivers.

Trader database
The introduction of AEO will be supported by the introduction of an EU-wide interactive database of all traders involved in the international trade of goods and a record of their authorisations.

Risk Management Framework
An electronic system for the exchange of risk information.

Import Control System and Automated Imports System
An electronic messaging system to support the exchange of import declaration data between Member States.

Export Control System and Automated Exports System
An electronic messaging system to support the exchange of export declaration data between Member States.

Single Access Point
Traders will be able to lodge their customs declarations for goods located anywhere in the EU through an electronic interface from their own place of business.

Common Customs Information Portal
An EU-wide website containing all the information traders will need to import/ export goods providing links to national administration and other government departments' websites.

EU Single Window
An extension of the UK's own Single Window initiative, facilitating a one-stop shop approach for traders to perform all their international trade business through a single portal on an EU-wide basis; including both Customs and other government departments' requirements, such as Port Health Certificates.

International Trade Single Window
This is the UK version of the single window that will provide a single point of access for UK government information/electronic transactions.

New Computerised Transit System 3.2
NCTS is the EU's electronic transit control system. It receives, processes, data-shares and monitors the declaration/ movement of goods in Community Transit. NCTS 3.2 is a further release of the NCTS project designed to incorporate guarantee management and enquiry handling functionality.

CHIEF Replacement, known as the Frontiers Freight Solution Project
This is the project that will develop the replacement system for CHIEF, the UK's import/export customs declaration processing system. This project will be incorporated into the UK's MASP programme to ensure that the FFS developments are in line with the wider EU-MASP proposals.

SAD Harmonisation
This project is in place to ensure that the UK is able to comply with an EU regulation enforcing a greater degree of harmonisation across the EU in respect of the data captured on the SAD. In practice, it means ensuring that changes are made to CHIEF and supporting systems (internal and external) which process SAD data. SAD H is now live.

Summary

Because, so far, there is no overview of MASP on either the EU or UK websites, to assist traders this article contains a general overview, including full details regarding ICS and ECS. The EU Commission is determined to digitise all the processes. This has already raised problems with NCTS. For instance, there are 4.5 million parcel movements at Heathrow per year. Customs IT people say if these have to be digitised it may overload the NCTS system. For this and other concerns representations have been made to the EU Commission. An advantage is that there will not be a 'Big Bang' with MASP. Even so traders will have to bear the costs of new software and training programmes for staff.