

LEAVE ALLIANCE

Brexit Monograph 11

Authorised Economic Operators (AEOs)

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(corrected)

Introduction

Most people are aware to some extent of the huge disruption to air travel occasioned by 9/11, and the continued effect of ever-increasing security measures to counter the spread of international terrorism. In many ways, the destruction of the Twin Towers changed air travel forever.

What is less well known are the effects on international trade – and not just with the United States. The potential for movement of goods across borders to provide cover for smuggling weapons and other materials into target countries was already well recognised, while trade in services afforded the opportunity of moving money and financing terrorist operations. But 9/11 added to the mix the realisation that the global transport system could be used as a means of delivering a terrorist attack.

The immediate aftermath of 9/11 saw the United States in lockdown, with its borders closed. But, despite huge queues of vehicles at the Canadian and Mexican borders, and congestion in the sea ports, the short-run effects on the US economy were not as great as might have been expected. The effects on foreign (non-US) economies were relatively slight.

What posed the greater economic threat was the quest for greater security over the longer term, with the demands for 100 percent X-ray scanning of shipping containers and a massively increased rate of border inspections. Such measures threatened to impose long-term costs on the world economy both in terms of a decline in productivity growth and, possibly, greater impediments to the free movement of goods.¹

¹ <https://fas.org/irp/crs/RL31617.pdf>

As it was, the direct impact on trading costs of security-inspired measures was estimated to be roughly equivalent to the entire reduction in tariffs on industrial goods of 2.5 percentage points agreed to under the Uruguay Round of Multilateral Trade Negotiations.² In effect, one event – albeit of huge importance – had negated the effects of years of negotiation, reversing a significant step in the liberalisation of trade.

But, although the tragic events of 9/11 brought the problems of international terrorism and border security to a head, the management of customs operations was already under scrutiny. High trade volumes and the demand for speed and cost-efficiency were making it more difficult for customs authorities to examine and verify exports and imports.³ Therefore, traditional customs systems were already under stress. The events of 9/11 were to prove the catalyst for a fundamental review of the global customs system.

In order to minimise effects on the cross-border flow of goods, in the aftermath of 9/11, the US took rapid action. It came up with a trade facilitation scheme to mitigate the effects of more intensive security measures, within months of the collapse of the Twin Towers. It, and related programmes, have since become part of an expanding, and developing global system which seeks to reconcile the apparently conflicting demands of border security and the free movement of goods.

The European Union version of this system is the Authorised Economic Operator (AEO) programme, in which the United Kingdom participates. But this programme not only deals with security. It also expands and develops ongoing trade facilitation measures. As a result, it has become a vital part of the overall trade system, so much so that when recently the Government of Japan sent a message to the UK Government on Brexit, it specifically asked for the framework of mutual recognition on Authorised Economic Operators to be maintained.⁴

Withdrawal from the EU could have a significant impact on UK access to and continued participation in the EU's AEO programme and to the global system as well. Therefore, in this Monograph, we look at the AEO system, take a brief look at its history and rationale, and explore the implications of Brexit in relation to the UK's involvement in it.

Historical background

A key player in the response to 9/11 was the World Customs Organisation (WCO). Founded by the Convention Establishing a Customs Cooperation Council, which took effect in 1952, it is an intergovernmental organisation

² http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-outlook-volume-2002-issue-1_eco_outlook-v2002-1-en#.V87APNQrKHs#page144

³ <https://tax.thomsonreuters.com/blog/onesource/a-global-and-indian-perspective-of-the-authorized-economic-operator-aeo-program/>

⁴ <http://www.mofa.go.jp/files/000185466.pdf>

headquartered in Brussels, representing 174 members. Prior to 9/11, its focus was on trade facilitation, its main instrument being the Kyoto Convention on the Simplification and Harmonization of Customs procedures, done at Kyoto in 1973 and amended in 1999.⁵ Some 56 WCO Members are signatories.

After 9/11, the focus of the organisation switched to security. In this, it was responding in part to the UN Security Council Resolution 1373 of September 2001, which called upon states to prevent the movement of terrorists or terrorist groups by means of effective border controls.⁶

The first systematic response came from the United States, in the form of the Customs-Trade Partnership Against Terrorism (C-TPAT). This was a "voluntary" programme led by US Customs and Border Protection (CBP), focused on improving the security of private companies' supply chains.⁷ It conferred a range of privileges for participants, including pre-clearance of goods, reduced paperwork, deferral of fees and fast-tracking of consignments through border posts.

C-TPAT was launched in November 2001 – only two months after 9/11 - with seven initial participants, all large US companies. As of 1 December 2014, the programme had 10,854 members, including 4,315 importers which accounted for approximately 54 percent of the value of all merchandise imported into the US. Certified companies are considered low risk and qualify for expedited processing of their cargo and fewer Customs examinations.⁸

In the chronology of events, the next major development came on 26 June 2002. A G8 Summit held in Kananaskis, Canada, produced a declaration on "Cooperative G8 Action on Transport Security". It called on international organisations to work for "greater security of land, sea and air transport while facilitating the cost-effective and efficient flow of people, cargo, and vehicles for legitimate economic and social purposes".⁹

The baton was picked up by the Customs Cooperation Council of the WCO which resolved to produce new guidelines on "cooperative arrangements between Members and private industry to increase supply chain security and facilitate the flow of international trade".¹⁰

⁵ http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv/kyoto_new.aspx

⁶ [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf)

⁷ As with so many of such schemes, while participation was indeed voluntary, refusal to participate was not a realistic proposition for major commercial companies. See: <http://www.canadianshipper.com/features/c-tpat-why-it-s-becoming-less-voluntary-and-more-necessary/>

⁸ https://en.wikipedia.org/wiki/Customs-Trade_Partnership_Against_Terrorism

⁹ <http://www.g8.utoronto.ca/summit/2002kananaskis/transport.html>

¹⁰ http://www.wcoomd.org/en/about-us/legal-instruments/~/_media/58FAC91B97664A7088BF66C9657BDF8A.ashx

A task force set up for the purpose produced initial guidelines on risk assessment, which was to form the basis of new operational framework. The theory was that, by identifying "trusted traders" and eliminating them from the routine screening processes, customs officials and other surveillance agencies could concentrate resources on higher risk consignments.

Following this, a High Level Strategic Group was set up. Meeting in June 2004, its task was to produce a new security framework.¹¹ The finished article became the SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework). Adopted by the WCO in 2005, it spawned AEO Guidance the following year and in June 2007, SAFE and AEO Guidance were combined in one document. This forms the basis for current schemes.¹²

As of July 2009, 156 of the 174 WCO Members had committed to implementing a SAFE framework. Its essence was to encourage the development of customs-to-customs networks using automated techniques to screen high risk cargo; and to build customs-to-business partnerships with procedures to pre-certify shippers through what was known as an Authorised Economic Operator (AEO) programme.

The networks and the partnerships focused on: the harmonisation of advance cargo information requirements across parties to the agreement; the use of risk management techniques; the inspection of outbound cargo upon the request of an importing country; and the establishment of new programmes to expedite customs processing for commercial shippers.¹³

However, the WCO was not acting entirely on its own. In parallel, the International Maritime Organisation (IMO) produced its International Ship and Port Facility Security (ISPS) Code, which placed obligations on port and ship operators to implement minimum security measures and maintain a security management system. The ISPS Code applied to all signatories to the SOLAS Convention.¹⁴

In addition, the International Labour Organization (ILO) initiated a new Seafarer's Identity Document and a Code of Practice for the security of all port areas. It was developed by a Joint ILO/IMO Working Group and finalised in December 2003. This was adopted by the ILO Governing Body in March 2004 and by the IMO Maritime Safety Committee in May 2004.¹⁵ The ILO and the WCO are working closely with each other, having signed in July 2001 s Memorandum of Understanding "to strengthen co-operation in the fields of

¹¹ http://www.wcoomd.org/en/topics/research/activities-and-programmes/~/_media/44CC67F66E7C48FC9834F3504F9D7C19.ashx

¹² http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package.aspx

¹³ https://www.usitc.gov/publications/332/journals/cargo_security.pdf

¹⁴ http://www.imo.org/blast/blastDataHelper.asp?data_id=17987&filename=Maritime.pdf

¹⁵ *Ibid.*

container examination, integrity of the multi modal transport chain and matters relating to the ship/port interface"¹⁶.

Formal changes to the regulation of international air transport, to take account of the WCO initiative, took somewhat longer. Not until 2011 were there changes to the IACO "Security" Annex 17 to the Chicago Convention on: "Safeguarding International Civil Aviation Against Acts of Unlawful Interference". These incorporated the "Regulated Agent" and "Known Consignee" concepts among its Standards and Recommended Practices for international aviation security.¹⁷

In 2013, the WTO Agreement on Trade Facilitation established a new "Authorized Operator" concept for WTO members. Such schemes must meet certain prescribed criteria and offer trade facilitation measures selected from a menu of benefits. There is no specific cross-reference to IMO, ICAO or WCO efforts but any scheme must conform to international standards, "where such standards exist".¹⁸ The WCO states that "it might be appropriate" to use their model as the standard, "given that the use of AEO criteria... would assist in ensuring a harmonised approach and enable countries to achieve mutual recognition on the basis of a shared understanding".¹⁹

The European Union dimension

An early adopter of the AEO concept was the EU which, in April 2005 passed Regulation (EC) No 648/2005 adding "security amendments" to the Community (now Union) Customs Code (UCC).²⁰ In adopting the WCO framework, the EU integrated it into a radical overhaul of its "customs environment", creating the so-called Paperless Trade and Customs Environment, with provision for centralised customs clearance by 2020.^{21,22}

The EU was the first to integrate the trade facilitation matters set out in the revised SAFE Guidelines, as opposed to an exclusive security agenda. The criteria for the EU schemes thus goes go well beyond the original scope of the SAFE Framework. They introduce a layer of complexity which results in a coupling of two quite different concepts – that of a compliant trader and that of a secure supply chain.²³ Therefore, the programme covers economic operators authorised for customs simplification (AEOC) and those for security and safety

¹⁶16 http://www.imo.org/blast/blastDataHelper.asp?data_id=17987&filename=Maritime.pdf

¹⁷ http://www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf

¹⁸ https://www.wto.org/english/thewto_e/minist_e/mc9_e/nov14dectradfac_e.htm

¹⁹ http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/~/_media/60AF2DFB42E74E86A13A3C24A4E0D636.ashx

²⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R0648&from=HR>

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[http://worldcustomsjournal.org/Archives/Volume%208,%20Number%201%20\(Mar%202014\)/04%20Widdowson_et_al.pdf](http://worldcustomsjournal.org/Archives/Volume%208,%20Number%201%20(Mar%202014)/04%20Widdowson_et_al.pdf)

²² <http://www.gfptt.org/sites/default/files/refread/5044e80a-4704-4558-aba8-b3cb95c56939.pdf>

²³

http://www.eccf.ukim.edu.mk/ArticleContents/JCEBI/JCEBI_2/spisanie%20David%20Widdowson%2067-77.pdf

(AEOS). Economic operators may apply to take part in either programme or both together.

Qualification criteria require applicants to show compliance with customs legislation and taxation rules and to have no criminal offences related to the economic activity. They must demonstrate appropriate record-keeping; financial solvency; proven practical standards of competence or professional qualifications and, in the case of the AEOS, appropriate security and safety measures. The details are set out in the Union guidelines, published on 11 March 2016, comprising 219 pages.²⁴

A further amendment to the Union Customs Code, in the form of Commission Implementing Regulation No 889/2014 of 14 August 2014, builds in the aviation elements, as regards "regulated agents" and "known consignors" into the AEO programme.²⁵ Applications are made to the Member States in which the economic operators are based, and the Member States are responsible for approving AEOs within their territories.²⁶ Under Protocol 10, Annex II, the AEO system also applies to the EEA.^{27,28}

Crucially, AEO status granted by one Member State is recognised by the customs authorities in all other Member States by virtue of Article 38 (4) of the UCC. Those economic operators which qualify enjoy easier admittance to customs simplifications, fewer physical and document-based controls related to security and safety, and a number of indirect benefits.

AEO status bestows considerable advantages on the holder: in particular, authorised economic operators enjoy fast and efficient customs clearance and are exempt from the obligation to provide surety. The specific trade-related benefits granted in return for implementing European security requirements mean that holders of AEO status clearly enjoy a clear competitive advantage over their non-AEO competitors.²⁹

Mutual recognition

A key element of the system is mutual recognition between countries and trading blocs, the eventual aim being to create a global network of compatible programmes, facilitating the more efficient and speedy trade in goods, while maintaining a high level of security.

²⁴ https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/aeo_guidelines_en.pdf

²⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0889&from=EN>

²⁶ <https://www.gov.uk/guidance/authorised-economic-operator-certification>

²⁷ <http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol10.pdf>

²⁸ <http://www.efta.int/eea/policy-areas/goods/customs-trade-facilitation/customs-matters>

²⁹

[http://worldcustomsjournal.org/Archives/Volume%205,%20Number%202%20\(Sep%202011\)/03%20Altemoeller.pdf](http://worldcustomsjournal.org/Archives/Volume%205,%20Number%202%20(Sep%202011)/03%20Altemoeller.pdf)

As of July 2016, the United States has signed eleven mutual recognition agreements (or "arrangements").³⁰ The countries comprise: New Zealand (June 2007); Canada (June 2008); Jordan (June 2008); Japan (June 2009); Korea (June 2010); European Union (May 2012); Taiwan (November 2012); Israel (June 2014); Mexico (October 2014); Singapore (December 2014); and the Dominican Republic (December 2015).³¹

The EU has concluded and implemented MRAs with Norway, Switzerland, Japan, Andorra, the US and China.³² In addition, the EU is providing technical assistance to a number of countries to prepare them to set up AEO programmes.³³ Turkey is amongst those countries with which MRA negotiations are current.³⁴ As regards China, the EU was the first trading partner to enter into such an agreement with China, with the deal having been signed in May 2014.³⁵

Progress, however, has not been without its difficulties. The fact that non-security related considerations have been incorporated into the SAFE Framework, or may be included in the WTO's concept of "Authorised Operator", has complicated the creation of a global network. Some WCO Members have followed the EU approach while others, such as Singapore, have confined their programmes exclusively to security.

The use of inconsistent criteria delayed the MRA between the EU and the US, reflecting the fundamental differences between the EU's AEO schemes and C-TPAT. The May 2012 agreement, therefore, was restricted to security elements, and "to the extent practicable and possible and consistent with applicable law and policy". The US is now in the process of expanding its own model, to achieve a greater degree of mutual recognition between C-TPAT and other AEO programmes, as well as enhancing the performance of its own system.^{36,37}

A dynamic system

Notwithstanding the political and administrative difficulties in developing and managing a global network of agreements directed at enhancing border security, at the heart of the system are the physical requirements relating to the detection and interception of potentially devastating threats, such as the

³⁰ The US prefers to use the term "arrangement", to signify that MRAs are non-binding administrative agreements, not treaties. http://www.wcoomd.org/en/topics/research/activities-and-programmes/~/_media/43AC3326904F4887925CBB339C135BFE.ashx

³¹ <https://www.cbp.gov/border-security/ports-entry/cargo-security/c-tpat-customs-trade-partnership-against-terrorism/mutual-recognition>

³² https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/infonote_aeo-ctpat.pdf

³³ *Ibid.*

³⁴ <http://english.gtb.gov.tr/external-relations/bilateral-relations/authorized-economic-operator-mutual-recognition-arrangement-agreement-mra>

³⁵ http://europa.eu/rapid/press-release_IP-14-555_en.htm

³⁶ *Op cit.*

http://www.eccf.ukim.edu.mk/ArticleContents/JCEBI/JCEBI_2/spisanie%20David%20Widdowson%2067-77.pdf

³⁷ <https://www.fas.org/sgp/crs/homesec/R43014.pdf>

secretion of a "dirty bomb" into a shipping container and its detonation at a target port.³⁸

In 2008, though, the GAO was questioning whether the UC C-TPAT programme was effective, particularly in terms of whether the security validation of the programme members was reliable. Pointing to multiple system vulnerabilities, and the huge costs of failure, it was unable to assure Congress that C-TPAT was working as intended.³⁹ Some even argue that "trusted traders" present the best opportunities for terrorists to get into the United States undetected, with the system creating vulnerabilities rather than resolving them.⁴⁰

This is by no means the only problem area. A key part of the system, as respects mutual recognition, is the requirement that partners notify US authorities of consignment details 24 hours in advance of loading on ships destined for US ports, to afford the US authorities to the option to request inspections of specific consignments and individual shipping containers.

For purely operational reasons though, there is a reluctance to take advantage of this option. For larger container ships, that loading process can take 18 hours or more and a decision to have a container inspected before loading ends up placing the shipment at risk of missing its voyage with all the resultant disruption to the importer's supply chain. Furthermore, because of the physical handling involved, if even as little as 1-2 percent of US-bound containers were subject to examination before loading, this would completely overwhelm the inspection facility.⁴¹

C-TPAT, and by inference the entire AEO programme, therefore, is a compromise between the need to facilitate the free movement of goods, and the need to maintain a high level of security. The level of disruption that is tolerable – and the costs incurred as a result - is largely a political decision which is dependent on the perceived threat level and the consequences of failure, and will therefore be subject to variation depending on circumstances and experience.

On that basis, the AEO programme cannot be considered to be a fixed system with the parameters defined for all time. The requirements will vary from time-to-time, and the balance between security needs and trade facilitation can be expected to be in constant flux. Therefore, the global and national programmes must be regarded as a dynamic system which, in order to be effective and to meet political and operational expectations, must be capable of accommodating rapid and substantial changes.

³⁸ <http://transportation.house.gov/uploadedfiles/2015-10-27-flynn.pdf>

³⁹ <http://www.gao.gov/new.items/d08240.pdf>

⁴⁰ <http://www.cfr.org/world/addressing-shortcomings-customs-trade-partnership-against-terrorism-c-tpat-container-security-initiative/p8141>

⁴¹ http://opim.wharton.upenn.edu/risk/library/WP20090501_NB,SF,NG_CSI.pdf

Implications for Brexit

Although the AEO programme is a global initiative, primarily directed by the WCO, it is implemented at national or regional level. In the case of the European Union, the programme is managed as an EU-wide operation in which the Member States participate by virtue of their membership of the EU. Similarly, mutual recognition agreements are concluded at EU level. Member State AEOs thus rely on their participation in the EU-wide scheme in order to benefit from mutual recognition provisions.

In the event of a "hard Brexit", it follows that the UK would no longer be able to participate in the EU's AEO programme. Neither would it benefit from any mutual recognition agreements between the EU and third countries. Continued participation in the EEA would, however, give the UK access to the EEA programme.

In anticipation of its removal from the EU schemes, the UK would need to codify its national component of the EU scheme and define a specific UK programme. It would then need to seek mutual recognition arrangements with other nations and trading blocs, including the EU. As long as these procedures are concluded during the two-year Article 50 negotiation period, there should be no break in continuity. Existing AEOs should be able to continue enjoying the benefits of the scheme from the moment the UK formally leaves the EU.

On that basis, ensuring AEO programme continuity becomes another complication to be taken into account when conducting Article 50 negotiations. Abrupt termination only becomes a problem in the event of the UK's unilateral adoption of the WTO option, whence no alternative arrangements will be in place.⁴²

Even in the event of a settlement that takes account of AEO programme continuity though, there is the longer-term problem of ensuring harmonisation with a dynamic system, ensuring that any changes made match those made by the EU in scale and timing. This could be done through maintaining relations on the WCO Council, although regional liaison might be necessary to avoid any temporary and potentially disruptive discontinuities with the EU.

Ongoing liaison might be especially important as current plans for centralised customs clearance and other measures relating to the revision of the Union Customs Code will have to be abandoned or modified.⁴³ This included changes to AEO status, which could have an impact on the UK scheme, even to the extent of limiting the trade facilitation aspects.

Conclusions

The events leading up to the establishment of the AEO systems provide a graphic illustration of the conflict between border security and securing the free

⁴² <http://www.eureferendum.com/documents/BrexitMonograph002.pdf>

⁴³ <https://www.gov.uk/guidance/introduction-of-the-union-customs-code-ucc>

movement of goods. They also illustrate effect of non-tariff barriers on international trade, and how they can wipe out any savings accruing from tariff reduction agreements.

The AEO system itself underlines the importance of trade facilitation in underwriting the global trading system, contributing potentially to significant increases in import and export volumes.⁴⁴ But, with that system in the UK currently integrated with EU membership, and potentially lapsing with our withdrawal, it becomes an active part of the Brexit agenda.

There should be little dispute that the maintenance of an active AEO programme and the establishment of mutual recognition agreements with our trading partners will continue to be a vital part of any UK trade policy. To ensure continuity in current arrangements, the UK can either re-establish its current arrangements as part of an independent system, or seek to work with the EEA provisions.

Maintaining continuity should not be difficult for the UK, as part of an ordered withdrawal from the EU. Necessarily, it will require some investment in time and resource, and diplomatic capital. Only if the UK chooses to withdraw from the EU without entertaining negotiations (the WTO option) and making alternative arrangements, would the termination of the EU's scheme create serious problems.

Future operation of the scheme, however, will require close coordination of systems with our closest trading partners, which suggests that continued liaison arrangements with the EU will be needed.

This might be especially the case as the EU referendum took place just after the introduction of the revised Union Customs Code (UCC), with some transitional arrangements operating until 2020.⁴⁵ Full extraction from the UCC may create as yet unidentified complications, which also have ramifications for the AEO programme.

With or without such complications though, the very essence of the AEO programme is itself a complication which cannot be ignored – yet another example of the underlying complexity of the Brexit process.

ends.

⁴⁴ <http://www.oecd-ilibrary.org/docserver/download/5js0bslh9m25.pdf?expires=1473356395&id=id&accname=guest&checksum=CA8BFC03E113A5A3B2F3EBBAEA9739D0>

⁴⁵ *Op cit*, <https://www.gov.uk/guidance/introduction-of-the-union-customs-code-ucc>