

Customs Communiqué Switzerland 1-09



We are pleased to send you the first Customs Communiqué Switzerland. In this first edition we look at the process for replacing the VAR (simplified export procedure) system and at the status of the negotiations between Switzerland and the EU on the security initiatives. In addition we would like to draw your attention to a possible change in the area of EU customs clearance and inform you about the new rule for imposing interest on late payment on price adjustments of imports. We shall also take a glance at Swiss foreign trade and should like to highlight the free trade agreement between Switzerland and Japan. In the final section of the communiqué we list a selection of actual court judgments.

Replacement of the simplified export procedure (VAR)

As one of the many changes in the new Customs Law the replacement of the VAR system by e-dec Export should have been implemented on 1 July 2009. In view of the current economic situation, of the time element and of the financial investments required the Federal Customs Administration (FCA) has now decided that the replacement of the VAR procedure by e-dec Export is to be postponed until **31 March 2010**.

This deferral gives exporters a sufficiently long period to introduce e-dec Export. Despite this deferral we recommend to implement e-dec Export as soon as possible. The FCA has expressly excluded a further deferral of the VAR approval.

24 hour rule

In connection with the amendment of the customs code the EU is introducing a prior notification requirement for the cross-border transfer of goods across its external borders. The result of the negotiations between Switzerland and the EU is that for bilateral goods traffic, even after introduction of the EU security rules, there will be no summary prior notification or 24 hour rule. On the other hand Switzerland undertakes to submit the transfer of goods between Switzerland and non-EU states to the new security rules. The consequence is that Switzerland will require prior notification of security data for movements in direct import and export traffic with non-EU states and on that basis perform a risk analysis. About 20% of imports into Switzerland and about 40% of exports from Switzerland will be affected by this measure. Implementation was originally planned for 1 July 2009. Various EU states (including Germany, Great Britain and Italy) are due to technical reasons not in a position to implement the regulations for imports until mid-2009. The competent EU Commission has therefore decided to postpone the effective date of this rule. The result of this decision is that this summary prior notification will not become **obligatory** also in Switzerland until **1 January 2011**.

Authorised Economic Operator (AEO)

In the course of further negotiations between Switzerland and the EU agreement has been reached that Swiss enterprises may in the near future apply for the status of Authorised Economic Operator. Of the AEO certificates foreseen for the EU, Switzerland will introduce the certificate AEO Security and Safety (AEOS). AEO certified enterprises can benefit from various simplifications, such as prior notification with reduced data requirements, fewer controls of goods and documentation or priority for the controls ordered. The FCA has foreseen for mid-April a further publication (including the additional requirements for certification). The legal basis for implementation in Switzerland will be in the form of an ordinance created by the Federal Council, which according to official publications is to enter into force on 1 July 2009. According to verbal information from the FCA it is already foreseeable that this ordinance will, because of timing constraints, probably not be published and will be come into force until **1 August or 1 September 2009**.

EU customs clearance

The EU customs clearance represents a special form of customs clearance and frees the Swiss exporter from the imposition of import tax when goods are imported into an EU state and then delivered to another EU member state. This procedure grants the Swiss exporters EU status and they can benefit from the advantages, including deliveries within Europe. Up to now it was possible for the exporters to undertake the EU customs clearance through a fiscal representative (e.g. transporter), without registering for Value Added Tax (VAT) in the EU entry state. The fiscal representative provides on the one hand the VAT ID number necessary for EU customs clearance and on the other hand assumes the reporting obligation for the necessary tax and intra-state notifications.

In connection with the amendment of Directive 2006/112/EC on the common system of VAT for the purpose of combating tax fraud on imports and other cross-border turnovers, the EU commission has issued a number of recommendations on 1 December 2008. They include the proposal that **future EU customs clearance is possible only by direct registration of the enterprise in the import state**. Such a tightening means that in future an EU customs clearance processed by a fiscal representative with his VAT ID number is no longer permitted. Therefore, any Swiss exporter who wishes to benefit from EU customs clearance must be registered for VAT purposes in the EU entry state. It is anticipated that the amendment is to become effective as per **1 January 2010**.

Subsequent price adjustments on imports of goods

In commercial transactions it may happen that the value of the goods imported into Switzerland is subsequently adjusted. This adjustment may be based on transfer pricing rules or it is also possible that the price is not final until inspection and analysis of the imported goods. As Switzerland applies customs duty according to weight, this price adjustment affects primarily the import VAT. If a **too high import value** is declared, the Customs Administration will on request make a correction only if the enterprise liable for the import VAT is not entitled to fully recover the input tax. If it turns out subsequently that the **import value is too low**, a correction must be made. This price correction can be notified in an informal letter to the competent Customs Area Management, whereby it imposes and charges VAT on the amount of the difference. From **1 January 2009** all Customs Areas Managements now charge **late payment interest of currently 5%** on the additional claim. They support this by reference to Art. 19, lit. d MWSTGV, which came into force already on 1 May 2007. Thus, every enterprise concerned must review measures in order to minimise or even avoid this additional late payment interest charge.

Swiss free trade treaties

During the past year Switzerland has made great strides in negotiating and concluding free trade agreements. The treaties with Canada, Japan and Columbia will come into effect in 2009 or at the beginning of 2010, negotiations with Peru and the states of the Gulf Cooperation Council have been concluded and investigations are under way for a possible treaty with e.g. China, India and Russia. Below we consider the treaty with **Japan** in more detail. On 19 February 2009 Switzerland was the first European state to sign a Free Trade and Economic Partnership Agreement with Japan, which will **probably come into effect this year**. It is Switzerland's most significant economic free trade agreement since the one concluded with the European Community in 1972, because Japan is the world's second largest economy and one of the most important foreign markets for the Swiss economy. The free trade agreement includes provisions covering e.g. trade in goods, exchange of services, cross border movement of individuals for business purposes or electronic trading. Based on the agreement Swiss enterprises are to benefit from simplified market access and improved conditions for trading and business transactions with Japan. The exporters' customs savings arising from the implementation of the agreement are estimated to amount to about CHF 100 million annually. At the same time Switzerland's annual customs receipts will fall by about CHF 12 million.

Selected current court judgments

Federal Administrative Court A-762/2007 dated 21 January 2009 re. Liability

Pursuant to Art. 9 Para. 1 and Art. 13 old Customs Law both the persons, who bring a good across the border and their principals are liable to pay customs duty. The legislator has therefore cast the **circle of persons liable to pay customs duty** widely. The purpose is to facilitate the collectability of the duty claim. The domestic person liable for payment can pursue its regress claim in civil law. The Federal Administrative Court holds in its judgment also that pursuant to Art 12 VSTrR the duty that is wrongly not imposed as a result of a contravention is to be paid subsequently irrespective of the culpability of a person. It is sufficient that as a result of the non-payment of a duty the person obtains the benefit of a wrongful advantage. The principal is therefore liable even if he was not aware of the incorrect or missing declaration. Therefore, **the principal or the purchaser must ensure** that the counterparty has satisfied all liabilities (import tax, customs duties, etc.).

Federal Administrative Court A-5104/2007 dated 19 January 2009 re. Customs classification and appeal period

The appellant notified the competent customs administration of a delivery "children's prams and related parts" duty free. After a physical check the Customs Administration corrected the import declaration. It classified the soft carrier bags under a different customs tariff and imposed the appropriate duty. The appeal raised by the appellant against the reclassification was approved by the Federal Administrative Court. Referring to this judgment the appellant with an application reclaimed the customs duties on the – during the period of the above appeal process – **finally assessed imports**. The Federal Administrative Court rejected the appeal, because the respective 60 day periods for appealing against the customs clearance had been expired. The appellant had been able firstly to appeal against every single customs clearance and secondly the opportunity existed of claiming **provisional customs clearance** of the goods. Furthermore, the Court also held that ignorance of the legal opportunities does not represent a hindrance through no fault of one's own.



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