CLECAT
European Association for Forwarding, Transport, Logistics and Customs Services

DG TAXUD Unit A2 (anonymised for press release)

1 September 2023

Concerns: Restrictions on customs representation in Austria – EUP (2022) 10308 – CHAP (2022) 01003

Your reference: Ares(2023)5412246 – 04/08/2023

Dear Sir, Madam,

On behalf of CLECAT, the European Association for Forwarding, Transport, Logistics and Customs Services, I would like to thank you for the recent response to our letter from 15 June 2022. In this letter we express our serious concerns about the practices introduced by the Austrian customs administration that restrict the use of customs representation in a way that we consider incompatible with the Union Customs Code (UCC).

CLECAT's Austrian member association, Zentralverband Spedition & Logistik is particularly pleased that the Commission has looked into our complaint about the restrictions of customs representation in Austria. These restrictions, which do not exist in this form in any other Member State, puts customs representatives in Austria at a comparative disadvantage in comparison to customs representatives carrying out their business in other Member States which distorts the level playing field for the profession in the EU. This concern is equally echoed by the Austrian Chamber of Commerce which has warned on its website[1] that 'developments in recent years have made the use of the special VAT ID No to an incalculable risk', highlighting also its efforts to change this situation which is detrimental to Austrian customs handling businesses: 'The Austrian Chamber of Commerce has constantly intervened at the Federal Ministry for Finance and once again pointed out the economic importance of the simplification according to Art. 6(3) UStG (Code 42..) for customs handling in Austria.'

We understand that DG TAXUD's preliminary conclusion is that the declarant's right to choose between direct and indirect representation is restricted by Austria's practice in an acceptable manner as importers must have a VAT identification number in Austria if they want to benefit from the VAT exemption on imports based on Art. 143(1)(d) [VAT Directive].

CLECAT is convinced that this assessment overlooks the particularities of the Austrian customs/fiscal representation system with regard to the use of code 42 which are not compatible with Union law.

[1] https://www.wko.at/service/aussenwirtschaft/Sonder-UID_fuer_Spediteure_(Code_4200).html

1. **EU established importers need only a fiscal representative but not an indirect customs representative; direct customs representation is an option provided under the UCC**

In order to benefit from the import VAT exemption, the importer needs to provide to the competent authorities (Art. 143(2)(a) VAT Directive)

- either his VAT identification number issued in the Member State of importation,
- or the VAT identification number of his tax representative in that Member State.

In Austria, when filing a customs declaration under code 42 because of a subsequent intra-Community supply, a fiscal representative of the supplier cannot act as such, he must act also act as an indirect customs representative (whereas in all other Member States, he is entitled to act as direct customs representative when he represents an EU established importer).

This Austrian way of combining customs and VAT law (thus restricting the options for customs representation) is well explained in guidelines "ZK-4200, Arbeitsrichtlinie Steuerbefreiung gemäß Art. 6 Abs. 3 UStG 1994":

„Die Anwendung der Sonder-UID ist nur zugelassen, wenn der Spediteur im Rahmen des indirekten Vertretungsverhältnisses als Anmelder im Zollverfahren auftritt (UStR 2000 Abschnitt 106.3.). Damit findet die Überführung in den zollrechtlich freien Verkehr im Namen des Spediteurs statt. Der Spediteur trägt als Anmelder (indirekter Vertreter) gegenüber der Zollbehörde das Risiko nicht nur hinsichtlich des Zolls, sondern auch bezogen auf die Einfuhrumsatzsteuer, wenn sich herausstellt, dass die Voraussetzungen für die Steuerbefreiung gemäß Art. 6 Abs. 3 UStG 1994 nicht erfüllt sind. Der Spediteur ist als indirekter Vertreter (Anmelder) Zoll- und Steuerschuldner nach Art. 77 UZK und nach Art. 79 UZK in Verbindung mit § 54 ZollR-DG und diesbezüglich nicht zum Vorsteuerabzug berechtigt."

For your convenience we add our translation:

"The use of the special VAT ID is only permitted if the freight forwarder acts as a declarant in the customs procedure as part of the indirect representation relationship (UStR 2000 Section 106.3.). This means that the goods are released for free circulation on behalf of the freight forwarder. As the declarant (indirect representative) vis-à-vis the customs authorities, the freight forwarder bears the risk not only with regard to customs, but also with regard to import VAT if it turns out that the requirements for tax exemption in accordance with Art. 6 (3) UStG 1994 are not met. As an indirect representative (declarant), the freight forwarder is liable for the customs and tax debt according to Art. 77 UCC and Art. 79 UCC in connection with § 54 ZollR-DG and is not entitled to VAT deduction in this regard."

Consequently, the first provision infringed by this arrangement is Art. 18(1) UCC which leaves a free choice between direct and indirect customs representation in cases where the person represented in the customs declaration is established in the EU customs territory (see Art. 170(2) UCC). Member States are not entitled to restrict the freedom of choice between direct and indirect customs representation provided under Art. 18 UCC for fiscal reasons; customs and fiscal law operate under different rules; they may refer to each other but may not restrict the rights of economic operators granted under one set of these rules for the benefit of the other.

2. **The exemption from import VAT is available for the importer, but not for his representative**

Art. 143(1)(d) VAT Directive grants the import VAT deduction to the importer, and not to his representative or freight forwarder. The Austrian rules or practices treat customs and fiscal representation in the same vein (though indirect fiscal representation does not exist under the VAT Directive), and put the fiscal representative into the position of the importer, though the VAT Directive restricts the right to benefit from the import VAT exemption to the importer.

The Austrian way of applying the customs provisions on representation in the VAT area, and treating the importer's representative as the importer thus infringes Art. 143(1)(d) VAT Directive.

3. The representative is not the primary import VAT debtor

Art. 32(2) VAT Directive stipulates that "if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods". Consequently, the debtor referred to in Art. 201 VAT Directive should, as a rule, be the importer who supplies the goods within the meaning of Art. 14 VAT Directive. It is evident that the freight forwarder/representative is neither the importer nor the supplier, given that he does not have the right to dispose of the import goods as owner. Making the representative nevertheless the primary debtor of import VAT contradicts these principles of the VAT Directive.

4. The representative is made the importer but deprived from the right to deduct the VAT

As the Austrian guidelines clearly explain, the representative is put in the position of the importer; however, if for some reason the import VAT exemption is eventually not applied, the representative is – unlike the importer – not entitled to deduct the import VAT.

In practice, there is a high number of cases in Austria, where the holder of the special VAT ID is charged, as the only debtor, the import VAT without being entitled to the right to deduction under Art. 168 VAT Directive. This infringes the principle of VAT neutrality for a tax on consumption pursuant to Art. 1(2) VAT Directive.

5. The freight forwarder/representative is not the supplier but nevertheless held liable even where an intra-EU acquisition has taken place

Code 42 represents a combination of the exemptions (*cf*. ECJ, C-531/17, Vetsch)

- from import VAT pursuant to Art. 143(1)(d) VAT Directive, and
- for supplies to taxable persons in other Member States pursuant to Art. 138 VAT Directive.

The Austrian rules and practices do not separate these intertwined provisions and focus with the special VAT ID on the import VAT. Under these rules the holder of the special VAT ID is treated as the importer. Even if this were legally possible, the person applying for the exemption under Art. 138 VAT Directive would, in addition to being the importer, also need to be the supplier (given that both provisions can only be applied together). It is beyond doubt that the freight forwarder/representative is not the supplier, given that he does not have the right, as owner, to dispose of the goods supplied to a taxable person in another Member State. On the contrary, he is only providing a service with regard to the import clearance, and possibly with the dispatch or transport of the goods to the person acquiring them in another Member State.

The consequence of the Austrian rules and practices is that the holder of the special VAT ID is often charged import VAT, even where he provides proof that the goods have arrived at a/the taxable person in a/the other Member State (which is then competent for charging the regular VAT), or when the VAT for an intra-EU acquisition has been paid there. In such cases there is no justification for the import Member State to charge the import VAT, given that a taxable import has been replaced by a taxable intra-EU acquisition (*cf.* ECJ, C-108/17, Enteco Baltic, para 70: "it suffices that the importer shows that the goods in question are intended to be dispatched or transported and subsequently are actually dispatched or transported to another Member State, without it being necessary to show that they are dispatched or transported specifically to the address of the purchaser of the goods"). Furthermore, this leads to a double or even quadrupled taxation, as AG Kokott has pointed out in C-531/17 (Vetsch, para 4,[2] and footnote 6[3]), notably because the right to VAT deduction is not available to the Austrian representative.

6. The Austrian rules/practices do not take into account the difference between Customs and VAT

In C-528/17 (Ježovnik) the ECJ has explained the difference between Customs and VAT in cases where a post-clearance recovery is taken as follows (paras 36-41):

"Secondly, it is clear, in essence, from the case-law of the Court that a supplier's liability to pay VAT after the event is assessed differently from an importer's liability to pay customs duties. Thus, an importer is required to pay customs duties payable on the importation of goods in respect of which the exporter has committed a customs offence, including where the importer is acting in good faith and has played no part in that offence (see, to that effect, judgment of 17 July 1997, Pascoal & Filhos, C-97/95, EU:C:1997:370, paragraph 61). By contrast, that case-law is not transposable to the assessment of whether the supplier, in an intra-Community transaction tainted by fraud, may be required to pay the VAT after the event (see, to that effect, judgment of 27 September 2007, Teleos and Others, C-409/04, EU:C:2007:548, paragraphs 54 to 57).

It follows that, in the context of the exemption for intra-Community supplies pursuant to Article 138 of the VAT Directive, a supplier who, in good faith and having taken every step which could reasonably be required of him, carried out a transaction which was, without his knowledge, connected with a fraud committed by the customer cannot be required to pay the VAT after the event (see, to that effect, judgment of 27 September 2007, Teleos and Others, C-409/04, EU:C:2007:548, paragraphs 65 to 67).

That case-law also applies to the scheme for exempting the importation of goods intended for intra-Community supply, laid down in Article 143(1)(d) of the VAT Directive (see, to that effect, judgment of 20 June 2018, Enteco Baltic, C-108/17, EU:C:2018:473, paragraph 94).

[2] Exceptionally, the present case does not concern a conventional supply chain, but an import with a subsequent intra-Community transfer by the purchaser. This produces two specific features. First, the question arises whether a VAT fraud at the end of a supply, which is planned and carried out only later, also 'infects' the preceding intra-Community transfer. This would have the 'benefit', from a fiscal point of view, that the tax revenue can be multiplied (in this case quadrupled (6)) where VAT fraud is discovered.

[3] The Republic of Austria could impose import VAT and at the same time refuse exemption for the transfer in Austria. The Republic of Bulgaria could in turn refuse deduction of VAT from the declared intra-Community acquisition and at the same time impose tax on the supply in Bulgaria.

As is apparent from the case law cited in paragraph 34 above, the import exemption is conditional upon the importer subsequently making an exempt intra-Community supply under Article 138 of the VAT Directive. Accordingly, both transactions must be treated consistently so as to ensure the inherent logic of the import exemption scheme laid down in Article 143(1)(d) of the VAT Directive.

Automatically denying a taxable importer and supplier, without regard to his diligence, the right to the exemption from import VAT in the case of fraud committed by a customer in the context of the subsequent intra-Community supply would have the effect of breaking the link between the import exemption and the exemption of the subsequent intra-Community supply. As is apparent from paragraph 37 above, a supplier may not be denied the latter exemption automatically in the case of fraud committed by the customer.

Accordingly, it cannot be inferred from the mere fact that, in customs matters, Article 78(3) of the Customs Code provides that, 'where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them', those authorities may require the taxable importer to pay the import VAT after the event in all circumstances and without assessing the diligence and good faith of that importer."

Given that in Austria imports for which code 42 has been declared by a representative are treated with regard to the withdrawal of the VAT exemptions according to the customs rules, these principles are not applied in Austria, and this neither by the customs administration nor by the courts. Instead of an application of this jurisprudence (i.e., not charging import VAT when the importer/supplier – or in Austrian practice in his place the customs/fiscal representative – was not aware of any subsequent fraud), the Austrian practice consists of charging nevertheless the import VAT, and allowing the representative to request a remission/repayment in analogue application of Art. 120 UCC on grounds of equity. Due to the different rules on the burden of proof (which lies on the administration if it performs a post-clearance import VAT recovery, but on the representative, if he applies for equity under Art. 120 UCC), the Austrian representative is placed in a less favourable situation than that provided for in Union law and jurisprudence.

7. Unrestricted, disproportionate financial liability for import VAT

Under customs law, the importer/declarant bears an unrestricted financial liability for import duties. This principle has been extended by Austria to import VAT in cases where code 42 is declared by the representative in the customs declaration. This contradicts the jurisprudence of the ECJ. In C-653/18 (Unitel), for example, the Court has held (para 34) that "the supplier cannot be held liable for the payment of the VAT irrespective of his involvement in the tax evasion committed by the person acquiring the goods. It would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever (see, to that effect, judgment of 21 February 2008, Netto Supermarkt, C-271/06, EU:C:2008:105, paragraph 23)."

Such disproportionate liability is, however, practiced in Austria due to a reference to the customs provisions with regard to the incurrence of an import VAT debt, and – for code 42 – the (only possible)

use of indirect representation even when the person represented is established in the EU customs territory but not registered for VAT in Austria.

8. Conclusion

We conclude that the Austrian rules and practices not only jeopardise a level playing field for customs/fiscal representatives in the internal market, they also infringe several provisions of customs and VAT law. We would therefore recommend you to consult the Commission's Legal Service, before taking a final decision on the follow-up to the complaint. We urge the Commission to make further efforts to bring Austria's rules and practices in line with Union law.

We thank you for your consideration and remain at your disposal for any further information.

Your sincerely,

Nicolette van der Jagt
Director General