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## THE EU AND ITS MEMBER STATES ON THE WAY TOWARDS A CUSTOMS SINGLE WINDOW

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### *Abstract*

*The European Union (EU) follows the global trend to establish a Single Window for customs purposes. This can form a remarkable step towards trade facilitation and function as an important tool to offer multiple benefits for customs and traders. In absence of binding global standard for setting up of Single Window systems public sectors are free to decide how they are going to implement Single Window programs. While this process is already complex for single customs authorities, it is an even bigger challenge for the EU and its Member States who share competences for customs processes. For a Single Window providing access to all customs authorities within the customs union different IT architectures are conceivable. This contribution examines whether plans have been developed to establish a single (regional) EU system rather than 28 national Single Windows and how far the EU's Single Window concept has already been developed and implemented.*

*Keywords: European Union, electronic customs, Single Window, Union Customs Code of the European Union, IT-architecture, e-Customs Decision, trade facilitation.*

### **Introduction**

On 22 February 2017 a new WTO tailor-made trade facilitation instrument – the Trade Facilitation Agreement (TFA) – entered into force. The EU ratified the agreement in October 2015.<sup>1</sup> Art. 10(4) thereof underlines the importance of a Single Window (SW) concept for the trade facilitation and encourages WTO members to implement it. Globally there is a wide scope of different approaches and definitions of a SW. It can cover customs-only aspects or comprise all relevant data and documents needed for cross-border trade. According to a broad UN definition, a SW is a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfil all import, export, and transit-related regulatory requirements.<sup>2</sup> If information is electronic, then individual data elements should be submitted only once. Hence, a SW is a form of a practical application of the trade facilitation concept.<sup>3</sup>

The obligation to establish a SW for the EU may also follow from Art. X:3(a) and

<sup>1</sup> Council Decision (EU) 2015/1947 of 1.10.2015 on the conclusion, on behalf of the European Union, of the Protocol Amending the Marrakesh Agreement establishing the World Trade Organization (OJ L 284 30.10.2015 p.1)

<sup>2</sup> UN/CEFACT Recommendation No. 33, p. 3.

<sup>3</sup> *Ibid.*

X:1 GATT which oblige each WTO member to administer its laws, regulations, decisions and rulings on certain customs-related matters in a uniform manner. The EU compliance with this provision was challenged by the US before the WTO in the mid-2000s. Although the Panel and the Appellate Body rejected most of the US arguments, the reason for that was the imprecise formulated claim since some central issues were found to be outside the Panel's terms of reference<sup>4</sup>. Hence, it is still not clarified what degree of the uniformity within the EU customs administration is required under Art. X GATT<sup>5</sup>. Apparently, the EU recognizes the above obligation given that one of the core objectives of the Union Customs Code (UCC) adopted in October 2013 is to achieve uniformity<sup>6</sup>. An important uniformity tool is supposed to be approximation of national IT systems.<sup>7</sup> However, it is recognized that development of customs IT systems may not be possible without clear and legally binding provisions on the procedures and the obligations of their participants.<sup>8</sup>

### 1. Single Window as an Essential Trade Facilitation Component

Regardless of the issue whether the current international disciplines contain a legal obligation to establish a SW, several economic advantages are associated with a SW. For the government they may include improvement in risk management and security, as well as increased revenue yields due to augmented trader compliance<sup>9</sup>. Traders should benefit from transparency and predictability. Moreover, the SW application should accelerate clearance and release of goods and herewith cut the traders' costs by reducing delays. Up to all, a better deployment of human and financial resources should contribute to productivity and competitiveness.<sup>10</sup> Due to these evident advantages 71 states have already implemented SWs by 2013, among them two EU Member States, the UK and Sweden.<sup>11</sup> The EU itself has decided to tap the benefits of a SW.

As long as there is no internationally binding standard for SW systems governments are free to decide whether and which type of SW they are going to implement. Most of the SWs maintained nowadays are limited, i.e. they do not link all government agencies,<sup>12</sup> and are either customs-centric or port-centric systems. The review of various systems that are currently in place or being developed undertaken by the UN/CEFACT International Trade Procedures Working Group show that mainly three different models can to be distinguished: a single authority system (mostly customs-centric), e.g. in Sweden, an automated information transaction system or a single automated system for self-regulating data channeling to various authorities after a single application, e.g. in Singapore and in the US.<sup>13</sup> Apparently, the EU decided for the single authority model. Under the secondary EU legislation customs shall collect all information – including information based on non customs-related legislation – required for imports and exports and share it with all customs and non-customs authorities and agencies involved in controlling the cross-border flow of goods.<sup>14</sup> Within the EU the SW is understood as the process that aimed to simplify border

<sup>4</sup> Panel Report WT/DS315/R, para. 7.33 seq.; Appellate Body Report WT/DS315/AB/R, para. 118 seq.

<sup>5</sup> Some scholars see the EU bound by the uniformity obligation. See e.g. Limbach, pp. 50 seq.; Lux, pp. 342-343.

<sup>6</sup> See among others rec. 5, 8, 15, and Art. 47(2), 50(1), 58 of the Regulation (EU) No 952/2013 of 9.10.2013 of the European Parliament and of the Council (OJ L 269 10.10.2013 p. 1).

<sup>7</sup> Lux, p. 345.

<sup>8</sup> Grave, p. 19.

<sup>9</sup> UN/CEFACT Recommendation No. 33, pp. 3, 10-11.

<sup>10</sup> *Ibid.*

<sup>11</sup> Ndonga, p. 26.

<sup>12</sup> *Ibid.*

<sup>13</sup> UN/CEFACT Recommendation No. 33, pp. 7 seq.

<sup>14</sup> Art. 47 UCC and Art. 4(4) of Decision 70/2008/EC of the European Parliament and of the Council of 15.1.2008 on a paperless environment for customs and trade (OJ L 23 26.1.2008 p. 21) (further – e-Customs Decision).

formalities by arranging a single (electronic) submission of information to fulfill cross-border regulatory requirements and by fostering closer collaboration between the border agencies and trade community.<sup>15</sup>

Due to the core technical component within a SW<sup>16</sup> structure, transparency and security of trade data information exchange are essential for establishing and maintaining a SW. Hence, a choice of technical design may have an impact on its legal and regulatory components.<sup>17</sup> In this context, there are two categories of issues which may arise during the SW implementation. The first is connected with the electronic form of the communications and transactions including mutual recognition of electronic signatures, data protection, intellectual property rights, and dispute resolution.<sup>18</sup> The second is related to the enforcement functions of the customs and other controlling agencies and concerns issues arising from the application of the submission flow-through model.<sup>19</sup> Establishing an appropriate legal environment should smooth out these legal issues and enable to build both national and regional SW-constructions. On a regional level SWs could be organized as a centralized technical model or as a bilateral one operating information exchange between national SWs using standardized protocols.<sup>20</sup> A centralized model is associated with more legal issues.<sup>21</sup> It is still not clear which model is pursued by the EU.<sup>22</sup> It could comprise a multitude of national single windows (NSW) or one centralized Union-wide Regional Single Window (RSW). It seems to be one of the fundamental challenges to apply a clear SW concept as there is still a lack on an agreed and commonly understood SW definition among the EU and the Member States.<sup>23</sup> Thus, in 2005 the European Commission communicated that a centralized “Single Window Community System“ was not envisaged for the time being<sup>24</sup> while characterizing in the same document the implementation of a Community SW as a milestone to be reached until 2012.<sup>25</sup>

Despite the ambiguity of the EU plan, it must be an obvious choice to make customs authorities a core of an EU SW structure since they receive information on all cross-border movements of goods and should be the best place to co-ordinate with other involved agencies. Considering the central role of customs, EU’s efforts are targeted at establishing a Customs SW which is focused on customs formalities and involves stakeholders dealing with cross-border movement of goods with the objective to enable traders to electronically lodge (only once) all information needed by customs and non-customs legislation.<sup>26</sup> There should be only one (central) access point to communicate with any customs authority in the EU within a RSW. For the time being a network of NSWs can serve as a “virtual RSW“. All access points must provide uniform access to data exchange with national customs authorities. Once data are lodged with customs, seamless data exchange with all customs authorities in the EU must be facilitated, as well as with other non-customs authorities which are involved in import procedures.

<sup>15</sup> Evaluation Report 2015, p. 9

<sup>16</sup> UN/CEFACT Recommendation No. 35, p. 6

<sup>17</sup> Chong, p. 189

<sup>18</sup> UN/CEFACT Recommendation No. 35, Annex II; Chong, p. 193.

<sup>19</sup> Chong, p. 191

<sup>20</sup> Chong, p. 189

<sup>21</sup> Chong, p. 193

<sup>22</sup> See e.g. Working Document Single Window at Community Level: TAXUD/1241/2005 - Rev. 5, p. 10; Evaluation Report 2015, pp. 42 seq.

<sup>23</sup> Evaluation Report 2015, p. 75

<sup>24</sup> European Commission, Working Document: TAXUD/1241/2005 - Rev. 5, p. 4

<sup>25</sup> European Commission, Working Document: TAXUD/1241/2005 - Rev. 5, pp. 6-7

<sup>26</sup> MASP 2016 Annex 2, p. 53

## **2. Legal Basis for the EU Single Window**

As established above, there is a no clear plan to establish a RSW in the EU but some legal provisions within the EU system may enable its construction. Thus, Art. 3(1)(a) and (e) TFEU provides the EU with exclusive competence for the customs union and common commercial policy. Customs law is a truly pioneer of communalization within the EU<sup>27</sup> and constitutes the largest harmonized body of laws within the EU legal system.<sup>28</sup> The EU customs codified legislation is the very first attempt for harmonization of administrative law in the Union.<sup>29</sup> Therefore, an establishment of a SW could be feasible from the legal point of view.

There is also a certain legal background for the execution phase on a decentralized model. Art. 4(3) TFEU anchors the principle of sincere cooperation between the Member States and the Union, which includes the objective of well-regulated and sincere administrative enforcement.<sup>30</sup> Particularly, according to Art. 33 TFEU the Union shall strengthen customs cooperation between the Member States and between the latter and the Commission. Furthermore, Art. 197(1) TFEU requires an effective implementation of the essential EU law by the Member States which is regarded as a matter of common interest. Moreover, Art. 291(2) TFEU foresees the delegation of implementing powers to the EU level where uniform conditions for implementing legally binding Union acts are needed.

According to the general principles of the EU legal system, it is for the Member States by virtue of Art. 5 TFEU to ensure that Union regulations are implemented within their territory. Insofar as Union law and its general principles do not include common rules to this effect, the national authorities when implementing Union legislation act in accordance with the procedural and substantive rules of their own national law. Thus, the Member States are entitled to administer EU law and to set rules for governing administrative procedures including IT-architecture. Accordingly, under Art. 16(1) Uniform Customs Code (UCC) customs electronic systems are to be developed, deployed and maintained by the Member States in cooperation with the Commission.

Notwithstanding its high relevance for international trade, EU law contains only few provisions addressing the SW implementation. It is astonishing not even to find the term “single window“ in the text of the UCC and in the interconnected legislation<sup>31</sup> despite the fact that it was adopted in order to complete the computerization of customs which was started with the security and safety amendment to its predecessor, the Community Customs Code.<sup>32</sup> Despite the omission of the direct reference in the UCC the regulation constitutes the basis for the European SW concept.<sup>33</sup> Art. 47(1) UCC mentions the one-stop-shop model. Whereas under the SW concept economic operators give information on goods to only one

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<sup>27</sup> Rogmann, p. 787 f.

<sup>28</sup> Witte, Rn. 3

<sup>29</sup> Rogmann, pp. 798-799

<sup>30</sup> Streinz, Rn. 539

<sup>31</sup> Commission Delegated Regulation (EU) 2015/2446 of 28.7.2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343 29.12.2015 p.1) (further UCC-DA); Commission Delegated Regulation (EU) 2016/341 of 17.12.2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards transitional rules for certain provisions of the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446 (OJ L 69 15.3.2016 p.1) (further UCC-TDA); Commission Implementing Regulation (EU) 2015/2447 of 24.11.2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343 29.12.2015 p. 558) (further UCC-IA)

<sup>32</sup> Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13.4.2005 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 117 4.5.2005 p.13)

<sup>33</sup> Truel, Maganaris, p. 15

contact point even if the data should reach different agencies, the controls for various purposes are performed under the “one-stop-shop“ concept at the same time and at the same place. It is hard to imagine how a one-stop-shop concept can work in an effective way without using a SW to deliver all data required for conducting of controls by different agencies.

Certain provisions on implementation of the SW concept may be also found in subordinated legal sources. For instance, Decision 2004/387/EC launched the so-called pan-European e-Government action which required measures to increase the efficiency of customs controls, to ensure the seamless flow of data in order to make customs clearance more efficient and to reduce administrative burdens.<sup>34</sup> Its implementation made clear that information and communication technologies (ICT) should play a crucial role within the customs procedure which provided an impulse to issue the e-Customs Decision in 2008 with an objective to create a paperless environment for customs and trade. Under Art. 4(6) of the e-Customs Decision the Member States and the Commission committed to establish and to make operational a framework of SW services in the field of customs. These SW services are intended to achieve the seamless flow of data between economic operators and customs authorities, between customs authorities and the Commission, and between customs authorities and other administrations or agencies. They shall also enable economic operators to submit all information required for import or export clearance to customs, including information required by non-customs related legislation.<sup>35</sup>

In its turn, the e-Customs Decision led to the generation of the electronic customs Multi-Annual Strategic Plan (MASP), a management and planning tool developed in collaboration between the Commission and the Member States in order to set the strategic framework and milestones for implementation of the e-Customs initiative while allocating tasks to the Commission and the Member States.<sup>36</sup> The latest revision of the MASP in 2016<sup>37</sup> pointed out that establishment of a single window environment was the area where the least progress has been made towards the commitments set out in the e-Customs Decision. None of the Member States has implemented a SW environment in full, although some were at the beginning to link up the authorities that coordinate border management. The difficulties inherent in trying to get authorities with different needs and mandates to work together should not be underestimated, especially at a European level, but coordination within the Commission (with DG MOVE’s SW initiative in the maritime transport sector) should be a priority.<sup>38</sup>

### **3. Implementation of the SW Concept into the Different Steps of Import Procedure**

According to the SW Roadmap developed by the United Nations Network of Experts for Paperless Trade and Transport in Asia and the Pacific (UNNExT),<sup>39</sup> a SW shall be built in five stages. The very first one previews a switch to paperless customs and electronic payments of customs duties. This step was launched in the EU in 2008 by issuing of the e-Customs Decision which is binding to all EU Member States. The implementation is still not completed. That phase should be followed by electronic document exchange between

<sup>34</sup> Art. 2(1) of Decision 2004/387/EC of the European Parliament and of the Council of 21.4.2004 on interoperable delivery of pan-European e-Government services to public administrations, businesses and citizens (IDABC) (OJ L 181 18.5.2004 p. 25)

<sup>35</sup> Art. 4(4)(c) of the e-Customs Decision

<sup>36</sup> Art. 8(2) of the e-Customs Decision

<sup>37</sup> Electronic Customs Multi – Annual Strategic Plan 2016, Revision (MASP Rev. 2016 Version 1.3), document Taxud.a.3(2016)3384892, 10.6.2016

<sup>38</sup> Evaluation Report 2015, p. 9

<sup>39</sup> UNNExT Single Window Planning and Implementation Guide, pp. 9 seq.

customs and connection to the IT systems of other regulatory agencies. There is no legal environment to step into this phase of the SW implementation for all customs procedures. Nowadays some customs-related aspects are more developed and the other could not overcome the first stage.

During the import procedure under the UCC different steps have to be taken which require communication between trade and customs. This sequence of communication between economic operators and customs leads to the situation that a number of data exchange processes have to be concluded over a period of time for a single import procedure. Consequently, a multiple submission of data is essential to follow the different steps of the import procedure. A fully fledged SW would offer a uniform access point for all necessary acts of communication. Until today the EU and its Member States follow the step-by-step approach and create individual solutions for every different import procedure step.

### **3.1. Registration**

Starting point of all customs-related communication is the registration under Art. 9 UCC. Already the e-Customs Decision provided for a system of identification and registration enabling economic operators to register only once for all their interactions with customs authorities throughout the Union.<sup>40</sup> The Economic Operators Registration and Identification number (EORI number) to be assigned to each economic operator<sup>41</sup> is designed to serve as a common reference in their relations with customs authorities throughout the EU as well as for the exchange of information between the customs authorities and between customs authorities and other authorities.<sup>42</sup> Using the EORI number is mandatory and a pre-condition to lodge all relevant declarations with customs authorities.<sup>43</sup>

The introduction of the EORI number included the obligation to develop a central electronic system for storing and exchanging data on the registration of economic operators and other persons and on the EORI numbers.<sup>44</sup> For a number of reasons a de-centralized system of registration has been implemented. Thus, Member States register economic operators anyway and link that registration to VAT, excise tax and other national register systems. In addition, there was a lack of resources on the Union level.<sup>45</sup> Economic operators established in the customs territory of the Union shall register with the customs authorities responsible for the place where they are established.<sup>46</sup> No RSW is used for the registration. In some Member States it is not even possible to register by electronic means of communication. Classic forms like post or fax still have to be used to make lodgment of the registration legally binding.<sup>47</sup>

The assignment of an EORI number, however, does not automatically give access to electronic communication with customs authorities in the Member States. Under national law it is essential to register for access to electronic customs systems of a Member State in order to be able to sign in and to lodge electronic information.<sup>48</sup> Every Member State runs its own IT system which makes an individual registration inevitable in order to get access to the national system in question. Hence, an importer into the EU needs up to 28 different

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<sup>40</sup> Art. 4(1) of the e-Customs Decision

<sup>41</sup> Art. 5(5) UCC stipulates that "economic operator" means a person who, in the course of his or her business, is involved in activities covered by the customs legislation

<sup>42</sup> Rec. 3 to Regulation (EC) No 312/2009 of 16.4.2009 (OJ L 98 17.4.2009 p. 3)

<sup>43</sup> Limbach, p. 96

<sup>44</sup> Rec. 8 to Regulation (EC) No 312/2009

<sup>45</sup> Working Document: TAXUD/1241/2005 - Rev. 5 (February 2006), pp. 8-9

<sup>46</sup> Art. 9(1) UCC

<sup>47</sup> For Germany see <http://www.zoll.de/EN/Businesses/Movement-of-goods/Import/Duties-and-taxes/EORI-number/Questions-and-answers/questions-and-answers.html> (24 February 2017)

<sup>48</sup> In Germany § 8a der Zollverordnung; in the UK the Data Protection Act (1998)

registrations which require different technical standards in order to be able to communicate with customs authorities.

An essential part of the SW technical requirements is the recognition of electronic signatures. All electronic communication, whether through a SW or not, require electronic documents performing the same function and receive the same legal recognition as paper-based documents.<sup>49</sup> Customs legislation traditionally requires a signature for identifying the signatory, associate the signatory to the content of the document, and safeguard the integrity of the document. Therefore, e-signatures have to be functionally equivalent to the classic form of signature.<sup>50</sup>

Customs administrations in the EU still apply national solutions for e-signatures. For instance, in Germany the “Beteiligten-Identifikations-Nummer” (BIN) replaces the handwritten signature under electronic communication.<sup>51</sup> The assignment has to be applied for at German customs administration, still using a paper form with a handwritten signature.<sup>52</sup>

It is obvious that a fully fledged EU customs SW should accept registration on a cross-border basis and electronic signing of all documents.

### **3.2. Pre-Arrival Declaration**

According to Art. 36a of the Community Customs Code (now Art. 127 UCC), which was introduced by the security amendment to the Customs Code,<sup>53</sup> economic operators are under the obligation that goods brought into the EU customs territory be covered by an entry summary declaration (ENS). An ENS must be submitted electronically to the customs office of first entry in accordance with the national technical specifications established by the Member States.<sup>54</sup>

Lodging of information has to take place before the goods are brought into the EU customs territory. The obligation to submit a ENS applies to all means of transport where time limits differ between the various means of transport.<sup>55</sup> Customs offices of entry are to carry out, as far as possible before the arrival of the goods, appropriate risk analysis, primarily for security and safety purposes on basis of the data received via the lodged ENS (Art. 128 UCC).<sup>56</sup> The customs office of first entry must send all “positive risk results” (i.e. information about all shipments that have been identified as constituting a risk) to all subsequent EU ports of call listed in the ENS.

To provide for the essential IT architecture, EU has developed and implemented the Import Control System (ICS). The ICS is a system architecture for the lodging and processing of ENS, and for the exchange of messages between national customs administrations and between them and economic operators or the European Commission. In the development of the ICS only the first phase has been deployed so far which covers lodging, handling and processing of ENS, exchange of safety and security risk analysis results between Member States, and handling of international diversions.<sup>57</sup> Despite the fact that the ICS is an EU system, ENS must be filed according to nationally determined technical specifications. A single pan-European repository for the lodging of ENS is still to be installed to establish a single gateway for EU ENS filings.

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<sup>49</sup> Ndonga, pp. 133-134

<sup>50</sup> Ndonga, p. 139

<sup>51</sup> No 4.1(3) of the Verfahrensanweisung zum IT-Verfahren ATLAS, Release 8.7 (June 2016)

<sup>52</sup> Generaldirektion, Merkblatt für Teilnehmer zum ATLAS-Release 8.7/AES-Release 2.4 (March 2017), No 3.2.1.2 and Zimmermann; in general see Fabio, §21.03

<sup>53</sup> Regulation (EC) 648/2005

<sup>54</sup> Art. 127(3) UCC

<sup>55</sup> Lyons, pp. 322-323; exceptions to the lodging of the ENS are eligible under Art. 127 UCC

<sup>56</sup> Lyons, pp. 321-323; Fabio, §6.03

<sup>57</sup> Guidelines on entry and summary declarations, TAXUD/2010/0051, p. 18

In order to achieve a uniform risk analysis by the national customs administrations, Commission and the Member States cooperated to develop and implement a common risk management framework (CMRF)<sup>58</sup> which comprises the application of common risk criteria based on Art. 50(1) UCC.<sup>59</sup> For this purpose data need to be accessible at the same time to multiple Member States to support their flexible use, management and exploitation.<sup>60</sup> Coordination between customs and other authorities or agencies and closer international cooperation would be essential to strengthen the security and integrity of the supply chain.<sup>61</sup> To apply the common risk criteria the European Commission runs the Common Customs Risk Management System (CRMS). This platform for wide-ranging communication between Member States and for systematic risk information exchange is available to Member States' risk analysis centers, to all external border control points in the EU and to the Commission.<sup>62</sup> It is obvious that this system is only used for "internal" communication and not as a SW tool even if it is a stepping stone towards a SW architecture. It functions as an instrument to analyze ENS lodged by importers, not as an access point for lodging pre-arrival declarations.

The risk management system cannot be applied in isolation with other electronic systems dealing with international trade in goods. Accordingly, the EU Strategy and Action Plan for customs risk management<sup>63</sup> demands complementarity and coherence with ongoing, related initiatives, both in customs and in other policy areas. One important element of the relevant legislation is the Reporting Formalities Directive (RFD) which has been adopted under the EU transport policy.<sup>64</sup> This legal instrument stipulates which access points have to be used by trade to forward the information needed for the ENS to customs authorities. The EU Member States apply different access points depending on the mode of transport for the goods the most important from which – maritime cargo and transport via land – will be used to demonstrate the different approaches.

### **3.3. Transport via sea**

The development of a SW is the main requirement for the RFD implementation. The objective of the latter is that parties involved in trade and transport will be able to lodge standardized information and documents via an electronic SW to fulfil reporting formalities as well as to share ship-related information and to link it with other national electronic systems.<sup>65</sup> Individual data elements should only be submitted once.<sup>66</sup> Under Art. 5(1) RFD the Member States have to accept the fulfilment of reporting formalities in electronic format and their transmission via a SW.

The RFD does not contain express provisions whether the SW is intended to be established on the basis of NSWs or a RSW. The legal nature of the act denotes establishment of a NSWs given that under Art. 288 TFEU a directive is addressed to the Member States and have to be implemented by them individually, leading to 28 NSWs.<sup>67</sup>

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<sup>58</sup> Now based on Art. 46(3) UCC

<sup>59</sup> [http://ec.europa.eu/taxation\\_customs/general-information-customs/customs-risk-management/measure-customs-risk-management-framework-crmf\\_de](http://ec.europa.eu/taxation_customs/general-information-customs/customs-risk-management/measure-customs-risk-management-framework-crmf_de).

<sup>60</sup> COM(2012) 793 final, p. 12

<sup>61</sup> COM(2012) 793 final, p. 15

<sup>62</sup> COM(2012) 793 final, p. 4

<sup>63</sup> COM (2014) 527 final

<sup>64</sup> Directive 2010/65/EU of 20.10.2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC (OJ L 283 29.10.2010 p. 1)

<sup>65</sup> COM(2014) 527 final, p. 3

<sup>66</sup> Rec. 9 of Directive 2010/65/EU

<sup>67</sup> The Commission mentions the setting up national single windows as one of the functions of Directive 2010/65/EU, see COM (2014) 527 final, p. 3



Every NSW shall be based on the SafeSeaNet (SSN) which was introduced by Directive 2002/59/EC<sup>68</sup> in order to establish the Union maritime information exchange system developed by the Commission in cooperation with the Member States.<sup>69</sup> However, SSN was not established to deal with customs matters, but principally to prevent accidents and pollution at sea as well as to enhance the efficiency of maritime traffic. The SSN consists of the central SSN system (run by the European Commission) and the national SSN systems.<sup>70</sup> The SW links the SSN, e-customs and other systems for entering or calling up data (Art. 5(1) RFD).

The submission of data by the shipping industry has to be conducted to the NSW. The list of data forming the reporting formalities is laid down in the Annex to the RFD. The UCC-based Entry Summary Declaration (ENS) is listed in Part A No 6 thereof. Hence, the function of the RFD for customs matters is restricted to lay down the NSW as an access point for lodgment of ENS.

It is remarkable that harmonization and coordination of reporting formalities is required only within a single Member State (Art. 3(1) RFD) which can lead to differing reporting formalities between Member States. Each of them is entitled to request that the ENS be lodged in any of the 24 official EU languages that are “acceptable” to it. In practice it is required that only elements which are not accepted in English to be translated into the language of an importing country.

Once Member States received the electronic data they have to make the information available in their national SSN systems as well as to enable access to relevant parts of such information to other Member States via the central SSN system (Art. 6(1) RFD). As a consequence, data exchange with other Member States may only be conducted using EU’s central SSN system.

As the RFD is not part of EU’s customs legislation<sup>71</sup> the link between it and a customs SW is not obvious. Surprisingly, data exchange under Art. 6 RFD is restricted to non-customs-related information. Hence, the SW under the RFD is restricted to the NSW approach for customs data whereas for other data the exchange platform under Art. 6 RFD (the central SSN) is used as means to link NSWs to achieve a RSW model.<sup>72</sup> The cargo information shall be exchanged through other EU systems (such as the e-Customs for the cargo) only if such a possibility is provided for in an EU legal act.<sup>73</sup> Even if under the RFD ENS constitutes a part of the reporting formalities which have to be forwarded via the NSW, data exchange with customs authorities in other Member States may not be conducted via the central SSN.

Under Art. 6(2) RFD NSW-authorities have to provide access to customs authorities to the information which they received via the NSW.<sup>74</sup> This is essential for all imports via ship as the ENS is to be submitted to the customs office of first entry (Art. 127(3) UCC). For customs purposes the Import Control System (ICS) was established to receive ENS data lodged by trade and to enable exchange of risk assessment-related messages between national customs authorities. Unlike for communication with the NSWs, all messages related to the receipt of the ENS in the ICS are harmonized EU-wide.<sup>75</sup> There must be a link

<sup>68</sup> Directive 2002/59/EC of 27.6.2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC (OJ L 208 5.8.2002 p. 10)

<sup>69</sup> European Commission. National Single Window Guidelines of 17.4.2015 (further - NSW Guidelines), p. 10.

<sup>70</sup> NSW Guidelines, p. 10

<sup>71</sup> It has been adopted on basis of Art. 100(2) TFEU, which is part of Transport Title (Title VI) of the TFEU.

<sup>72</sup> NSW guidelines, fig. 1, p. 11

<sup>73</sup> NSW guidelines, p. 10

<sup>74</sup> NSW guidelines, p. 20

<sup>75</sup> NSW guidelines, Annex 2

between NSW and the ICS to manage the submission of cargo data for the ENS purposes and to ensure that data elements have to be transmitted to the authorities only once. It is up to the Member States to decide whether the NSW and the national SSN component are integrated into one system or they are separate but interoperable.<sup>76</sup> In any case, NSW and ICS will work as independent electronic systems to share information. It must be decided whether ENS have to be forwarded to the ICS and the relevant data is made available to the NSW, or all cargo information will be submitted through the NSW which will forward the data to the ICS. Considering the obligation to use the NSW for communication with shipment industry (Art. 5 RFD) and with a view to avoid double-communication, only the latter option seems to be in conformity with the RFD. This *modus operandi* is in compliance with EU customs law as Art. 127(7) UCC stipulates that customs authorities may accept lodging ENS via commercial, port or transport information systems.

This approach to implement NSWs instead of one RSW conforms to the strategy as laid down in the e-Customs Decision. However, it departs from the Customs SW model if electronic entry points of other authorities have to be used.

### **3.4. Transport via road**

Lodgement of ENS via the NSW applies only to maritime cargo. For goods carried on-board of other means of transport an ENS has to be lodged directly to the ICS network via the access point of the national customs administration representing the customs office of first entry (place of entry to the EU).

Even if the content, format and codes of the ENS are harmonised by EU law<sup>77</sup> the carrier of the goods has to communicate with national IT-systems<sup>78</sup> whose technical standards still lack harmonization. This leads to data exchange with customs systems in 28 Member States with different requirements. Therefore, the EU Customs SW program requires uniform standards for access to customs systems of the Member States.

### **3.5. Arrival Notification**

For goods transported by sea or by air the operator of the vessel or the aircraft entering the customs territory of the Union has to notify the arrival to the customs office of first entry upon arrival (Art. 133 UCC). Again, customs authorities may accept that port or airport systems or other available information methods to be used to notify the arrival. In road and rail traffic, this function is fulfilled by the presentation of the goods.

As Phase 1 of the ICS implementation does not cover arrival notifications, technical details for the lodgement of the notification is still a matter of national customs legislation.<sup>79</sup> If already forwarding of ENS lacks harmonization despite common technical standards, even less uniformity between the Member States can be expected for communicating the arrival notification. At least carriers should be able to lodge arrival notifications via the same system as they could lodge the ENS within that Member State for the time being.<sup>80</sup>

### **3.6. Presentation of the Goods**

The next stage reached by goods during the import procedure is presentation of goods to customs which stands for notification of the arrival of goods to the customs authorities (Art. 5 No 33 UCC). Goods have to be presented to customs immediately upon their arrival at the designated customs office or place (Art. 139(1) UCC). Core information to be

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<sup>76</sup> NSW guidelines, p. 29

<sup>77</sup> Art. 2(2) and Annex B (F2a to F5) to UCC-DA (data requirements); Art. 2(2) and Annex B to UCC-IA (formats and codes)

<sup>78</sup> Art. 16 UCC, Art. 182 UCC-IA

<sup>79</sup> Guidelines on entry and summary declarations, TAXUD/2010/0051, p. 18

<sup>80</sup> In Germany both ENS and arrival notification have to be forwarded via ATLAS-EAS system

conveyed to the customs is the location of the goods in question. Like for the ENS data requirements, relevant formats and codes are harmonized by EU legislation.<sup>81</sup>

Like for an ENS and an arrival notification, customs authorities may accept use of port or airport systems or other available information methods (Art. 190 UCC-IA). This option demonstrates that no SW system is expected to be also deployed also under the UCC as long as competing access points can be offered to importers. Phase 1 of the ICS does not cover presentation of goods. Thus, establishing further details for the lodgement of the message forming the presentation of goods is still a national matter.<sup>82</sup>

### **3.7. Temporary Storage**

The next phase of the import procedure is the "temporary storage" which covers the period between presentation of goods and their placing under a customs procedure or re-export. This specific status of the goods also delivers reasons for communication between economic operators and customs since a temporary storage declaration has to be lodged.<sup>83</sup> A declarant has to deliver information in order to identify the goods, especially description of the goods.<sup>84</sup> Again, content, format and codes of the temporary storage declaration are harmonised by EU law.<sup>85</sup> Here again, determination of further details for the lodgement of the message is left to the Member States.<sup>86</sup> This gap in EU legislation and the absence of a community entry point for the declaration leads also for this step of import procedure to diverging national systems. Likewise customs authorities may accept that commercial, port or transport information systems are used to lodge a temporary storage declaration (Art. 145 (6) UCC).

### **3.8. Customs Declaration**

Under Art. 158(1) UCC all goods intended to be placed under a customs procedure have to be covered by a customs declaration. Only in exceptional cases a customs declaration may be lodged using means other than electronic data-processing techniques (Art. 6 and 158(2) UCC). The core challenge for the lodgement of customs declarations via a SW is to deliver all relevant data and supporting documents all at once.

Except for simplified procedures customs declarations have to contain all the particulars necessary for application of the provisions governing the customs procedure for which the goods are declared (Art. 162 UCC). A functional SW architecture requires harmonized data sets to be forwarded to customs as well as uniform technical standards. Both conditions have not been achieved in the EU yet. Also under the UCC data to be provided for a customs declaration are divided into those which are mandatory (data required by every Member State) and others which are optional for the Member States.<sup>87</sup> Different data requirements in conjunction with non-harmonised IT-standards do not allow setting up interoperable IT systems which is the basis for an EU customs SW.

The supporting documents required for the chosen customs procedure have to be in the declarant's possession and at the disposal of the customs authorities at the time when the customs declaration is lodged (Art. 163(1) UCC). However, supporting documents shall be provided to the customs authorities where Union legislation so requires or where necessary

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<sup>81</sup> Art. 2(2) and Annex B (G3) to UCC-DA (data requirements); Art. 2(2) and Annex B to UCC-IA (formats and codes)

<sup>82</sup> Guidelines on entry and summary declarations, TAXUD/2010/0051, p. 18

<sup>83</sup> Art. 5 No. 11, 145(1) and (3) UCC

<sup>84</sup> The commodity code (CN) is an alternative to the description of goods when it is not provided

<sup>85</sup> Art. 2(2) and Annex B (G4) to UCC-DA (data requirements); Art. 2(2) and Annex B to UCC-IA (formats and codes)

<sup>86</sup> Guidelines on entry and summary declarations, p. 18

<sup>87</sup> Annex B, Title I, Chapter 2, Section C UCC-DA

for customs controls (Art. 163(2) UCC). Hence, supporting documents fall into one of two categories: category 1 for documents, which have not to be presented in the standard case but must be shown if customs so requests; category 2 for documents which have to be provided to customs in every case. In this situation, a declarant has to submit the supporting documents to the supervising customs office before the customs declaration can be accepted and the goods released. Using the category 2 documents will allow a fully electronic environment only if all necessary supporting documents are available in electronic form, or if at least their existence can be checked against a database. This concerns import permits, licences and documents related to prohibitions and restrictions.<sup>88</sup> As these documents are issued by a variety of administrations and in many cases still paper-based no uniform standard has been developed yet.<sup>89</sup>

The Commission and national customs authorities are aware about this challenge. Several Member States started to connect their customs systems with particular agencies to check the validity of electronic documents against a database.<sup>90</sup> On the EU level the SW Common Veterinary Entry Document (SW-CVED) project has been launched as the first one in cooperation with several Member States in order to provide automated acceptance of certificates. For this purpose, national customs systems are interconnected with the relevant EU certificate database which holds the entry documents.<sup>91</sup>

### **Summary and concluding remarks**

A closer look at the status quo towards a EU customs SW reveals that it is still a long way to establish a fully functional SW. European Commission sees the progress made in relation to the “complexity of the SW concept as such”.<sup>92</sup> The existing national IT systems are not prepared to serve as a basis for a SW architecture yet - whether on a centralized (RSW) or a decentralized (NSW) model. The effect of the current situation is that economic operators using points of entry in several Member States are faced with numerous and differing obligations. Lack of harmonization in imposes an economic burden on business by forcing economic operators to outsource certain customs operations in order to cope with the regulatory complexity or to install complicated and costly internal operations and processes.<sup>93</sup>

A RSW system requires the introduction of transnational and interoperable IT systems within the EU Customs Union<sup>94</sup> which cannot be achieved without the essential harmonization of IT standards. For this purpose, establishment of NSWs is envisaged to function as a gateway to non-customs agencies in the individual Member State. They are to be connected to one another and will be supported by the Single Electronic Access Point (SEAP).<sup>95</sup> The core obstacles for the essential harmonization include a non-binding nature and a limited scope of the common technical and functional specifications and preferences for established national systems („legacy systems“).<sup>96</sup> Member States have invested remarkable amounts to set up functioning national IT systems for customs purposes while the EU itself does not have resources to establish its own system which would automatically deliver a single standard for the whole customs union.

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<sup>88</sup> Henke in Witte/Wolffgang, para. 358

<sup>89</sup> Evaluation 2015, p. 67

<sup>90</sup> 2014 e-Customs progress report, p. 21

<sup>91</sup> MASP Rev. 2016 (Version 1.3), p. 53

<sup>92</sup> MASP Rev. 2016 (Version 1.3), Annex 2, p. 53

<sup>93</sup> Evaluation 2015, p. 67

<sup>94</sup> Limbach, p. 152

<sup>95</sup> [http://ec.europa.eu/taxation\\_customs/general-information-customs/electronic-customs/individual-projects\\_en#sw](http://ec.europa.eu/taxation_customs/general-information-customs/electronic-customs/individual-projects_en#sw); SEAP is not a system by itself and will be the link between traders and customs systems, see MASP Rev. 2016 (Version 1.3), p. 127

<sup>96</sup> Evaluation 2015, pp. 53-54

Under Art. 278 UCC non-electronic means may be used for the exchange and storage of information on a transitional basis until 31 December 2020. At the same time, Art. 280 UCC provides that a work programme relating to the development and deployment of the electronic system has to be drawn up by the Commission in order to identify the relevant electronic systems and to specify the legal basis, key milestones and envisaged dates for starting the operation.<sup>97</sup> The current Work Programme sets out an extensive plan for the implementation of electronic systems and takes into account the need to achieve synchronicity with the MASP.<sup>98</sup>

The Work Programme follows the UCC in not mentioning the SW as one of the electronic system to be achieved. This silence demonstrates that the EU does not envisage completion of the SW until the end of 2020. The MASP revision 2016 provides a complete and up-to-date overview of all future customs projects and envisaged IT requirements as well as a detailed planning for the projects covered. For some policy domains including SW it reflects the progress only.<sup>99</sup> Reporting the progress in implementing the EU Customs SW Program is limited to “EU SW-CVED Phase 1”.<sup>100</sup>

The validation of further supporting documents to the customs declaration shall be a part of future projects without the MASP mentioning a specific date or a time window.<sup>101</sup> This lack of providing a legally binding date for the implementation of the SW programme should be owed to the fact that the SW objective under the e-Customs Decision is not linked to any timeframe for its implementation. It can be expected that realistic deadlines will be subject of a future revised e-Customs Decision which is envisaged by the MASP.<sup>102</sup> It seems to be a long and stony way until the EU Customs SW will be completed.

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<sup>97</sup> Consideration (5) of Commission implementing decision (EU) 2016/578 of 11.4.2016 establishing the Work Programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code (OJ L 99 15.4.2016 p.6), replacing the first Work Programme adopted by Commission Implementing Decision 2014/255/EU (further - Work Programme)

<sup>98</sup> Considerations (3) and (10) of the Work Programme

<sup>99</sup> MASP Rev. 2016 (Version 1.3), p. 3

<sup>100</sup> MASP Rev. 2016 (Version 1.3), Annex 1, Group 1: Customs European Information Systems, 1.13

<sup>101</sup> MASP Rev. 2016 (Version 1.3), Annex 2, p. 53

<sup>102</sup> MASP Rev. 2016 (Version 1.3), Annex 2, p. 55

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