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Brexit Customs Compliance for Aircraft

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Paul Cawley, Director of Indirect Taxes for KPMG in the Crown Dependencies, explores the importance of determining the Customs status for aircraft now that the UK has left the EU VAT and Customs territory.

Now that Brexit day has passed and the EU and UK provisionally operate under the "Trade and Cooperation Agreement" ("TCA") that was agreed on 24 December 2020, it is important for owners to understand the EU and UK Customs status of their aircraft in order to ensure that they are operated compliantly for VAT and Customs purposes going forward.

Prior to the Brexit Transitional Period ("TP") expiring (at 23.00 GMT/ 0.00 CET on 31 December 2020 to be precise), maintaining VAT and Customs compliance for aircraft which had been imported through the EU was relatively simple. The UK's membership of the EU meant that aircraft which had been formally imported through the UK (including the Isle of Man for these purposes) or the EU obtained the Customs status of "Union goods" and were entitled to travel under "free circulation" in both territories, including where internal traffic took place.

The expiry of the Brexit TP and the removal of the UK[1]. from the VAT and Customs territory of the EU has dramatically changed this position, with the UK now forming its own Customs union outside of the EU, including the Crown Dependencies[2]. Although the UK and the EU have provisionally agreed the TCA, which, subject to EU Parliament scrutiny, is expected to be formalised by March 2021, it does not provide for an alternative to the previous common VAT and Customs territory – i.e. goods which move between the EU and the UK are now unequivocally moved on import/ export terms.

For aircraft which are purchased after the expiry of the Brexit TP the basic position is that aircraft imported through the UK will not also be considered to have been imported into the EU, leaving the two options of either operating in the EU under Temporary Admission ("TA") (subject to meeting the prevailing TA conditions, which can be perceived as restrictive) or, undertaking a further Customs importation procedure in the EU.

Similarly, an aircraft imported now through the EU will not be considered to have also been imported into the UK and will also be required to undertake a Customs importation procedure if the conditions for TA cannot be met. The impact of this for owners with a nexus in both the UK and the EU (or for those who simply prefer not to use TA) is challenging, with many now considering dual importation (i.e. importing through both the EU and the UK).

However, what about the thousands of aircraft that were imported into the EU prior to the expiry of the Brexit TP? What VAT and Customs position do they now have and what measures (if any) should their owners take to ensure VAT and Customs compliance?

[1] Exceptionally, The Protocol on Ireland/ Northern Ireland broadly has the effect of EU VAT and Customs law continuing to be applied to Northern Ireland even though it forms part of the UK VAT and Customs territory.

[2] The Crown Dependencies comprise the Channel Islands and the Isle of Man. In addition to sharing a Customs territory, the UK and the Isle of Man also share a common VAT territory.

"Union goods" and "domestic goods"

Firstly, it is important to consider where an aircraft was physically located at the expiry of the Brexit TP – this is because there is a direct and immediate link between the physical location of goods and their Customs and VAT status – i.e. goods will only have free circulation status for Customs purposes in the territory where they are physically located (this excludes aircraft imported under TA).

At the expiry of the Brexit TP, when the UK became a separate Customs territory outside of the EU, the legal presumption was that goods located in the EU (having previously been imported) retained the Customs status of "Union goods"[3] - i.e. unless they were in the EU under a suspension regime (e.g. TA) they were there under EU free circulation. Conversely, goods that were located in the UK retained the equivalent UK Customs status of "domestic goods"[4]. This concept is quite evident from much of the Brexit guidance published by the EU and the UK authorities, where significant emphasis was given to the physical location of goods in and around Brexit day and their resulting Customs status.

This is a fundamental concept in Customs law (i.e. the Union Customs Code ("UCC")) which must be considered in determining the Customs status of aircraft. The strict legal position under EU law is that goods which are in free circulation and are present in the EU are presumed to be Union goods (unless the contrary is shown).[5] Goods which have been removed (or "taken out") of the Customs territory of the EU are considered to be "non-Union goods".[6] The consequence of Brexit is that the UK has been removed of "taken out" of the EU at the expiry of the Brexit TP.

The implication of the expiry of the Brexit TP for aircraft from a Customs perspective was, at least from the perspective of the Customs law, aircraft located in the UK at that moment will have lost EU Union goods status, whilst aircraft located in the EU will not have UK domestic goods status – i.e. it is not possible to be in free circulation in two different Customs territories simultaneously. This is nothing unusual as it is the binary position for goods removed from a Customs territory.

However, it is important to emphasise that a loss of Union goods or domestic goods status will only be temporary if an aircraft can later qualify for Returned Goods Relief.

Returned Goods Relief ("RGR")

RGR is a Customs relief that, until Brexit, received relatively little focus in the aircraft sector. RGR's purpose is to relieve goods that are temporarily exported from the EU from being subjected to further Customs formalities and duties when they return, subject to certain conditions regarding *inter alia* the amount of time spent outside of the EU and their condition being the same on return.

Such is the transient nature of aircraft that the conditions for RGR are typically met without the owner or operator ever recognising it. However, RGR is an important relief for aircraft, with the implication being that aircraft that do not meet the conditions for RGR (or TA) will *prima facie* be required to be re-imported - a fact that Brexit has highlighted. The availability of RGR must be considered in assessing whether it is necessary for an aircraft to be formally re-imported in a particular territory after Brexit. A failure to do this could result in an aircraft being re-imported into the EU when it was not actually necessary.

Article 203 of the UCC which provides the conditions for RGR states inter alia *"Non-Union goods which, having originally been exported as Union goods from the Customs territory of the Union, are returned to that territory within a period of three years and declared for release for free circulation shall, upon application by the person concerned, be granted relief from import duty."*

The inference of this opening paragraph of Article 203 is that goods must be exported[7] outside of the Customs territory and they must have previously been "Union goods".

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[3] Article 5 (23), Union Customs Code.

[4] Part 1, 33 (1), Taxation (Cross-border Trade) Act 2018.

[5] Article 153(1), Union Customs Code.

[6] Article 154(a), Union Customs Code.

[7] It should be noted that an "export" for RGR purposes is temporary and such exports will rarely be accompanied by a formal Customs export document. Specifically, Article 245(1)(iii) of UCC Commission Delegated Regulations 2015/2446 provides for a waiver from this requirement for "means of transport".

Returned Goods Relief ("RGR") continued…

This regulation was clearly not written with Brexit in mind, as at the expiry of the Brexit TP, the UK had until that point been a part of the Customs territory of the Union and goods located in the UK at that moment cannot have been exported there.

It is very important to stress that the EU Member State through which an aircraft was originally imported before the expiry of the Brexit TP is immaterial. Until that point the UK remained part of the Customs territory of the Union and aircraft imported through the UK (or any other Member State) and which were put to free circulation obtained the Customs status of Union goods, which is the requirement of Article 203. Therefore, it is not necessary to consider the particular pre-Brexit Member State of import when determining whether an aircraft has qualified for RGR after expiry of the Brexit TP, only that it had actually been imported into one of the 28 Member States. It follows, that to assume that all aircraft imported through the UK before expiry of the Brexit TP will require a further importation through the EU after expiry of the Brexit TP is not a view that is supported by Article 203.

Therefore, aircraft that were located in the EU at the expiry of the Brexit TP retained the Customs status of Union goods in the EU and (subject to meeting the RGR conditions) are entitled to return to the EU under RGR in the future and be put to free circulation without the need for a further Customs importation taking place.

It also appears quite clear that aircraft which were previously imported through the EU and which were located in a third country at the expiry of the Brexit TP, will have met the basic conditions for RGR (i.e. they were *"…exported as Union goods from the Custom territory of the Union")* and will be entitled to return to the EU after the expiry of the Brexit TP under RGR and be put to free circulation.

At certain stages leading up to the expiry of the Brexit TP there was some doubt as to whether RGR rights would be preserved for aircraft that were located in a third country at expiry of the Brexit TP if they had flown there from the UK after the expiry of the Brexit TP prior to returning to the EU would jeopardise EU RGR rights. However, this is an issue that the EU Commission appear to have addressed in their Guidance Note.

EU Commission Guidance Note

As is often the case with Customs matters, the EU Commission seeks to clarify difficult matters by publishing technical guidance and they have sought to address some uncertainties where RGR is concerned in their "Guidance Note - Withdrawal of the United Kingdom and Rules in the Field of Customs, including Preferential Origin"

At 5.4 of the Guidance Note *("Relief from import duty")* the EU Commission state that *"…Union goods…temporarily exported from the UK before the end of the transition period and are re-imported in the Union after the end of that period complying with the conditions established in Article 203 UCC, those goods are to be considered returned goods and hence be imported with total relief."* This would appear to give reasonable assurance to owners of goods which were located in a third country at the expiry of the Brexit TP that they will be able to utilise RGR when they return to the EU afterwards.

However, where the Guidance Note appears to offer the most assistance, going beyond the legal position explained above, is by stating that goods which were located in the UK at the expiry of the Brexit TP will also be able to return to the EU under RGR subject to meeting certain conditions. It states at 5.4 *"…Union goods…brought from the Union to the UK before the end of the transition period and where then such goods move back to the Union after the end of that period, the provisions on returned goods referred to in Article 203 UCC apply if the economic operator can provide evidence that the Union goods:*

— *were transported to the UK prior to the end of the transition period; and*

— *return in an unaltered state in accordance with Article 203(5) UCC and Article 158 UCC DA."*

EU Commission Guidance Note continued…

A key issue posed by the Guidance Note is that it is not legally binding and it does not make specific reference to aircraft (albeit aircraft are "goods" for Customs purposes). For those dealing with such high-value assets as aircraft, and to whom legal certainty is paramount, the Guidance Note will perhaps not provide sufficient comfort from the threat of an EU importation risk. Currently, there is little evidence that different EU Member States will materially depart from the EU Guidance Note. In many circumstances, aircraft previously imported into the EU or UK prior to Brexit will not require re-importation in one of the territories after Brexit as they will satisfy the conditions for RGR. However, the circumstances of any particular aircraft must be considered.

The dilemma for owners

Perhaps the biggest decision to be made is by owners of aircraft which were imported through the EU before expiry of the Brexit TP but which were located in the UK when it expired. Do those owners import their aircraft through the EU again, or do they rely on the EU Commission Guidance note which is not legally binding?

That is a dilemma in respect of which owners will take differing views depending on the implications of a further importation and their appetite for risk.

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