

Recommendation 36 – SINGLE WINDOW INTEROPERABILITY

Draft Legal Environment Section

1 INTRODUCTION AND BACKGROUND

The Single Window Interoperability Project was launched in 2011 and revised in 2012. Four main themes have been emerged including one for the legal environment. Following the success of the Single Window symposiums from 2006 and 2011, UN/CEFACT decided to create a follow-up event on the next main theme concerning Single Window, that of *interoperability*. The UNECE has also published a paper in 2013 on the subject entitled “Trends for collaboration in international trade: Building a common Single Window Environment”¹ that is a useful reference paper for this effort.

The Single Window Interoperability (SWI) project focuses on the mechanisms required for the interconnectivity of two or more Single Window facilities located in different countries. This Section of the Recommendation concentrates on the legal environment required for the effective implementation of Single Window Interoperability. It aims at answering the questions of what administrative and legal conditions need to be in place in order to support and facilitate interconnectivity and interoperability of Single Window systems across borders. While Recommendation No. 33 looked at both electronic and paper-based processes, the current project looks only at electronic exchange of information.

Parties involved need to have a model of working through proposed legislation that coordinates the different agencies, departments and their respective agendas and cultures and take into account the opinions of other stakeholders, such as trade itself to ensure it meets their business requirements. The model for SWI is addressed to governments, international organisations, and private sector stakeholders including legislators, regulators, facilitators and operators of Single Window systems.

* *Ed. Note:* This preliminary draft is subject to review and incorporation of the technical and related aspects of Recommendation 36. The legal and technical approaches to Single Window development often intersect where one approach, either legal or technical, may create limitations on the other.

¹ [Citation and link needed.]

2 THE APPROACH CHOSEN

2.1 Cross-border interoperability

The overall focus of this Recommendation is on cross-border interoperability of Single Window systems. It leaves interoperability issues between two or more Single Windows in the same economy and jurisdiction to be resolved by national laws and solutions.

Cross-border interoperability means that a Single Window system in country A will achieve interconnectivity with a Single Window in country B. Thus, data messages can be exchanged between two or more national Single Windows and effectively used by the authorities and agencies in each country's Single Window environment. Moreover, this may include a transaction model that permits company X to send electronic data communications or electronic records replicating given trade documents in the same format to Single Windows in countries A and B by using the Single Window in country A as a platform, as a repository for authentication, or other channelling or support functions. Such transactions may be identified as Business-to-Government (B2G) interoperability.

2.2 Regional Single Windows

There are a variety of "regional" Single Window models that may be considered. For example, States A, B and C all adhere to a Single Window ABC, the server for which is located in country A. Each country participates in server maintenance and costs. Most importantly, Single Window ABC will recognize and process electronic records received through the joint Single Window. Data exchanges in this arrangement could include B2G and G2G transactions

Another type of regional Single Window environment is one where the central server provides a communications hub for each of the participating countries. The central server does not retain or archive any trade or regulatory data. Only the transmitting and receiving national Single Windows retain such data.

2.3 Regulatory issues

The legal environment issues addressed in this Section of the Recommendation focus primarily on regulatory issues generally in the context of governments exercising trade controls. For example, company X is submitting a customs declaration including particular documents such as the certificate of origin, veterinary or phytosanitary certificates, and applications for import licences and permits. The variety of legal issues related to this type of exchange are considered here in terms of the overall legal framework necessary for Single Window Interoperability.

This approach does not address contracting issues (B2B transactions) nor contracting issues that may be related to the establishment and operation of the Single Window facility. Generally, companies can enter into contractual relationships through trade platforms or otherwise by electronic means. It is, however, not common to conclude contracts through Single Window systems. Using Single Windows is part of performance of a trade contract by the parties to such trade contracts, as well as contract performance by their agents, e.g., freight forwarders.

3 SCOPE OF LEGAL ENVIRONMENT COMPONENT OF THE RECOMMENDATION

3.1 Government to Government Interoperability

The legal environment issues in this Recommendation focus on issues relating to the government-to-government (G2G) interoperability of national single window frameworks, including issues that arise in connection with the implementation and operation of such interoperable systems. It will not address business-to-government (B2G) interoperability requirements unless these are closely connected to government-to-government interoperability. It will also not address issues involving business-to-business (B2B) relationships between the various parties involved in international trade transactions, or relationships between such businesses and governments, such as filing requirements.

3.2 Relationship with *Recommendation No. 35*

UN/CEFACT issued *Recommendation No. 35 – Establishing A Legal Framework For International Trade Single Window*² to provide general guidance on the legal framework issues related to developing, implementing and operating Single Window facilities. *Recommendation No. 35* suggests the importance of considering international trade transaction legal issues and its Annex II provides criteria to consider and these criteria should be observed whenever establishing a Single Window system. This Recommendation on Single Window Interoperability builds on the foundation provided in *Recommendation No. 35* and adds to its provisions only where necessary. Reference may be made to other legal instruments relevant to the setting up and running Single Window facilities. *Recommendation 35* also notes the importance of

² Recommendation 35 is available at http://www.unece.org/fileadmin/DAM/cefact/recommendations/rec35/Rec35_ECE_TRADE_401_EstablishingLegalFrameworkforSingleWindow_E.pdf. (December 2010.)

adopting international standards when establishing the legal environment for a Single Window.

4 LEGAL ISSUES INVOLVED IN CROSS-BORDER SINGLE WINDOW INTEROPERABILITY

4.1 General Introduction

The following list of issues and principles are largely based on *Recommendation No. 35*. They are intended primarily to highlight those questions that may arise in a cross-border interoperability context. Recommendation No. 35 should be referenced when reviewing the following material. It should be noted that due to the extremely robust range of legal issues that might need to be addressed in varying Single Window circumstances and different legal regimes, the list is not exhaustive.

4.2 The main principles of Single Window Interoperability

There are a number of key principles applicable to the information exchanges between Single Window systems and these will be addressed and defined in any agreement between two or more National Single Window operations participating in such exchanges. The electronic exchange of information and data messages, and the further use of this information in each participating State, should be based on at least the following principles:

1. Mutual interest and benefit of the parties (participating in the exchange of information);

This principle means that the parties agree on the provision of information on a parity basis. The scope and conditions of the information provided should meet the interests of the parties. Information exchange should enhance the development of cooperation between the parties.

2. Accessibility and availability of data;

The requests for information should be processed and replied to the requesting party to the extent specified in the agreement between the States parties.

3. Accuracy and completeness of information;

Information provided to the requesting party must be accurate and contain a complete list of information as defined in their agreement.

4. *Timely submission of required information;*

Parties should adhere to deadlines for providing the information fixed in an agreement. Delays in reporting should be avoided.

5. *The information exchanged should be used only for limited specified purposes taking into account the needs of confidentiality and without prejudice to the State that has provided such information;*³

The use of the information is allowed only for the purposes for which it was sent. The receiving Single Window would ordinarily not be permitted to share this information, without the express permission of the party submitting it, with third parties except, of course, with other government agencies that are participating in the Single Window and are involved in a decision-making process related to the transaction (e.g., issuing permits, clearance of goods, etc.)

In some countries, the exchange of trade and/or customs information with another Single Window may require the permission of the trader submitting such information. In this situation, it may be important to incorporate provisions to permit this in an end-user agreement for traders who submit trade data to the Single Window.

6. *Exchange of information is based on international standards and recommendations.*

For the purposes of information exchange and interoperability of information systems, the parties should be based on existing international standards and recommendations.

7. *Exchange of information is conducted free of fees or charges,*

The information exchange should ideally be organized to take place on a free of fees or charges basis, especially in the G2G context. However, this should not prevent the parties from concluding in an agreement to exchange trade data to adopt a fee schedule. This is also without prejudice to the financing model of the Single Window and the public services in general.

³ Not all members agreed that information should be available to the declared purposes only, but all agree that the information should not be in unlimited use for the government of the country of the Single Window. See also item 3.6, *infra*. To the extent we are dealing with G2G relationships, this should be less of a problem.

4.3 The legal basis for establishing cross-border interoperability

This matter is most closely connected with and based on public international law. Countries A and B may become legally obliged to create interoperability. Treaties and conventions create legal obligations on States. At the same time, and as noted in *Recommendation No. 35*, the national law that enables a country's Single Window should authorize the cross-border exchange of trade data and information.

In the absence of a binding treaty or convention, states may nevertheless undertake to cooperate with other states by assent on the basis of reciprocity and mutual recognition. This may include mutual recognition of Single Window systems. This may require considerable effort unless the administrative and technical systems are already quite similar. However, it is likely that some type of bi-lateral agreement may be needed between the two or more States involved in establishing cross-border interoperability.

Legal obligations are most effectively created to cut administrative red tape and to harmonise administrative requirements such as the number and nature of administrative documents needed to fulfil the regulatory procedures conducted through the Single Windows. It is also possible to create technical interoperability requirements through legislation, but it is usually preferable to maintain technology neutrality in national legislation. It is suggested that technical (in the pure sense of the word) interoperability be maintained through negotiations.

4.4 Appropriate organisational structure

Establishing the organisational structure (i.e., its legal structure and governance) is normally a matter of domestic law. And provided that the cross-border exchange of data is authorized in national law, the organizational issue should not affect Single Window Interoperability.

4.5 Identification, Authentication and Authorisation Procedure

The legal issues emanating from the identification, authentication and authorisation procedures are critical and complex in the context of SWI and consistent application of these procedures is vital. In any state across the world, the authorities involved and other potential users of a Single Window facility should take into consideration the UN/CEFACT Recommendation No. 14 in assessing the needs and levels of authentication.

Recommendation 14 states that, as far as possible, the requirement of a signature (manuscript or its electronic functional equivalent) should be eliminated unless it is essential in the context of the transaction. Depending on the scope and objectives of the

SWI, consideration should eventually be given to the authentication methods, which are 'as reliable as appropriate' for a particular transaction within a country.

For example, if the aim of SWI is just to share and disseminate information about the trader or the trade transaction volume to formulate border management strategy, a low-level of authentication may be adequate. Similarly, if a trader or its agent is an Authorised Economic Operator (AEO) or has signed a separate contract with the Customs Agency (or the Single Window facility) [by putting in place necessary financial guarantees], then only a low-level authentication may be needed for filing individual customs declarations.⁴

However, States that participate in the exchange of information between their Single Window systems need to undertake a risk assessment to determine if the selected authentication method in each state is reliable enough to ensure safe and secure information exchange between the trader and the local Single Window (B2G). Thus, there can be an understanding that the information being conveyed to another national SW will take into account the nature of the information and the risks involved. Should the assessment lead to a positive result, the cooperating states should mutually recognize each other's authentication methods for exchanges of data emanating from the trader in his country of origin.

A similar assessment may be required to ascertain whether the authentication methods used by the government authorities are robust enough to ensure safe and secure information transmission between the Single Windows of cooperating States (G2G). While forming a cross-border authentication policy for SWI, the cooperating states should either agree on a common authentication standard in information exchanges between them or mutually recognize the standards of other cooperating states.

The creation of a legal framework that provides equal legal status and acceptability to modern authentication methods is crucial for SWI. Cooperating states should, where appropriate, take into account and adopt international legal standards/instruments and guidelines which serve as a benchmark when creating a legal framework to ensure its compatibility with the global legal infrastructure for the seamless exchange of electronic information.⁵ The series of legal texts developed by the United Nations Commission on International Trade Law (UNCITRAL) provide tools for reaching a uniform legal

⁴ UN/CEFACT, *Recommendation No. 14: Authentication of Trade Documents*, UN Doc ECE/TRADE/C/CEFACT/2014/6/Add.1 (April 2014). Available at <http://www.unece.org/tradewelcome/areas-of-work/un-centre-for-trade-facilitation-and-e-business-unecefact/outputs/cefactrecommendationsrec-index/list-of-trade-facilitation-recommendations-n-11-to-15.html> (accessed 12 September 2014).

⁵ Hemali Shah and Ashish Srivastava, 'Authentication and Recognition Issues in Cross-Border Single Window' (2013) 47:6 *Journal of World Trade*, 1252. Available at <<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=TRAD2013041>> (accessed 12 September 2014).

framework also for the legal recognition of authentication methods.⁶ Cooperating states should also take into consideration the emerging best practices such as the legal architecture of the Association of Southeast Asian Nations (ASEAN) and recent work at the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) to make a Single Window facility legally interoperable.⁷

[4.6 Right to obtain data from the Single Window

This is equally one of the most complex legal issues affecting Single Window systems, and cross-border dimension do not make them any easier. States have very different policies as to the access to public documents and transparency. These are often constitutional issues and are seldom subject to legal harmonisation.]⁸

4.7 Privacy and protection of commercial information

Data protection and privacy laws are generally national although some international regimes such as that adopted under the auspices of the Council of Europe exist. There exist methods to transmit personal data to other countries with sufficient level of legal protection. If such legislation does not exist, a contractual solution to the same effect may be used.

For example, the European Commission has produced model contracts to transfer data to countries which do not have legislation with protection equivalent with the EU.⁹ If the EU recognized the standards of the country where the data is to be transferred, such as the United States, no contract is needed.

⁶ These include UNCITRAL Model Law on Electronic Commerce 1996, UNCITRAL Model Law on Electronic Signature 2001 and the UN Convention on the Use of Electronic Communication in International Contracts 2005. Available at <http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html> (accessed 12 September 2014). See also, the UNCITRAL Guidance document, Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication And Signature Methods. Available at <<http://www.uncitral.org/uncitral/en/publications/publications.html>> (accessed 12 September 2014)

⁷ It should be noted that the ASEAN Member States are in the process of drafting a *Protocol on the Legal Framework to Implement the ASEAN Single Window* to ensure that "...their local laws are synchronised for both Single Window at the national level and ASEAN Single Window". This draft Protocol is expected to be signed by end of 2014 <http://asw.asean.org/events/item/asw-web-portal-takes-regional-grouping-closer-to-integration-2?category_id=124> (accessed 12 September 2014). Consideration may also be given by the cooperating States to the Framework Arrangement/Agreement on Facilitation of Cross-border Paperless Trade for the Asia Pacific Region of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). Available at <<http://www.unescap.org/events/ad-hoc-intergovernmental-meeting-regional-arrangement-facilitation-cross-border-paperless>> (accessed 12 September 2014). Work on this international text is continuing through an Interim Intergovernmental Steering Group approved by the Commission at its Plenary Session in August 2014. See also, UNESCAP, *Electronic Single Window Legal Issues: A Capacity Building Guide*, pp. 20-32 (2012), available at http://www.unescap.org/sites/default/files/0%20-%20Full%20Report_4.pdf (accessed 10 October 2014).

⁸ Further discussion may be needed on this issue.

⁹ See the model clauses at http://ec.europa.eu/justice/data-protection/document/international-transfers/transfer/index_en.htm.

Most states have legislation on the protection of commercial secrets generally and additionally to meet treaty requirements under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Protection of commercial secrets, trade data, etc., are often the subject of legislative and regulatory measures in many countries.

4.8 Accuracy and integrity of data

The accuracy and completeness of data is an issue that relates mainly to the competence and integrity of the party submitting information. If the information is submitted by a public authority, there exists at least a presumption of its accuracy. For public bodies issuing documents, the Single Window providing the information may be presumed to have provided accurate and complete information, unless fraud or falsification is demonstrated or obvious. For individuals, the administrative and criminal laws of the receiving country's Single Window (whose regulatory procedures are seized) may prevail. This may lead to questions of personal jurisdiction that may be complicated for national laws and constitutional protections for citizens. At least for non-criminal issues, such issues may be addressed in agreements related to SWI.

The technical integrity of data may also be subject to information security solutions that may be applied in the SWI environment. Usually, a party administering an information system has legal obligations to maintain information security. Information security standards should be addressed in the SWI agreements between the parties.

4.9 Liability issues

In the context of this SWI Recommendation, liability usually refers to civil liability as distinct from criminal liability. The party incurring liability may be held liable for his or her acts or omissions in the context of operation or use of the SW. The liability may be based on statutory requirement, on a provision in a contract such as a User Agreement or may be tortious. Liability may be strict so that it does not presuppose negligence, or it may be based on negligence. A general requirement is causality between an act and the harmful consequence. Governments entering SWI agreements will need to address these issues particularly since they may have implications for the contractual relationships between private sector trading partners utilizing the Single Windows in each country.

Liability is one of the complicated issues in a cross-border context since in order to determine liability of any party, one needs to take into account in which jurisdiction the liability is to be determined, i.e. jurisdiction issues. Moreover, a court (or an arbitral tribunal where arbitration is possible) needs to determine what substantive rules will be applied to determine who may be held liable and in what situations liability arises.

Ordinarily, the SW operator will not be liable for the data content submitted by the private sector user of the Single Window. Where private sector operators of Single Windows (usually under contract with a government), here is a tendency of SW operators to include exculpatory clauses in End-User Agreements vis-à-vis the parties. SW operators could also agree on liability issues on a transnational basis, or agree on standards applied in the B2B cooperation.

See also dispute resolution in item 3.13, *infra*.

4.10 Criminal law

While this Recommendation does not explore the detailed implications of criminal law issues, governments should consider these issues in establishing SWI. For example, if Company X from country B were to violate the criminal laws of country A by submitting false information or forged records or data to the authorities of country A, how will this be addressed?

[Each country defines the international application of its criminal laws, and sometimes only public international law limitations of extraterritoriality may limit this independence.]

In criminal law, the application of domestic law is always connected with jurisdiction. In fact, the international aspects of criminal laws are presented as jurisdictional issues. If Country A exercises criminal jurisdiction on individual Y, a national and resident of country B, this usually presupposes the presence of Y within the jurisdiction of A either by being caught there or after having been extradited to Country A by Country B.

In dealing with the possible criminal liability of corporate entities, additional problems may arise. Further, difficulties in this area may arise, for example, if the cooperating SWI Countries A and B have very different approaches to the application of criminal laws in cross-border situations.

4.11 Data Retention, Archiving, and Audit Trails

Each State in developing the national law (often through operating regulations) for its Single Window will define data retention and archiving, as well as audit trail, requirements. The use of archived information may be needed to fulfil a transaction between two Single Window systems. Different approaches to access to information and transparency in different countries may pose problems in respect of archived data. Thus, countries should carefully examine these requirements domestically and those of countries with which it may enter SWI agreements.

4.12 Intellectual property and database ownership

It is submitted that these issues are merely organisational and should not have cross-border dimensions. International conventions on intellectual property create much harmony, due to which fewer problems should arise. The WTO TRIPS Agreement includes provisions on the protection of business secrets as well as enforcement of intellectual property rights under Part III.

4.13 Competition law

Competition law issues are mainly national law issues, or are applied in uniform markets such as the EU. Competition law nevertheless has a grip on some harmonisation measures between companies. It is submitted that competition laws would not pose any obstacle to Single Window Interoperability, unless the structure of the system is used to restrict competition. In such cases, governments should carefully review their obligations under the WTO agreements applicable to competition issues.

4.14 Dispute Resolution

There are basically three types of disputes that could arise in the context of Single Window Interoperability: 1) administrative, 2) civil, and 3) criminal.

Since Single Windows are a trade facilitation tool for governments, the substantive issues at stake are usually administrative. Single Windows are then mainly seen as a channel of information, and administrative procedures and litigations are not affected by the means of communication. However, there may be instances where disputes between national Single Windows arise, for example, where one Single Window does not meet performance criteria (such as timeliness) and damages result for traders.

Given the costs of litigation, as well as other factors, it may be beneficial to include dispute resolution mechanisms in the SWI agreement.