International Trade

EU Customs Developments

In this issue…

September-November 2017

Authors: Jacquelyn MacLennan, Sara Nordin, Fabienne Vermeeren, Charlotte Van Haute

EU Customs Policy

UCC Implementation and Delegated Act amendments

Amendments to the Union Customs Code (UCC) **Delegated Regulation 2015/2446** are still under consideration, with various expert meetings having taken place in recent months. The draft amendments involve a new definition of "exporter", preferential treatment of goods under inward processing, and guarantee reductions/waivers. These amendments could still be adopted **in the course of 2017**. Separately, possible further amendments to the UCC Delegated Regulation are being considered (at a less advanced stage), with respect to time limits for filing a supplementary declaration and to the determination of the office of exit.

Meanwhile, the Commission is also working on a report in respect of the powers delegated to it under the UCC. This report must be submitted to the Council and the European Parliament (EP) before the end of **January 2018**, 9 months before the current 5-year delegation of powers is up for renewal.

UCC transitional measures to be extended until end 2025

Under Article 278 of the UCC, use of paper-based customs systems is only possible until the **end of 2020**. However, as a number of electronic systems required for the full implementation of the UCC will not be ready by that time, the Commission is preparing a proposal to extend the transitional period during which paper-based systems may continue to be used for certain procedures until the **end of 2025**. EU Commissioner Moscovici on 20 November 2017 explained to the EP's Internal Market and Consumer Affairs (IMCO) Committee that approximately 80% of the IT work will be done by **2020**, but that "realism" calls for an extension of the timelines for the rest of the IT systems.

Customs Decision System launched

On 2 October 2017, the Commission launched the Customs Decision System (CDS), a pan-European electronic system through which companies now have to apply online for authorisations and customs decisions under the UCC that involve more than one Member State. The system can be accessed through the EU Trade Portal. CDS brings together 22 types of applications and will also hold post-application/decision information (e.g. on amendment, revocation, suspension or annulment of decisions). The Commission has made available an eLearning module on CDS.

Meanwhile, on 14 November 2017, the Commission adopted **Implementing Regulation 2017/2089** on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of information under the UCC which applies to CDS (as well as to the Uniform User Management and Digital Signature system).

Tariffs

Duty suspensions and tariff quotas

On 25 October 2017, the Commission published a notice to economic operators informing them that they have until **12 December 2017** to object to new requests for duty suspensions (DS) or tariff quotas (TQs) that have been made in the context of the **July 2018 round.**

The formal proposals to update the DS and TQ Regulations for the **January 2018 round** were not yet available when this issue was prepared. These proposals will, as usual, be submitted to the Council for adoption by the **end of 2017**.

Generalised Scheme of Preferences – five countries losing benefits

In late September 2017, the Commission submitted a draft Delegated Regulation to the Council and the EP to amend certain Annexes of **Regulation 978/2012** applying a scheme of generalised tariff preferences (the "GSP Regulation"). The draft amendments are proposed in the context of the required annual update of the list of countries that can enjoy GSP benefits, which is based on how countries are ranked by the World Bank. Countries that for three consecutive years are classified as upper-middle income countries lose GSP status, as do countries for which other preferential trade agreements apply, after a transitional period. Under the draft amendments, Côte d'Ivoire, Ghana, Paraguay and Swaziland will lose all GSP preferences as from **1 January 2019**, while Equatorial Guinea will do so as from **1 January 2021**. The Council and EP have two months (which can be extended by a further two months) to raise objections, if any, following which the Commission can formally adopt and publish its Regulation.

EU preferences granted to certain Ukrainian goods

As of 1 October 2017, with **Regulation 2017/1566**, the EU is granting autonomous preferences to certain products originating in Ukraine, on top of the trade preferences granted under the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Ukraine, which has been provisionally applied since 1 January 2016. The autonomous preferences will remain in place until **end September 2020** and relate to wheat, maize, barley, oats and barley groats and pellets, processed tomatoes, natural honey, grape juice, and certain footwear, certain titanium-based pigments and preparations, certain fertilisers, certain copper and aluminium products and certain video camera recorders, video tuners, and televisions. The preferences are available subject to strict conditions and could be suspended or withdrawn in case of failure to comply with those conditions, or if imports under these preferences are such as to (threaten to) cause serious difficulties for EU producers.

EU FTA Update

State of the Union and Commission Work Programme 2018

On 13 September 2017, European Commission President Jean-Claude Juncker in his **State of the Union Address** announced that he wants to strengthen the EU's trade agenda by negotiating and concluding FTAs while ensuring reciprocity as well as investment screening. In parallel, the Commission published a

communication entitled "A Balanced and Progressive Trade Policy to Harness Globalisation" providing more details and announcing more transparency on the EU's trade policy. In order to progress on new FTAs, Juncker wants to keep investment protection out of FTAs, as this would avoid the need for ratification by all regional parliaments of the Member States. Various EU Member States (including France, Germany, Spain, Italy and the Netherlands) are unconvinced by this approach. They fear that individual countries may lose investment protection benefits if they rely solely on a bilateral approach, and that the EU would lose leverage when negotiating other trade related issues in FTAs if there is no linked discussion on investment protection with the partner country. EU Trade Commissioner Cecilia Malmström has indicated that the split approach should be assessed on a case-by-case basis.

On 24 October 2017, the Commission published its **Work Programme for 2018**. On trade, the report promises to *"deliver on a progressive and ambitious trade agenda, striking a balance between openness and reciprocity and enforcement of social and environmental standards."* The Commission aims to finalise FTAs with Japan, Singapore and Vietnam, pursue negotiations with Mercosur and Mexico and advance negotiations with Australia and New Zealand.

Report on the Implementation of EU FTAs

On 9 November 2017, the Commission published its report on the implementation of EU's Free Trade Agreements (FTA) in 2016. It concludes that, generally, EU exports to FTA partner countries have increased (in particular for cars and agricultural products), but as regards TRQs, there is untapped potential under all FTAs and in both directions. EU businesses tend to have lower preference utilisation rates than their counterparts in the FTA partner country, which the Commission says is due to a lack of awareness, difficult rules, and cumbersome procedures. The Commission further notes that progress has been made on sanitary and phytosanitary (SPS) measures (with Columbia, Peru, Moldova, Georgia and Ukraine), discriminatory regimes for spirits (with Colombia) and technical regulations and standards (with Ukraine and Georgia). On the other hand, problems persist for certain SPS measures, for restrictions in agricultural trade, enforcement of geographical indications, and public procurement.

Updating the EU Aid for Trade Strategy

On 13 November 2017, the Commission published a communication, entitled "Achieving Prosperity through Trade and Investment – Updating the 2017 Joint EU Strategy on Aid for Trade". This Strategy aims to help developing countries integrate into the rules-based global trading system and use trade to boost their growth and reduce poverty. In the report, the Commission observes that its Strategy has achieved positive results, but at the same time, aid for trade has only had limited success for the poorest countries. It therefore announces a number of fundamental changes, including better coordination, improved monitoring and reporting, and better differentiation of countries with increased focus on least-developed countries.

EP Resolution on the impact of international trade

On 12 September 2017, the EP adopted a resolution on the impact of international trade and the EU's trade policies on global value chains. The EP believes that further integration of the EU into global value chains *"must not be to the detriment of the European social and regulatory model and the promotion of sustainable growth."* It also stresses the need for reinforced EU coordination and supervision of the application of import duties, including problems with false declarations of origin, undervaluation and incorrect descriptions of goods. The EP also wants preferential origin rules to be made less complex and easier to satisfy.

Japan

Following the political agreement reached in July 2017 on the EU-Japan Economic Partnership Agreement (EPA), the bilateral discussions in September and October 2017 focussed on the outstanding issues, notably whether and how to include provisions on data protection and investment protection in the EPA, or address those issues separately or at a later date. These discussions continued into November 2017, with the aim to conclude the EPA negotiations in **December 2017**. On 15 November 2017, the two sides agreed not to include the investment protection provisions in the EPA and to continue discussions on investment protection on a separate track.

Meanwhile, on 14 September 2017, the 2012 EU negotiating mandate for the EPA negotiations was published in an effort to increase transparency.

Canada

Following the start of provisional application of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) on 21 September 2017, **Commission Implementing Regulation 2017/1781** was adopted with details on derogations from product-specific origin rules agreed in CETA within origin quotas. This concerns certain agricultural products, certain textiles and apparel, and cars.

Belgium has meanwhile confirmed that it is referring questions on the legality of certain CETA provisions on investment protection to the Court of Justice of the EU.

Singapore

Singapore has agreed to remove the investment protection provisions from its FTA with the EU (EUSFTA) into a separate agreement. This follows the Opinion of the Court of Justice of the EU (CJEU) of May 2017 that concluded that non-direct investment (portfolio investment), investor-state dispute settlement (ISDS), and certain related issues are a shared competence of the EU and the Member States. By splitting the EUSFTA into two agreements, it is hoped that the FTA covering only exclusive EU competence matters could be ratified faster, as only the Council and EP, and not the national parliaments, would have to approve the text before it can start to apply definitively.

Meanwhile, the EU has also been successful in convincing Singapore to accept an investment court system, but with a limited number of judges to keep costs down.

Vietnam

On 23 October 2017, the European Commission warned Vietnam to increase efforts to end illegal fishing, failing which it could face a ban on its exports to the EU. Only a few months ago, the EU and Vietnam finalised legal scrubbing of the bilateral FTA on which they concluded negotiations in 2016, and that the text will shortly be submitted to the Council and EP. The aim is to be able to apply the FTA provisionally from **early 2018**.

Australia and New Zealand

On 13 September 2017, the European Commission formally proposed negotiating mandates for trade negotiations with Australia and New Zealand to the Council, but contrary to the Commission's hopes, the mandates were not approved by the Council in November 2017.

On 26 October 2017, the EP adopted recommendations on these proposals. While these EP recommendations are not binding, they do give a good indication of the elements that the EP (which has to give final consent for these agreements in due course) wants to see reflected in these FTAs. The EP insists, *inter alia*, that the FTAs should offer new opportunities for EU business in the public procurement market of the two countries, and that certain agricultural products need special attention (with limited tariff concessions or none at all). Unsurprisingly, the EP further states that nothing in the future FTAs should prevent the EU or Member States from adopting and maintaining legislation to protect health, consumers and the environment. The Recommendation further calls for investment protection to be covered in separate agreements.

Mexico

On 25-29 September 2017, the 5th round of EU-Mexico FTA update negotiations took place, and the EU reported that there had been substantive discussions by all 21 working groups. Nevertheless, in mid-October 2017, EU Trade Commissioner Cecilia Malmström noted that 19 of the working groups still have to conclude their work, and that intense work would therefore be needed to reach the goal of reaching political agreement on 95% of the negotiations by the **end of the year**. Among the outstanding issues at that point were public procurement, sustainable development, investment protection and geographical indications. A controversial issue within the EU was also whether or not to include data flows in the FTA. The 6th round started on 25 November 2017.

Meanwhile, on 13 September 2017, the EP adopted a Resolution on EU political relations with Latin America in which it supports the speedy conclusion of the FTA update.

Mercosur

In late September 2017, in anticipation of the 29th round of EU-Mercosur FTA negotiations (2-6 October 2017), 11 EU Member States expressed strong concerns about the Commission's plans to exchange beef and ethanol tariff offers with Mercosur (and to insist on robust provisions on environmental and sanitary standards), but the Commission nevertheless went ahead and made such offers, as it was clear that Mercosur countries insisted on getting these offers and would otherwise block the negotiations. The report of the 29th round shows that various issues remained outstanding after that round. The report of the 30th round (6-10 November 2017) notes that 14 working groups met and the two sides are preparing for an exchange of improved market access offers. A further round was to be held from **29 November to 5 December 2017**.

The aim of the European Commission and Mercosur negotiators is to conclude these talks by the **end of 2017**. It is unclear how realistic that is, and certain senior officials in late November 2017 started managing expectations by indicating that the discussions may well run **into 2018**. In particular, tariff liberalisation on beef continues to cause excitement among various EU Member States, with a group of 9 countries, including France and Ireland, protesting again in October 2017 against plans by the Commission to offer a 70,000 ton tariff quota, and expressing similar concerns over the EU's offer on ethanol, sugar and poultry. On the other hand, another group of 8 EU Member States with important non-agricultural interests, including the UK, Italy, Spain and Germany, issued a letter of support to the Commission to make certain offers so as to allow the negotiations to conclude soon. The European Sugar Refineries Association and the European Sugar Users have called on the Commission to grant sugar tariff quotas to ensure the reliability of sugar supplies to the EU.

Meanwhile, in early October 2017, it was revealed that EU food safety inspectors issued a negative report after their visit to Brazil in May 2017, following a scandal involving the sale of rotten produce. They consider that Brazilian control systems for poultry and horse meat are inadequate and that this compromises the reliability of export certification of these products.

Origin rules for cars and machinery and car tariffs also remain controversial outstanding issues under the negotiations, as do animal welfare, antimicrobial resistance and geographical indications.

South Korea

On 21 September 2017, EU Trade Commissioner Malmström in a speech to the EU-Korea Business Forum, while visiting South Korea in the context of an EU-ASEM meeting, applauded the EU-Korea FTA which has been in force since mid-2011. She noted that many trade barriers (including in the area of cars, cosmetics and cheese) were resolved recently but that Korea needs to do more to fully implement the agreement, notably in the area of sustainable development and labour rights.

On 20 October 2017, the Commission issued its 5th annual report on the implementation of the FTA in which these comments were reflected in more detail.

Colombia and Peru

On 10 October 2017, the European Commission published its 3rd annual report on the implementation of the EU-Colombia/Peru trade agreement which has been applied provisionally since 2013. It notes that the FTA is "functioning well overall", but that some areas "need further attention", citing Peruvian sanitary and phytosanitary measures on EU exports of agricultural problems and taxation of spirits as examples. The EU would also like the two countries to put more effort into the protection of geographical indications and into labour and environmental issues.

Indonesia

The 3rd round of FTA negotiations between the EU and Indonesia took place during the week of 11 September 2017. The EU report of the meeting shows that discussions were held in a "good and cooperative atmosphere" and that there was "progress in some chapters". The 4th round is tentatively scheduled for **early 2018**. The plan is for both sides to exchange their first offers before then. Meanwhile, Indonesia, through its Trade Minister Enggartiasto Lukita, has said that if the EU disrupts palm oil production (as a draft EP opinion envisages), Indonesia will disrupt milk powder imports from the EU.

Chile

On 14 September 2017, the EP adopted a resolution on the planned modernisation of the EU-Chile FTA recommending the inclusion of sanctions to enforce trade and sustainable development commitments. The EP further insists that the EU should ensure that it secures its right to regulate on public health, environment issues and social services, and wants audio-visual services to be excluded from the updated FTA. It further wants investment protection provisions that are shared competence of the EU and the Member States to be negotiated in a separate agreement so as not to complicate and delay ratification of the FTA.

The Commission presented a negotiating mandate proposal to the Council in late May 2017. On 13 November 2017, the Council approved the mandate, and on 16 November 2017, the EU and Chile formally launched the negotiations.

India

During the 14th EU-India Summit in New Delhi on 6 October 2017, EU Commission President Juncker expressed the EU's willingness to resume negotiations with India on a Bilateral Trade and Investment Agreement (BTIA) *"when the conditions are right"*. It was announced that the Chief Negotiators of the two sides will convene in November to discuss the way forward. The BTIA talks were launched in June 2007 but have been slow and challenging. Numerous differences persist, including on market access for cars and spirits, services and non-tariff barriers.

Meanwhile, the EP on 13 September 2017 adopted a resolution on EU political relations with India in which it reiterated its support for a comprehensive and ambitious free trade agreement that is *"economically, socially and politically valuable for both sides"* and welcomed efforts to relaunch the BTIA negotiations.

Philippines

On 25 September 2017, the Secretary for Trade and Industry of the Philippines, in an exchange of views with the EP's International Trade Committee, called for a re-launch of the FTA negotiations with the EU, and noted that media reports on human rights issues, which led to a halt to these talks earlier this year, were biased and should not lead to his country losing GSP+ status, as the EP had called for earlier.

Turkey

Following German elections in September 2017, Chancellor Merkel observed that, due to human rights issues she does not foresee the opening of negotiations on modernising the EU-Turkey Customs Union. This indicates that the EU Council discussions on the proposed Commission negotiating mandate will remain inconclusive and no negotiations will start, not least because various other Member States (and the EP) have also expressed serious concerns over human rights, Turkey's refusal to recognise Cyprus and allow Cypriot ships and aircraft in its waters and airspace, as well as agricultural sensitivities.

Eastern and Southern Africa

On 2-3 October 2017, the EU and representatives from the Eastern and Southern African (ESA) region met in Madagascar in the context of the ESA-EU Interim Economic Partnership Agreement (iEPA). The 6th meeting of the EPA Committee, as well as meetings of the Customs Cooperation Committee and the Joint Development Committee under this EPA, were held. The parties discussed progress so far in the implementation of the iEPA and origin rules, including the extension of derogations from the standard origin rules for certain fish.

Malaysia

In early November 2017, Malaysia's Trade Minister Dato' Sri Mustapa bin Mohamed told his domestic press that his country is planning to relaunch FTA negotiations with the EU (which were halted in 2012) "soon", and to have discussions on avoid trade barriers to palm oil exports to the EU.

Brexit news

General negotiations

On 22 September 2017, **UK Prime Minister Theresa May delivered her Florence speech** in which she stated that the UK is looking for a bespoke new partnership agreement with the EU, while leaving the customs union and the Single Market, and accepted an "implementation period" or transitional period of around two years during which a status quo would be observed and EU rules would continue to apply in the UK.

On 20 October 2017, the **European Council considered that the Brexit negotiations with the UK on an orderly withdrawal from the EU had not progressed sufficiently to move to the next phase of the negotiations**, i.e. to start negotiating the future EU-UK relationship. The situation will be reassessed in December. Meanwhile, the EU has internally started to prepare for the second phase of the negotiations and for the possibility of a transitional period following Brexit. If the **14-15 December 2017** European Council gives the green light to move to phase two, actual negotiations may not start until **a few months later**, but the negotiations on the future agreement and a transitional arrangement could run in parallel.

Meanwhile, the **EU's Chief Negotiator for Brexit, Michel Barnier, has indicated that the only realistic model for the future EU-UK trade agreement is an FTA modelled on the EU-Canada FTA (CETA)** given that the UK has stated that it does not want to remain in the EU Customs Union and does not want to accept the jurisdiction of the European Court.

Customs-specific developments

In the last few months, concerns specifically with respect to customs-related Brexit issues have become very outspoken:

On 7 September 2017, the **European Commission published a position paper on "customs related matters needed for an orderly withdrawal of the UK from the Union"**. The paper discusses the status and treatment of goods loaded before Brexit and arriving in the EU/UK after Brexit, or in temporary storage or under a special customs procedure at the time of Brexit. It also covers administrative cooperation on customs procedures completed before Brexit.

On 9 October 2017, the **UK government published a White Paper** entitled **"Legislating for the UK's future customs, VAT and excise regimes"** in which it re-affirms its three strategic objectives post-Brexit in the customs and trade area: (a) continuing frictionless trade with the EU, (b) avoiding a hard border between Ireland and Northern Ireland, and (c) setting its own trade policy. In order to achieve these three objectives, the Paper proposes two alternatives. The first alternative is a "highly streamlined customs arrangement", with maximum facilitation of customs formalities including waivers to file entry and exit summary declarations, the UK remaining a member of the Common Transit Convention, Authorised Economic Operators (AEOs) getting faster clearance, and more use of technology at roll-on, roll-off ports to avoid congestion. The second option is a "new customs partnership" under which the UK at its external border would apply EU external tariffs and EU origin rules to ensure goods can flow to the EU having paid the correct EU duties, while for goods staying in the UK, companies would be able to seek refunds if the UK's own import tariffs were lower. The White Paper notes that *"in order to avoid any cliff-edge as the UK moves from the current relationship to the future partnership, people and businesses in both the UK and the EU would benefit from a time-limited interim implementation period that allows for a smooth and orderly transition."*

On 21 November 2017, the **Taxation (Cross-border Trade) Bill** to establish the UK's post-Brexit customs, VAT and excise duty regime was published. It is largely based on the EU UCC and repeats that *"it is the government's intention that the UK's Customs regime will continue to operate in much the same way as it does today"*, while allowing for *"divergence from EU law where the government feels it is necessary to do so, or where it believes that there is a clear benefit to business to diverge from it"*.

On 14 November 2017, the UK Parliament's **Public Accounts Committee published a report calling for a contingency plan for a hard Brexit (no deal) scenario** to be put in place **well before January 2019** should the UK's new customs system (Customs Declaration Service – or CDS) to replace the current Customs Handling of Import and Export Freight System (CHIEF) not be ready in time. Preparations for the introduction of CDS were started well before the Brexit referendum, and it is still intended to be operational from **early 2019**. However, as Brexit will lead to a five-fold increase in customs declarations, the capacity of CDS will

have to be increased **before March 2019** and this is causing concern, even though the Chief Executive of HMRC informed this Committee in October 2017 that CHIEF will be upgraded to handle more declarations as of **August 2018** and will co-exist with CDS if the new system is not ready in time or does not perform as expected. UK car manufacturers have expressed their concerns, focussing on the cost of delays at the border in their just-in-time business model. The UK transport sector has phrased concerns over the readiness of customs authorities of the EU27 (and in particular France, Belgium, the Netherlands, Spain and Ireland) to deal with their additional workload after Brexit.

On 16 November 2017, the **Home Affairs Select Committee of the UK Parliament published a report** calling for greater certainty for businesses and a transitional period and discussing the consequences of a "no deal" outcome. It expresses serious concerns about the lack of contingency planning by the UK government for post-Brexit customs operations, which the Committee fears may cause major disruptions at the border.

The Director-General of HM Revenue and Customs stated at the UK Parliament's Public Accounts Committee on 20 November 2017 that, while all freight coming into the UK post-Brexit will require a customs declaration, **it is not expected that the UK will be carrying out more physical checks** than it does currently.

In November 2017, the **EP published a report** commissioned by its Citizen's Rights and Constitutional Affairs Committee, entitled **"Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons"**. As far as trade in goods is concerned, the report describes how a possible solution could be found to avoiding a hard border through an advanced customs cooperation agreement between the UK and the EU allowing inspections to be carried out by UK and Irish customs on behalf of each other, mutual recognition of AEOs, pre-registration of operators, and identification systems at the border (e.g. number plate recognition) allowing swift border crossings.

Trade policy developments

On the trade policy front, the following important developments have occurred in recent months in the UK:

On 9 October 2017, the **House of Commons Library published a Briefing Paper "Brexit: trade aspects"** in which it examines the effect of Brexit on UK trade with both the EU and the rest of the world, and describes possible future partnerships with the EU, including the UK Government's preferred option of a new bespoke economic partnership (leaving the EU customs union and the Single Market), as well as membership of the European Economic Area ("the Norway model") and trading solely based on WTO rules.

On 9 October 2017, the UK government also published a **White Paper on "Preparing for our future UK trade policy"**, seeking comments on the transparency of the UK's future trade policy, its trade defence regime, and the future autonomous preference scheme. The White Paper was followed on 7 November 2017 by the publication of the **Trade Bill** which is to create the powers enabling the UK to transition current EU trade agreements with third countries to UK agreements with those countries under a fast-track procedure, to implement the WTO Agreement on Government Procurement, to establish a Trade Remedies Authority, and to allow HMRC to share trade data with other UK agencies and WTO bodies.

On 28 November 2017, the UK's Department of International Trade published a **call for evidence to identify UK interest in existing EU trade remedy measures**. It is asking businesses to let it know by **30 March 2018** by means of an "application to maintain measures" which of the over 100 existing EU trade defence measures are important to UK industry, so that as much information as possible can be gathered already now to ensure that future UK measures meet WTO requirements in this area. UK producers or users that wish to see an end to certain measures can also respond within the same deadline.

On 11 October 2017, **the EU and the UK sent a joint letter to all WTO countries in which they announced that their intention is to split existing tariff rate quotas (TRQs) as a technical rectification** on the basis of historical trade flows under each of these TRQs and statistics on where in the EU the products imported under these quotas were consumed during the last three years. Various WTO countries, including the US, Canada, Argentina, Brazil, New Zealand, Australia, Thailand and Uruguay have rejected the technical rectification approach, which does not require negotiations with each WTO country.

Classification

Common Customs Tariff for 2018 published

As always at the end of October 2017, the annual update of the EU's Common Customs Tariff was published (**Commission Implementing Regulation 2017/1925**). It provides the new structure of the EU's Combined Nomenclature (CN) and also amends the applicable tariff for some headings (e.g. to implement the Information Technology Agreement's latest commitments (the so-called "ITA2"). Contrary to last year (when the new version of the Harmonised System (HS2017) had to be implemented), there are only a handful of changes, in Chapters 19, 39, 38, 84 and 85. The changes will apply as of **1 January 2018**.

Court judgment on the classification of "shapewear"

On 19 October 2017, the Court of Justice of the EU (CJEU) delivered its judgment in Case C-556/16 (*Lutz GmbH v. Hauptzollamt Hanover*) on the classification of panty girdles. Lutz, the German importer had sought Binding Tariff Information (BTI) classifying its products ("shaping knickers" or "shapewear") under CN code 6212 90 00 (the subheading for corsets (other than girdles and panty girdles), but the German customs authorities instead issued BTI classifying these under CN code 6108 22 00 ("women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, negligées, bathrobes, dressing gowns and similar articles"). The court to which Lutz appealed considered that either subheading 61078 22 00 or 6212 20 00 (girdles and panty girdles) was appropriate, and asked the CJEU essentially to clarify the requirement in the Explanatory Note to the CN (CNEN) relating to subheading 6212 20 00 that a product must "have vertical elasticity and restricted horizontal elasticity" in order to be classified there. The CJEU considered that the elasticity criteria in the CNEN were met *"if an examination establishes that [the products] have substantially reduced horizontal elasticity in order to support the human body and create a slimming effect on the silhouette"* and that this was for the referring court to decide. The CJEU therefore did not consider the CNEN to be inappropriate.

Classification Regulations

Since the last issue, the following Classification Regulations have been published:

- **Commission Implementing Regulation 2017/1971** classifies a so-called Solid State Drive (SSD) under CN code 8471 70 98 as other storage units for automatic data-processing machines.
- **Commission Implementing Regulation 2017/1983** classifies an article in a form of unworked board consisting of various veneer layers of (mixtures of) spruce or pine under CN code 4412 99 85 as other similar laminated wood.
- **Commission Implementing Regulation 2017/2157** classifies a mixture of ethyl alcohol and gasoline used a raw material to produce fuels for motor vehicles under CN code 2207 20 00 as denatured ethyl alcohol.

In addition, **Commission Implementing Regulation n 2017/1977** was adopted, repealing **Implementing Regulation 876/2014**, which classified a portable battery-operated apparatus for capturing and recording still and video images under CN code 8525 80 99 as other video camera recorders. This Regulation implements a CJEU judgment of 22 March 2017 on GoPro cameras.

CN Explanatory Notes

The Commission has introduced new, or amended existing CNENs, for:

- **tourniquets** (excluding these from CN code 9018 90 84);
- **storage cubes** (declaring these to fit in heading 9403 as furniture);
- **hairbands and headbands** (clarifying which of these are not classifiable in heading 9615); and
- **oranges** (clarifying under which subheading of CN code 0805 10 these must be classified).

HS Explanatory Notes and Opinions endorsed

On 1 November 2017, the European Commission published a communication endorsing amendments to a series of HSENs and HS Opinions and Rulings adopted during the March 2017 session of the HS Committee. This means that EU Member States may no longer issue Binding Tariff Information (BTI), and will have to revoke BTIs that are not consistent with these HS guidance tools.

This latest HS guidance concerned, *inter alia*, hybrid electric vehicles, ceramic inks for inkjet devices, refrigerated outdoor cabinets, certain silos, needle roller cage assemblies for gears for motor vehicles, "Hall element devices" (for use in small accurate motors of washing machines/refrigerators, air conditioners, etc.), special tube bundle containers, screws for use in trauma surgery, covers for car seats, and a virtual reality set for a video game console, palm-sized washer devices, Insulated Gate Bipolar Transistor modules, and unassembled bicycle parts.

Nomenclature Committee/Customs Expert Group Developments

a) Agriculture/Chemistry Sector

The report of the 182nd meeting of the Agriculture/Chemistry Sub-section of the EU's Nomenclature Committee (NC) which took place on 16-17 October 2017 has been made public. It shows that the Member State experts voted favourably on a draft Classification Regulation on a mixture of ethyl alcohol and gasoline to produce biofuels and on an amendment of Additional Note 10 to Chapter 27 ("Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes") and on an amendment to the CNENs for subheading 2710 19 (medium oils). They failed to adopt an opinion on an amendment of Additional Note 2(f) to Chapters 22 ("Beverages, spirits and vinegar") as regards excess pressure for sparkling fermented beverages, and the vote on a draft amendment of the CNEN for subheading 2306 50 (oilcake and other solid residues of coconut or copra) was withdrawn.

The Committee further discussed the classification of, among others, essential oils in encapsulated dispersions of ethylene-vinyl acetate or low-density polyethylene, fused alumina slag, insulin syrup, encapsulated products containing colostrum, and anti-freezing preparations. In addition, the Member State experts were updated by the Commission on the pending file for novel tobacco products (heat-not-burn) and synthetic nicotine.

b) Mechanical/Miscellaneous/Textiles Sector

The agenda of the 183rd meeting of the Textiles and Mechanical/Miscellaneous Sub-section of the NC which took place on 23-26 October 2017 (meeting report not yet available) indicates that the Member State experts were due to vote on various draft Classification Regulations (aluminium rails, printing plates, massage/heating pads/mats, an item for use in trauma surgery, guy-grip dead ends, and bathing boards).

The Commission and Member State experts were also expected to discuss, among others, the following products: superluminescence diodes, radial shaft seals, head up displays, hybrid smart watches, stylus pen with Bluetooth, oxygen analysers, and GPS trackers.

The agenda of the 184th meeting of this Sub-Section scheduled for **18-20 December 2017** reveals that a draft Classification Regulation for manual spreaders will be put to a vote, as well as an amendment to the CNENs for cameras for drones. The group should further discuss the classification of 16 products, including oxygen analysers, portable interactive educational electronic devices, glass fibre fabric, roller chains of steel, stack cables, cables for weed brushes and GPS trackers.

c) HS/WCO Coordination Sector

According to the agenda, during the 13th meeting of the HS/WCO Coordination Sector held on 29 September 2017, various (unnamed) issues related to the HS were to be discussed, as well as imminent discussions in the HS Committee related to certain tobacco-products. The agenda of the 15th meeting of this NC Sector scheduled for 23-24 November 2017 reveals similar topics in the run up to the HS Review Subcommittee meeting, as well as possible amendments to General Rules 3(a) and 3(b) for the Interpretation of the HS. Discussions will also be held on possible amendments of Chapters 72 and 73 (steel), yoghurt, offset printing plates, multichip integrated circuits, and the "parts" Notes to Sections XVI and XVII and Chapter 90, and the classification of a product referred to as "Sterilizer Formaldehyde Formomat PL 349-2".

Origin

Origin Section of the Customs Expert Group

On 28 November 2017, the Origin Section of the Customs Expert Group met. The agenda indicated that the Commission and Member State experts were due to discuss the revision of the Pan-Euromed (PEM) Convention, the implementation of CETA, the ongoing negotiation of the EU-Mercosur FTA and the EU-Japan EPA, and the modernisation of the EU-Mexico FTA. In addition, the group was due to discuss various GSP origin issues, as well as horizontal issues including guidance on the Supplier's Declaration, the calculation of duty drawback and origin rules for used cars.

Valuation

Court judgment in *X BV* – adjustment of customs value following reimbursement of costs of a (preventive) recall and validity of time limit to request repayment of duties

On 12 October 2017, the CJEU delivered a judgment in Case C-661/15 (*X BV v. Staatssecretaris van Financiën*) on the rules for claiming repayment of customs duties where the customs value is lowered as a result of a reduction in the price actually paid or payable in order to address a risk of defect. In the case at issue, a Dutch importer of Japanese cars was asked by the Japanese manufacturer to invite all car owners to return their vehicles to a dealer so that the steering coupling could be replaced free of charge as for some types defects had been found, and for other types it was considered wise to do so, as there was a risk of defects. The importer reimbursed the related costs to the dealers, and the Japanese manufacturer in turn reimbursed the importer as part of its contractual warranty obligation.

The importer applied for the partial repayment of customs duties as the customs value – because of the reimbursements – had turned out to be lower than at import. The company relied on the provisions in the previous EU customs rules which allowed for a downward adjustment of the customs value for defective goods if the sales contract provided for such adjustment and if such application were filed within 12 months following release for free circulation (Article 145(2)-(3) of **Customs Code Implementing Regulation 2454/93**). The customs authorities rejected this request: for the cars being recalled to replace the steering coupling as a preventive measure, they argued that these cars were not defective at the time of import, and for the defective cars the application had not been made within the 12-month deadline.

The district court in which X brought proceedings dismissed the action, holding that X had failed to prove that at the date of entry into free circulation the cars were defective, and that a risk or possibility of a defect was not sufficient to fall under Article 145(2). Upon further appeal, the Dutch Supreme Court wondered if this provision should not be given a wider interpretation to cover cases where it is established that at the date of entry into free circulation, there was a manufacture-related risk that an imported product may actually become defective. The referring court further questioned the 12-month time limit in Article 145(3), as this was – for unclear reasons – different to the general 3-year limit for filing applications for duty refunds based on other legal grounds (notably Article 236(2) of the **Customs Code Regulation 2913/92**).

The CJEU considered that the term "defective" should cover goods "which lack required qualities or are imperfect" and that a product (in line with EU legislation on liability for defective goods) is defective "when it does not provide the safety which a person is entitled to expect". The CJEU confirmed that it is legitimate and reasonable to require a high degree of safety for a key car component such as the steering coupling and that such *"safety requirement is not met where there is a manufacture-related risk of failure of that component"* and that accordingly, the car in which such component is present must be regarded as defective. Contrary to justifications put forward by the Commission (e.g. that a shorter deadline necessary to combat the risk of error or fraud in the application of the defective goods provision and that the 12-month deadline was needed to ensure legal certainty and uniformity), the CJEU held that the 12-month time limit was neither necessary nor useful in Article 145(3) and it annulled this part of Article 145.

The old Customs Code and its Implementing Regulation have since May 2016 been replaced by the new Union Customs Code (UCC), which contains the same 12-month time limit for the provision relating to requests for adjustment under the defective goods provision. It remains to be seen when/how the EU will amend this UCC provision in line with the CJEU's ruling.

Court judgment on the choice of the valuation method in case of unlawful removal of goods from customs supervision during a transit operation

On 9 November 2017, the CJEU ruled in Case C-46/16 (*Valsts ieņēmumu dienests v. LS Customs Services*) concerning the customs valuation method to be used for goods unlawfully removed from customs supervision while in transit in the EU. In the case at issue, LS Customs Services submitted a customs declaration with Latvian customs for the transit of goods from China and destined for Russia. As the transit procedure was not ended properly, the customs authorities applied import duties and anti-dumping duties based on a customs value determined on the basis of available information.

EU customs rules normally require the transaction value method to be used as the primary valuation method (i.e. the price actually paid or payable for goods when sold for export to the EU). When it is not possible to use that method, another valuation method must be used. The determination of the alternative method to be used must follow a strict hierarchy laid down in the WTO Agreement on Valuation on which the EU rules are based. A final "residual" method (i.e. after it has been found to be impossible to apply any other alternative method) is to decide "on the basis of data available" in the EU, while ensuring that this is done "using reasonable means" (and not, for example, using the selling price of EU-produced goods or minimum customs values).

LC Customs Services successfully appealed against the decision of Latvian customs to use the residual method on the grounds that the customs authorities had not indicated the information on the basis of which they had calculated the duties. Upon further appeal by the customs authorities, the higher court confirmed the first judgment, noting that the customs authorities had also failed to explain why it had been impossible to obtain information allowing it to use any of the other methods, and that this had prevented LS Customs Services from fully defending its rights. The national revenue authority again appealed to the Supreme Court, which referred the matter to the CJEU.

The CJEU confirmed that in case of a transit operation, the transaction value method cannot be used, as the price for export to a third country (e.g. Russia) does not necessarily correspond to the price that would have been established for export of those goods to the EU. The CJEU further held that the amount of the security lodged by the principal of the transit operation (based on an estimate of the customs value), cannot create a legitimate expectation as to the ultimate customs value. Importantly, the court also ruled that the authorities are obliged to state the reasons, on the basis of which they have set aside the various other valuation methods, before moving on to the next method. They must also set out the information on the basis of which they have calculated the customs value. However, the CJEU rejected the argument that the customs authorities are required to request information from producers in order to determine the customs value. Instead, they are required to consult all the information sources and databases available to them and they must allow economic operators to provide them with information which may contribute to their value determination. In other words, the customs authorities must not actively request information from the manufacturer, but they must consider relevant information that is (made) available to them.

Procedures

Court judgment in *Tigers GmbH* anti-dumping duty refund case

On 12 October 2017, the CJEU delivered its judgment in Case C-156/16 (*Tigers Gmbh v. Hauptzollamt Landhut*). German importer Tigers GmbH in late 2012 imported ceramics from China and was asked by German customs to secure the highest amount for provisional anti-dumping duties applicable at the time for "all other companies", even though the goods had been purchased from a manufacturer who was entitled to a lower individual duty rate. This was because the invoice when it was submitted with the import declaration did not contain the special declaration required by the Regulation imposing the provisional anti-dumping duties. When the definitive duties were adopted in 2013, German customs asked Tigers to pay the duty for "all other companies". A week later, Tigers produced such invoice and asked for a refund of the anti-dumping duties paid in excess of the individual company rate. The German customs authorities refused that request on the grounds that they could not accept an invoice drawn up or presented retroactively.

The CJEU noted that while it is clear under the Regulation imposing the anti-dumping duties that presentation of a valid commercial invoice with the special manufacturer's declaration is required to benefit from the individual company rate, that Regulation does not specify when such invoice must be presented. It thus ruled that such invoice can still be presented after the customs declaration has been accepted. In other words, a

refund was appropriate here.

Court judgment on customs debt liability for a person not directly involved in customs clearance but involved in fictitious transactions to avoid certain duties

On 19 October 2017, the CJEU delivered its judgment in Case C-522/16 (*A v. Staatssecretaris van Financiën*) concerning duty liability of a party involved in designing artificial arrangements intended to avoid additional import duties duty on poultry meat that can be imposed if the CIF import price is below a trigger price. Although the import (by German company F through the Netherlands) appeared to involve a price well above the relevant trigger price, upon inspection, the Dutch customs authorities discovered a special scheme. Under this scheme, through various related companies, the initial price of the poultry meat paid to South American suppliers by a related company was artificially increased through a chain of fictitious transactions so that the CIF price at import into the EU would be well above the trigger price, but the price ultimately charged to EU customers was well below that trigger price. The customs authorities sent notice of payment of the additional duties based on the initial price paid to the South American suppliers to shareholder "A" of the company that owned the importing company F, on the basis that A had asked for the invoices submitted with the import declarations to be drawn up, and he should have known that these were based on artificial transactions.

Upon unsuccessful successive appeals by A through the Dutch court system, the Supreme Court (which agreed that the transactions were carried out solely for the purpose of avoiding the additional duties) nevertheless referred the matter to the CJEU. The key question was whether or not A could be held liable here as he did not himself supply the information required for the drawing up of the customs declaration. In his defence, A had argued that he only designed the special scheme after he had obtained confirmation from customs experts that this structure was in compliance with applicable legal rules and the referring court asked if that was a relevant factor in assessing if A "ought to have reasonably known" that the information was false, which is a criterion to make parties other than the declarant liable for customs debt under the EU customs rules.

The CJEU ruled that even though A had not himself provided the invoices, he could be held liable as he was involved in acts connected to the supply of those invoices as he was closely and knowingly involved in the design and artificial set-up of the structure of companies and artificial transactions. A's defence that he had a reassuring customs expert opinion was considered to be irrelevant as he clearly knew that the invoices were fictitious as he had been involved in the entire set-up which was not in the ordinary course of trade.

Miscellaneous

EU launches global Alliance for Torture-Free Trade

On 18 September 2017, EU Trade Commissioner Cecilia Malmström during the United Nations General Assembly Week launched the Alliance for Torture-Free Trade, a joint initiative with Argentina and Mongolia, with 58 participating countries, and which aims to stop trade in goods used to carry out the death penalty and to commit torture. These countries signed a joint political declaration listing four action points: (a) take measures to control/restrict exports of these goods, (b) equip customs authorities with appropriate tools, (c) provide technical assistance to help countries adopt and implement laws to ban this trade, and (d) exchange best practices for efficient control and enforcement.

White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Belgium

T +32 2 239 26 20