

EU Customs Practice Group

March 2015

EU CUSTOMS POLICY

Union Customs Code Developments

Following the last round of comments and consultations with Member States and the Trade Contact Group of industry representatives a few months ago, the European Commission in early March circulated to these parties the draft of the implementing and delegated acts for the Union Customs Code (UCC) which is undergoing “inter-service” consultation (i.e. comments from various Commission Directorates and its Legal Service). Around mid-April, the Commission is expected to have a final draft. Some changes will reportedly be made, but it is at this stage unclear in precisely what areas. The final text is expected to be put to a vote in the coming months, and become available to the wider public around that time as well.

IMCO vote on proposed Regulation on Mutual Assistance

On 17 March 2015, the European Parliament’s (EP’s) Committee on the Internal Market (IMCO) accepted the text agreed in trilogue meetings with the Council and the Commission for the proposed regulation amending **Regulation 515/97** on mutual assistance between the administrative authorities of the Member States, and cooperation between the latter and the Commission to ensure the correct application of law on customs and agricultural matters.

The amendments are aimed at eliminating certain loopholes in the system for detection of customs fraud while enhancing customs risk management and supply chain security. A central database for import and export data will be introduced for this purpose (but covering fewer products for export reporting than originally foreseen in the Commission’s proposal). The text must still be approved formally by the EU Council and EP before it can be published in the Official Journal. The new rules are set to apply fully from 1 September 2016.

TARIFFS

Amendment of vulnerability threshold in GSP Regulation

The EU Council has decided not to object to a Commission proposal to amend the vulnerability threshold in the EU’s Regulation on the Generalised Scheme of Preferences (GSP).

The special GSP+ arrangement provides additional benefits to reward sustainable development and good governance (for products listed in Annex IX) to developing countries that are considered “vulnerable” when exporting to the EU.

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This newsletter briefly describes EU customs developments. Due to the general nature of its content, this newsletter is not and should not be regarded as legal advice.

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Until now, the EU GSP Regulation provided that in order to meet the vulnerability criteria in the GSP+ arrangement, a country's imports of relevant products into the EU must represent less than 2% in value of total relevant EU imports from all GSP beneficiary countries as an average during the last three consecutive years. Because of the removal as from 1 January 2015 of four countries (China, Thailand, Maldives and Ecuador) from the list of GSP beneficiaries and expected drop in total GSP imports into the EU, the Commission now wants to set this threshold at 6.5% retroactively as from the same date.

If the EP also does not object, the Commission can formally adopt and publish this Regulation so it can enter into force.

Duty suspension and tariff quotas

In March 2015, the list of products for which a duty suspension has been requested as part of the January 2016 round was made available on the Commission's dedicated webpage. Companies have until 23 June 2015 (the date of the second scheduled meeting of the Economic Tariff Questions Group) to raise objections to the new requests.

The formal proposal for the July 2015 round was not yet available when this issue was written, but the latest state-of-play of requests can be found on the Commission's webpage.

FTA update

a) US

On 20 March 2015, EU Trade Commissioner Malmström and US Trade Representative Froman discussed the state-of-play in negotiations on the Transatlantic Trade and Investment Partnership (TTIP) agreement, as well as agendas for the two upcoming negotiation rounds taking place before the Summer. On the same date, the European Council urged TTIP negotiators to reach agreement by the end of 2015, and asked the Commission and the Member States to increase their efforts to communicate expected TTIP benefits and strengthen the dialogue with the civil society.

A few days earlier, Commissioner Malmström presented to the International Trade Committee (INTA) of the EP her long-awaited "preliminary ideas" for improvements in the controversial investor-state dispute settlement (ISDS) mechanism to be negotiated in TTIP. The INTA Committee is scheduled to vote on its draft report for TTIP negotiations on 6 May 2015 and the plenary EP session is currently scheduled to vote on the recommendations during the 18-21 May 2015 session, although there may well be a delay.

Member State discussions on ISDS issues also took place during the informal EU Trade Ministers meeting on 24-25 March 2015, and will continue at the next formal Foreign Affairs Council on trade, which is scheduled to take place on 7 May 2015.

b) Japan

On 18 March 2015, the EP's INTA Committee hosted an exchange of views with the Japanese Ambassador to the EU and the EU's Chief Negotiator on the ongoing EU-Japan FTA talks. According to the Japanese Ambassador, the "real" negotiations have now started and he suggested accelerating negotiations at a high pace with meetings every two months. The EU Chief Negotiator stated that further attention is required as regards non-tariff measures (NTMs), public procurement (going beyond transparency commitments), tariffs, (postal) services and investment. While the end of 2015 target for the conclusion of negotiations is considered to be ambitious, both representatives said it is feasible.

During an informal meeting of the EU Trade Ministers on 23-24 March 2015, progress achieved thus far by the EU negotiators was commended and the Commission was asked to continue working actively with Japan to deal with outstanding negotiation issues.

On 23-27 March 2015, the EU and Japan were scheduled to hold so-called 'inter-sessional' talks focussing on a few specific topics, such as intellectual property rights (IPR).

c) Vietnam

From 23 to 27 March 2015, the 12th round of EU-Vietnam FTA negotiations took place, and were reported to have focussed on all outstanding issues such as goods trade (tariffs, rules of origin, non-tariff barriers (NTBs), and export duties), services and investment, government procurement, state-owned enterprises, IPR and geographical indications, and regulatory issues. The aim is to hold the 13th round during the first half of June 2015.

During the informal meeting of the EU Trade Ministers on 23-24 March 2015, EU Foreign Affairs Ministers expressed satisfaction with prospects for concluding the EU-Vietnam FTA negotiations "in the coming months".

d) Singapore

On 4 March 2015, the Commission confirmed its decision to request a Court of Justice of the EU (CJEU) opinion on the EU-Singapore FTA in order to clarify which EU body has the competence to sign and ratify the FTA (i.e. certain parts of it) with Singapore. This development has stopped the clock on the normal procedure for the approval and ratification process of this FTA.

e) Canada

Similar to calls for an arbitration court in the context of TTIP, Socialist leaders from six Member States signed a joint position paper calling for a reform of the ISDS system agreed in the EU-Canada Comprehensive Trade and Economic Agreement (CETA) by setting up a permanent EU-Canada trade and investment court.

On 18 March 2015, EU Trade Commissioner Malmström stated that the legal scrubbing of CETA is basically finished, and that the final text will be sent for translations in a few weeks' time. She also announced that the EU will not re-open negotiations with Canada on ISDS, but will raise the idea of setting up a special court with Canada.

f) Turkey

The EU and Turkey have agreed on a road map to update the EU-Turkey Customs Union. The Commission is aiming to carry out an impact assessment for that purpose by the end of 2015. After that, it would have to obtain a negotiating mandate from the Council to start the actual negotiations with Turkey. According to reports, such EU-Turkey negotiations would be expected to cover public procurement and services.

g) India

According to unofficial reports, the EU and India are making attempts to resume negotiations for an EU-India FTA (for which the negotiations started in June 2007). No negotiation rounds have taken place since May 2013.

h) Indonesia

According to a senior Indonesian government official, Indonesia is aiming to resume talks with, among others, the EU on possible future FTA negotiations. The country's Ministry of Trade is currently reviewing Indonesia's position, and looking into necessary adjustments to facilitate the start of negotiations.

EU Trade Policy Strategy

The European Commission has announced that it intends to publish, in the Autumn of 2015, a communication with an updated strategy for the EU's trade policy for the next five years. The EU Trade Ministers during their informal session on 23-24 March 2015 observed that the role of trade policy should be addressed in a broader context when evaluating bilateral and multilateral trade priorities, and take into account the relationship between trade issues and development, human rights, rights to work, and sustainable development. The Ministers also felt that there must be better information to the general public about the economic benefits of international trade.

Implementation of the EU-Central America Association Agreement

On 18 March 2015, the Commission issued its annual report on implementation of the trade part of the EU-Central America Association Agreement. This Agreement has been provisionally applied as from 1 August 2013 with Nicaragua, Honduras and Panama; from 1 October 2013 with El Salvador and Costa Rica; and from 1 December 2013 with Guatemala. The report finds that, overall, EU imports from Central America increased by 3.4% during the first year of implementation while EU exports to Central America decreased by 6.3%. In the Commission's view, this reduction is in line with the overall negative EU export trend for this region.

Another finding is that traders have made significant use of tariff rate quotas for products that were already traded before the provisional application of the agreement, but that there has not been any significant trade creation for products not traded before implementation.

Implementation of the EU-Korea FTA

On 26 March 2015, the Commission published its third annual report on the implementation of the EU-Korea FTA. EU exports of goods to Korea increased by 35% in the third year of the FTA (compared to the 12-month period before the FTA took effect). EU imports from Korea increased by only 6% compared to the previous implementation year. The EU considers that this is the result of decreased EU demand following the financial crisis. The Commission further notes that some implementation and bilateral trade issues persist, notably with respect to remaining NTBs in the automotive sector.

CLASSIFICATION

Nomenclature Committee Developments

a) CN Sector

On 31 March 2015, the 149th meeting of the Combined Nomenclature (CN) Sector of the Customs Code Committee took place. The agenda indicates that the Committee was due to examine the possible creation of new CN codes for certain beverages based on soy, nuts and cereals; for tableware and kitchenware; for lubricants, succinic acid and 1, 4-butanediol; and for 'fluorinated greenhouse gases'. A French proposal to create the supplementary unit "number of items" for CN code 9304 00 00 (Other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of heading 9307) was also on the table for discussion, as was the possible introduction of special codes for rare earths.

New Classification Regulations

In the past month, the following relevant EU Classification Regulations were published:

- **Commission Implementing Regulation 2015/352** classifies a stuffed toy animal with a built-in music module as a stuffed toy representing an animal under CN code 9503 00 41.
- **Commission Implementing Regulation 2015/386** classifies a four-wheeled skateboard equipped with an electric motor and presented with a handheld remote control under CN code 9506 99 90 as articles and equipment for other sports or outdoor games.
- **Commission Implementing Regulation 2015/387** classifies an electrical apparatus incorporating a lamp that emits UV radiation and that is presented to be used for the photochemical purification of water as an apparatus for filtering and purifying water under CN code 8421 21 00.
- **Commission Implementing Regulation 2015/388** classifies a plastic sheet containing 24 copper wire antennae to be used as parts of smart cards as other inductors under CN code 8504 50 95.

EU publishes CN Explanatory Notes

On 4 March 2015, the EU published the revised full list of EU CN Explanatory Notes (CNENs). This new list includes and replaces all CNENs previously published in the Official Journal of the EU. The previous consolidated version was from 2011.

EU amends Additional note to Chapter 27

On 10 March 2015, the Commission updated Additional note 4 to Chapter 27 of the CN with respect to the method for determining oil content in crude products of CN codes 2712 90 31 and 2712 90 39.

EU amends Additional note to Chapter 20

On 10 March 2015, the Commission replaced Additional note 24 to Chapter 20 of the CN with respect to the method used to calculate sugar content of products of Chapter 20 (Preparations of vegetables, fruit, nuts or other parts of plants).

Court Judgment on laser and ultrasonic appliances

On 4 March 2015, the CJEU issued a judgment in Case C-547/13 (*'Oliver Medical' SIA v. Valsts ieņēmumu dienests*) on the classification of laser and ultrasonic appliances and their parts and accessories (i.e. as electrical apparatus, medical instruments or mechano-therapy appliances under tariff headings 8543, 9018 or 9019, respectively).

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The Court confirmed that for the classification of goods, all relevant factors should be taken into account to the extent that they relate to characteristics and objective properties inherent to the products. Such relevant factors include the use for which the product is intended by the manufacturer and the methods and place of its use. The Court held that if the products in this case are intended to treat certain pathologies in an authorised medical center under the supervision of a practitioner, this is an indication that they are for medical use, and hence, classifiable as medical instruments or appliances under heading 9018, or as mechano-therapy appliances under heading 9019. On the other hand, if these products only generate an aesthetic improvement and can be used outside a medical environment and without a practitioner's intervention (e.g. in a beauty parlour), this would indicate that the products are not intended for medical use and that they should instead be classified under heading 8543 as electrical apparatus. The Court also observed that dimensions, weight and technology used do not constitute decisive factors for classification under heading 9018.

Court Judgment on action cameras integrated into sports goggles

On 5 March 2015, the CJEU handed down its ruling in Case C-178/14 (*Vario Tek GmbH v. Hauptzollamt Düsseldorf*). The applicant had imported various models and types of goggles worn for sports activities (skiing and diving) with an integrated "action" camera under CN codes 8525 80 91 (as video camera recorders only able to record sound and images taken by the television camera) and 8525 80 30 (as digital cameras). However, the German customs authorities considered that the correct CN code was 8525 80 99 (the residual subheading for video camera recorders not only able to record sound/images taken by the TV camera, subject to an MFN rate of 14%) on the basis that they could also store such images/sound recordings from an external USB stick.

Vario Tek claimed that the fact that USB recordings may be stored on the goggle camera could not in itself lead to classification under CN code 8525 80 99, as the product was first and foremost intended to register its own images/sound. The referring court asked the CJEU whether the absence of a zoom function would preclude classification as a video camera recorder, and, if not, whether the USB fed storage of external video/sound – albeit without viewing or listening capacity with the camera alone – could still allow classification under CN code 8525 80 91.

The CJEU held that the absence of a zoom function does not preclude classification of it as a video camera recorder under CN codes 8525 80 91 or 8525 80 99. However, it also decided that the possibility for the integrated camera

to store images/sound from an external source meant that the product cannot be classified under CN code 8525 80 91, if this recording can be executed autonomously and without the need for external software.

ORIGIN

EU publishes amendment to rules of origin relating to GSP and other preferential tariff measures

On 14 March 2015, the Commission published a Regulation amending the **Customs Code Implementing Regulation (2454/93)** as regards the rules of origin relating to the EU's GSP regime and preferential tariff measures for certain other countries or territories. The amendments relate to the extension of the registered exporter system (REX) to Norway, Switzerland and Turkey once certain conditions are met, and revise the conditions for retrospective issuing of Form A certificates. It also introduces a tolerance in width requirements for Form A certificates of origin and transitional measures and a phasing-in approach until 31 December 2019 for the REX system. Detailed rules concerning the protection of personal data in the REX system are also included, as are provisions concerning the splitting of consignments (notably to clarify that this may only be done by exporters or under their responsibility if origin status is to be kept).

Origin Committee Developments

The report of the 216th meeting of the Origin Section of the Customs Code Committee which took place on 20-21 January 2015 has been made available. The Committee discussed various matters relating to the Pan-Euro-Mediterranean (PEM) Convention and the Commission briefed the Committee on, *inter alia*, a request from Cape Verde for a derogation from the GSP rules of origin, and on the state-of-play of the Registered Exporters (REX) system, including coordination with Norway and Switzerland. The Commission gave an update on the origin-related talks held in preparation for the 9th round of EU-Japan FTA negotiations. The Committee further discussed the origin rules applicable to trade with Cameroon under the Central Africa-EU Economic Partnership Agreement (EPA), and the re-inclusion of Kenya in Annex I of the Market Access Regulation following the conclusion of negotiations between the EU and Kenya of the East African Community-EU EPA in October 2014. The situation as regards goods from Ecuador under GSP was explained (pending the application of the FTA with this country). The Member States were informed about the Commission's activities in relation to verification requests and reasonable doubt in 2014, and were told that the Commission is setting up of a project group (under the Customs 2020 programme) to draft UCC guidelines on binding origin information and application of preferential and non-preferential rules of

origin. These should eventually be published in the Official Journal.

Finally, the Commission provided an update on the discussions to be held during the then upcoming WCO Technical Committee on Rules of Origin (TCRO) meeting of 3-4 February 2015. In this respect, the Commission flagged the strategic topic of "WCO Guidelines on Advance Rulings", under which the WCO is aiming to group guidance on classification, valuation and origin into one document. It also noted that on the fringes of the TCRO, a workshop on origin would take place at the WCO focussing on origin certification and origin irregularities.

PROCEDURES

Judgment in "Vestel" case on lack of direct concern

On 12 March 2015, the CJEU rendered its judgment in Case C-7/14 P (*Vestel Iberia CL and Makro autoservice mayorista SA v. European Commission*). This proceeding concerns a long litigation process related to imports of Turkish televisions into Spain in 2000 which were subsequently found to have had Chinese non-preferential origin, and should have thus been subject to EU anti-dumping duties. Setting aside certain details, the main question in this case was whether an importer who has unsuccessfully requested remission of customs debt is "directly concerned" by a Commission Decision rejecting remission of customs debt requested by another importer in cases that are comparable. If so, the former would be in a position to seek annulment of that other decision before the CJEU and potentially achieve a different outcome for his own remission request.

The EU Customs Code (CC) and its implementing provisions provide that remission requests must, in certain cases, be transmitted by the Member State concerned to the Commission, unless the Commission is already considering a case involving comparable issues of fact and law. When the Spanish authorities forwarded the remission requests of the applicants to the Commission, these were returned by the Commission on the basis that the Commission was indeed considering a similar case (involving Schneider España de Informática SA), and the Spanish authorities thus awaited the outcome of that case.

The Commission then decided that the Schneider application was not justified (i.e. no remission granted) on the basis of two conditions to achieve remission (under Article 220 CC): 1) that the customs authorities had not made any error and 2) that Schneider did not prove it had acted diligently. Also, it decided that there was no special circumstance (which could have allowed remission under Article 239 CC).

Subsequently, the applicants' remission requests were also rejected and they therefore sought annulment of the Schneider decision. The applicants (and the Spanish government) considered that the Schneider decision was of direct concern to them, as Member States do not have discretion to decide "similar" cases themselves since they must automatically apply Commission decisions in similar cases. The CJEU disagreed and clarified that the only obligation on Member States is to await the outcome in similar cases and to then take this into account when deciding their own case. The aim of the two-level process was to help the customs authorities reach their own decisions, but the assessment of whether the criteria under Articles 220 or 239 CC were satisfied and/or the circumstances were different from those in the Schneider case could still be carried out by the Member State. The CJEU thus dismissed this action.

MISCELLANEOUS

EU Commission presents 5th Trade and Investment Barriers report

On 17 March 2015, the 5th annual edition of the so-called "Trade and Investment Barriers Report" for 2015 was published by the European Commission. It reports on the most significant trade restrictive barriers faced by EU companies in 2014 on the markets of the EU's six strategic economic partners, i.e. China, India, Japan, Mercosur (Brazil/Argentina), Russia and the US. The barriers identified in this report include requirements to use locally-produced goods, and discriminatory taxes and subsidies.

Green Goods Trade – status of talks

On 14 March 2015, a further negotiating round took place between the participants in the international negotiations on an Environmental Goods Agreement (EGA), including the EU. The participating 16 parties completed a list of 600 products that have been proposed for zero-tariff treatment. Initially, the list was based on 54 products under the Asia-Pacific Economic Cooperation (APEC) List of Environmental Goods. By August, the parties wish to narrow down the list, and the aim is to conclude the EGA negotiations in advance of the December 2015 United Nations Conference in Paris.

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