

EU Customs Practice Group

June 2015

EU CUSTOMS POLICY

Union Customs Code Developments

It has become clear that there are further delays in finalising the draft Union Customs Code (UCC) Implementing and Delegated Acts within the Commission, in light of a rather difficult inter-service consultation launched a number of months ago. The final draft Implementing Act will now not materialize until after the Summer, while progress is expected to be a little quicker on the draft UCC Delegated Act. Originally, the Commission's goal was to make available the final versions before 1 May 2015, so that the customs administrations and businesses would have at least one year to adapt to the new rules (which should take effect in May 2016 and with the UCC replace the current Community Customs Code (**Regulation 2913/92**) at that point).

In early July 2015, the General Customs Legislation section of the Customs Code Committee is due to discuss another draft UCC Delegated Act which focusses on the transitional measures foreseen under the UCC for the introduction of electronic systems. As not all IT systems will be ready by 2016, this Act will contain rules to allow the transition from the current EU customs environment to the fully automated customs environment by 2020.

Mutual Assistance Regulation

On 15 June 2015, the EU Council adopted its position at first reading on a compromise text agreed last December with the European Parliament (EP) for a Regulation of the European Parliament and of the Council amending **Council Regulation (EC) 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 the law on customs and agricultural matters*). Later in the month, the Commission formally supported the amendments the EP and Council have agreed on for the Commission's original proposal.

The new Regulation is expected to be adopted and published after the EP formally confirms the compromise text at a forthcoming plenary session. The new Regulation will replace the old Regulation which dates from 1997 as from 1 September 2016. It aims to address loopholes in the current system for the detection of customs fraud and shorten delays in fraud investigations. A new centralized directory of Container Status Messages (CSMs) will be created, as well as an import, export and transit directory. In addition, the new rules should streamline data protection supervision and clarify the rules on restricting visibility of data and the admissibility of evidence collected under mutual assistance procedures.

In this issue

EU CUSTOMS POLICY

Union Customs Code Developments
Mutual Assistance Regulation

TARIFFS

Duty Suspensions and Tariff Quotas
EU seeks input for EGA talks
FTA Update

CLASSIFICATION

Court Judgment Amazon – eBook Readers

Court Judgment Baby Dan – spindles
Nomenclature Committee Developments

ORIGIN

Origin Committee Developments
PEM Convention Matters

VALUATION

WCO Guide on customs valuation and transfer pricing

PROCEDURES

Court Judgment DSV Road – transit
EU-Japan customs cooperation
EU-China customs cooperation

MISCELLANEOUS

EU Sanctions update – Russia/Crimea and Iran
EU updates textile import rules
EU Dual-Use Export Controls
EU concerns about Pakistan taxes

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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TARIFFS

Duty Suspensions and Tariff Quotas

The July 2015 round for EU duty suspensions and tariff quotas has officially ended with the publication of relevant Regulations. On 23 June 2015, **Regulations 2015/982** and **2015/981** were adopted to update the existing **EU Duty Suspensions (DS) Regulation (1387/2013)** and **EU Tariff Quota (TQ) Regulation (1388/2013)**, respectively. The latest DS Regulation update added 111 new duty suspensions, removed 15, and amended the description of almost 30 existing suspensions as from 1 July 2015 (except a few changes which will apply retroactively from 1 January 2015 or 1 July 2014). Also as from 1 July 2015, the TQ Regulation update added 7 tariff quotas, amended 6 existing tariff quotas, and deleted two tariff quotas.

Meanwhile, the first two meetings of the Economic Tariff Questions Group (ETQG) to consider applications under the January 2016 round have already taken place, and the third meeting is scheduled for mid-July. The formal proposals to the Council should be presented in the late Autumn, for adoption in December and application as of 1 January 2016.

Companies seeking new DS or TQs must be aware that the deadline to file applications for the July 2016 round is approaching and are advised to check the precise deadline applied by their Member State. The Member States will – in line with normal practice – need to forward any valid applications they have received to the Commission by 15 September 2015. The first ETQG meeting of that round should then follow between mid-October and mid-November.

EU seeks input for WTO Member talks on the Environmental Goods Agreement

On 3 June 2015, the European Commission organized a stakeholder event on the ongoing multilateral Environmental Goods Agreement (EGA) talks to seek input from experts in anticipation of the 7th round held during the week of 15-22 June 2015. The focus is on deciding which products should be included for duty elimination. On the occasion of the event, EU Trade Commissioner Cecilia Malmström said she hopes a deal for the elimination of tariffs on “as many environmental products as possible” can be reached by the end of 2015. She would also like the agreement to include a non-tariff pillar covering after-sales services (e.g. for wind turbines), but admitted that it would not be possible to include regulatory barriers and public procurement issues in a possible agreement already this year.

FTA Update

a) Europe Trade Policy Day

The Commission is preparing to issue a Communication in the Autumn on the EU’s trade and investment strategy for the next five years. In that context, the Commission

organized a Europe Trade Policy Day on 23 June 2015 to seek the views of various stakeholders. Opening the event, Commissioner Malmström called the pending EU FTAs being negotiated with the United States and Japan “*fundamental objectives*.” She further announced that the EU hopes to be able to extend the transparency shown in the context of Transatlantic Trade and Investment Partnership (TTIP) talks to other trade negotiations. The Commissioner also called for a deepening of trade relations with the Asia Pacific region, including by engaging with Australia and New Zealand (countries thus far not linked to the EU by any trade preference regime).

b) US

The draft resolution prepared by the EP’s International Trade (INTA) Committee with TTIP related recommendations was withdrawn from the EP’s June plenary session. This withdrawal came after frantic last-minute negotiations over certain amendments, including on investor-state-dispute-settlement (ISDS) provisions. The EP Chair decided to send the matter back to the INTA Committee for further deliberation, which led to a new vote on a revised draft resolution in that Committee on 29 June 2015. The matter was finally debated and voted on in the July plenary, resulting in an EP resolution proposing, among other things, a new justice system to settle trade-related investor-state disputes.

The next formal TTIP negotiating round is scheduled for 13-14 July 2015, combined, as usual, with a mid-week stakeholder event. Meanwhile, in the US, the Trade Promotion Authority (TPA) has been approved in Congress, so President Obama now has “fast track” authority to negotiate TTIP (and other major FTAs). Congress will, as a result, only be able to approve or reject an entire FTA (without ability to amend the text), similar to the EU procedure involving EP consent.

c) Canada

In early June 2015, the Commission was reported to have indicated that it has not yet decided whether the Comprehensive Economic and Trade Agreement (CETA) with Canada is a mixed competence agreement (i.e. involving competence of both the EU and the Member States). A mixed competence agreement can only be applied (as far as the provisions falling in the mixed competence category) after all 28 national parliaments have ratified the text. Currently, the so-called “legal scrub” of the CETA text is ongoing. The Commission hopes that this process can be finished before the Summer break, so that the text can then be translated into all official EU languages. The current aim is to submit the text to the EU Member States and the EP for consideration and adoption in early 2016.

d) Vietnam

Contrary to expectations, the June negotiating round between the EU and Vietnam did not lead to conclusion of the talks on a bilateral FTA (which started in 2012), as certain issues could not be resolved (e.g. related to access to the Vietnamese public procurement market and the protection of geographical indications). On 23 June 2015, the EU Trade Commissioner met the Vietnamese Trade Minister to take stock of the negotiations. To date, the negotiations are still pending, but it still appears the parties are close to a deal.

e) ASEAN

In its conclusions on the EU's strategic partnership with ASEAN made on 22 June 2015, the EU's General Affairs Council underlined the importance of promoting closer trade and investment links with the region. The Council also welcomed the joint assessment with ASEAN on the prospects of a region-to-region FTA (on which the Commission is starting).

f) China

During the EU-China Summit held on 29 June 2015, it was confirmed that “[n]egotiations and concluding [the] comprehensive EU-China Investment Agreement will convey both sides’ joint commitment towards stronger cooperation as well as their willingness to envisage broader ambitions including, once the conditions are right, towards a deep comprehensive FTA, as a longer term perspective.” In other words, despite China’s keen push to start FTA talks with the EU soon, this is being held off by the EU side for now.

g) Mercosur

On 10 June 2015, the so-called “CELAC” Summit took place in Brussels between the EU and the Community of Latin American and Caribbean States. On the fringes of the Summit, Ministers from Argentina, Brazil, Paraguay and Uruguay and EU Trade Commissioner Malmström issued a joint statement confirming that Mercosur wants to exchange market access offers in FTA negotiations by the end of 2015. This would mean the negotiations could then be resumed, after having been held up for quite some time (after their re-launch a few years ago).

h) Mexico

On 12 June 2015, at the EU-Mexico Summit in Brussels, both parties confirmed their willingness to launch the internal process on each side to start negotiations in 2015 on modernizing the existing bilateral FTA, which took effect in 2000. Meanwhile, the Commission has launched a public consultation (which closes at the end of August 2015) to seek the views of stakeholders on this modernization process. The Commission is expected to submit a draft negotiating mandate to the Council by the end of this year.

i) EU-Andean Agreement

As from 1 July 2015, Croatia has formally become part of the EU's Agreement with Colombia and Peru, following the signature of an Additional Protocol to the FTA to this effect on 30 June 2015. Meanwhile, Decisions of the EU-Colombia-Peru Trade Committee set up under this FTA have been published to adopt the rules of procedure of that Committee, and to appoint the list of arbitrators on disputes relating to trade matters.

j) Economic Partnership Agreements

In her speech to launch the European Development Days on 3 June 2015, Commissioner Malmström urged African countries to fully implement their Economic Partnership Agreements (EPAs) with the EU so as to increase the predictability and transparency of the local business environment, in particular in the area of customs administrations.

CLASSIFICATION

Court Judgment – Amazon – eBook Readers

On 11 June 2015, the Court of Justice of the EU (CJEU) gave its judgment in a German court referral case (Case C-58/14, *Hauptzollamt Hannover v. Amazon EU Sàrl*) concerning the customs classification of electronic book readers with pre-installed dictionaries. The local German customs office required classification of this product under Combined Nomenclature (CN) code 8543 70 90 (i.e. as an electrical apparatus with an individual function, not specified or included elsewhere in Chapter 85), but on administrative appeal by Amazon, this was changed by the regional customs administration to code 8543 70 10 (as an electrical machine with translation or dictionary functions). When Amazon subsequently sought Binding Tariff Information (BTI) to confirm the latter CN code, the German customs administration went back to classifying the product under code 8543 70 90 on the ground that the main function of the device was the reproduction of books and not the translation/dictionary function. Amazon appealed and the German first instance court agreed with its position, so the regional customs administration subsequently appealed to the federal court. That court referred the matter to the CJEU asking whether CN code 8543 70 10 is intended for apparatus with only a translation or dictionary function.

The CJEU ruled that a reading device for electronic books which has a translation or dictionary function must be classified under CN code 8543 70 90 where that function is not its principal function, rather than under code 8543 70 10. It added that the fact that there is no specific tariff heading for reading devices did not mean that a device must then be classified under a specific subheading based on one of its ancillary functions. In other words, for this type of device, German customs was correct in ordering classification under the residual code 8543 70 90.

Court Judgment – Baby Dan – security gates/spindles

On 11 June 2015, the CJEU delivered its judgment in a case referred to it by a Danish court related to the classification of a removable security gate for the security of small children in the form of spindles to be placed between walls or in a door frame (Case C-272/14, *Skatteministeriet v. Baby Dan*). The question was whether this product should be classified under heading 7318 (“Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers and similar articles, of iron or steel”) or 8302 (“Base-metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base-metal hat-racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal”).

The Danish customs authorities (after a customs audit and examination of the product) concluded the appropriate heading was 7318, but the importer, Baby Dan, objected and on appeal before the fiscal tribunal was told the proper classification was in yet another heading, namely 7326 (the residual heading for “Other articles of iron or steel”). The Danish customs administration appealed the first instance judgment to the Vestre Landsret, which referred the question to the CJEU. The CJEU decided that correct classification fell under heading 7318, referring to an Explanatory Note to the Harmonized System (HSEN) which clarifies that heading 7318 includes “*all types of fastening bolts and metal screws regardless of shape and use, including U-bolts, bold ends (i.e. cylindrical rods threaded at one end), screw studs (i.e. short rods threaded at both ends, and screw studding (i.e. rods threaded throughout).*” The Court decided that the product at issue corresponded to that description, and that it did not appear to be caught by any of the examples listed in the HSEN for 8302.

Nomenclature Committee Developments

a) Sub-Section Agriculture/Chemistry

The report of the 153rd meeting of the Agriculture/Chemistry Sub-Section of the EU’s Nomenclature Committee held on 1-2 June 2015 shows that the experts discussed, *inter alia*, the classification of “fused magnesia chrome”, dietary supplements, erotic cosmetic preparations, and the calculation of fructose. The Committee also endorsed reports of the March and April Project Group meetings on the chemicals chapter and of a recent meeting of the Project Group on the food chapters. A file on possible amendment of Additional Note 2(e) to Chapter 27 related to the classification of gas oils was closed, but at the same time, a new gas oil case is likely to be opened to examine a possible amendment to Additional Note 2(f) to Chapter 27, apparently to address concerns related to excise duty fraud. The Commission also informed the Committee that it is preparing a corrigendum to the English version

of the CN Explanatory Note (CNEN) for subheading 3912 20 11 (collodions and celloidin). Finally, the possibility of additional codes for specific tobacco products was discussed.

b) Combined Nomenclature Sector

The report of the 152nd meeting of the CN sector of the Nomenclature Committee which was held on 29 May 2015 has been made available. There was agreement with the proposal by the Commission’s Directorate-General for Climate Change to delete CN codes 2903 19 10, 2903 19 90, 2903 79 11, 2903 79 19 and 2903 79 21, and to merge subheadings 2903 77 10 to 2903 77 50 (fluorinated greenhouse gases) and on an amendment to the description of CN code 9018 90 50 to explicitly also include infusion apparatus. The creation of CO codes for soy-based beverages and cereal and nut-based beverages also progressed considerably. On the other hand, the Committee discussions on the possible creation of a new CN code for lubricants, succinic acid and 1,4-butanediol did not lead to a conclusion.

The Committee also had its first reading on the CN 2016 text, and the results of the first meeting of the Project group set up to examine the transposition of the Harmonized System (HS) 2017 version into the CN were presented: Chapters 3, 22, 84, 85, 87 and 96 were said to all need special consideration. For example, the main issue for Chapter 85 is the transposition for monitors and newly defined MCOs; for Chapter 87, the focus of discussions will be on transposing the hybrid vehicles codes. That discussion will be referred to the Mechanical sector of the Nomenclature Committee.

The next meeting of the CN sector is scheduled to take place on 16-17 July 2015. The agenda includes formal votes in numerous pending matters, including on fluorinated greenhouse gas subheadings, CN codes for soy-based/cereal-based beverages, new CN codes for lubricants, succinic acid and 1,4-butanediol, for certain tableware/kitchenware, and for rare-earth. The Committee is also due to give the CN 2016 a final reading and to continue the discussion on the HS/CN 2017 transposition.

ORIGIN

Origin Committee Developments

The 219th session of the Origin Committee took place on 9 June 2015, but the report has not yet been published. The agenda included a debriefing on the EU-Japan FTA discussions, coordination for a Pan-Euro-Med (PEM) Convention meeting, different versions of movement certificates under the EU-Central America FTA, and GSP matters (notably, derogations for bicycles produced in Cambodia and the extension of cumulation to Turkey). In addition, the Committee was scheduled to be informed about a trade federation’s consultation on horizontal value added rules.

PEM Convention Matters

On 30 June 2015, the Commission updated its notice showing the date of application for diagonal cumulation of origin among PEM countries. Diagonal cumulation is only possible if identical preferential origin rules are applied between the PEM countries involved in a given cumulation scenario.

Meanwhile, Decisions of the EU-Denmark-Faroe Islands Joint Committee and of the EU-Albania Stabilization and Association Council have been published to formally replace the Origin Protocols under these two agreements with a mere reference to the PEM Convention. Such simple reference should allow swifter updating of the relevant origin rules in the future. Decisions with other PEM partner countries (e.g. Israel, Egypt, Jordan, Palestine Authority) are expected to be adopted soon as well.

VALUATION

WCO guide on customs valuation and transfer pricing

In June 2015, the World Customs Organization (WCO) issued a guide to customs valuation and transfer pricing. These two regimes rely on different frameworks, namely the WTO Valuation Agreement and the OECD Transfer Pricing Guidelines, respectively. Under customs rules, the price paid in a transaction (transaction value) between related parties is only accepted if the relationship is found not to have influenced the price. The same principle applies for transfer pricing for direct tax purposes. In practice, a country's customs and tax administrations will often look at these issues separately, using different rules and reaching different conclusions as to whether transactions have occurred "at arm's length", i.e. that the relationship has not influenced the price.

The WCO's Technical Committee on Customs Valuation (TCCV) has now confirmed that transfer pricing studies prepared for direct tax purposes may be of use to customs administrations when they assess related party transactions. It will also seek to provide further guidance to customs officials on how to interpret transfer pricing documentation. Importantly, the TCCV will also examine the impact of adjustments made after importation by the tax authorities and how these could or should be taken into account by the customs authorities while determining the final customs value.

PROCEDURES

Court judgment – DSV Road – transit operations

On 25 June 2015, the CJEU delivered its judgment in a transit-related case referred to it by a Danish court (Case C-187/14, *Skatteministeriet v. DSV Road A/S*). DSV Road had failed to properly discharge an external Community transit procedure (from the free port of Copenhagen in Denmark to Jönköping in Sweden) for a

number of packages of electronic goods after the goods were refused by the consignee, and subsequently included these goods in a larger shipment for which a second external transit operation (again from Copenhagen to Jönköping) was started and properly discharged.

Failure to discharge this procedure properly (e.g. not meeting the deadline for presentation of the goods at the customs of destination) normally constitutes "unlawful removal" from customs control and leads to a customs debt. However, the CJEU considered whether, in these circumstances, Article 204(1) of the EU Customs Code and Articles 356 and 859 of the Customs Code Implementing Regulation could be invoked. These provisions essentially provide that non-fulfilment of obligations does not lead to a customs debt if the failure had no effect on the correct application of the procedure in question, the late presentation of the goods can be explained to the satisfaction of the customs office of destination, there was no obvious negligence on the part of the party concerned, and all formalities necessary to regulate the situation are subsequently carried out. Accordingly, the Court held that a customs debt would not be incurred in this case if it is established that the goods in the second operation are the same goods as in the first operation. This was for the referring court to assess.

EU-Japan customs cooperation

On 10 June 2015, during the 7th EU-Japan Joint Customs Cooperation Committee (JCCC) meeting in Brussels, Japan and the EU signed an "Interface Control Document". This signing marks the first step in the development and implementation of a digitalized customs procedure for mutual recognition of authorized economic operators under the bilateral EU-Japan mutual recognition agreement signed in mid-2010.

EU-China customs cooperation

In June 2015, the EU and China confirmed their commitment to implementing the Strategic Framework for Customs Cooperation and the importance of enhancing customs connectivity, implementing mutual recognition of Authorized Economic Operators (AEO) and fighting against customs fraud. The Commission and General Customs Administration of China also issued a joint statement on AEO mutual recognition in which China's new system (introduced in December 2014) is recognized as fully compatible with EU customs legislation. The statement also lists a number of operational actions that will be undertaken with a view to the full implementation of the EU-China AEO mutual recognition agreement in November 2015.

MISCELLANEOUS

EU sanctions update – Russia/Crimea and Iran

In June, the EU prolonged its sanctions targeting Russia and Crimea/Sevastopol until 31 January 2016 and 23 June 2016, respectively. In the beginning of July, the fate of the EU sanctions targeting Iran (some of which have been temporarily relaxed since early 2014) was still unclear. As international talks with Iran (including the EU) were still ongoing when the temporary relaxation was supposed to expire on 30 June 2015, the decision relaxing certain sanctions was amended three times to give a bit of extra time for the talks to be concluded, first until 7 July, then to 10 July, and subsequently to 13 July 2015.

EU publishes updated rules on textile imports

On 9 June 2015, the EU published **Regulation 2015/937** repealing **Regulation 3030/93** to take into account the fact that the possibility to impose safeguard measures no longer exists with respect to textiles from Russia or Serbia. This is because Russia is now a WTO member and Serbia has a bilateral agreement in place with the EU.

With **Regulation 2015/936**, the EU updated its common rules for imports of textiles from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific EU import rules. This Regulation will repeal the predecessor **Regulation 517/94** as from 15 July 2015.

EU Dual-Use Export Controls

On 17 June 2015, the EP's INTA and Security and Defence Committees organized a workshop on dual-use export controls. It organized the event in view of a possible EP resolution on the Commission's plans to prepare a formal proposal to replace the current EU dual-use legislation. The Commission has set out its ideas for this purpose in a Communication issued in April 2014 and is expected to present a formal proposal in late 2015 – or perhaps more likely – in early 2016.

EU concerns over Pakistani taxes on imports

On 26 June 2015, the EU (and the United States) expressed concern about Pakistan's tax regime at the WTO Council for Trade in Goods meeting. This tax regime is said to impose a 17% tax on imported finished goods, while only a 5% tax applies to domestic goods. EU exporters of leather products are apparently particularly affected. Pakistan has indicated that it wishes to resolve this issue amicably through bilateral discussions.

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