

European Customs & Trade Communiqué

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Greetings from the Editor

Welcome to the forty seventh edition of our Newsletter on Customs and Trade issues.

We have included, among others, topical articles on a recent Judgment of the ECJ on the provisions for an application for binding tariff information, the introduction of administrative penalties for Customs in Ireland, and an export control alert on exporting controlled dual-use and military goods for demonstration and exhibition purposes, in addition to the usual Textile and Footwear and Anti-Dumping Updates.

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If any of the articles in this month's edition are of interest and you would like further details, please contact the author or your local PwC contact - their details are listed at the back of this Communiqué.



Judgment of the ECJ on the provisions for an application for binding tariff information for ‘one type of goods’

Parties:

Schenker SIA versus Valsts ieņēmumu dienests (Latvian State Tax Authority)

Background:

In 2005, Schenker applied to the Latvian State Tax Authority (‘the Tax Authority’) for binding tariff information on LCD liquid crystal displays which ought to be classified under subheading 9013 80 20 of the Combined Nomenclature (‘the CN’). By way of description, Schenker stated that the goods at issue were liquid crystal displays used as components in the manufacture of electronic apparatus and unable either to receive or to process information by themselves.

On the view that Schenker’s application had not been made in accordance with Article 6(1) of the Customs Code and Article 6(2) and (3) of the Implementing Regulation, the Tax Authority refused to issue binding tariff information. It found that:

- Schenker had not provided sufficient information to enable the Tax Authority to classify the goods at issue, and that
- Schenker had not submitted separate applications according to the different characteristics of the goods, as the liquid crystal displays were of different sizes (26, 29 and 32 inches).

Schenker successfully challenged the decision of the Tax Authority before the District Administrative Court and the Administrative Court of Appeal. Moreover, the latter court held that none of the provisions of the Customs Code or of the Implementing Regulation precluded several goods which were to be classified under the same CN code from being covered by a single application for binding tariff information.

Following this judgment, the Tax Authority brought an appeal before the Administrative Law Division of the Latvian Supreme Court, which decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling: whether Article 6(2) of the Implementing Regulation, under which an application for binding tariff information is to relate to only one type of goods, must be interpreted as meaning that such an application must be confined to goods which are the same and cannot therefore relate to different goods even if the differences between them are minimal.

Findings:

At the outset, the ECJ recalled that neither the Customs Code nor the Implementing Regulation contains a definition of the term ‘one type of goods’ as used in Article 6(2) of the Implementing Regulation. Therefore, the ECJ found that when interpreting that term, the wording, context and objectives of the provision have to be taken into account.

In reference to the wording of Article 6(2), which refers to “one type of goods”, an application for binding tariff information may relate to various different goods provided that they are all of the same type. Accordingly, only goods with similar characteristics are likely to constitute ‘one type of goods’.

Furthermore, for the purposes of ascertaining which distinguishing features preclude goods with similar characteristics from being regarded as belonging to one type of goods, the ECJ found that the aim of the system of binding tariff information is to provide the trader with legal certainty where there is a doubt as to the tariff classification of goods. Thus, binding tariff information assures the holder of that information that the goods are classified under a precise tariff heading, making it possible to know in advance the amount of duty payable on completion of the customs formalities in relation to those goods.

Regarding the objective of the system of binding tariff information that can be attained, Article 6(3) of the Implementing Regulation requires the applicant to provide in the application a detailed description of the goods as well as any useful information which may enable the customs authorities concerned to determine the correct classification.

In light of the objective pursued by the legislation in question, goods cannot - even

if they have similar characteristics - be regarded as belonging to one type of goods for the purposes of Article 6(2) of the Implementing Regulation if they are likely to be classified under different headings or subheadings of the CN. The inclusion of several goods likely to fall under different headings or subheadings in the same application for binding tariff information would entail a high risk of error in the assessment of the information provided and in the determination of the classification of the goods.

Thus, the ECJ concluded that an application for binding tariff information cannot relate to different goods, even if they have similar characteristics, if the features which distinguish those goods from one another are likely to have any bearing on their tariff classification.

Consequently, the ECJ held that although the classification envisaged by Schenker fell within CN heading 9013, which does not refer to the size of goods as one of the relevant factors for the purposes of their classification under one or other of the subheadings of that heading, a classification such as that envisaged is not binding on the customs authorities.

In this context the ECJ found that it has to be kept in mind that the uncertainty

concerning the tariff classification of LCD liquid crystal displays, which existed at the material time, concerned essentially their classification under CN headings 8528, 8529 or 9013. Therefore, the size of goods under CN heading 8528 can constitute a relevant factor for the purposes of their classification under one of the subheadings of that heading.

In those circumstances, as the ECJ concluded, displays such as those at issue, which have distinguishing features which are not completely irrelevant for the purposes of the tariff classification of those displays, cannot be regarded as belonging to one type of goods for the purposes of Article 6(2) of the Implementing Regulation.

Conclusion:

In essence, the judgment illustrates that an application for binding tariff information may relate to goods with similar characteristics provided that their distinguishing features are completely irrelevant for the purposes of their tariff classification. However, the ECJ did not further clarify which distinguishing features other than size, might be considered completely irrelevant for classification purposes. Previous case law does not shed light on this uncertainty.

It is settled case-law of the ECJ that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes. The notion of “objective characteristics and properties” does not, a priori, rule out any feature to be irrelevant for tariff classification purposes.

Against this background, economic operators might consider not lodging an application for a BTI for more than one good, even if the goods at issue might seem very similar at first sight. Otherwise, they run the risk that the application may be rejected and resources have been spent in vain.

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Introduction of the EU Suspension Regulation with effect from 1 January 2011

Temporary duty suspensions are granted for raw materials and components used in processing in the EU, which are not available or manufactured within the EU and have to be imported from third countries (i.e. countries outside of the EU). Traders are entitled to apply for temporary duty relief if any raw materials or components which they use in processing are not available within the EU and they incur a duty bill of at least €20,000 per annum. The relief is available for all traders, i.e. it is not limited to the trader who applied for the relief.

The EU has recently published its latest list of duty suspended products. Clients should review this list to assess whether there is a duty suspension for any of the raw materials or components they use in processing in the EU.

The next deadline for traders to apply for ‘Temporary Customs Duty Suspension Relief’ is the end of January 2011 (although some Member States provide a degree of flexibility). Such applications, if successful, would come into force on 1 January 2012. If this deadline is missed, the next window for applications will be July 2011.

If you have any products on which customs duty is payable at the point of import into the EU and such product can only be sourced from a non-EU based supplier, you should consider whether an application for ‘Temporary Customs Duty Suspension Relief’ should be prepared and submitted.

If you require further information, please contact the author or your local PwC contact.

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Introduction of administrative penalties for Customs in Ireland

The Irish Finance Bill 2011 introduces new administrative penalties for customs infringements aimed primarily at errors in customs import and export declarations and returns (e.g. returns for economic procedures such as Inward Processing, Processing Under Customs Control and Warehousing). The penalties are a response to poor compliance levels identified in the course of recent audits by the Irish Revenue Commissioners.

In summary:

- The penalties include a fine of €2000 for failure to submit a declaration, and fines of up to €250 for each incorrect or incomplete declaration or return.
- In addition to applying to the company (or entity), an equivalent separate penalty can be imposed on the secretary of the body.
- The penalties are per infringement so could quickly mount up for companies with significant numbers of import or export declarations.
- They are payable to the Minister for Finance and cannot be appealed under the normal customs appeals mechanism.

It should be noted that the above penalties are for administrative breaches and will apply even if there is no customs duty payable on the goods.



What actions are required to mitigate the potential impact?

We are recommending clients that they should:

- Undertake a “desk top” review of a representative sample of import/export declarations and returns to identify any compliance weaknesses. (Revenue audits identified inaccuracies in over 70% of declarations in some instances)
- Introduce corrective processes, if necessary (to show you have acted responsibly in the light of the new provisions)
- If you engage a customs agent or broker:
 - engage with the agent on the results of your desk top review
 - review the instruction issued to him to ensure they are sufficiently comprehensive
 - introduce a periodic compliance review with the agent

- review your contractual arrangements and engagement terms with the broker to clearly identify roles and responsibilities (including any indemnities) in the light of these changes

If you would like additional information on the above, please contact the author or your local customs contact.

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Export Alert: Controlled “dual-use” or military goods exported for demonstration or exhibition purposes

A recent press release¹ from the UK export licensing authorities (BIS) is a timely reminder of the need to check whether an export licence is required for goods (including hardware, software and technology) being sent to trade fairs or exhibitions abroad.

The UK BIS (and some other EU authorities) allows the export of controlled “dual-use” and military goods for demonstration or exhibition purposes to certain destinations under an Open General Export Licence (OGEL). This removes the need to apply for and manage individual licences. BIS has recently issued a reminder that such an OGEL cannot be used to export controlled military items for demonstration or exhibition purposes to a number of emerging markets, including

China, India, Israel and Turkey. For exports to such countries, a UK exporter must apply to BIS for an individual licence. These licence applications will take at least 20 working days to process and so early application is advisable.

Ireland does not have an equivalent general licence, similar to the OGEL. So, in all instances, it is necessary to check the licensable status of goods which you intend to export to trade fairs or exhibitions abroad. If they are controlled dual-use or military goods it may be illegal to export them without obtaining a licence from the Department of Enterprise, Trade and Innovation (DETI).

Please contact us if you need assistance in this area, for example, in assessing the licensable status of your goods, or whether you need to obtain a licence for a specific exhibition or trade fair because of its location.

¹Notice to exporters – 2011/02: Are you planning to exhibit at Aero India 2011? Ensure you hold an appropriate export licence

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Harmonized System (HS) 2012 Time to Start Reviewing?

The World Customs Organisation amends the Harmonised System Nomenclature generally every four years. The next amended version of the HS will come into effect on 1 January 2012. The list of amendments which will be introduced from that date can be viewed at:

<http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/HarmonizedSystem/HS%20Overview/HS2012E.pdf>

The amendments introduce a large number of new subheadings especially in the fish and vegetable chapters. In addition, approximately 40 subheadings

have been deleted due to the low volume of trade. Alignment and clarification of texts have also been undertaken with a view to ensuring harmonisation globally. Some headings have had their content expanded and new headings have been created for specific products (e.g., babies napkins of any material will be classified in new heading 9619). There have been a number of amendments to the legal notes to some Chapters (e.g., 30, 38, 42) and Section XI.

While January 2012 seems a long way off, traders should be reviewing this list of amendments to determine the impact for their business. BTIs which no longer

conform to the 2012 HS will become invalid from 1 January 2012, so there is some planning which may need to be put in place to ensure continuation of BTIs for a grace period if required. Your product may have a new numerical coding under the HS 2012 which will need to be taken into account for your SAP and declaration purposes.

If you would like more information please contact the author or your PwC contact.

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The Customs Service of the Ukraine introduces a new regime based on good faith

On 17 December 2010, the Customs Service of Ukraine approved, by Order, the compilation of a register of companies which do not comply with customs law and procedures when transporting high risk goods and vehicles. Companies on this register, referred to as the “Black List”, will be subject to a more thorough customs inspection of their products.

Companies who act in good faith and comply with customs procedures will be registered on a “White List”, and will undergo minimum customs inspections. Initially, all companies will be on the “White List”.

In cases where a company on the Black List rectifies its non-compliance, it will be removed from the Black List and added to the White List.

For more information, please contact the author or your local PwC contact.

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Textiles and Footwear Update

January has been relatively quiet for the clothing and footwear sector, which has allowed companies to concentrate on getting all their merchandise shipped before Chinese New Year on 3 February, rather than worry about customs and trade policy issues.

The new GSP origin rules entered into force on 1 January. We have not heard of anyone having problems with documents and it appears that, despite concerns to the contrary, both Bangladesh and Cambodia are issuing GSP Forms A for garments meeting the new rules, i.e. made of imported (in some cases, Chinese) fabric. An interesting demonstration of Bangladesh’s commitment to the new rules was a request from Bangladesh and Nepal that they are allowed to start issuing GSP Forms A for goods that met the new origin rules with effect from 30 November, the date the regulation entered into force. The Commission agreed to this, provided that the goods concerned would not be entered

into free circulation until 1 January and that the GSP Form A was endorsed in Box 4. It is not clear whether any goods were actually shipped under this arrangement.

But good news on GSP has been countered by less good news from Turkey, which has opened a safeguards investigation on imports of a wide range of clothing and woven fabrics of wool, cotton, man-made filaments and man-made staple fibres, on the grounds that import levels are damaging the Turkish textile industry. Interested parties have to have made themselves known by 2 February and will be invited to complete a questionnaire. The investigation is likely to last for nine months and any decision will be on the basis of information from the interested parties.

Meanwhile, a proposal has been made to the Council of Ministers to apply temporary measures, which would see additional duties imposed at the following rates:

Clothing 6101-10, 6112, 6201-6208, 6211	Other countries	Developin countries	Least developed countries Special incentives countries
Additional duty rate	40%	37%	27%
Total min/max duty per kg	Max: USD 20/kg Min: USD 5.5/kg	Max: USD 18/kg Min: USD 4.5/kg	Max: USD 16/kg Min: USD 3.5/kg

Woven fabric 5111-12, 5208-5211, 5407-08, 5512-16	Other countries	Developin countries	Least developed countries Special incentives countries
Additional duty rate	30%	28%	21%
Total min/max duty per kg	Max: USD 4.25/kg Min: USD 1.25/kg	Max: USD 4/kg Min: USD 1/kg	Max: USD 3.75/kg Min: USD 0.75/kg

It is not clear when the temporary measures will be imposed – probably sometime in March. There is some confusion as to how the measures will be applied but it is thought to mean that, for example, clothing from China has a full rate of duty of 12% and therefore the maximum amount of duty would relate to duty at a combined rate of 52%.

And, after so many years of uncertainty, it now looks as though the anti-dumping measures on leather footwear from China and Vietnam will expire on 31 March. The Commission was very late in publishing the notice of impending expiry of measures – by publishing it on 18 December, it effectively only gave the industry until 31 December to lodge a request for a review. The Commission has still not made any formal announcements – and it has no legal obligation to do so – but the European Confederation of the Footwear Industry (CEC) confirmed in January that it had not requested a review and that it does not propose to call for further measures.

Technically, the Commission or any Member State could call for an extension of the measures, but it is extremely unlikely that they would do so. Barring some completely unforeseeable eventuality, the measures will expire on 31 March and footwear importers will be free to source from wherever they choose. However, it should be noted that both the

Commission and the industry will monitor import volumes very closely and if imports increase significantly, it is possible that a new investigation could be launched. Importers should, therefore, be careful about shifting too much of their sourcing or production back to China and/or Vietnam.

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Anti-dumping Update

- Regulation imposing a definitive countervailing duty on imports of certain graphite electrode systems originating in India following an expiry review
- Regulation imposing a definitive anti-dumping duty on imports of certain graphite electrode systems originating in India following an expiry review
- Regulation terminating the anti-dumping proceeding on imports of glyphosate originating in the People's Republic of China
- Notice of the impending expiry of certain anti-dumping measures on footwear with uppers of leather originating in the People's Republic of China and Vietnam
- Regulation amending the Regulation imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in the People's Republic of China
- Regulation (imposing a definitive anti-dumping duty on imports of synthetic fibre ropes originating in India following an expiry review pursuant to
- Regulation imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China produced by Since Hardware (Guangzhou) Co., Ltd.
- Notice of the impending expiry of certain anti-dumping measures on Potassium chloride originating in Belarus and Russia
- Regulation imposing a provisional countervailing duty on imports of certain stainless steel bars originating in India
- Notice of the impending expiry of certain anti-dumping measures on certain side-by-side refrigerators originating in the Republic of Korea
- Notice of the impending expiry of certain anti-dumping measures on lever arch mechanisms originating in the People's Republic of China
- Regulation amending the Regulation imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating in India
- Decision terminating the anti-subsidy proceeding concerning imports of purified terephthalic acid and its salts originating in Thailand
- Decision terminating the anti-dumping proceeding concerning imports of purified terephthalic acid and its salts originating in Thailand
- Notice of the impending expiry of certain anti-dumping measures on silicon carbide originating in the People's Republic of China
- Notice of the impending expiry of certain anti-dumping measures on chamois leather originating in the People's Republic of China
- Notice of initiation of an anti-dumping proceeding concerning imports of oxalic acid originating in India and the People's Republic of China
- Notice of initiation of an expiry review and a review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China
- Corrigendum to the Regulation imposing a provisional countervailing duty on imports of certain stainless steel bars originating in India

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