

European Customs & Trade Communiqué

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Greetings from the Editor

Welcome to the forty eight 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 tariff classification of electric mobility scooters, drafts for new WCO Valuation commentaries and export control alerts, in addition to the usual Classification 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 tariff classification of electric mobility scooters

Parties:

Lecson Elektromobile GmbH versus Hauptzollamt Dortmund

Background:

Between July and October 2005, Lecson lodged seven customs declarations regarding various electric mobility scooters made in China and Taiwan. Those customs declarations describe the goods as ‘wheelchairs and other vehicles for the disabled, electric mobility scooters’ and classify them under subheading 8713 90 00 of the Combined Nomenclature (‘CN’) (Carriages for disabled persons, whether or not motorised or otherwise mechanically propelled, other). The goods were released for free circulation, in accordance with the applications, without customs duties being levied and with import turnover tax being charged at a reduced rate.

Following an audit of Lecson, carried out in 2008, the Hauptzollamt classified the goods under subheading 8703 10 18 of the CN (motor cars and other vehicles principally designed for the transport of persons [...], vehicles specially designed for travelling on snow; golf cars and similar vehicles) as ‘other vehicles’ and, by a decision in July 2008, applied tax adjustments to that company for customs duties and turnover tax relating to those goods.

Lecson lodged an objection against that decision, which was rejected by the Hauptzollamt in May 2009. The company then brought an action against the decision, before the Finanzgericht (‘Finance Court’) Düsseldorf.

The objection and the action both refer to judgments delivered by the Customs Chamber of the Amsterdam Court of Appeal of April 2008, according to which electric mobility scooters should be

classified under subheading 8713 90 00 of the CN. The Hauptzollamt considered however that electric mobility scooters are not specially designed for the transport of disabled people and, as a result, fall within subheading 8703 10 18 of the CN.

The electric mobility scooters at issue are three or four-wheeled motor vehicles designed for the transport of one person. Depending on the type, these vehicles reach a maximum speed of 6 to 15 km/h. They are manufactured in such a way that they always have a platform on which the driver can place his feet. Some of the vehicles also have a small additional axle, intended to serve as an anti-tipping system. The vehicles are operated by an adjustable steering column to which the steering and other controls for driving and braking, and often a metal basket, are attached.

The Finanzgericht Düsseldorf starts from the premises that key elements support the classification of the electric mobility scooters at issue under subheading 8703 10 18 of the CN. The Finanzgericht also has doubts as to the contrary position adopted by the Amsterdam Court of Appeal in its decisions cited in paragraph 11 of this judgment.

However, in order to ensure uniformity in the application of European Union law, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Findings:

The ECJ recalled that it is settled case-law that the decisive criterion for the classification of goods for customs purposes is, in general, to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the section or chapter notes. Furthermore, the court stated that, the explanatory notes to the CN, drawn up by the Commission, are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force.

The Court pointed out that, here, it is apparent from the wording of headings 8703 and 8713 of the CN themselves that the difference between them results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons.

Furthermore, the ECJ emphasised that it is clear from the explanatory note to the CN relating to heading 8713 that the decisive criterion for classification under that heading is the special design of the vehicle to help disabled persons. Accordingly, that heading covers electrically-driven vehicles similar to ‘electric wheelchairs’ (‘Elektorollstühle’), specifically designed for the transport of disabled persons and with characteristics such as, in particular, a maximum speed of 10 km/h (which may correspond to a fast walking pace), special

“Do the electric mobility scooters which are described more precisely in the order [for reference] fall within heading 8713 or heading 8703 of the [CN], as amended by Regulation (EC) No 1810/2004?”

features to alleviate the disability (for example, footrests for stabilising the legs) and steering and other controls (such as a joystick) which are easy to reach and manipulate and therefore are usually attached to one of the armrests. The explanatory note states that, conversely, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this heading and come under heading 8703 of the CN.

The electric mobility scooters at issue all have a separate, adjustable steering column, to which the steering and other controls for driving and braking and, as the case may be, a metal basket are attached. Furthermore, they are equipped with a platform on which the driver can place his feet, but this does not constitute a support to stabilise the legs. The anti-tipping system of the electric mobility scooters also contributes to user comfort, but it does not include any specific feature which is aimed at aiding disabled persons' use of the scooters. They can reach a speed up to 15 km/h.

Therefore, the ECJ held that the electric mobility scooters at issue must be considered to be means of transport of persons falling within heading 8703 of the CN, and not vehicles for disabled persons for the purposes of heading 8713 of the CN.

The Court added that the mere fact that those electric mobility scooters may be used, where appropriate, by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who for one reason or another prefer to travel short distances other than on foot, for example, golfers or persons going shopping.

Hence, according to the ECJ, the answer to the question referred is that heading 8703 of the CN must be interpreted as covering three or four-wheeled vehicles designed for the transport of one person who is not necessarily a disabled person, powered by a battery-operated electric motor, reaching a maximum speed of 6 to 15 km/h and equipped with a separate, adjustable steering column, known as 'electric mobility scooters', such as those at issue in the main proceedings.

Conclusion:

The tenor of the present decision is unambiguous, but the ECJ's reasoning is far from being clear and concise. The ECJ does not take into account the particular intended use of the electric mobility scooters as a transportation aid for disabled people. According to the ECJ's settled case law the intended use of a

product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties. Subheading 8713 90 00 of the CN shows an inherent intended use of a product by emphasizing that the carriages need to be "for disabled persons". The objective characteristics, inter alia the top speed and the anti-tampering system, indicate that the vehicles at issue were not designed for leisure activities as the court presumed without substantive reasoning. Also, the ECJ did not question that the explanatory note drawn up by the Commission considerably narrowed the scope of heading 8713 of the CN by randomly favouring certain technical specifications over others (e.g. joystick vs. steering column). However, the court did not even take into consideration that the explanatory note itself could be flawed.

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Drafts for new WCO Valuation commentaries

At the end of October 2010, the Technical Committee on Customs Valuation of the WCO agreed on the draft texts for two new Commentaries, No. 23.1 and No. 24.1. The purpose of these commentaries to ensure the uniform interpretation of the rules regarding customs valuation as laid down in the GATT valuation code. As the GATT valuation code is incorporated in the EU Community Customs Code (CCC), the commentaries will also be relevant for the EU.

Commentary No. 23.1

Commentary No. 23.1 regards the examination of the expression "circumstances surrounding the sale" under Article 1.2 (a) of the GATT Valuation code (Article 29, paragraph 2 (a) of the

CCC). In cases where the price of a related party transaction is used as the basis for calculating the customs value, the "circumstances surrounding the sale" can be examined by the customs authorities in order to verify whether that price has not been influenced as a result of the relation between both the buyer and the seller, i.e. whether it is an arm's length price.

The commentary provides an analysis on whether a transfer pricing study that is prepared in accordance with the OECD transfer pricing guidelines can be used for demonstrating the arm's length nature of a price under the circumstances surrounding the sale test for customs valuation. The conclusion of the analysis is that "the use of a transfer pricing study as

a possible basis for examining the circumstances of the sale should be considered on a case by case basis. As a conclusion, any relevant information and documents provided by an importer may be utilized for examining the circumstances of the sale. A transfer pricing study could be one source of such information."

Although it may not be the firm statement / instruction for using a transfer pricing study as hoped for, it certainly is a step on the path towards a more integrated application of transfer pricing and customs valuation regulations.

Commentary 24.1

Commentary 24.1 relates to the determination of the value of the tools, dies, moulds and similar products that are used for the production of the imported products. The costs of these should be included in the customs value. When the buyer provides these tools, dies, moulds, etc. free of charge or at reduced costs, the (total) costs are therefore not included in the price paid to the seller and so, the costs of these assists must be added under Article 8.1(b) of the GATT Valuation code (Article 32, paragraph 1b (ii) of the CCC).

For determining the value of such assists, the Interpretative Note to Article 8.1(b) / Article 32, paragraph 1b (ii), provides some guidance and as such refers to "given costs" if the buyer acquires the assist from a seller not related to him.

The Commentary explains the meaning of "a given cost" as mentioned in the Interpretative Note. Not surprisingly, the proposal is that this should be regarded to be "all the costs incurred by the importer in respect of acquiring the assist".

Please note that both are draft Commentaries that will need to be approved by the Council and may, as such, be subject to modifications. The next WCO Council meeting is in June 2011, we will keep you updated.

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EU Tariff Suspensions News

Prolongation of EU Tariff Suspensions 2011

EU tariff suspensions are valid for a period of five years. After five years, users may have to make a case for the prolongation of a tariff suspension for a further five year period.

A number of tariff suspensions are due to expire at the end of 2011, for example:

- Frozen boysenberry juice concentrate with a Brix value of 61 or more, but not more than 65
- Microspheres of amorphous silicon of a particle size of 5 µm (± 1 µm), for use in the manufacture of cosmetic products (1)
- Trans coil for boosting DC voltage and isolating high and low voltages for use in the manufacture of products falling within subheading 8504 31 80(1) - transformers

The European Commission has begun a review to determine whether these tariff suspensions should be prolonged for a further five years.

If you are currently using a tariff suspension that is due to expire at the end of 2011, your duty bill may significantly increase if the suspension is not extended. An application for an extension will have to be made to the Commission through your national authority / department of trade. All applications for renewal must be received by the EU Commission by 15 April 2011.

If you would like further information or assistance in submitting an application, please contact the author or your local PwC contact.

Suspension of duty on certain LCD monitors

As many of you are aware, the duty suspension on certain monitors expired on 31 December 2010. The monitors concerned are LCD monitors, with a diagonal measurement of the screen not exceeding 55.9cm (22 inches), and with an aspect ratio of 1:1, 4:3, 5:4 or 16:10. Such monitors became liable to a 14% rate of customs duty from 1 January 2011.

We understand that the EU Commission has advised that they are proposing a re-introduction of the duty suspension for the six-month period until 30 June 2011. If the proposal is accepted, it is anticipated that the Regulation implementing the duty suspension will be published some time in April with retroactive effect to 1 January. In the intervening period, traders should continue to pay the 14% duty rate at import and retain all documentary evidence of such in anticipation of claiming a refund.

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Update: Implementation of the Modernised Customs Code

According to the legislation, the latest date for implementation for the new EU Modernised Customs Code is currently 24 June 2013.

However, we understand that such a date may now be deferred. The reasons for the potential deferral are:

1. Problems with getting the necessary IT systems of all Member States in place for June 2013; and
2. Legal arrangements relating to the “conversion” of the Modernised Customs Code, which was adopted under the old Treaty arrangements, to take account of the Lisbon Treaty.

We will keep you updated with any further developments.

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AEO – Authorised Economic Operator in Switzerland

The Swiss Federal Customs Administration (FCA) will shortly commence with the registration procedure for companies interested in obtaining the status of an Authorised Economic Operator (AEO) and will publish the questionnaire for self-evaluation. The request for AEO certification in Switzerland can then be submitted.

Different security initiatives have been started due to recent developments and the AEO status in the EU and in Switzerland represents the implementation of these standards. The aim is to achieve a continuous, secure international supply chain – from the manufacturer, to the freight forwarder

involved, to the client. To achieve this goal it is necessary that all participating businesses are seen as particularly trustworthy from a customs point of view.

In Switzerland, the AEO Security status will be introduced to meet its international requirements. Companies which obtain this status benefit from, inter alia, simplifications to security related customs control as well as the priority control and clearance of goods. In addition to securing the entire supply chain, individual companies can keep delays caused by extensive customs checks to a minimum.

There are also indirect benefits of AEO certification which should not be disregarded. Security risks can be identified and security-related business

processes can be optimised. Also, awareness of security-related areas can be increased.

An agreement under which their respective AEO statuses is mutually acknowledged by the European Community and Switzerland has already been signed. Similar agreements with Norway and other important trading partners will soon be concluded. Consequently, holders of the Swiss AEO status can benefit from eased security-related checks when trading goods with the major trading partners of Switzerland.

Companies which are involved in international supply chains have to decide whether AEO certification should be pursued. It is expected that this security

status will be of major importance in the future. We would be pleased to assist you with the preparation of your AEO application.

AEO status in Switzerland and its impact

Introduction

Due to recent developments security related matters in the international movement of goods have become a major aspect in international trade. In recognition of these developments the World Customs Organisation (WCO) has developed the WCO Framework of Standards to Secure and Facilitate Global Trade (SAFE).

The EU Member States created AEO status, which is described in the

SAFE framework for its economic operators in the following three certificates with the respective advantages:

- **AEO S:** Security and Safety (to benefit from security related measures when importing goods into or exporting goods out of the Customs territory of the community)
- **AEO C:** Customs Simplifications (to benefit from Customs simplifications)
- **AEO F:** Full (bundles AEO S and AEO C)

AEO Status in Switzerland

In order to waive the Customs security checks which are in place in the European Union without having AEO status, Switzerland has concluded an agreement with the European Community which entered into force on 1 July 2009. Based on this agreement, Switzerland intends to implement equivalent security measures. Furthermore, the respective AEO certificates are mutually recognised. Based on this background, Switzerland implements the AEO certificate for security and safety (equivalent to AEO S). Thus, acquiring AEO status should be considered by any business involved in the supply chain.

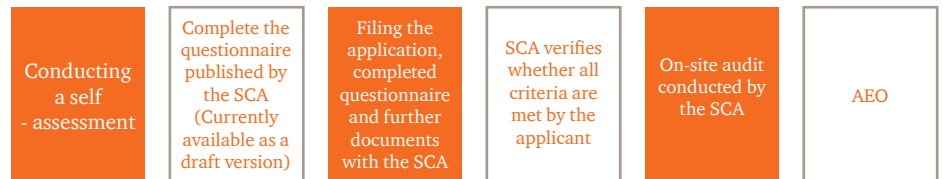
Requirements and application procedure

The applicant has to demonstrate the fulfilment of the following four basic criteria:

Compliance with customs requirements

- Satisfactory system for management of commercial records
- Financial viability
- Adequate security (including cargo, conveyance, personnel, premises and trading partners)

Based on the publications of the Swiss Customs Authorities (SCA) the application procedure to obtain AEO status is as follows:



Benefits

The following list highlights the most important benefits which come with AEO status:

Direct benefits:

- Simplifications to security related customs controls, e.g. fewer and less stringent checks
- Preferential checks of selected shipments
- Summary declaration with reduced data sets

Indirect benefits:

- Recognition of risks
- Optimisation of processes
- Evaluation of transport security
- Improved selection of suppliers
- Personnel related security
-

In order to maximise the advantages of an AEO application we recommend seizing the opportunity by performing a Customs and Trade review (so-called customs landscaping) while completing the questionnaire.



Your opportunity and PwC's support

With our experience we can support you from the first step towards AEO registration until the certification process is finished.

- Our team of experts is pleased to provide you with the following support:
- Providing tailored information about the AEO status' benefits and implications
- Support during the entire application process
- Support in process changes necessary to obtain AEO status
- Support and guidance during the self-assessment and during the completion of the questionnaire
- Monitoring the application process and the relevant tasks
- Negotiations with the SCA

The following service packages can optimise and accelerate the registration procedure:



Our service packages will be specially customised to the needs of your business. We will also be pleased to arrange an individual service package which suits your needs and requirements.

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Package	Your challenges and our services
Decision-maker	<p>In order to receive the right background information and to have sufficient knowledge about the benefits and impacts inherited by the AEO certification, the management and project sponsors shall be adequately informed about AEO status. It shall also be considered which entity obtains AEO status in which countries. Any obstacles or setbacks during the registration procedure shall be avoided.</p> <p>During a meeting with management and the respective project sponsors we will evaluate the benefits and impacts of AEO status. Furthermore, we can assess how AEO status fits into the supply chain security policy. Based on the initial discussions we will assist and support you during the decision process.</p>
Flexible Support	<p>It is advantageous to complete the registration process as smoothly as possible once it is started. A competent partner is required to back you up and assist if required. Whether you need ad-hoc support to solve urgent questions or require a second opinion, we will support your business where required.</p>
Administrative Support	<p>As the AEO application process may absorb substantial resources, it is of great importance to manage and allocate the available resources reasonably.</p> <p>PwC can support you with the planning of the AEO certification process, monitor different tasks to be completed and also inherit individual tasks. Our team of experts helps you to avoid potential obstacles while navigating through the different rules and regulations governing AEO status.</p>
Full Service Package	<p>Handling the full AEO application process from the decision-making process to negotiations with the authorities establishes a new task for any business. It is important to manage the entire process properly.</p> <p>We can support you from the first assessment of whether to start an AEO application process, evaluate the benefits and impacts to your business, and support you during the registration process according to your needs. Guidance with the identification and implementation of possible process changes as well as our support during the negotiations with the authorities is also included.</p>
Customs & Trade Review	<p>To enhance the indirect benefits of AEO applications, we recommend performing a customs review simultaneously. Our first step is to assess the customs position by drawing up a customs landscape (status quo SWOT analysis). Based on this key analysis major customs factors can be explored in further details. We will be pleased to discuss the respective solutions.</p>

DG Trade's Management Plan 2011

The European Commission's Directorate-General for Trade has identified the EU's export control system for dual-use goods as a specific objective in the Management Plan 2011. The Management Plan states that the Commission must



“ensure effective functioning of the EU export control system for dual-use goods that is translated into providing a level-playing field for EU exporters and enhancing their competitiveness, while ensuring efficient enforcement and the highest possible level of security”

The Management Plan states that the main policy outputs for 2011 are:

- A Green Paper on the EU export control system, which will be publically available and, we understand, will contain significant content on the area of intangible exports, including cloud computing. This will be eagerly anticipated by exporters.
- EU guidelines on export controls for the national export licensing authorities which, we understand, will contain guidance on the management of controls on intangible exports.

We expect the Green Paper to be published in late quarter 2 or early quarter 3 of 2011.

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Export controls in Malaysia - impact for European companies

The Malaysian export authorities are considering introducing a mandatory requirement for an export control internal compliance program (ICP) for any company wishing to take advantage of both bulk and multi-use permits. The legislation will be enforced in full on 1st July 2011 for all categories of controlled items (permit requirements on products under category 0 will take effect earlier on 1 April 2011).

Companies with either their own operations or outsourced operations in Malaysia should take note of this issue to avoid being restricted to single-use permits (issued on a per-shipment basis). Implementing an ICP takes time and, given that 1 July is fast

approaching, there is limited time to get an ICP in place and approved by the Malaysian authorities.

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Export Alert: Publication of new UK Open General Export Licence (OGEL) for International Non-Proliferation Regime Decontrols: Dual-Use Items

The UK export licensing authority, BIS, has published a new OGEL for items which have been decontrolled by international regimes. This OGEL is a temporary measure designed to facilitate exports until such time as both EU and national legislation has been updated to reflect international amendments.

Schedule 1 of this OGEL includes a list of items for which the OGEL can be used. This list contains a number of items, including certain:

- electronic equipment, software and technology;
- computer equipment, software and technology;
- telecommunication equipment, software and technology;
- cryptographic equipment, software and technology;
- scanning cameras and systems and related technology;
- air traffic control software; and
- lasers, software and technology.

The OGEL includes items covered by the existing OGEL (Cryptography), which came into force on 22 October 2010. As OGEL (Cryptography) expires on 31 December 2011, BIS advises exporters to register for OGEL (International Non-Proliferation Regime Decontrols: Dual-Use Items), which has no expiry date.

As with all OGELs, there are certain conditions to be met to use the OGEL, for example registration requirements, and specific destinations for which the OGEL cannot be used.

This is of particular relevance to companies exporting dual-use items

from the UK. Such exporters should check the coverage and specified terms and conditions of this OGEL.

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

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Classification Update

The Commission published three classification Regulations in February as well as an amendment to the CN explanatory notes to heading 8528. The products concerned were:

- An artificial tooth stump used in dentistry as an artificial tooth root which is implanted in the jaw and connected with an artificial crown. The Regulation classifies the artificial tooth stump at 9021 29 00 as a dental fitting as the article is for specific use in dentistry.
- A 'Gas Analyser Module' designed for monitoring the respiratory and anaesthetic gases of a patient under medical treatment. The module is not considered to be a complete instrument or apparatus for physical or chemical analysis as its controlling functions and the display of the consequent results are performed by a patient monitoring system. The module is not recognisable as an ultraviolet or infra-red ray

apparatus. As the module is not used for providing anaesthesia, it cannot be considered to be an anaesthetic apparatus and instrument. As the module is suitable for use solely with an electrodiagnostic apparatus for simultaneous monitoring of two or more parameters, it is therefore, classified under CN code 9018 19 10.

- A 'video surveillance system for babies' presented in a set put up for retail sale consisting of:
 - a wireless television camera incorporating a microphone, a video signal transmitter and an antenna; the camera is equipped with an output interface for audio/video;
 - a wireless colour monitor of the liquid crystal display (LCD) type, incorporating a loudspeaker, a video signal receiver and an antenna; the monitor is equipped with an input interface for audio/video;

- two adaptors; and
- an audio/video cable

The classification justification given is that the product is a set consisting of a camera of heading 8525 and a television reception apparatus of heading 8528, in which the component giving the set its essential character cannot be determined. The product is therefore to be classified as a television reception apparatus of CN code 8528 72 40.

- Video tuners: The CN explanatory note for subheadings 8528 71 11 to 8528 71 19 has been replaced.

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Anti-Dumping Update

- Regulation imposing a definitive anti-dumping duty on imports of kourmé plywood originating in the People’s Republic of China following an expiry review and terminating a partial interim review
- Regulation imposing a provisional anti-dumping duty on imports of certain ring binder mechanisms originating in Thailand
- Notice of the impending expiry of anti-dumping measures on furfuryl alcohol originating in the People’s Republic of China
- Notice of initiation of an anti-dumping proceeding concerning imports of certain polyethylene terephthalate originating in Oman and Saudi Arabia
- Notice of initiation of an anti-subsidy proceeding concerning imports of certain polyethylene terephthalate originating in Oman and Saudi Arabia
- Regulation imposing a provisional anti-dumping duty on imports of certain open mesh fabrics of glass fibres originating in the People’s Republic of China
- Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of sodium cyclamate originating in the People’s Republic of China
- Notice of initiation of an anti-dumping proceeding concerning imports of sodium cyclamate originating in the People’s Republic of China, limited to two Chinese exporting producers, Fang Da Food Additive (Shen Zhen) Limited and Fang Da Food Additive (Yang Quan) Limited, and of initiation of a review of the anti-dumping measures on imports of sodium cyclamate originating in the People’s Republic of China
- Regulation terminating the partial interim review of the anti-dumping measures applicable to imports of certain polyethylene terephthalate originating, inter alia, in the Republic of Korea

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