

European Customs & Trade Communiqué



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Greetings from the Editor

Welcome to the Forty third edition of our Newsletter on Customs and Trade issues.

We have included, among others, topical articles on the recent WTO dispute settlement decision on the EU's treatment of monitors, set-top boxes and multifunctional printers in the EU, an AEO update, an ECJ judgment on the preferential origin status of goods imported from the West Bank under the Israeli Agreement and the introduction of single window customs services in Hungary.

Damian McCarthy, Editor

In this month's Bulletin:

- WTO dispute settlement decision on the EU's treatment of certain ITA goods
- AEO Update on the status of permanent establishments and the new standard EU self-assessment questionnaire
- The EU and Japan sign on AEO Mutual Recognition
- ECJ Judgment on goods originating in the West Bank but imported under the EU-Israel Preferential Origin Agreement
- Single Window Customs Services introduced in Hungary
- Textile and Footwear Update
- Anti-dumping Update

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.

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Abolition of import duties on monitors, set-top boxes and multi-functional printers in the EU?

In July 2008, the US, Japan and Taiwan filed a complaint against the EU at the World Trade Organization (WTO), claiming that the European Union's (EU) import duties on monitors, multifunctional printers and TV set-top boxes violated the WTO's Information Technology Agreement (ITA).

The complaints are dealt with by the WTO's dispute settlement body which installed a panel in order to examine the complaints. This panel has now issued its report in which it concludes that the EU failed to meet its WTO obligations. Therefore the panel recommends that the EU adjust its current rules and return to full compliance with its WTO obligations.

The panel's report was published on August 16 and will be adopted by the dispute settlement body unless the EU or any of the other parties involved appeals it within 60 days. Once adopted the EU will have to return to full compliance with its WTO obligations, or otherwise the US, Japan and Taiwan may implement trade sanctions against the EU.

The products concerned

Currently and in the past years the EU levied import duties on:

- **Set-top boxes which incorporate a hard disk / dvd drive**, that nevertheless retained the essential character of a set top box, since these are classified under Tariff heading 8521 attracting 13,9% import duties;
- **Set-top boxes without recording devices** that do not meet the EU requirements regarding built-in modems and internet access classified under HS-code 85287113 and therefore attracting 14% import duties;
- **Computer monitors** that are classified as video monitors, based upon their capacity to also display signals from machines other than computers, and therefore attracting 14% import duties (where they do not meet the specific duty suspension requirements for video monitors);
- **Multifunctional printers** that can be used in combination with a computer attracting 6% import duties as the EU did not create a Tariff heading with a zero rate for these products.

When the panel report is adopted by the Dispute Settlement Body, the EU will have to return to full compliance with its WTO obligations.

Consequences of panel report: refund opportunities

Assuming that the panel's report is adopted by the dispute settlement body, possibly after an EU appeal, we expect that the EU will adjust its practices and stop levying import duties on these products. However the implementation of these adjustments may take some time, there will be at least 60 days until the decision, and after the report's adoption the EU may still need to consider how to adjust its rules.

Depending upon how the adjustments in its legislation will be made by the EU, these adjustments may provide opportunities to obtain refunds for import duties paid in the past upon importation of these monitors, set-top boxes and multifunctional printers. As the period to apply for refunds is limited to three years after the day of importation, we strongly advise you to apply for refunds as soon as possible to safeguard your position regarding imports that currently still fall within the three years period.

Should you wish to discuss the abovementioned opportunities, please do not hesitate to contact us.

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AEO Update

This update covers:

- the position of permanent establishments; and
- the self-assessment standard recently published by the European Commission.

Permanent Establishment

When applying for an AEO certificate, a permanent establishment in another EU member state is often incorporated in the application of that legal entity as it is legally part of that entity. However, this may not always be correct in all EU countries. The local legislation in some EU countries determines that a permanent establishment is to be seen as a separate legal entity and, as such, should apply for its own AEO certificate in the EU member state in which it is established.

Therefore, before applying for an AEO certificate for a company with a permanent

establishment in other member states, a company needs to verify whether the local legislation in those EU member states regards the permanent establishment as being a separate legal entity. If not, the permanent establishment can be included in the request for AEO certification filed in the country where the company (itself) is established. Otherwise separate requests for AEO certification must be filed for the permanent establishment.

Self-assessment

The European Commission has developed a self-assessment standard that should be used uniformly in all member states as of January 2011. All member states have committed to start using the new self-assessment as from January 1, 2011 except for the Netherlands. Dutch Customs is not willing to implement the new self-assessment and will continue to request a company established in the Netherlands to submit the current Dutch self-assessment. The Netherlands will only implement the newly developed self-assessment if this becomes obligatory in the new Customs Code. However, if a multinational company were to insist on filing the EU self-assessment this could be requested from Dutch Customs.

Should you have any problems or questions regarding the above, please contact

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The European Union and Japan sign on the mutual recognition of Authorised Economic Operators

On 24th June 2010 in Brussels, Director-General Walter Deffaa of the Taxation and Customs Union of the European Commission and Director-General Toshiyuki Ohto of the Customs and Tariff Bureau of the Ministry of Finance, Japan signed the Decision establishing mutual recognition of Authorised Economic Operators (AEOs) between the EU and Japan.

This mutual recognition offers enhanced trade facilitation opportunities provided by customs to certified trustworthy traders in both the EU and Japan who invest in securing their supply chains. With this decision, two major trading partners, the EU and Japan, have established the equivalence of their AEO programmes and provided for recognition of each other's security certified operators. Japanese



AEOs will receive benefits from European customs that are comparable to those received by EU AEOs; Japan will apply the same for EU AEOs in Japan.

The mutual recognition of AEOs will allow for more predictability in international commercial transactions. This is because each customs authority will provide comparable benefits to economic operators holding AEO status under the other customs authority's programme. These benefits will include taking into account the AEO status of an operator authorised by the other customs authority for risk assessments to reduce inspections or controls and other security-related measures.

Another benefit of mutual recognition is that it facilitates the establishment of a joint business continuity mechanism to respond to disruptions in trade flows (due to border closures, natural disasters, emergencies involving hazardous substances or other major incidents). This allows for priority cargos shipped by AEOs to be facilitated and expedited, as far as possible, by the customs authorities. Each customs authority may also provide further future benefits to facilitate trade following the review process.

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Judgment of the ECJ on the interpretation of Euro-Mediterranean Agreements ('EC-Israel Association Agreement' and 'EC-PLO Association Agreement') and doubts as to the origin and preferential treatments of products

Parties:

Brita GmbH versus Hauptzollamt Hamburg-Hafen (Principal Customs Office, port of Hamburg, Germany)

Background:

Brita, the applicant in the main proceedings, is established in Germany. It imports drink-makers for sparkling water, as well as accessories and syrups, all produced by an Israeli supplier, Soda-Club Ltd, at a manufacturing site at Mishor Adumin in the West Bank, to the east of Jerusalem. Soda-Club Ltd is an approved exporter within the meaning of Article 23 of the EC-Israel Protocol.

During the first six months of 2002, Brita imported goods to be released for free circulation stating that the country of origin for those goods was 'Israel'. It sought the application of the preferential tariff provided for under the EC-Israel Association Agreement on the basis of invoice declarations confirming that the products concerned originated in Israel.



The German customs authorities provisionally granted the preferential tariff applied for, but commenced the procedure for subsequent verification. On being questioned by the German customs authorities, the Israeli customs authorities replied that the verification had proven that the goods in question originate in an area that is under Israeli Customs responsibility, and were originating products pursuant to the EC-Israel Association Agreement entitled to preferential treatment.

In February 2003, the German customs authorities asked the Israeli customs authorities to indicate, by way of supplementary information, whether the goods in question had been manufactured in Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights. The letter remained unanswered.

Therefore, the German Customs authorities refused the previously granted preferential treatment in September 2003, on the ground that it could not be established conclusively that the imported goods fell within the scope of the EC-Israel Association Agreement.

The objection filed by Brita was dismissed, whereupon it brought an action before the Finanzgericht Hamburg (Finance Court of Hamburg) for annulment of that decision. The Finanzgericht Hamburg referred the following questions to the ECJ for a preliminary ruling (questions as summarised by the ECJ):

1. May the customs authorities of a Member State refuse to grant the preferential treatment provided for under EC-Israel Association Agreement where the goods at issue originate in the West Bank?
2. For the purpose of the procedure laid down in Article 32 of the EC-Israel Protocol, are the customs authorities of

the importing State bound by the proof of origin that is submitted and by the reply given by the customs authorities of the exporting State? Also, in order to settle a dispute that has arisen in relation to the verification of invoice declarations, the ECJ asked if the customs authorities of the importing State must, pursuant to Article 33 of the protocol, submit that dispute to the Customs Cooperation Committee before adopting measures?

Findings:

Question 1:

The ECJ pointed out that the answer to Question 1 depends on the interpretation to be given to Article 83 of the EC-Israel Association Agreement, which defines the territorial scope of that agreement. In this respect, the Court recalled that an agreement concluded by the Council of the European Union with a non-Member State constitutes, as far as the European Union is concerned, an act of one of the institutions of the Union. From the moment it enters into force, the provisions of such an agreement form an integral part of the legal order of the European Union and so the Court has jurisdiction to give preliminary rulings concerning its interpretation. In addition, the EC-Israel Association Agreement is governed by international law and, more specifically, as regards its interpretation, by the international law of treaties, namely the Vienna Convention.

In interpreting the Vienna Convention, the ECJ stressed the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third States.

In this respect, the ECJ found that it is common ground that the European Communities concluded two Euro-Mediterranean Association Agreements,

first with the State of Israel and then with the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip. Each of those two association agreements has its own territorial scope. Under Article 83 thereof, the EC-Israel Association Agreement applies to the 'territory of the State of Israel'. Under Article 73 thereof, the EC-PLO Association Agreement applies to the 'territories of the West Bank and the Gaza Strip'.

The ECJ concluded that the customs authorities of the exporting State, within the meaning of the two protocols mentioned above, have exclusive competence – within their territorial jurisdiction – to issue movement certificates (EUR.1s) to approved exporters based in the territory under their administration.

Accordingly, to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. The Court further ruled that such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to principles of general international law. Hence, Article 83 of the EC-Israel Association Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement. In those circumstances, the German customs authorities could refuse to grant preferential treatment to the goods in question.



The ECJ also rejected an elective determination of the origin and the preferential treatment. In essence, The Finance Court of Hamburg asked whether the customs authorities of the importing State may grant preferential treatment when such treatment is provided for under both the agreements to be taken into account (and it is not contested that the goods at issue originate in the West Bank) and only a formal certificate of Israeli origin has been submitted. The ECJ replied that to allow elective determination simply because both agreements provide for preferential treatment and because the place of origin of the goods is established by evidence other than that envisaged under the association agreement would be tantamount to denying that, in order to be entitled to the preferential treatment, it is necessary to provide valid proof of origin issued by the competent authority of the exporting State.

This proof of origin must be produced in respect of products originating in the territories of the contracting parties if they are to qualify for the preferential treatment. The requirement for valid proof of origin issued by the competent authority cannot be considered to be a mere formality that may be overlooked as long as the place of origin is established by other evidence.

Consequently, the ECJ ruled that the customs authorities of the importing Member State may refuse to grant the preferential treatment provided for under the EC-Israel Association Agreement where the goods concerned originate in the West Bank. Furthermore, the customs authorities of the importing Member State may not make an elective determination, leaving open the questions of which of the agreements to be taken into account applies in the circumstances of the case and of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.

Question 2:

Regarding the question whether the customs authorities of the importing State are bound by the reply given by the customs authorities of the exporting State, the ECJ found that it is clear from Article 32 of the EC-Israel Protocol that the subsequent verification of invoice declarations is carried out whenever the customs authorities of the importing State have reasonable doubt as to the authenticity of such documents or the originating status of the products concerned. The verification is carried out by the customs authorities of the exporting State. The customs authorities requesting the verification are to be informed of the results of that verification within a maximum period of 10 months. Those results must indicate clearly whether the invoice declarations are authentic and whether the products concerned can be considered to be originating products. If, in cases of reasonable doubt, there is no reply within 10 months or if the reply does not contain sufficient information to enable the authenticity of the invoice declarations or the real origin of the products to be determined, the customs authorities of the importing State are to refuse to grant the preferential treatment.

The ECJ ruled that in the present case, the subsequent verification pursuant to Article 32 of the EC-Israel Protocol was to establish the precise place of manufacture of the imported products, for the purposes of determining whether those products fell within the territorial scope of the EC-Israel Association Agreement. The European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement.

In accordance with Article 32(6) of the EC-Israel Protocol, if the reply given by the customs authorities of the exporting

State does not contain sufficient information to enable the real origin of the products to be determined, the requesting customs authorities are to refuse to grant preferential treatment.

The ECJ found that Israeli Customs gave no reply to the requests of the German customs authorities to check whether the products at issue had been manufactured in Israeli-occupied settlements in the West Bank, Gaza Strip, East Jerusalem or the Golan Heights. In such circumstances, there is not sufficient information to enable the real origin of the products to be determined and the assertion made by those authorities is not binding upon the customs authorities of the importing Member State.

Regarding the obligation to bring the matter before the Customs Cooperation Committee, the first paragraph of Article 33 of the EC-Israel Protocol provides that, where disputes arise in relation to the verification procedures under Article 32 of the protocol or where they raise a question as to the interpretation of that protocol, they are to be submitted to the Customs Cooperation Committee. According to the ECJ, the reply given by the customs authorities of the exporting State in the context of the subsequent verification procedure provided for in Article 32 failed to provide the information requested and so the dispute does not concern the interpretation of the EC-Israel Protocol, but the determination of the territorial scope of the EC-Israel Association Agreement. The ECJ concluded that there is no obligation to bring the matter before the Customs Cooperation Committee.

In the light of all of the foregoing, the ECJ ruled that, for the purposes of the procedure laid down in Article 32 of the EC-Israel Protocol, the customs authorities of the importing State are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting State where that reply

does not contain sufficient information to enable the real origin of the products to be determined. Furthermore, the customs authorities of the importing State are not obliged to refer to the Customs Cooperation Committee a dispute concerning the territorial scope of the EC-Israel Association Agreement.

Conclusion:

The case opened a stormy political debate and has been extensively discussed in the press. Despite all the political implications, the ECJ, not surprisingly, stuck to a balanced interpretation of the underlying agreements. Technically, the case is also of particular importance for manufacturers producing in Israel or importing goods from Israel.

The ruling underlines the importance of verifying where exactly the production of goods within 'Israeli territory' takes place. It clearly states that the advantages of preferential treatment depend on the application of a precise documentation of the origin of goods and the careful attention to the corresponding agreement. Besides that, the ECJ clearly rejected a principle of "elective determination" and continued a strictly formal approach to proof of origin.

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Single-window customs services introduced in Hungary

Single-window customs services have been introduced as a result of a joint initiative launched nearly two years ago by a consortium of nine public administrative authorities.

The participating authorities upgraded the IT systems they use to grant authorisations and have set up an electronic system to provide a seamless flow of data between economic operators and the various authorities involved in customs authorisation procedures.

The authorities specified by current legislation will continue to issue licences and certificates but the relevant data will be electronically forwarded to the Customs Authority. The Customs Authority will also provide licence usage information to the competent authorities by electronic means. The Customs Authority expects that this will help to increase the efficiency of administrative



procedures and speed up the exchange of information on customs matters.

Export/import licensing and related procedures will also be brought up to date thanks to the newly introduced IT solutions, record-keeping systems and digital communication.

The new system will provide a "one-stop shop" to assist with addressing matters related to customs procedures and movements of goods through a single point of contact. In addition, it offers the following benefits:

- clients will only interact directly with the Customs Authority as a central single-window authority;
- it will also be possible to submit electronic forms to other authorities involved in the customs procedure;
- authorities will be able to exchange data with each other through a single electronic channel; and
- clients will no longer be required to facilitate data exchange between the Customs Authority and the other authorities involved in the customs procedure.

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Textiles and footwear update

Summer is generally quiet for clothing and footwear from a customs and trade policy – which is just as well, given the focus on getting Autumn/Winter merchandise in store in time. The last couple of months have, perhaps, been more notable for what hasn't happened than what has.

As expected, the Sri Lankans did not make any written commitment to undertake the human rights related actions required by the EU in order to postpone the withdrawal of duty free access under GSP+. As a result of this, GSP+ was withdrawn from Sri Lanka with effect from 15 August and all eligible imports now enter the EU at the normal GSP rate, not duty free. If, at any time, Sri Lanka makes progress in this area and approaches the EU with regard to the reinstatement of GSP+, it is likely to get a positive hearing.

Meanwhile, there has been very limited progress on the proposed GSP origin rules. The Commission has completed the consolidated text, although it is not yet publicly available. The Commission had intended to do a tour de table at the June meeting of the Origin Committee, to establish member states' positions on the proposals, but this did not take place. However, it is thought that, although some member states do not think the changes go far enough and others think they go too far, it will be approved and the final vote is due to take place on 20-21 September.



A number of member states have expressed concern that there is not enough time to train the beneficiary countries in the new rules. Certainly, in our experience, exporters in the beneficiary countries are either not aware of the new rules or have a rather strange interpretation of them. Importers should, therefore, take extra care to ensure that suppliers do understand the rules, particularly the least developed countries (LDCs), such as Bangladesh and Cambodia, for which the new rules for garments are significantly relaxed.

And, finally, just to keep us all interested in footwear, China requested the establishment of a World Trade Organisation dispute settlement panel to consider its claims that the EU's anti-dumping measures on leather footwear are inconsistent with its obligations under various WTO provisions. The panel was duly composed on 5 July and has six months to report its findings and recommendations (ie till 5 January 2011), after which either party has 60 days in which to appeal. Given that the measures are due to expire on 30 March 2011, this could all end up being rather academic. However, there is a small possibility that, if the panel finds in favour of China, the EU would have to refund the duties paid.

Let's hope that autumn is quiet as well – importers have better things to do than constantly watch out for new threats of protectionism.

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Anti-dumping Update

- Notice of the expiry of anti-dumping measures on imports of bicycles originating in Vietnam
- Notice of the impending expiry of the anti-dumping measures on imports of bicycles originating in China
- Notice of the impending expiry of the anti-dumping measures on imports of tartaric acid originating in China
- Notice of the initiation of an expiry review on the anti-dumping measures applicable to imports of certain castings originating in China
- Notice of the initiation of an expiry review on the anti-dumping measures applicable to imports of hand pallet trucks and their essential parts originating in China
- Notice of the initiation of anti-dumping proceedings on imports of fatty alcohols and their blends originating in India, Indonesia and Malaysia
- Commission Decisions dated 14 July terminating the anti-dumping and anti-subsidy proceedings on imports of stainless steel fasteners and parts thereof originating in India and Malaysia
- Commission Regulations dated 11 August initiating investigations concerning the possible circumvention of anti-dumping and countervailing measures on imports of biodiesel originating in the USA by imports of biodiesel consigned from Canada and Singapore
- Commission Regulation dated 19 August initiating an investigation concerning the possible circumvention of anti-dumping measures on imports of certain plastic sacks and bags originating in China

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