

# European Customs & Trade Communiqué



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Welcome to the thirty ninth edition of our Newsletter on Customs and Trade issues. We have included topical articles on Customs and Trade matters from throughout our European network of PwC firms. This edition specifically covers an update on textiles and footwear developments and the impact of EORI numbers on transit guarantees and AEO applications, as well as an analysis of a Judgment from the Court of First Instance concerning the reimbursement and remission of certain customs duties.

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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.

*We would like to wish all our readers  
a Happy Christmas and a prosperous  
New Year*

## Network Leadership Team



**Ruud Tusveld**, PwC Rotterdam  
ruud.tusveld@nl.pwc.com



**Hubert Jadrzyk**, PwC Warsaw  
hubert.jadrzyk@pl.pwc.com



**Tamas Locsei**, PwC Budapest  
tamas.locsei@hu.pwc.com

## Editor



**Damian McCarthy**, PwC Dublin (Editor)  
damian.mccarthy@ie.pwc.com

### Textiles and footwear update – December 2009

The footwear anti-dumping case continues to twist and turn and, as we go to print, is still not resolved. On 19 November, member states voted on the Commission's proposal to extend the anti-dumping measures on leather footwear from China, Macao and Vietnam for a further 15 months. 15 member states voted against the measures, 10 in favour and two abstained.

However, since then, three of the member states that voted against the measures have indicated their intention to abstain, which effectively counts as a vote in favour, and one member state that voted in favour of the measures has now said that it will vote against. It appears that this is the result of horse-trading involving other anti-dumping cases and means that 13 member states intend to vote against. Unless one more member state switches sides, the proposal to extend the measures will go through. The final vote will be on 22 December.

With regard to the outcome of the GSP+ investigation into Sri Lanka's compliance with the conditions of GSP+, the Commission adopted a formal proposal to withdraw Sri Lanka from the GSP+ scheme on 15 December. The Council now has two months to consider the proposal and, given that this period includes Christmas and the New Year, it seems likely that it will make its decision in early February 2010. Assuming that they agree with the proposal, GSP+ would be withdrawn from Sri Lanka six months later, i.e. early August 2010, at which point eligible goods will no longer be duty free but will benefit from the normal GSP rates.

It is worth noting that the GSP legislation has provisions for any eligible country to apply for GSP+ mid-term. The current GSP term expires on 31 December 2011 and countries can apply by 30 April 2010 for inclusion in the GSP+ from 1 July 2010. As Sri Lanka's status in April will still be that of a GSP+ beneficiary, it will not be able to reapply mid-term but will have to wait till 2011 to reapply for inclusion in the new GSP scheme from 1 January 2012.

There has been no further progress on the proposed new GSP origin rules, as the Commission has not yet produced the final text. This is due before Christmas for discussion at the Origin Committee meeting currently scheduled for 12-13 January. The final vote is likely to be taken in March or April and, assuming that the proposals are accepted, they will enter force in January 2011. We understand that there are no further changes to the textile rules but will report on this once we have seen the final text, probably sometime in late December/early January.

So, 2009 has been a strange year, as relatively little has happened but still the possibility looms of possible trade defence action against clothing. The final outcome of the footwear anti-dumping case may well trigger further activity on this.

**Emma Ormond, PwC UK,**  
(emma.ormond@uk.pwc.com)

### Judgment of the Court of First Instance concerning an application for annulment of a Commission decision refusing the reimbursement and remission of certain customs duties

#### Parties:

Transn utica - Transportes e Navega o, SA (Portugal) versus the Commission of the European Communities.

#### Background

The applicant (Transn utica) is a Portuguese freight transportation company which had the status of authorised consignee during the period in which the operations in question, which were liable to customs duty, were carried out under the external Community transit procedure.

Between April 1994 and October 1994, 68 T1 transit declarations concerning 64 consignments of tobacco and 4 consignments of ethyl alcohol were issued by the customs authority of Xabregas (Portugal), the customs office of departure. In some cases, the 'Copies No 5' of the 68 T1 transit declarations were never returned to the customs office of departure while, in others, the T1 declarations were returned with stamps and signatures which were later discovered to be false.

The applicant had been designated as principal in respect of the external transit declarations in question; furthermore, the guarantee certificate had been issued in its name. Transn utica was requested to provide evidence that it had acted duly and lawfully throughout the external Community transit procedure and demanded to pay the relevant customs debts.

In its reply, the applicant stated that it had been unaware of the transit operations, involving cigarettes and ethyl alcohol, carried out in its name. Following an internal investigation, it had found that one of its employees had been acting fraudulently by signing T1 declarations for smuggling operations, without the company's knowledge.

The employee in question was dismissed and subsequently found guilty of repeated

breach of trust by the Tribunal Criminal de Lisbon (Criminal Court of Lisbon, Portugal) in December 1999. The criminal investigation opened in respect of the applicant was closed in September 2005, on the ground that the company had been unaware of its employee's actions and that its representatives had had nothing to do with the fraud in question. That same criminal investigation also revealed that the customs authorities had acted negligently by accepting too low a guarantee for the operations in question and also by mishandling the examination of the goods in question.

In July 2005, pursuant to Article 907 of the Implementing Regulation, the Commission adopted Decision REM 05/2004. The application was refused. The Commission stated that there was no justification for repayment and remission of the customs debt, on the ground that the applicant was not in a special situation for the purposes of Article 239 of the Customs Code ('the contested decision'). Subsequently, Transnautica applied at the Court of First Instance (CFI) for an annulment of that decision.

The applicant inter alia complained that the Commission failed to take account of the fact that the Portuguese customs authorities were in breach of the legislative provisions governing the comprehensive guarantee by accepting too low a guarantee for operations concerning sensitive goods such as tobacco and ethyl alcohol, thereby placing the applicant in a special situation. In fact, the Portuguese customs authorities had accepted the comprehensive guarantee certificate for the operations in question, even though it

covered only 7.29% of the customs debts and other charges relating to a single lorry-load.

### Findings

The CFI ruled that the circumstances referred to by the applicant represent a special situation within the meaning of Article 239 of the Customs Code and that the contested decision must be annulled.

Regarding the existence of a special situation, the Court recalled that circumstances which might constitute a special situation within the meaning of Article 905 of the Implementing Regulation exist where, having regard to the objective of fairness underlying Article 239 of the Customs Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist. The fairness clause provided for by the Community customs legislation is intended to apply where the circumstances characterising the relationship between an economic operator and the administration are such that it would be inequitable to require that operator to bear a loss which he normally would not have incurred. The Commission has some discretion in applying a fairness clause, while the Court must examine whether the Commission committed a manifest error of assessment in finding, in the contested decision, that the circumstances relied on by the applicant did not constitute a special situation.

The CFI found that, clearly, the Portuguese customs authorities had accepted an insufficient guarantee for the 68 T1 declarations at issue. The Court further

argued that had the Portuguese customs authorities verified, at the time of issue of the T1 declarations, whether the amount of the duties and other charges that might be incurred for each cargo was covered by the comprehensive guarantee provided by the applicant, the 68 T1 declarations could not have been issued.

The Court further rejected the Commission's argument to the effect that there is no causal connection between a customs debt being incurred and acceptance of a comprehensive guarantee certificate that is invalid on account of the low amount it covered. The CFI found that it is true that the customs debt is incurred at the time when the goods are removed from customs supervision, but acceptance, at the time when the T1 declarations are issued of too low a guarantee, the amount of which could clearly not cover all the duties and other charges payable, constitutes a defect in the T1 declaration issuing procedure.

Rather, the Portuguese customs authorities should either have requested the applicant, in its capacity as principal, to provide additional security necessitated by the high value of the customs debt that might be incurred, or suspended the T1 declaration issuing procedure. If the Portuguese customs authorities had refused to accept the guarantee on account of its insufficient amount and required the provision of additional security, not only would the T1 declarations at issue not have been issued but, as the applicant correctly asserts, it would have been able to uncover the fraudulent acts of its employee.



The CFI also stressed the rule contained in the applicant's articles of association, requiring a double signature for an adequate guarantee intended to cover all the duties and other charges that might be incurred in the circumstances, constitutes an internal monitoring mechanism designed for more thorough verification of operations in respect of which a higher customs debt might be incurred.

In addition, the fact that the CFI pointed out that the applicant was an economic operator known to the Portuguese customs authorities and regarded as reliable does not in any way ease the obligation on the customs authorities to monitor the amount of the guarantee in relation to the goods which are submitted to them. On the contrary, the fact that the economic operator was known and that the applicant had never previously marketed sensitive goods such as tobacco and ethyl alcohol are circumstances which should have attracted closer scrutiny from the customs authorities.

The court drew the conclusion that the lack of diligence on the part of the Portuguese customs authorities when they carried out their monitoring task, which precedes the issue of T1 declarations, in particular as regards the fixing and monitoring of the amount of the comprehensive guarantee, undermined the verification system provided for under the external Community transit system by the Customs Code and the Implementing Regulation. The Portuguese customs authorities therefore denied the applicant any real opportunity to detect the fraud before it was committed.

The Court concluded that lack of diligence is the responsibility of the Portuguese customs authorities and puts the applicant in a special situation that goes beyond the normal commercial risk relating to its business. The CFI ruled that the Commission committed a manifest error of assessment in finding that the applicant was not in a special situation as far as concerns the breach of the obligation to monitor the validity and amount of the comprehensive guarantee on the part of the Portuguese customs authorities. Consequently, the CFI annulled the contested decision.

#### Implications

The present judgment of the CFI does not only clarify the conditions for a special circumstance within the sense of Article 239 of the CC and the repayment / remission provisions of the IR. It is also welcome that the Court eases the principal's strict liability in cases where the customs authorities acted negligently themselves, thereby carefully balancing the accountability of the economic operators and customs authorities.

**Frank Stiebert, PwC Germany**  
([f.stiebert@de.pwc.com](mailto:f.stiebert@de.pwc.com))

### Economic Operator Registration and Identification Number Update

Following our earlier communication on the introduction of the Economic Operator Registration and Identification (EORI) Number, we herewith provide an update on this topic and its relationship to transit guarantees and AEO applications, as the

introduction of this number might have a significant operational impact.

All companies frequently involved in transit, will have a comprehensive guarantee arrangement. This guarantee - valid throughout the EU and the transit partner countries - is 'managed' by the Customs Authorities in the country where the guarantee is delivered. With the introduction of the guarantee monitoring system in transit, this guarantee is to be registered in the transit system (i.e. the guarantee certificate is replaced by a guarantee reference number in transit). On an EU level, there seems to be an agreement that such registration is only possible by the authorities of the country that has issued the EORI number for the respective operator. This means that if your guarantee (and the associated reference amount) is arranged in a different member state than the member state that has issued your EORI number, your current guarantee is to become invalid and needs to be replaced by a guarantee to be delivered to the authorities in the member state that has issued the EORI number.

Not only is this likely to result in additional costs (fees of the bank) related to the guarantee itself, but it might also result in a re-negotiation of your reference amount.

The same principle - as we understood - is also likely to become applicable to the AEO database, as a result of which operators are to apply for AEO certification in the member state that has issued the EORI number.



Should you have any problems or questions regarding the above, please contact the authors or your local PwC contact

**Jos Verstraten, PwC The Netherlands**  
([jos.verstraten@nl.pwc.com](mailto:jos.verstraten@nl.pwc.com))

**Suzanne Bras, PwC The Netherlands**  
([Suzanne.bras@nl.pwc.com](mailto:Suzanne.bras@nl.pwc.com))

## Anti-dumping Updates

- A Commission Decision of 30 November 2009 grants certain parties an exemption from the extension to certain bicycle parts of the anti-dumping duty on bicycles originating in the People's Republic of China imposed by Council Regulation (EEC) No 2474/93, last maintained and amended by Regulation (EC) No 1095/2005, and lifting the suspension of the payment of the anti-dumping duty extended to certain bicycle parts originating in the People's Republic of China granted to certain parties pursuant to Commission Regulation (EC) No 88/97.
- Council Implementing Regulation of 7 December 2009 imposes a definitive anti-dumping duty on imports of furfuryl alcohol originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No 384/96.
- Commission Regulation of 16 December 2009 imposes a provisional anti-dumping duty on imports of certain cargo scanning systems originating in the People's Republic of China.
- A Commission Regulation of 17 December 2009 imposes a provisional anti-dumping duty on imports of certain molybdenum wires originating in the People's Republic of China.
- Commission Regulation of 16 December 2009 continues and updates the scope of prior surveillance of imports of certain iron and steel products originating in certain third countries.
- A Council Implementing Regulation of 18 December 2009 amends Regulation (EC) No 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, inter alia, in Russia.
- A Council Implementing Regulation of 18 December 2009 concludes the new exporter review of Regulation (EC) No 1338/2006 imposing a definitive anti-dumping duty on imports of chamois leather originating in the People's Republic of China, levying retroactively and imposing an anti-dumping duty with regard to imports from one exporter in this country and terminating the registration of these imports.
- Notice concerning the anti-dumping measures in force in respect of imports into the Community of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China: modification of the name of a company subject to an individual anti-dumping duty rate.
- Notice concerning anti-dumping measures on imports of ironing boards originating in the People's Republic of China and a partial reopening of the anti-dumping investigation concerning imports of ironing boards originating, inter alia, in the People's Republic of China.
- Notice of initiation of an anti-dumping proceeding concerning imports of certain continuous filament glass fibre products 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 polyethylene terephthalate (PET) film originating in India.
- Corrigendum to Council Regulation (EC) No 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC)

No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy.

**Deirdre Jennings, PwC Ireland**  
([deirdre.jennings@ie.pwc.com](mailto:deirdre.jennings@ie.pwc.com))

## News in Brief

- An Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part was published on 4 December 2009.
- At the request of the European Commission, the ECJ declared that six member states had infringed EU Law by not paying customs duties payable on imports of armaments and material for civil and military use. The countries concerned are Finland, Sweden, Germany, Italy, Greece and Denmark and they must now take the necessary measures to comply with the judgment as soon as possible. If the Commission considers that a Member State has not taken the necessary measures to comply with the judgment, the Commission may bring a further action requesting financial penalties.
- Restrictive measures against Burma/ Myanmar were renewed by a Council Decision on 18 December 2009.
- The Harmonised System Explanatory Notes (HSExNs) regarding the classification of whiskey have been amended.
- China and Switzerland have launched a Joint Feasibility Study for a Bilateral Free Trade Agreement.

**Deirdre Jennings, PwC Ireland**  
([Deirdre.jennings@ie.pwc.com](mailto:Deirdre.jennings@ie.pwc.com))

## European Contact Details

Country	Name	E-mail	Telephone
Austria	Christine Weinzierl	<a href="mailto:christine.weinzierl@at.pwc.com">christine.weinzierl@at.pwc.com</a>	(43) 1 501 88 3605
Albania	Loreta Peci	<a href="mailto:loreta.peci@al.pwc.com">loreta.peci@al.pwc.com</a>	(355) 4 242 254
Azerbaijan	Movlan Pashayev	<a href="mailto:movlan.pashayev@az.pwc.com">movlan.pashayev@az.pwc.com</a>	99412) 497 74 05
Belgium	Dirk Aerts	<a href="mailto:dirk.aerts@pwc.be">dirk.aerts@pwc.be</a>	(32) 3 259 3214
Bulgaria	Tania Pavlova	<a href="mailto:tania.pavlova@bg.pwc.com">tania.pavlova@bg.pwc.com</a>	(359) 2 91 003
Croatia	Iain McGuire	<a href="mailto:iain.mcguire@hr.pwc.com">iain.mcguire@hr.pwc.com</a>	(385) 1 6328 807
Cyprus	Chrysilios Pelekanos	<a href="mailto:chrysilios.pelekanos@cy.pwc.com">chrysilios.pelekanos@cy.pwc.com</a>	(357) 22 555280
Czech Republic	Nora Grymova	<a href="mailto:nora.grymova@cz.pwc.com">nora.grymova@cz.pwc.com</a>	(420) 251 152 629
Denmark	Winni Nielsen	<a href="mailto:winni.nielsen@dk.pwc.com">winni.nielsen@dk.pwc.com</a>	(45) 3945 9454
Estonia	Ain Veide	<a href="mailto:ain.veide@ee.pwc.com">ain.veide@ee.pwc.com</a>	(372) 614 1978
Finland	Juha Laitinen	<a href="mailto:juha.laitinen@fi.pwc.com">juha.laitinen@fi.pwc.com</a>	(358) 9 2280 1409
France	Guy Le Gall	<a href="mailto:guy.le.gall@fr.landwellglobal.com">guy.le.gall@fr.landwellglobal.com</a>	(33) 1 56 57 44 22
Germany	Jochen Schmidt	<a href="mailto:jochen.schmidt@de.pwc.com">jochen.schmidt@de.pwc.com</a>	(49) 40 63 78 13 90
Greece	Panagiotis Tsouramanis	<a href="mailto:panagiotis.tsouramanis@gr.pwc.com">panagiotis.tsouramanis@gr.pwc.com</a>	(30) 210 6874 547
Hungary	Tamás Locsei*	<a href="mailto:tamas.locsei@hu.pwc.com">tamas.locsei@hu.pwc.com</a>	(36) 1 461 9358
Ireland	Damian McCarthy	<a href="mailto:damian.mccarthy@ie.pwc.com">damian.mccarthy@ie.pwc.com</a>	(353) 1 792 6203
Israël	Shay Shalhevet	<a href="mailto:shay.shalhevet@il.pwc.com">shay.shalhevet@il.pwc.com</a>	(972) 3 7954811
Italy	Luca Lavazza	<a href="mailto:luca.lavazza@it.pwc.com">luca.lavazza@it.pwc.com</a>	(39) 02 9160 5701
Kazakhstan	Kristina Kriščiunaite-Bartuseviciene	<a href="mailto:kristina.bartuseviciene@lt.pwc.com">kristina.bartuseviciene@lt.pwc.com</a>	(7) 327 298 06 19
Latvia	Ina Spridzane	<a href="mailto:ina.spridzane@lv.pwc.com">ina.spridzane@lv.pwc.com</a>	(371) 709 4513
Lithuania	Kristina Kriščiunaite-Bartuseviciene	<a href="mailto:kristina.bartuseviciene@lt.pwc.com">kristina.bartuseviciene@lt.pwc.com</a>	(370) 5 2392 365
Luxembourg	Anne Murrath	<a href="mailto:a.murrath@lu.pwc.com">a.murrath@lu.pwc.com</a>	(352) 49 48 48 3120
Macedonia	Katerina Carceva	<a href="mailto:katerina.carceva@mk.pwc.com">katerina.carceva@mk.pwc.com</a>	(389) 02 3111 012
Malta	Neville Gatt	<a href="mailto:neville.gatt@mt.pwc.com">neville.gatt@mt.pwc.com</a>	(356) 2564 6719

## European Contact Details

Country	Name	E-mail	Telephone
The Netherlands	Ruud GA Tusveld*	<a href="mailto:ruud.tusveld@nl.pwc.com">ruud.tusveld@nl.pwc.com</a>	(31) 10 4075 669
Norway	Yngvar Solheim	<a href="mailto:yngvar.solheim@no.pwc.com">yngvar.solheim@no.pwc.com</a>	(47) 95 26 06 57
Poland	Hubert Jadrzyk*	<a href="mailto:hubert.jadrzyk@pl.pwc.com">hubert.jadrzyk@pl.pwc.com</a>	(48) 2 25 234 837
Portugal	Mario Braz	<a href="mailto:mario.braz@pt.pwc.com">mario.braz@pt.pwc.com</a>	351 21 3599624
Romania	Daniel Anghel	<a href="mailto:daniel.anghel@ro.pwc.com">daniel.anghel@ro.pwc.com</a>	(40) 21 202 8688
Russia	Marina Volkova	<a href="mailto:marina.volkova@ru.pwc.com">marina.volkova@ru.pwc.com</a>	(7) 495 967 6223
Serbia and Montenegro	Nebojsa Jovanovic	<a href="mailto:nebojsa.jovanovic@rs.pwc.com">nebojsa.jovanovic@rs.pwc.com</a>	(381) 11 3302 100
Slovakia	Eva Fricová	<a href="mailto:eva.fricova@sk.pwc.com">eva.fricova@sk.pwc.com</a>	(421) 2 59 350 613
Slovenia	Marijana Ristevski	<a href="mailto:marijana.ristevski@si.pwc.com">marijana.ristevski@si.pwc.com</a>	(386) 1 58 36 019
South Africa	Gerard Soverall	<a href="mailto:gerard.soverall@za.pwc.com">gerard.soverall@za.pwc.com</a>	(27) 11 797 5004
Spain	Pilar Salinas	<a href="mailto:pilar.salinas@es.landwellglobal.com">pilar.salinas@es.landwellglobal.com</a>	(34) 91 568 45 35
Sweden	Kajsa Boqvist	<a href="mailto:kajsa.boqvist@se.pwc.com">kajsa.boqvist@se.pwc.com</a>	(46) 8 555 338 24
Switzerland	Simeon L. Probst	<a href="mailto:simeon.probst@ch.pwc.com">simeon.probst@ch.pwc.com</a>	(41) 58 792 53 51
Turkey	Cenk Ulu	<a href="mailto:cenk.uldu@tr.pwc.com">cenk.uldu@tr.pwc.com</a>	(90) 212 326 64 24
United Kingdom	Emma Ormond	<a href="mailto:emma.ormond@uk.pwc.com">emma.ormond@uk.pwc.com</a>	(44) 207 804 51 35
Ukraine	Igor Dankov	<a href="mailto:igor.dankov@ua.pwc.com">igor.dankov@ua.pwc.com</a>	(380) 44 490 67 77
Uzbekistan	Abdulhamid Muminov	<a href="mailto:abdulhamid.muminov@uz.pwc.com">abdulhamid.muminov@uz.pwc.com</a>	(998) 71 120 4879

## Global Contact Details

Country	Name	E-mail	Telephone
Americas	Domenick Gambardella	<a href="mailto:domenick.gambardella@us.pwc.com">domenick.gambardella@us.pwc.com</a>	(1) 646 471 3791
Asia	John Robinson	<a href="mailto:john.robinson@sg.pwc.com">john.robinson@sg.pwc.com</a>	(65) 6236 7318

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