

European Customs & Trade Communiqué



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Greetings from the Editor

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

We have included, among others, topical articles on a recent judgement of the ECJ, new rules concerning import and export summary declarations, substantial changes to the US EAR, and developments regarding BTIs, in addition to the regular updates on classification and anti-dumping measures.

Damian McCarthy, Editor

In this month's Bulletin:

- Judgment of the ECJ (in a preliminary ruling) concerning the value of goods for customs purposes and the inclusion of the import duties in the event that seller and buyer have agreed on the delivery term 'Delivered Duty Paid' (case C-354/09)
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- New rules concerning customs obligations with respect to goods imported and exported from the European Union customs territory from 1 January 2011
- Substantial changes to the EAR (Export Administration Regulations)
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- Classification Update
- Barriers lifted for meat importation to Turkey until the end of the year
- 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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Judgment of the ECJ (in a preliminary ruling) concerning the value of goods for customs purposes and the inclusion of the import duties in the event that seller and buyer have agreed on the delivery term 'Delivered Duty Paid' (case C-354/09)

Parties:

Gaston Schul BV versus Staatssecretaris van Financiën (Netherlands State Secretary for Finances)

Background:

Gaston Schul is a customs agent established in the Netherlands. From 1998 to 2000 Gaston Schul brought before the Netherlands authorities declarations for release of fish products into free circulation. The company made those declarations, in its name and on its behalf, on the instruction of an Icelandic carrier, which, in turn, was acting on the instructions of an Icelandic exporter. The declarations were accompanied by requests for the application of a preferential zero rate on the ground that the fish products originated in the European Economic Area (hereinafter 'EEA').

Gaston Schul attached copies of the invoices issued by the exporter. These invoices referred to DDP (Delivered Duty Paid) as a delivery term and stated that '[t]he exporter of the products covered by this document ... declares that, except where otherwise clearly indicated, these products are of EEA preferential origin'. The DDP delivery term was also mentioned on the customs declarations.

An investigation into the origin of the goods subsequently established that they in fact came from third countries and that the preferential rate had therefore been incorrectly applied. The Staatssecretaris van Financiën accordingly proceeded with the post-clearance recovery of customs duties and requested Gaston Schul to pay those duties. That administration calculated the amount of the duties to be recovered by taking as the customs value the transaction price, as it appeared on the import declarations, without deducting the amount of the customs duties to be recovered. Gaston Schul sought to reduce its liability by requesting that the amount of customs duties subsequently calculated should be deducted from the contractual price. This request was rejected and the following judicial appeal was dismissed.

Gaston Schul appealed this ruling in cassation to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The Supreme Court decided to stay the proceedings and referred the case to the ECJ for a preliminary ruling. The ECJ summarised the question by the national court as:

"whether the condition set out in Article 33 of the Customs Code, to the effect that import duties must be 'shown separately' from the price actually paid or payable for the imported goods, is met in the case where the parties to the contract have agreed that those goods are to be delivered DDP and have incorporated that information in the customs declaration but, by reason of a mistake as to the preferential origin of those goods, have not indicated any amount of import duties".

Findings:

In answering this question, the ECJ found it necessary to examine the scope of the condition set out in Article 33 of the Customs Code (hereinafter 'CC') to the effect that import duties must be 'shown separately' from the price actually paid or payable for the imported goods.

In interpreting this provision, the ECJ referred at the outset to settled case-law on the objective of the EU legislation on customs valuation. The court held that this objective is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values.

In further clarifying the concept of customs valuation, the ECJ observed that Article 29 (1) of the CC provides that the customs value of imported goods is, in principle, their transaction value, i.e. the price actually paid or payable for the goods when sold for export to the customs territory of the Community. The customs value, however, must reflect the real economic value of imported goods and take into account all of the elements of those goods that have economic value.

The ECJ then turned to Article 33 of the CC. The provision allows for exclusion, from the customs value, of the import duties applicable in the EU. This exclusion, however, requires compliance with the condition that the amount of those duties is 'shown separately' from the price actually paid or payable for the imported goods.

In view of the context elaborated above, the ECJ interpreted the agreement between the seller and the buyer. The agreement must be interpreted as meaning that, in accordance with the DDP clause, the custom duties are to be borne

by the seller. This interpretation is even valid, if the parties to the contract wrongly assumed that no import duty would be owed. As a consequence, the ECJ concluded that the import duties which may be payable are included in the price actually paid or payable for the imported goods. This interpretation is supported by the fact that the DDP clause places the seller under a maximum obligation. Pursuant to the DDP clause it is the seller who bears all the charges and risks connected with the delivery of the goods in the State of importation, inter alia, the charges relating to customs clearance.

In addition, the ECJ addressed further arguments to support these findings. The ECJ started by emphasising that the authorities of the State of importation are responsible for the calculation of import duties. Since the transaction value is correctly stated in the import declarations and the rate of customs duty applicable can be determined in the light of the origin of the goods, the authorities are in a position to calculate the amount of import duties legally owed and are able to separate the value of those duties from the price actually paid or payable for the imported goods.

The ECJ additionally pointed to the fact that import duties are mandatorily regulated by the EU customs tariff. As a corollary, the risk that fictitious or inflated costs may be submitted in order to fraudulently reduce the customs value of the imported goods is excluded in such a situation. The ECJ, however, noted that this might be different to other charges referred to by Article 33 of the CC, such as buying commissions or assembly charges, where the existence and amount are based solely on the intention of the parties to the contract and can be only known to the customs authorities in so far as they are expressly set out in the customs declaration and accompanying documents.

Implications:

The case is of particular importance to economic operators of all kinds concerned with import procedures to the EU. The case law of the ECJ indicates and clarifies the specific interpretation of Article 33 of the CC and provides guidance on the underlying concept of customs valuation. A profound understanding of this provision and the underlying concept is very helpful to further optimise international trade flows by reducing custom duties and improving profit trade margins.



By following this, Article 33 of the CC must be read together with Article 29 of the CC that provides that the customs value of imported goods shall be the transaction value. Article 33 of the CC establishes that those charges, laid down within this provision, may not be included in the customs value. The essential legal requirement that these charges shall not be included in the customs value is that they are 'shown separately' from the price paid or payable.

In general, the legal term 'shown separately' was the subject of much debate among law practitioners, national courts and the ECJ and should be seen and analysed in continuity with previous case law.

In particular, the judgment at issue exclusively concerns the interpretation of that term for import duties or other charges payable in the Community by reason of the importation or sale of the goods pursuant to Article 33 (1)(f) of the CC.

As a brief historical notion, this requirement was subject to an advisory opinion by the WCO Technical Committee on Customs (no. 3.1). The Committee stated that duties and taxes of a country of importation do not form part of the customs value, insofar as, by their nature, they are distinguishable from the price actually paid or payable. In their view, they are, in fact, a matter of public record.

This rather wide approach was not followed in its entirety by the EC Customs Code Committee in its Compendium of Customs Valuation texts, Commentary (2008, no. 5). The Committee found that the term 'shown separately' in this context has effectively the same meaning as "distinguishable". The Committee explained that the duties and other charges do not need to be shown separately on the invoice; but, obviously, their existence must be clearly indicated on the invoice or on some other accompanying document that the price actually paid or payable includes these charges.

This approach is reflected in the presented decision. The ruling implicates that it is sufficient that the transaction value is correctly stated in the import declarations and that the rate of customs duty applicable can be determined in light of the origin of the goods. Instead of requiring that specific customs duties and other charges are 'separately shown' it is satisfactory that the authorities are able to separate the value of those duties from the price actually paid or payable for the imported goods.

In practice, an economic operator must clearly distinguish between three conditions that are essential. That is, whether a deduction is properly claimed and indicated based on an element under Article 33 of the CC; whether this element meets the requirement that it is 'shown separately', and whether sufficient documentation is provided.

In this regard, a reference to a DDP clause as a delivery term on an invoice or any other type of commercial documentation allows customs authorities to recognize that the transaction value contains custom duties and other charges. The same applies to any clause with an equal effect of stating that the transaction value contains customs duties or other charges. As this even applies where parties to the contract wrongly assume that no import duty would be owed, economic operators are well advised - as a matter of precaution - to declare such clauses, as far as they are agreed, on invoices.

However, to satisfy the condition that an element is properly claimed and indicated it is necessary to make a claim in the appropriate boxes of the DV 1 declaration or any other customs value declaration.

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

In our August Communiqué we provided an update on the complaint by the US, Japan and Taiwan to the World Trade Organisation against the EU's duty treatment of monitors, set-top boxes and multi-functional printers.

The EU has not appealed the Dispute Settlement Body's ("DSB") findings against it. The Commission is currently considering what adjustments it needs to put in place to its tariff to bring its practices into line with the DSB findings.

However, initial indications are that the Commission may seek to apply the decision prospectively and resist refund claims for earlier imports on the grounds that DSB decisions do not necessarily have retrospective effect.

We will continue to provide you with updates on further developments in future editions of the Communiqué. Please contact the author or your local PwC contact if you require further information.

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New rules concerning customs obligations with respect to goods imported and exported from the European Union customs territory from 1 January 2011

From 1 January 2011 customs authorities in all 27 Member States of the European Union (EU) will require, from traders, a new method of notification of goods being brought into and out of the customs territory of the EU.

Traders who bring goods into the EU will be obliged to lodge to the customs authorities an Entry Summary Declaration (ENS). On the basis of data received from traders, customs authorities in the EU will perform risk analysis with respect to goods imported to the EU.

This ENS will be lodged, as a rule, electronically, by using the, so called, "Import Control System" (ICS). It should be submitted to the customs office of entry, i.e. to the customs office located at the border of the EU which will be the first point of entry of goods into the EU territory.

Depending on the mode of transport, there are different time limits for submitting the ENS. For example, in case of road transport, ENS will be lodged at least one hour before arrival of goods at the customs office of entry (at the border of the EU customs territory).

Usually, ENS will be lodged by the carriers. It will be also possible to lodge ENS by persons other than carriers. However, in this case, it should be done with the carrier's knowledge and consent.

As ENS will be lodged, usually, by carriers (or other relevant persons), it is important for them to obtain all necessary data concerning goods which are the subject of importation into the EU.

Depending on the situation and applied delivery terms, data necessary to create and submit ENS should be delivered to carriers by importers of goods established in the EU or by the exporters of goods established in the non-EU countries.

Having the above in mind, from an EU importers point of view, it is recommended that they ensure themselves that their contracting party from non-EU countries (non-EU exporters and carriers that cooperate with them) are aware of and prepared for (also by possessing the relevant IT tools) the new rules for importation of goods into the EU customs territory, which will enter into force from 1 January 2011.

It should also be stressed that similar obligations will arise from 1 January 2011 with regard to goods that are brought out of the EU territory.

In some cases, traders who bring goods out of the EU territory will be obliged to lodge to the customs authorities an Exit Summary Declaration (EXS) by using the "Export Control System" (ECS), which has been implemented by the Member States in the period 2007-2009.

Therefore, EU exporters and carriers should also prepare themselves for the new rules of exportation of goods to outside the EU customs territory.

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Substantial changes to the EAR (Export Administration Regulations)

US export control legislation is extra-territorial and often applies to US origin products, or products incorporating US origin products or technology, when such products are exported from the EU or between EU Member States. As such companies exporting these goods should be aware of changes to US legislation.

On 25 June 2010, BIS (the Bureau of Industry and Security) in the United States published amendments to the encryption provisions of the Export Administration Regulations (EAR). Major changes apply to the requirements for use of the Licence Exception ENC, "Encryption Commodities, Software and Technology", and the requirements for qualification of an encryption item as "mass market".

The major features include:

- Most mass market encryption commodities and software may now be exported immediately without a 30 day waiting period;
- Lower strength mass market encryption items continue to be self-classifiable without registration;
- Higher strength encryption mass market items require encryption registration and are subject to self-classification reporting or require submission of a classification request to the US authorities;
- The scope of License Exception ENC is extended to most encryption technology exports, following a technical review;
- The addition of a decontrol note for items that perform "ancillary" cryptography, which covers items such as games, robotics, business process automation, and other product that contain encryption capabilities but do not have communication, computing, networking or information security as a primary function.

Exporters or re-exporters can now rely on the producer's self-classification (pursuant to the producer's encryption registration) or CCATS (Commodity Classification Automated Tracking System) for a mass market encryption item or an item eligible for Licence Exception ENC. In this instance, encryption registration, classification request or self-classification reporting are not required and the product can be exported immediately.

Encryption registration and participation in annual self-classification reporting are not required for companies who have received completed encryption commodity classification determinations prior to 25 June 2010 (grandfather provisions apply if the encryption functionality has not been changed).

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Developments regarding Binding Tariff Information

A Binding Tariff Information (BTI) is issued by the Customs Authorities upon request and provides the holder of a BTI with certainty on the classification of the products and the associated customs duty rate. For importers who seek this legal certainty it is therefore important that they receive BTIs that mention them as the holder.

Under the current EU customs legislation both importers that are established in the EU, as well as the importers that are established outside the EU, can apply for a BTI and thus be the holder of a BTI. However, under the new Modernised Customs Code (MCC) this is likely to change. The current draft for the Implementation Regulation on the MCC (IMCC) defines that the applicant must be established in the EU. The modernised customs code is however not (yet) clear as to whether the applicant can be a representative for a non-established importer and/or whether that non-established importer can then be the holder of that BTI.

Whilst the situation on the representation and/or possibility for a non-established importer are not yet clear under the current draft for the IMCC, we have experienced that some customs authorities are already anticipating the new legislation by only issuing BTIs to applicants established in the EU and, in case of a non-established importer, define the fiscal representative for VAT as the importer's representative for the BTI application. This may create an issue for the non-established importer, e.g. since it may be unclear who will be regarded the legal holder of such a BTI (who can invoke the associated legal rights). Furthermore, the non-established importer may be restricted in its flexibility of appointing a new/other fiscal VAT representative since that may create the need for an application for a new BTI.

We feel that there is no legal basis for the abovementioned approach towards non-established importers and therefore advise those importers that are confronted with such a policy to take appropriate actions against it, e.g. request revision of such a BTI or submit an appeal. Alternatively you may contact your local PwC Customs advisor to assist you with that process.

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Changes to Incoterms

The International Chamber of Commerce (ICC) has announced that the Incoterms will change as of January 1, 2011.

Under these new Incoterms 2010, the total number of terms will be reduced to 11. Whilst a few terms have been deleted, two new Incoterms, DAT and DAP will be introduced. Below you will find an overview of the Incoterms that will apply as of January 1, 2011:

Incoterms for any Mode or Modes of Transport:

- EXW - Ex Works
- FCA - Free Carrier
- CPT - Carriage Paid To
- CIP - Carriage and Insurance Paid
- DAT - Delivered At Terminal (new)
- DAP - Delivered At Place (new)
- DDP - Delivered Duty Paid

Incoterms for Sea and Inland Waterway Transport Only:

- FAS - Free Alongside Ship
- FOB - Free On Board
- CFR - Cost and Freight
- CIF - Cost, Insurance and Freight

Please contact the author or your local PwC contact if you require further information.

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Classification Update

The classification of combined MP3/MP4 multifunctional players continues to be a contentious issue in the EU. Some administrations appear to arbitrarily attribute “video recording/reproducing” (heading 8521 at a duty rate of 13.9%) as the principal function without adequately considering the technical capabilities of the other functions in the device. A recent referral to the European Court of Justice (C-193/10, KMB Europe BV) is challenging this approach and should provide clarification on whether these devices are more correctly classified at the sound recording heading (8519 at a duty rate of 2%).

A recent judgment of the European Court of Justice has clarified the conditions for the classification of garlic bulbs which have undergone a drying process. The appellant argued for their classification as “dried” vegetables of heading 0712 (12.8% customs duty). However, Dutch Customs regarded the garlic to be insufficiently dried to meet the requirements of heading 0712 because they were maintained in a “chilled” state. They considered they were properly classified at heading 0703 (customs duty of 9.6% + 130 per 100kg). The ECJ ruled that the Court’s role is to provide guidance on the criterion for classification and not to determine the actual classification of a product. It therefore concluded that based on the evidence before it, including the HS guidance, garlic bulbs which have undergone a process to remove all the moisture (or most of the moisture) from the bulbs are to be classified in heading 0712 as “dried” vegetables. However, garlic bulbs which have been partially dried and retain the properties and characteristics of fresh garlic remain classified in 0703.

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Barriers lifted for meat importation to Turkey until the end of 2010

In order to stabilize the sharp increases in meat prices, the Turkish Government have opened tariff quotas for the importation of butchery animals and fatlings during the first half of 2010. In this context, contracts for importation of 66,000 tons of live animals have been finalized and another contract of 10,000 tons will be tendered in a short time period.

On the other hand, the Decree published on 09.19.2010 has also lifted barriers for meat importation which was previously not possible in practice. Currently, the importation shall be compatible with the conditions determined by the World Organisation for Animal Health and the Turkish Ministry of Agricultural and Rural Affairs.

According to the written explanation related to the subject, cold and frozen carcasses prepared in accordance with Islamic manner under the surveillance and control of veterinary assigned from Turkey

shall be imported until the end of the year. Meat produced and frozen previously will not be eligible for importation to Turkey.

The trade can be carried out by first class slaughter houses, meat production and food production facilities, accredited and controlled by the Meat and Fish Institution and the Ministry of Agricultural and Rural Affairs.

Goods will be subject to specific tests and it is obligatory to meet certain requirements; not to have any residue and also to be produced from animals aged no older than 30months.

By its application, which will be effective until 31 December 2010, the Turkish Government will also be able to fulfil its commitment for importation of 19,000 tons of meat from the EU. This issue has been a constant dilemma between Turkey and the EU since 1998.

You can find the list (below) which shows the rates of import taxes in terms of Combined Nomenclature Codes. It is also important to note that the VAT rate applied at importation is 8%.

CN Code	Description	Customs duty rate (%)		
		EU and EFTA	Bosnia-Herzeg.	Other
0102.90.05	Of a weight not exceeding 80 kg	20(1)	20(1)	20(1)
0102.90.29	Other	20(1)	20(1)	20(1)
0102.90.49	Other	20(1)	20(1)	20(1)
0102.90.71	For slaughter	30(1)	30(1)	30(1)
0104.10.30	Lambs (up to a year old)	20(2)	20(2)	20(2)
0104.10.80	Other	20(2)	20(2)	20(2)
0201.10.00	Carcases and half-carcases	30(3)	30(3)	30(3)
0201.20.20	'Compensated' quarters	30(3)	30(3)	30(3)
0201.20.30	Unseparated or separated forequarters	30(3)	30(3)	30(3)
0201.20.50	Unseparated or separated hindquarters	30(3)	30(3)	30(3)
0202.10.00	Carcases and half-carcases	30(3)	30(3)	30(3)
0202.20.10	'Compensated' quarters	30(3)	30(3)	30(3)
0202.20.30	Unseparated or separated forequarters	30(3)	30(3)	30(3)
0202.20.50	Unseparated or separated hindquarters	30(3)	30(3)	30(3)

(1) : The customs duty rate shall be applied as 135% starting from 01.Apr.2011.

(2) : The customs duty rate shall be applied as 135% starting from 01.Jan.2011.

(3) : The customs duty rate shall be applied as 225% starting from 01.Jan.2011.

Anti-dumping Update

- Regulation initiating a ‘new exporter’ review of the Regulation imposing a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People’s Republic of China, repealing the duty with regard to imports from one exporter in this country and making these imports subject to registration
- Regulation amending the Regulation imposing a definitive anti-dumping duty on imports of trichloroisocyanuric acid originating, inter alia, in the People’s Republic of China
- Regulation terminating the partial interim review of the Regulation imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia
- Regulation imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates
- Commission Decision terminating the anti-dumping proceeding concerning imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates and releasing the amounts secured by way of the provisional duties imposed
- Notice of initiation of an anti-dumping proceeding concerning imports of certain seamless pipes and tubes of stainless steel originating in the People’s Republic of China
- Notice concerning the anti-dumping measures in force in respect of imports into the Union of certain polyethylene terephthalate originating, inter alia, in Malaysia: change of the name of a company subject to an individual anti-dumping duty rate
- Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of trichloroisocyanuric acid originating in the People’s Republic of China
- Notice of the expiry of certain anti-dumping measures on imports of trichloroisocyanuric acid originating in the USA as of 08 October 2010
- Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain magnesia bricks 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 ferro-silicon originating, inter alia, in Russia.

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