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European Court of Justice rules on classification of set-top box and overrules Explanatory Notes to the Combined Nomenclature

On April 14, the European Court of Justice (ECJ) provided its judgment in joined cases C-288/09 and C-289/09. Further to the references for a preliminary ruling from the First Tier Tribunal in the UK, the ECJ was asked to provide clarity in respect of the tariff classification of certain specific decoders with a hard disk drive. The ECJ answered the prejudicial questions and provided some interesting considerations, including an overrule of the Explanatory Notes (EN) to the Combined Nomenclature (CN).

ECJ rules on BTI ‘applicability’

Recently, the ECJ ruled in a case involving a Binding Tariff Information (BTI) that was applied by an economic operator, not being the title holder. The ECJ ruled, among other things, that a BTI issued in respect of the same goods in another Member State may be submitted as evidence by a non-title holder, although the BTI itself can provide no legal ‘protection’. It is up to the national courts to determine whether or not the relevant procedural rules of the Member State concerned allow for the possibility of producing such type of evidence.

EU reshapes Generalized System of Preferences

The current Generalized System of Preferences (GSP) helps developing countries export products to the European Union (EU). When importing products from developing countries into the EU, reduced duties can be claimed. At the same time, the developing countries do not have to allow any reduced duties on EU products. The European Commission proposed a new GSP.

Compulsory country of origin marking in the EU (2)

In our December 2010 issue, the possible implementation of a mandatory EU country of origin marking scheme on certain products, including footwear and textile products, was discussed. In the meantime, the Parliament approved the implementation of mandatory labelling requirements of fur and leather parts that are used in textile products.

In Short:

- Mutual recognition of authorized economic operators between EU and Japan
- Commission publishes new consolidated version of Explanatory Notes
- EU imposes restrictive measures on Syria
- Free Trade Agreement between EU and Republic of Korea signed
- WTO Appellate Body issues report on Airbus dispute

ECJ rules on classification of set-top box and overrules Explanatory Notes to the Combined Nomenclature By Erik Zietse

On April 14, the ECJ provided its judgment in joined cases C-288/09 and C-289/09. Further to the references for a preliminary ruling from the First Tier Tribunal in the UK, the ECJ was asked to provide clarity in respect of the tariff classification of certain specific decoders with a hard disk drive.

In accordance with the Explanatory Notes (EN) to the Combined Nomenclature (CN), the local Customs Authorities in the UK classified the Sky+ Box, a set-top box with a communication function, containing a hard disk drive and allowing the user to record television programs, as a recording apparatus, subject to a 13.9 percent customs duty rate. British Sky Broadcasting Group Plc., the importer of record in this case and the manufacturer of the set-top box, Pace Plc, disputed this decision, arguing the Sky+ Box should be classified as a set-top box with a communication function subject to a zero percent customs duty rate.

The cases were brought before the UK Court that referred the cases to the ECJ to obtain answers to prejudicial questions that would allow the UK Court to determine the appropriate classification of the Sky+ Box. Although all four prejudicial questions are very interesting, the first question regarding the actual classification of the set-top box at hand and the second question regarding the possible violation of the Information Technology Agreement (ITA) by the European Union (EU) in case a set-top box such as the one at hand would be subject to a 13.9 percent duty rate when imported into the European Union were of special interest to many companies in the consumer electronics industry. On April 14, the ECJ answered the prejudicial questions. The ECJ provided some interesting considerations.

The main prejudicial question as asked by the UK Court related to the classification of a set-top box with a communication function and a hard disk drive. Is such a set-top box to be classified as a set-top box with a communication function or, in line with the EN CN, as a recording device as a result of the incorporated hard disk drive? In line with the General Rules for Interpretation of the CN and existing case law, the ECJ confirms that to determine the correct classification of electrical apparatus that have several functions and as a result could be classified in different categories of the CN, are to be classified according to the principal function of the apparatus.

After careful consideration of the various objective characteristics and specifications of the set-top box, the ECJ ruled that the communication function is the principal function of the Sky+ Box. In this respect, especially the fact that the Sky+ Box is sold to television service-providers, such as British Sky Broadcasting, who make them available to their customers to enable them to access the programs they offer is a very important factor. The ECJ considers:

“ 79. It therefore seems that consumers subscribe to service-providers such as Sky principally in order to be able to access the television programs offered and that, in order to do so, they must obtain a set-top box such as a Sky+ box. The television programme recording function which is, in addition, available on that model, is merely an additional service that it offers.

80. The interaction between the functions of the Sky+ box described in paragraph 75 of this judgment, which makes the recording function dependent on the reception of television signals, shows that consumers who choose that product are seeking, primarily, not a recording function, but rather a function of decoding television signals, although their choice may be influenced by the fact that it has a recording function or the number of hours of programming that can be recorded.

81. *It follows from all those considerations that the Sky+ box is principally intended to be used to receive television signals and that function is inherent to that apparatus. It therefore constitutes its principal function and the recording function is only secondary.*

82. *Consequently, since the Explanatory Notes to the CN contradict the CN on that point, they must be disregarded.”*

As a result, the intended use of the product is once more considered to be a decisive objective criterion for classification of the set-top box in these cases by the ECJ. Something that is in many other cases still not honored by local Customs Authorities when brought forward in classification disputes. As, further to the ECJ, the Commission now also acknowledged that it is necessary to take into account what consumers would consider to be the principal function of an apparatus, it is expected that the intended use of a product will become a more prominent part of classification discussions in the consumer electronics industry, especially if it can be demonstrated that the intended use is inherent to the product.

Unfortunately, the ECJ does not go into detail on the prejudicial question on the possible violation of ITA by the EU if the set-top box at hand would be subject to a 13.9 percent duty rate instead of a zero percent duty rate as provided for under ITA to which the EU committed. In view of the answer given to the first question, which leads to a zero percent duty rate for the set-top box at hand, the ECJ sees no need to answer this question.

Nevertheless, the ECJ provides for an interesting and important consideration in paragraph 83 of the judgment. The ECJ states that *“even though the provisions of a treaty such as the ITA are not such as to create rights upon which individuals may rely directly before the courts under European Union law, where the European Union has legislated in the field in question, the primacy of international agreements concluded by the European Union over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.”*

Here, the ECJ appears to follow the standpoints of the WTO Panel in the ITA dispute between the EU and the U.S., Japan and Chinese Taipei¹ and to provide a strong hint to the Commission that the EU should honor its obligations as committed to under ITA. With a view to the EU confirmation to implement the rulings and recommendations of the WTO Panel in the ITA dispute by June 30, it will be interesting to see exactly how the EU will interpret its ITA obligations and how the EU will truly comply with its ITA obligations.

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ECJ rules on BTI ‘applicability’ By Martin Ouwehand

Recently, the ECJ ruled in a case involving a Binding Tariff Information (BTI) that was applied by an economic operator, not being the title holder. A BTI is a tariff classification ‘ruling’, issued by the customs authorities of one of the 27 European Union (EU) Member States. A BTI is issued upon request and is legally binding on the customs authorities in all EU Member States for a period of six years. A BTI promotes the uniform application of customs policy and also helps ensure that a correct duty (rate) is levied upon importation.

The case: Sony Computer Entertainment Europe Ltd. (SCEE), based in the UK, was in possession of a BTI for one of their game consoles. Sony Supply Chain Solutions (SLE), part of the same group of companies, performed

¹ The U.S., Japan and Chinese Taipei filed an official complaint with the WTO claiming the EU violates ITA by virtue of its customs tariff treatment of certain high tech products, including set-top boxes. The EU was indeed found to violate its ITA obligations by the WTO Panel.

logistic services on behalf of SCEE, including lodging customs declarations for said products in The Netherlands. SLE lodged the customs declarations in its own name and on its own behalf. SLE applied a BTI² that was issued to SCEE.

It is worth mentioning that the Dutch customs handbook contained a passage on BTI applicability, even for non-title holders, if the exact same goods are imported as described in the BTI. SLE initially declared the classification code that was laid down in the first BTI issued to SCEE, i.e., CN-code 9504 1000. This classification resulted in payment of customs duty. SLE objected (and subsequently appealed) against the additional assessment raised by Dutch customs and referred to the SCEE proceedings before the English court. Pursuant to an amended BTI issued to SCEE for CN-code 8471 4990 (customs duty: zero percent), the Dutch customs court ruled that SLE could rely on the amended BTI issued to SCEE, also for customs declarations submitted in the period between issuance of the 'first' BTI and issuance of the amended BTI.

Pursuant to the Dutch court's decision, the Dutch State Secretary brought an appeal in cassation before the Dutch Supreme Court. As the Supreme Court had doubts regarding *inter alia* the value of the amended BTI in the period between issuance of the first BTI and the amended BTI, the Supreme Court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. *Must Community law, and in particular Article 12(2) and (5) and Article 217(1) of the [Customs Code] and Article 11 of the [implementing regulation], in conjunction with Article 243 of the [Customs Code], be interpreted to mean that a person involved in proceedings concerning customs duties which have been imposed may challenge their imposition by producing binding tariff information issued in another Member State for the same goods, which information was still the subject of a legal dispute at that time, but was eventually revised?*
2. *If the answer to Question 1 is in the affirmative, can the person declaring the goods to customs in his own name and for his own account successfully rely in a case such as this, when making customs declarations for release for free circulation, on binding tariff information whose holder is not that person, but an associated firm on whose instructions that person made the customs declarations?*
3. *If the answer to Question 2 is in the negative, does Community law preclude a person in a case such as this from successfully relying on a national policy decision in which the national authorities raise the expectation that, in respect of the tariff classification of the goods declared, it can rely on tariff information issued to a third party for the same goods?'*

In its decision, the ECJ first considered the second question. After an assessment of the relevant legal provisions, the ECJ concluded that a person who makes customs declarations in his own name and on his behalf cannot rely on a BTI of which he is not the title holder, even when this person acted on the instructions of the holder. According to the ECJ, SLE did not act as representative within the meaning of article 5 of Regulation (EEC) 2913/92. Hence, SLE could not rely on the BTI issued to SCEE.

On the first question, the ECJ ruled that even though a BTI can only be applied by a title holder (or its representative) *vis-à-vis* the EU customs authorities, a BTI may be relied on as evidence by a person other than the holder of that BTI. In addition, the national courts should take particular care in its assessment when determining the correct application of the CN. In sum, a BTI issued in respect of the same goods in another Member State may be submitted as evidence by a non-title holder, although the BTI itself can provide no legal 'protection'. It is up to the national courts to determine whether or not the relevant procedural rules of the Member State concerned allow for the possibility of producing such type of evidence.

² In the case at hand, a BTI was initially issued for a classification code that was not desired by SCEE. After a successful appeal before the English court, an amended BTI was issued to SCEE.

As to relying on national policy (question 3), the ECJ concluded that the Dutch customs authorities acted in a manner inconsistent with EU law. In view of the ECJ, the Dutch customs authorities attributed the same legal value to a BTI, issued for exactly the same goods, for both title holders and – indirectly – non-title holders. Per the ECJ decision, this approach could not give rise to a legitimate expectation, on part of the traders, that they could rely on that policy.

Especially the answers to questions 2 and 3 should be carefully considered by companies importing goods into the EU. If your company appointed a customs agent to fulfill the import formalities and no form of representation is in place, the customs agent can – at the moment of import – not apply BTIs issued to your company. However, if the classification is challenged by local customs authorities, the BTIs can – subject to conditions – be submitted as evidence in subsequent legal proceedings. As discussed in previous editions of this newsletter, a BTI has proven to be a useful means whereby economic operators can obtain certainty on the tariff classification of their goods before decisions on imports are taken. It promotes uniform tariff classification throughout the EU, thus creating a level playing field. Given the recent ECJ decision, it is recommendable to analyze the current import procedures and make sure that BTIs can be rightfully invoked.

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EU reshapes Generalized System of Preferences *By Erik de Bie*

The current Generalized System of Preferences (GSP) helps developing countries export products to the EU. When importing products from developing countries into the EU, reduced duties can be claimed. At the same time, the developing countries do not have to allow any reduced duties on EU products. The current GSP provides preferences to 176 developing countries. The GSP+ program provides for additional tariff reductions to support developing countries in the areas of sustainable development and good governance. The third program concerns the least developed countries and is known as “The Everything But Arms (EBA)” arrangement. EBA provides for a full “exemption” of duties. The EBA program applies to the products which originate from the 49 least developed countries as defined by the United Nations.

The European Commission proposed a new GSP. In the below a summary of the proposal.

1) *Focusing on fewer countries, i.e. countries that are really in need. Instead of products from 176 countries, the new GSP will allow preferential treatment for products from around 80 countries.*

The current GSP allows countries like Russia, Saudi Arabia and Qatar certain preferences. The new GSP will exclude countries which developed well and which are, bearing in mind the World Bank classification, no longer considered as developing countries. At this stage it is not yet certain which countries will lose their preferential status. Besides the exclusion of countries that meet certain developing standards, the new GSP will not provide preferences to countries which already have similar or better preferential access to the EU, for example countries that agreed on a Free Trade Agreement with the EU or overseas countries and territories with an alternative market access arrangement.

Under the new GSP the product coverage will remain unchanged. The expansion in products or preferential duties can apply under the GSP+ or EBA program. The graduation mechanism will be revised, but will no longer apply to GSP+ countries and will remain not to apply to EBA countries.

2) *The principles of sustainable development and good governance will be more promoted and will become more important in the GSP program. There will be incentives for respecting human and labour rights and the environment and compliance with good governance standards.*

Countries can apply for the GSP+ benefits at any time. Countries can join GSP+ when certain criteria are met and they respect core international standards. The GSP+ countries must commit to comply with international conventions and to cooperate with international organizations. The countries must prove that they meet their obligations. The GSP+ will have better monitoring options and more robust procedures for the temporary suspension from GSP+. For example, every two years a monitoring report will be published.

3) Increase the importance of the EBA scheme by allowing less developing countries to GSP.

As a result of allowing the products of less countries to preferential EU duty treatment, the competitive advantage of the least developed countries will increase. As a result of concentrating the preferences on those that most need them, the GSP advantages will become more meaningful.

4) The proposal is to make the system open-ended in contradiction to the current GSP that is subject to a review every three year period.

The new GSP must be predictable, transparent and stable, making it more attractive for EU importers to source in GSP countries.

The proposed new GSP is developed by the European Commission. The proposal will have to be debated with the Council and the European Parliament. When the proposed legislation is approved, the Regulation will be published 6 months in advance to the date of its application. The goal is to have the amended GSP regime in place on January 1, 2014, at the latest.

A complicating factor is that the current GSP ends in December of 2011. However, in the meantime the Commission proposed and the European Parliament and the Council approved a “roll-over” Regulation based on which the current GSP is extended until the end of 2013. This avoid that the current GSP lapses before the new regime is approved.

If you would like to receive more information concerning the proposed new GSP, including the draft Regulation, or to discuss the potential impact of the amended preferential regime, please feel free to contact us.

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Compulsory country of origin marking in EU (2)?

By Martin Ouwehand

In our December 2010 issue, the possible implementation of a mandatory EU country of origin marking scheme on certain products, including footwear and textile products, was discussed. This plan has been on the table for many years now but at the end of last year, some movement could be detected. Currently, there are no harmonized EU laws but companies are free to label their products with the country of origin. If they do so, the information on the label should be accurate and correct.

As the Commission’s proposal proved (and still proves-)controversial for some European Member States, the European Council did not (yet) agree on the requirement to be formalized. A second-reading agreement was reached between the Parliament and the Council of Ministers. Also, the Council requested the Commission present a study – to be completed by September 30, 2013 – on the feasibility of an country of origin labelling scheme. Part of the study will also focus on new technologies for labelling, the feasibility of harmonizing care labelling requirements as well as the use of hazardous substances, specifically to establish whether there is a causal link between allergic reactions and chemical substances used in textile products.

In the meantime, the Parliament did approve the implementation of mandatory labelling requirements of fur and leather parts that are used in textile products. Soon, any use of animal derived materials will need to be clearly marked on the product labels of textile products. In order to distinguish between – for example – real fur and fake fur, textile products containing such products should be labelled “contains non-textile parts of animal origin”. After the Parliament’s approval on the above topic, the new textile labelling rules are still to be formally signed by the Member States, after which a Regulation will be published in the Official Journal of the European Union. It appears that a 2½ year transition period will apply for the industry to adapt to the new requirements.

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European VAT, Customs and Trade Alert – in Short

Mutual recognition of authorized economic operators between the EU and Japan

Ensuring the security of the global supply chain while facilitating trade is a challenge both for customs authorities and economic operators. To meet this challenge, many countries have introduced additional security measures to reinforce risk management in accordance with the WCO SAFE Framework of Standards. In risk management, the reliability of traders is of crucial importance. Established authorized economic operators (AEOs) that adhere to security and compliance criteria allow customs to focus on risky trade flows. In exchange, AEOs receive benefits in form of trade facilitation. Mutual recognition of AEOs provides reliable operators additional trade facilitation benefits in partner countries; it also allows customs to target high risk shipments more effectively. The implementation of mutual recognition of AEOs between the EU and Japan will begin on 24th May 2011. From this date, AEOs in the EU and Japan will start to benefit from this mutual recognition.

Please note that the European Commission has also updated the AEO self-assessment and explanatory notes to take account of the mutual recognition possibilities.

http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/pr_aeo_japan_en.pdf

Commission publishes new consolidated version of Explanatory Notes to the Combined Nomenclature

Although the Explanatory Notes do not have legally binding force as such (see related article by Erik Zietse in this issue), the Explanatory Notes do provide an important aid to the interpretation of the scope of the various headings in the Combined Nomenclature. The Commission recently published the new consolidated version of the Explanatory Notes to the Combined Nomenclature.

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2011:137:SOM:EN:HTML>

EU imposes restrictive measures on Syria

The EU has decided to impose restrictive measures against Syria and persons responsible for the violent repression against the civilian population in Syria. These measures include an embargo on arms and equipment that may be used for internal repression, as well as an asset freeze and a travel ban targeting specific individuals.

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/121898.pdf

Free Trade Agreement – EU and Republic of Korea

The Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part has been signed and published in the Official Journal of the EU

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A127%3ASOM%3AEN%3AHTML>

WTO Appellate Body issues report on Airbus dispute

The WTO Appellate Body, on 18 May 2011, issued its report in the case “European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft” (WT/DS316/AB/R).

http://www.wto.org/english/news_e/news11_e/316abr_e.htm

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