WHITE & CASE

International Trade

# EU Customs Developments in 2018

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***This is a special newsletter with our selection of key EU customs developments in 2018. It is not intended to provide an exhaustive summary***


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## EU Customs Policy

### Amendments to the UCC and related legislation

Key developments relating to proposed and adopted amendments to the Union Customs Code (UCC) in 2018 include the following:

- In March 2018, the European Commission published a **formal proposal** to amend the UCC in light of the fact that certain new IT systems will not be ready by the **end-2020** deadline. It would amend Article 278 ("Transitional measures") of the **UCC Regulation (952/2013)** to **extend the deadline to end-2025** for the following system upgrades: the Import Control System (ICS) for Entry Summary Declarations, the Computerised Transit System (NCTS) and Automated Export System (AES) to include the export component of the national Special Procedures System, and the electronic system introduction for Centralised Clearance for Import (CCI), Proof of Union (PoU) and Guarantee Management (GUM). This proposal must be considered and co-decided by the Council and the European Parliament (EP) before it can enter into force.
- In a separate proposal, unveiled in May 2018 and not yet adopted, the Commission has **proposed amendments to correct** a series of errors, omissions and technical anomalies in the UCC, as well as to align certain provisions with international agreements (notably the EU-Canada Free Trade Agreement) concluded since the adoption of the UCC.
- Also in May 2018, the Commission adopted **Commission Delegated Regulation 2018/1063** amending and correcting **Commission Delegated Regulation 2015/2446** supplementing the UCC. The revisions relate to a wide variety of areas; for example, the definitions of 'exporter' and 'registered exporter', EORI registration requirements for parties requesting Proof of Union (PoU) Status, certain limits to the right to be heard, calculation of duties on processed products resulting from inward

processing, certain time limits for seeking repayment or remission of duties or declaration under a customs procedure, simplifications of certain customs formalities, and updating of the product-specific origin rules to reflect recent changes in customs classification codes.

- In June 2018, the Commission adopted **Commission Delegated Regulation 2018/1118** to also amend **Delegated Regulation 2015/2446** as regards the conditions for a reduction of the level of the comprehensive **guarantee** and the guarantee waiver.
- In April 2018, the Commission adopted **Commission Implementing Regulation 2018/604** with amendments to **Commission Implementing Regulation 2015/2447** relating to the UCC concerning procedural rules to establish **preferential origin** of goods in the EU. The amendments relate to, *inter alia*, exporter registration and replacement documents.

### EU Own Resources - Proposed reduction of "collection costs"

In May 2018, the Commission proposed a Council Decision to modernise the EU's system of "Own Resources" in the context of the broader discussion on the next Multiannual Financial Framework (MFF), i.e. the EU's budget, for the period 2021-2027. The EU's Own Resources system is currently based on three main categories of income, including so-called "Traditional Own Resources" which mainly consist of customs duties.

At present, the EU Member States can keep 20% of customs duties they collect on imports and the Commission is proposing that the amount of these "collection costs" should be reduced to 10%. In return, the Commission seems to suggest strengthening financial support for customs equipment and IT that is more targeted to current needs. It is difficult to predict the Council's view on this proposal, and whether the new Own Resources system will be approved without amendment. In late November 2018, the European Court of Auditors (in Opinion 5/18) observed that the Commission has not justified the proposed rate of 10% by means of a study providing reliable estimates of costs incurred by Member States in collecting customs duties.

## EU Tariffs

### Duty Suspensions and Tariff Quotas

On 27 June 2018, the updating Regulations for the EU Tariff Quota (TQ) and Duty Suspensions (DS) Regulations for the July 2018 round were published. These Regulations took effect on 1 July 2018. Under **Regulation 2018/914**, 85 new DS were introduced, 53 existing DS amended and 5 DS eliminated. **Regulation 2018/913** introduced 7 new TQs and amended 11 TQs.

On 28 December 2018, the next DS and TQ updates applicable from **1 January 2019** were published. **Regulation 2018/2069** introduced 87 new DS and eliminated 13 DS, while amending 26 existing DS. **Regulation 2018/2070** opened 6 new TQs and ended 7 others, while amending 16 existing TQs.

### Updated EU regulation for suspended duties on aircraft parts

In April 2018, the EU published **Council Regulation 2018/581**, which updates and replaces **Regulation 1147/2002** on temporary duty suspensions for aircraft parts and components. The new regulation – which foresees future implementing regulations with product lists, etc. – updates conditions for acceptable authorised release certificates and procedures, and introduces certain changes concerning eligible goods.

### GSP developments

#### a) Classification code update

In February 2018, **Commission Delegated Regulation 2018/216** was published to amend the Annexes of **Regulation 978/2012** establishing the EU's Generalised Scheme of Preferences (GSP). These Annexes list products for which tariff preferences are granted under the GSP Regulation. The amendments reflect updates to the customs classification codes as of 1 January 2017 (following the EU's implementation of updated international Harmonised System codes).

### b) Annual beneficiary country development assessment

Through **Commission Delegated Regulation 2018/148**, **Côte d'Ivoire, Ghana, Paraguay and Swaziland** lost access to EU GSP benefits as of **1 January 2019**. This is the result of the countries' status as upper-middle income economies under World Bank criteria during the last three years. **Equatorial Guinea** will lose GSP benefits as from **1 January 2021** for the same reason, but because this country is currently a beneficiary under the GSP scheme for least-developed countries (the "Everything But Arms" or "EBA" scheme), a longer transition period applies.

### c) Mid-term evaluation report

In October 2018, the Commission published its mid-term evaluation report on the EU GSP Regulation. It concludes that the 2012 reform of the GSP succeeded in focussing preferences on the most-needing countries, and has contributed to their sustainable development. While the Commission is not proposing to amend the GSP Regulation, it acknowledges the need to increase both transparency with respect to the GSP+ regime (giving better preferences to countries that comply with certain international social and environmental standards) and civil society involvement. The Commission also wants to promote greater awareness in GSP beneficiary countries.

### d) Safeguard investigation for Indica rice from Cambodia and Myanmar

In March 2018, the Commission launched a safeguard investigation under the EU GSP Regulation. Italy has requested safeguard measures for rice of the 'Indica' type originating in Cambodia and Burma/Myanmar (imported duty free under the EU GSP regime), which it claims is imported in volumes and at prices causing serious difficulties for EU producers of like or directly competing products. In November 2018, it was reported that safeguard measures are likely in light of investigation findings. Such measures would lead to the re-introduction of normal import duties, which would in principle be temporary. The Member States were consulted in early December 2018 and the investigation should conclude in **early 2019**.

### e) Bangladesh, Cambodia, and Burma/Myanmar risk losing EBA preferences; Sri Lanka's GSP+ status under threat

In August 2018, the Commission increased pressure on **Bangladesh** to address human rights concerns related to how the authorities have dealt with student protests and blocked Internet access. Imports originating in Bangladesh currently benefit from duty-free EU market access under the GSP EBA scheme. The Commission has announced that it is closely monitoring the situation and could withdraw EBA benefits in case of serious and systematic violations of certain human and labour rights conventions.

In the context of the Asia-Europe Summit in October 2018, EU Trade Commissioner Cecilia Malmström confirmed that the EU is threatening to remove **Cambodia and Burma/Myanmar** from the GSP EBA scheme in light of the deterioration of human rights in the countries. However, in December 2018, the EU Council decided to only send a warning to Burma/Myanmar without withdrawing preferences.

**Sri Lanka**'s GSP+ status could also be under threat again. The EU Ambassador to Sri Lanka recently expressed renewed concern about the treatment of certain population groups and the lack of progress on the reconciliation efforts promised by the Sri Lankan government in 2016. Sri Lanka regained its GSP+ status in 2017 after it was suspended in 2010 over human rights issues.

## Additional customs duties on certain US products

In April 2018, the EU published **Commission Delegated Regulation 2018/632** featuring additional customs duties on imports of certain products originating in the United States. These additional duties were introduced in 2005 as retaliation by the EU following a World Trade Organisation (WTO) challenge of the US Continued Dumping and Subsidy Offset Act (CDSOA), and they are subject to amendment every year. Under the new Regulation, the EU has amended the rate of additional import duty to 0.3%. The list of products remains unchanged: 0710 40 00 (**sweetcorn**), ex 9003 19 00 (**spectacle/goggle frames and mountings of base metals**), 8705 10 00 (**crane lorries**) and 6204 62 31 (**denim trousers for women/girls**).

In addition, the EU started applying retaliatory tariffs on certain imports of US products in response to increased US steel and aluminium tariffs as of 22 June 2018. These tariffs are imposed through **Commission Implementing Regulation 2018/886**. The Commission adopted this Regulation in response to the US

decision of 1 June 2018 to end the temporary tariff exemption for EU steel and aluminium, which made such imports into the US subject to a 25% and 10% *ad valorem* duty, respectively.

The EU is applying these additional customs duties on US products in two stages:

- At the first stage, *ad valorem* duties at a maximum rate of 25% were imposed as of 22 June 2018 on imports of, *inter alia*, **certain agricultural, tobacco, textile and steel products**.
- At the second stage, further *ad valorem* duties at a maximum rate of 10%, 25%, 35% and 50% could be applied on **23 March 2021** (or following a WTO Dispute Settlement Body ruling) on imports of, among others, **electronics, motor vehicles, water vessels, dishwashers, washing machines and glassware**.

The EU has also launched WTO Dispute Settlement proceedings against the US, claiming that the US steel and aluminium tariffs are inconsistent with the WTO Safeguards Agreement and GATT 1994.

## EU FTA Update

### Implementation of FTAs

On 31 October 2018, the Commission published its second report covering the year 2017 on EU FTA implementation. It provides an update on the Commission's activities in the implementation of 35 major FTAs, covering both "new" and "first" generation FTAs as well as Deep and Comprehensive FTAs and Economic Partnership Agreements. The main findings of the Commission with respect to trade in goods include the following:

- EU trade under FTAs amounts to one third of all EU trade with third countries.
- Preference utilisation rates for imports into the EU increased, while for exports, these rates (to the extent that data was available) increased as well in trade with South Korea, Georgia and Chile.
- Some trade issues involving sanitary and phytosanitary measures were resolved, while various others remain in place. The same is true for technical barriers to trade.
- FTA dispute settlement regimes were not used in 2017.

The report provides updates on resolved and pending issues per agreement.

The report also zooms in on trade and sustainable development and agro-food trade under FTAs. A chapter on certain pending and future activities discusses, inter alia, the development of an online portal for EU import and export (combining the former Market Access Database and the Trade Helpdesk) for the benefit of SMEs in particular, as well as the "Transparency in Action" webpage (with information on FTA discussions).

### Horizontal bilateral safeguard regulation

In April 2018, the Commission proposed a horizontal regulation relating to bilateral safeguard clauses and other special mechanisms typically included in various EU FTAs for withdrawal of preferential treatment (featuring procedural steps and individual rights, etc.). The aim with this proposal is to streamline the EU process by having a fixed set of FTA clauses which can be used for all future EU FTAs. In late November 2018, the Commission, Council and EP reached agreement in principle on the proposal. The Regulation should be able to enter into force in early 2019 after the EP and the Council confirm political agreement.

### Status of FTA negotiations

In 2018, the EU moved various important FTAs towards finalisation, as follows:

- **Singapore**: Currently awaiting EP consent; not yet in force.
- **Japan**: Received EP consent in December; expected to enter into force on **1 February 2019**.
- **Vietnam**: Legal scrubbing of the texts completed; awaiting EP consent (perhaps not until after the EP elections in **May 2019**), so not yet in force.

- **Mexico**: Update of existing FTA agreed in principle in April 2018, but final technical talks are continuing.

In 2018, negotiations were formally launched (and discussions are ongoing) on the following FTAs:

- **Australia**: Negotiations were launched in June 2018; 3rd round is scheduled for **March 2019**.
- **New Zealand**: Negotiations were launched in June 2018; 3rd round is scheduled for **February 2019**.
- **Africa, the Caribbean and the Pacific (ACP) region**: Negotiations were launched in June 2018 to replace the Cotonou Agreement, which expires in **2020**.

FTA discussions continued (or with some on hold) in 2018 without immediate prospects to conclude with the following countries/regions:

- **United States**: TTIP negotiations were stopped in late 2016; scoping discussions to revive negotiations on a limited agreement are ongoing.
- **Mercosur**: Despite intensive negotiations throughout 2018, it was not possible to conclude the FTA. This was mostly because of disagreement over beef; no date has been set yet for the next round.
- **India**: Despite a joint statement in November to strengthen cooperation, the EU considers the ambitions "too far apart" to resume FTA discussions; the EU now wants a bilateral investment agreement first.
- **Indonesia**: The 9th round is scheduled for **March 2019**.
- **Chile** (update of existing FTA): Last round took place in May-June 2018; no date has been set yet for the 4th round, but Chief Negotiators are due to meet in **January 2019**.
- **Malaysia**: The stocktaking exercise to resume negotiations dates from 2016; no news on possible resumption of talks yet.
- **Thailand**: The FTA negotiations have been on hold since May 2014.
- **Philippines**: The 2nd round took place in early 2017; no date set yet for the next round.

A review of the existing EU FTAs with **South Korea** and **Ukraine** is being explored to address certain issues.

# Brexit

## General negotiations

At the time of writing, there is still great uncertainty over Brexit. Discussions continue over whether there could be some kind of a deal, whether that would be based on the Withdrawal Agreement negotiated between the UK Government and the EU (described below), whether there could be a hard Brexit, or whether the Brexit date might be extended.

The **Withdrawal Agreement** on which the EU and UK negotiators reached agreement in November 2018 contains the following trade-related sections which are particularly noteworthy:

- The UK may negotiate, sign and ratify **international agreements** but cannot become bound by such agreements in areas of exclusive EU competence – including on trade and customs matters – during the transition period (ending on **31 December 2020**, but extendable once by mutual consent until **the end of 2021 or 2022**), unless authorised by the EU to do so.
- On customs matters, the draft Agreement aims to **avoid disruption for ongoing customs procedures** at the end of the transition period, and ensure some **continued administrative EU-UK customs cooperation and mutual assistance** for recovery of customs duties for another **3-5 years** after that.
- The draft Agreement also contains the so-called "**backstop solution**" in a special Protocol on Ireland/Northern Ireland creating a "**single customs territory**", aimed at avoiding a hard border on

the island of Ireland if no agreement is reached on the future EU-UK relationship before the end of the transitional period.

For an overview of the impact of the draft Withdrawal Agreement (if approved as such) on trade in goods, see our client alert of 28 November 2018.

On 25 November 2018, the European Council also adopted a non-binding **Joint Political Declaration setting out the framework for the future relationship** between the EU and the UK. In it, the EU and UK commit to seeking a comprehensive economic partnership, entailing *"a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition."* With respect to tariffs, the declaration notes that the Parties will *"build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin."* The EU and the UK further state that *"facilitative arrangements and technologies will also be considered in developing any alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing"*. They also confirm that there would be *"a spectrum of different outcomes for administrative processes as well as checks and controls, and note in this context their wish to be as ambitious as possible, while respecting the integrity of their respective markets and legal orders."*

## Preparing for all scenarios, including "no deal"

Since August 2018, over 90 **guidance papers for a "no deal" scenario** have been published by the UK Government. These notices are intended to set out "clear steps that public institutions, companies and people should take or consider taking, in order to avoid or mitigate or manage the risk of any potential short-term disruption."

The EU is also preparing for all scenarios, including a "no deal" outcome. A list of "**preparedness notices**" was published in a Commission Communication of 19 July 2018 entitled "Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019". The Commission started issuing these preparedness notices already in 2017 and there are now well over 80 such notices on a dedicated website.

In addition, the Commission presented a **Communication with a Contingency Action Plan** to "mitigate significant disruptions in some narrowly defined areas" (including customs) in November 2018. This was followed in December 2018 by a Communication implementing the Action Plan and a package of legislative drafts to ensure that in case of a "no deal" Brexit, the most significant disruptions can be softened (e.g. in the area of pre-departure and pre-arrival customs declarations for risk assessment purposes, and by allowing the UK to benefit from a general export authorisation for dual-use items shipped to the EU27). In addition, in late 2018, the Commission organised **"sectoral preparedness seminars"** with the EU27, including a seminar on customs and import/export licences.

## Customs-specific developments

In June 2018, the European Commission published a preparedness notice to stakeholders on the **legal repercussions concerning rules of origin for preferential treatment of goods** after the UK's withdrawal from the EU. The Commission notes that in case transitional arrangements are agreed under the Withdrawal Agreement, it will notify third country FTA partners that the UK is treated as a Member State during such period. However, in light of some uncertainty as to whether FTA partner countries will agree, companies are advised to treat UK inputs in their products as non-originating when assessing whether a product has preferential origin status under an EU FTA after **29 March 2019**, and to take steps to show that their product have sufficient EU content.

The numerous UK guidance papers issued in August 2018 include the following in the customs area:

- A guidance note entitled **"Trading with the EU if there's no Brexit deal"** advises businesses to understand the likely changes for tariffs and customs declarations, and the impact of a "no deal" on their role in supply chains (e.g. with respect to origin rules). For example, it recommends considering renegotiation of commercial terms, possibly engaging the services of a customs broker or freight forwarder to handle customs procedures, and purchasing appropriate software and securing relevant customs authorisations.

- The UK states in the guidance note **"Classifying your goods in the UK Trade Tariff if there's no Brexit deal"** that it does not intend to immediately change the classification of goods or the current list

of commodity codes in a no deal situation. Also, future deviations from the current tariff are not planned, and would only occur where necessary to maintain alignment with international standards or for trade remedy purposes.

- A guidance note entitled **"Exporting controlled goods if there's no Brexit"** confirms that export licences would generally be required for exports of firearms and dual-use items from the UK to the EU27 in a "no deal" scenario. The note does state that the UK would publish a new Open General Licence (OGEL) in advance of **29 March 2019** to simplify the process for such exports to the EU27.

On 14 September 2018, the Taxation (Cross-border Trade) Act 2018 entered the UK statute book. This means the UK now has the legal instrument to put in place its own customs controls, and VAT and excise duty regimes. These framework rules are largely based on the relevant EU legal instruments, including the UCC.

### Trade-specific developments

In February 2018, the UK Government published a **technical note outlining transition period principles for the international agreements** by which the UK is bound as an EU Member State. It proposes that even though the UK is no longer considered an EU Member State during the transition period, the EU's FTAs with third countries should apply to the UK unchanged. The note acknowledges that some form of agreement would be required between the various parties (i.e. the EU, FTA partner countries and the UK) to temporarily interpret existing FTA terms "European Union" or "EU Member State" as including the UK. In late December 2018, the Commission published a draft of the letter it intends to send to FTA partner countries to this effect if the Withdrawal Agreement is ratified.

On 12 October 2018, the UK guidance note **"Existing free trade agreements if there's no Brexit deal"** was published. In this document, the UK states that in a no deal scenario, it would seek bilateral agreements largely replicating EU FTAs with EU FTA partner countries to enter into force "from exit day, or as soon as possible thereafter." The UK has started discussions with various third countries to achieve this goal.

In late July 2018, the UK Department for International Trade launched a second public consultation on which EU **trade defence measures** should be imposed by the UK after Brexit (while considering not to replicate a majority of the 114 existing EU measures). On 23 August 2018, the UK government published a guidance note entitled **"Trade remedies if there's no Brexit deal"**, which explains that the UK is in the process of creating a trade remedies system (in the context of its future independent trade policy). It is expected that a new UK Trade Remedies Authority will be operational by the **end of March 2019** in case of a no deal situation, which UK companies seeking trade remedies would then have to approach with complaints (rather than the European Commission's DG Trade).

## Classification

### 2019 Common Customs Tariff published

On 31 October 2018, the Commission published **Regulation 2018/1602** containing the updated Common Customs Tariff (CCT) applicable from 1 January 2019. As always, symbols in the margins flag any amendments of CN codes or their product coverage in the annual update.

### Classification Regulations

In 2018, the following Classification Regulations were published:

- **Commission Implementing Regulation 2018/77** classifies a mattress cover under Combined Nomenclature (CN) code 6302 22 90 as bedlinen, other than knitted or crocheted, of man-made fibre.
- **Commission Implementing Regulation 2018/81** classifies electrical apparatus for skin treatment and hair removal by means of laser technology under CN code 8543 70 90 as electrical apparatus, having an individual function, not specified or included elsewhere in Chapter 85.
- **Commission Implementing Regulation 2018/220** classifies a manual spreader for fertilisers, etc. under CN code 8424 89 70 as other mechanical appliances for projecting, dispersing or spraying liquids or powders.

- **Commission Implementing Regulation 2018/267** classifies two types of 'masterbatches' of thermoplastic pellets incorporating essential oils and insecticides – to prevent animals from biting and damaging finished plastic products – under CN codes 3302 90 90 (as other mixtures of odoriferous substances and mixtures with a basis of one or more of these substances, of a kind used as raw materials in industry) and 3808 91 10 (as insecticides based on pyrethroids), respectively.
- **Commission Implementing Regulation 2018/407** classifies brown-fused alumina slag used for concentrating metal ores under CN code 7202 29 90 as other ferro-silicon alloy.
- **Commission Implementing Regulation 2018/553** classifies an article consisting of two tubes held by brackets designed to be used in motor vehicles to convey the cooling liquid from the engine to the heat exchanger under the vehicle dashboard under CN code 7608 20 20 as aluminium tubes and pipes of welded aluminium alloys.
- **Commission Implementing Regulation 2018/603** classifies a plastic wheelchair cushion intended to prevent pressure sores under CN code 3926 90 97 as other articles of plastics.
- **Commission Implementing Regulation 2018/787** classifies 'lace orthosis' to be worn inside a shoe as an ankle bandage under CN code 6307 90 10 as other made-up textile articles.
- **Commission Implementing Regulation (EU) 2018/837** classifies a food supplement for supporting the immune system and providing energy to the human body under CN code 2106 90 98 as other food preparation.
- **Commission Implementing Regulation (EU) 2018/838** classifies a disposable liner for a child's potty under CN code 3924 90 00 as other household articles and hygienic or toilet articles, of plastics.
- **Commission Implementing Regulation (EU) 2018/1207** classifies a tuning element used in a bandpass filter under CN code 8517 70 00 as a part of an apparatus for the transmission or reception of voice, images or other data in a wireless network.
- **Commission Implementing Regulation (EU) 2018/1208** classifies an 'oxygen analyser' used in industrial gas process and quality control under CN code 9027 10 10 as an electronic gas or smoke analysis apparatus.
- **Commission Implementing Regulation (EU) 2018/1209** classifies a type of ballet dancing shoe under CN code 6405 20 99 as other footwear with uppers and outer soles of textile materials.
- **Commission Implementing Regulation (EU) 2018/1243** classifies a bulk aqueous extract composed of various organic substances produced from sugar beet molasses and used as an animal feed premix under CN code 2309 90 96 as a preparation of a kind used in animal feeding.
- **Commission Implementing Regulation (EU) 2018/1489** classifies a set of garden hoses, a spray nozzle and connectors under CN code 8481 80 99 as other valves.
- **Commission Implementing Regulation (EU) 2018/1530** classifies a cover to protect a mobile phone's USB sockets against water and dust under CN code 3926 90 97 as other articles of plastics.
- **Commission Implementing Regulation (EU) 2018/1531** classifies an article made from air bubble type sheets of plastic used as a swimming pool cover under CN code 3926 90 92 as other articles of plastics, made from sheet.
- **Commission Implementing Regulation (EU) 2018/1785** classifies 'stack cables' fitted with connectors at both ends under CN code 8544 42 10 as other electric conductors for a voltage note exceeding 1000 V, fitted with connectors, of a kind used for telecommunications.
- **Commission Implementing Regulation (EU) 2018/1864** classifies a mixture of fish oil, tocopherols and sunflower oil presented in bulk for use in the production of soft gelatine capsules under CN code 1517 90 99 as an edible mixture of animal and vegetable oils.
- **Commission Implementing Regulation (EU) 2018/2041** classifies certain cable connectors under CN code 8536 69 90 as other plugs and sockets.

- Other classification-related legislation includes the following:
- **Commission Implementing Regulation 2018/125** amended Additional Note 2(f) to Chapter 27 to account for the development of renewable fuels containing animal or vegetable fats.
- **Commission Implementing Regulation 2018/198** repealed Implementing **Regulation 716/2012** relating to encapsulate colostrum powders to ensure classification of certain food preparations in line with case law of the Court of Justice of the EU (CJEU).
- **Commission Implementing Regulation 2018/396** replaced Additional Note 10 to Chapter 22 with respect to sparkling fermented beverages.
- **Commission Implementing Regulation 2018/507** added an Additional Note to Chapter 15 with respect to certain food preparations presented in measured doses and intended as a food supplement (which should be classified in heading 2106).
- **Commission Implementing Regulation 2018/549** added an Additional Note to Chapter 17 on the determination of the quantity of fructose in inulin syrup.

## Court judgment in *Kubota* – Classification Regulation on motor vehicles upheld

On 22 February 2018, the CJEU issued its judgment in Case C-545/16 (*Kubota (UK) Ltd. and EP Barrus Ltd v. Commissioners for Her Majesty's Revenue and Customs*). A UK court had referred a question relating to the validity of **Regulation 2015/221**, which classifies a four-wheel drive utility vehicle used as a dumper under CN code 8704 21 91 (motor vehicles for the transport of goods). As a result of **Regulation 2015/221**, the applicant Kubota/EP Barrus was facing revocation of UK-issued Binding Tariff Information (BTI) classifying a similar vehicle under tariff code 8704 10 (for "dumpers designed for off-highway use"). It appealed on the basis that the Classification Regulation (i) did not apply to its vehicle, and in any event (ii) unduly restricted the scope of tariff code 8704 10.

On the latter issue, the CJEU upheld the Regulation in view of the Harmonised System Explanatory Notes (HSENs) to subheading 8704 10 (which require a certain sturdiness for vehicles to be considered dumpers for off-highway use). It concluded that the vehicle classified under the Regulation did not fit under subheading 8704 10, and there were therefore no grounds to conclude that the Commission had unduly changed the product scope of that tariff code.

## Court judgment in Pilato – classification of hearses

On 25 July 2018, the CJEU handed down its judgment in Case C-445/17 (*Agenzia delle Dogane e dei Monopoli v. Pilato SpA*) concerning the classification of hearses. The question was whether hearses were classifiable under heading 8704 (motor vehicles principally for the transport of goods), as Pilato claimed, or under heading 8703 (motor vehicles principally for the transport of persons), as the Italian customs authorities felt was appropriate. The lower court had sided with Pilato. Upon appeal, the Italian customs authorities relied on an HSEN for heading 8703 which explicitly listed hearses as an example of vehicles within the scope of this heading. The referring court felt that this HSEN may not be conclusive as hearses do not possess any of the structural and objective characteristics listed in the same HSEN. The referring court thus asked whether hearses were after all classifiable in HS heading 8704 as claimed by Pilato (or alternatively, even in heading 8705 for motor vehicles the primary purpose of which is neither the transport of goods nor the transport of persons).

The CJEU observed that a vehicle principally designed for the transport of corpses was still a vehicle for the transport of persons, rather than goods. Accordingly it considered the classification of hearses in heading 8703 appropriate, and that it was not necessary for such vehicles to possess the characteristics laid out in the HSEN for 8703.

## Court judgment in *Medtronic* – classification of spinal fixation systems

On 12 April 2018, the CJEU delivered its ruling in Case C-227/17 (*Medtronic GmbH v. Finanzamt Neuss*) on the classification of spinal fixation systems which are implanted in the body. The question raised before the Court was under which CN codes – considering 9021 10 10, 9021 10 90 and 9021 90 90 – such fixation systems should be classified.

The Court confirmed that the principal function of the fixation systems is decisive for classification purposes:

- If they are orthopaedic appliances (i.e. for preventing or correcting bodily deformities, or for supporting or holding body parts following an illness, operation or injury), then they are classified under CN code 9021 10 10.
- They can only be classified under CN code 9021 10 90 if intended principally for treatment of fractures.
- If they do not fit within CN code 9021 10 10 or 9021 10 90 (or any other 9021 subheading), the fixation systems could be classified under residual CN code 9021 90 90 provided they are intended not only to be implanted in the body, but also to compensate for a defect or disability.

### Court judgment in *Profit Europe* – classification of fittings of spheroidal graphite cast iron for fire-fighting installations

On 12 July 2018, the CJEU issued a judgment in joined cases C-397/17 and C-398/17 (*Profit Europe NV v. Belgische Staat)* concerning the classification of fittings of spheroidal graphite cast iron for fire-fighting installations. The question raised before the Court was in essence whether the cast tube or pipe fittings of spheroidal graphite cast iron at issue in this case should be classified under subheading 7307 11 10, as fittings of non-malleable cast iron, or under CN subheading 7307 19 10, as fittings of malleable cast iron.

The Court considered an opinion of the Customs Code Committee and a CN Explanatory Note (CNEN) to subheading 7307 19 10, which it disregarded as it altered the meaning of the relevant CN code by broadening the scope of the concept "malleable". The CJEU concluded that cast tube or pipe fittings of spheroidal graphite cast iron must be classified under subheading 7307 19 90.

### Court judgment in *Vision Research* – classification of volatile-memory high-speed digital cameras

On 13 September 2018, the CJEU ruled in case C-372/17 (*Vision Research Europe BV v. Inspecteur van de Belastingdienst/Douane kantoor Rotterdam Rijnmond*) relating to the classification of volatile-memory cameras from which recorded images are deleted when the camera is switched off or when new images are captured. Vision Research Europe applied for BTI in 2009 seeking classification of a high-speed camera under CN code 8525 80 30 as a digital television camera, but the Dutch customs authorities classified the product under CN code 8525 80 19 as 'other television camera'. Dutch customs relied on the fact that there was only a volatile memory and no other storage memory in the product, and ignored the fact that there was an option to connect to an external memory. They based this decision on **Commission Implementing Regulation 113/2014** classifying a similar product under that code.

Vision Europe Research brought an action before the referring court, which considered that the product classified the 2004 Classification Regulation was sufficiently comparable to allow application of that regulation by analogy. However, the Dutch court also felt that the European Commission may have unduly narrowed the scope of the heading for digital cameras in that regulation by deciding that temporary recording in volatile memory did not constitute recording, a conclusion which furthermore was in contradiction with the HSENs and CNENs for the relevant headings.

The CJEU sided with Vision Europe and the referring court. It considered that the camera at issue had the usual characteristics of a digital camera due its capability of still-image recording, and not those of a television camera. It was clear from the ENs that the images of covered cameras could be recorded on either an internal memory or an interchangeable medium, and that the type, nature or other characteristics of the internal memory (e.g. volatile or not) was irrelevant as the length of time for which images can be stored is not specifically stated. As a result, the CJEU declared the 2014 classification regulation to be invalid.

### Court judgment in *2M-Locatel* – classification of IPTV set-top boxes

On 20 September 2018, the CJEU issued its judgment in Case C-555/17 (*2M-Locatel A/S v. Skatteministeriet*) relating to the classification of apparatus capable of receiving, decoding and processing live TV signals transmitted over the internet, so called IPTV set-top boxes.

Under the international Information Technology Agreement (ITA) concluded in 1996, "set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the internet, and having a function of interactive information exchange" should enter the EU duty-free. As a result, the EU has a dedicated duty-free CN code 8528 71 13 to this effect for set-top boxes with a video tuner.

In the current dispute relating to imports from China into Denmark between October 2007 and July 2010, the customs authorities took the view that the products did not contain a tuner and therefore had to be classified under residual subheading 8528 71 90 instead, bearing a duty of 14%. After various appeal stages, the question as to the correct classification of these products was referred to the CJEU, which agreed in principle with Danish customs and left for the national court to decide whether or not the product contained a tuner.

The CJEU observed that its tariff interpretation was not called into question by the ITA as it was not possible to select channels or carrier frequencies with the IPTV at issue; it considered these functions – in the absence of a definition in the CN – to be the meaning of "video tuner" in everyday language (which was also supported in CNENs applicable at the time of the import). In June 2011 (i.e. after the subject imports had been made), the EU had adopted **Regulation 620/2011** amending the CN in a way which also gave set-top boxes not incorporating a tuner duty-free treatment following a WTO Panel Report condemning the EU for excluding set-top boxes with additional functions (recording and reproducing) from duty-free treatment, but the CJEU confirmed that this Regulation (and the related WTO Panel Report) did not have retroactive effect.

### Court judgment in *Kreyenhop* – classification of fried instant noodles

On 6 September 2018, the Court delivered its judgment in Case C-471/17 *(Kreyenhop & Kluge GmbH & Co. KG v. Hauptzollamt Hannover)* with respect to the customs classification of fried instant noodles. Relevant here was that the applicant and the referring court considered "dried" in the context of the relevant CN codes (1902 30 10 – dried pasta, and 1902 30 90 – "other" pasta) to mean a drying process simply involving dehydration, evaporation or freeze-drying and not more sophisticated processes such as frying, in which they claimed certain complex chemical reactions take place.

The CJEU ruled that in the absence of a clear definition of "dried" for the relevant heading (at least at the time of the dispute), regardless of the precise process which the noodles had undergone, the end result was "dried" pasta, and therefore, classifiable as such.

### Court judgment in *Baby Dan* – classification of spindles for safety gates for children

On 15 November 2018, the Court delivered its judgment in Case C-592/17 *(Skatteministeriet v. Baby Dan A/S*) in relation to the customs classification of a spindle used to mount a removable barrier for child safety to a wall or door frame. Danish customs considered the spindle to be classifiable under CN heading 7318 as iron or steel screws or bolts, while the importer Baby Dan considered it to fall under CN heading 8302 for mountings, fittings and similar articles. Upon appeal, a Danish court considered the product to fall under heading 7326, the residual heading for articles of iron/steel.

In 2015, the CJEU had in a separate case (also brought by Baby Dan) ruled that the safety gate itself was classifiable under heading 7318 as an iron/steel part of general use. In the current case, the question essentially was whether the spindle was also a general part of iron or steel (falling under heading 7318) or a specific part of a safety gate (and classifiable under 7326, 4421 or 9403). The court decided that the spindle should – like the gate itself – be classified under heading 7318.

### CNENs

CNENs were published in 2018 on the following items:

- medium oils, jet fuel and kerosene;
- preparations of a kind used in animal feeding (heading 2309);
- cameras for drones (CN codes 8525 80 91-99);
- ground seeds of guarana (CN code 1212 99 95);

- mobile phone cases ("articles of a kind normally carried in the pocket or in the handbag" (subheadings 4202 31 00 through 4202 39 00) vs. other parts and accessories of the machines of heading 8471 (subheading 8473 30 80));
- toys representing human beings and toys representing animals or non-human creatures (subheading 9503 00);
- mushroom powder (subheading 1211 90 86), oxo oils (subheadings 3824 99 92 and 3824 99 93), and cocaine, ecgonine, levometamfetamine, metamfetamine and derived products (CN codes 2939 71 00 and 2939 79);
- bamboo and wood/wooden furniture (headings 9401 and 9403) and certain information displays/street boards (excluding the latter from heading 9403);
- certain flavoured waters and non-alcoholic drinks (heading 2202), poly-(acrylonitrile) and polyacrylic elastomers (ACM) (CN code 3906 90 90), and "similar oils" (Note 2 to Chapter 27);
- articles and equipment for physical exercise or outdoor games (heading 9506);
- portable interactive electronic education devices for children (subheading 9503 00 87); and
- prefabricated buildings (9406) including so-called "poly-tunnels" used in horticulture.

### EU endorses recent HSENs and Classification Opinions

In April 2018, the Commission published a communication endorsing a long list of Explanatory Notes, Classification Opinions and Classification Decisions approved by the World Customs Organisation's (WCO's) HS Committee in March and October 2017. Accordingly, no EU Member State can issue BTI conflicting with these HS tools and existing BTI not in line with them, should be revoked.

## Origin

### Temporary derogation from GSP origin rules for bicycles

In March 2018, **Commission Implementing Regulation 2018/348** was adopted in relation to the EU GSP rules of origin. It allows Cambodia to continue using Malaysian origin parts (of tariff heading 8714) for its production of non-motorised bicycles (tariff heading 8712) in derogation of the normally applicable preferential origin rules. This derogation comes with an origin quota of 100,000 bicycles for the period 9 March 2018 through **31 December 2019**.

### Notice on GSP REX system

In June 2018, the Commission published a Notice to importers concerning the application of the Registered Exporter System (REX) within the framework of the EU's GSP regime. The REX system was introduced to allow self-declaration of GSP origin by exporters in GSP beneficiary countries subject to their registration by the local authorities. REX was supposed to be introduced in all GSP beneficiary countries by 1 January 2017, but countries could request a longer transition period during which they would continue to issue Form A origin certificates instead. That transitional period ended on 1 July 2018 for certain countries, but some of these did not succeed in fulfilling the requirements for applying the REX system by then. As a result, Form A certificates issued by those countries after 1 July 2018 are no longer accepted as valid proof of origin at import into the EU and there is therefore no entitlement to GSP treatment for the underlying shipments.

The Notice recommends that importers should check on a dedicated Commission webpage which GSP beneficiary countries are entitled to apply the REX system, and from what date. The website also lists the GSP beneficiary countries which have been granted a transitional period until **1 July 2019** or **1 July 2020**.

### Agreement on changes to PEM Convention and diagonal cumulation possibilities

In March 2018, the 43 countries of the Union for the Mediterranean (UfM) – which includes the EU Member States – agreed on a set of modernised origin rules for the region. They also agreed to finalise the revision of the origin rules under the Pan-EuroMed (PEM) Convention by the end of 2018.

Meanwhile, in September 2018, the Commission published an updated notice concerning the application of the PEM Convention's origin rules relating to diagonal cumulation. The table shows the cumulation possibilities as of 1 August 2018 between the various countries of the region.

### Notices on cumulation under EU EPAs with African countries

On 12 November 2018, the European Commission published three notices in the EU's Official Journal clarifying which cumulation possibilities exist in the context of the EPA with the South African Development Community (SADC), and in particular which limits apply with respect to materials from South Africa. On the same day, the Commission also published a notice clarifying cumulation possibilities under the interim EPA between the EU and the Eastern and Southern African States.

### Court judgment in Combaro – remission of import duties in origin dispute

On 25 July 2018, the CJEU issued a judgment on the appeal in case C-574/17 P (European Commission v. Combaro SA) concerning the remission of import duties under Article 239 of the old Customs Code, which allowed for such remission (or repayment) of duties in certain "special situations". The case concerns EU imports of linen fabrics by Combaro between 1999 and 2002 which were declared to be of Latvian origin. At the time, Latvia was not a member of the EU but imports of textiles of Latvian origin were exempt from import restrictions. In 2003, Latvian customs stated in the context of a request for administrative cooperation foreseen in the EU-Latvia Association Agreement applicable at the time that the certificates of origin used by Combaro were not issued by it and were therefore invalid. However, shortly thereafter, the EU's antifraud agency OLAF found that the stamp and the signature on the origin certificates were likely authentic after all.

The Commission was then asked to remit the import duties in application of Article 239 of the prior Customs Code, but refused to do so as it found that there was no "special situation". In particular, the Commission stated that it was unable to conclude that the Latvian customs authorities had been involved in issuing the contested certificates. In July 2017, Combaro obtained annulment of that Commission decision before the General Court. Combaro, while referring to potential corruption within Latvian customs as well as organisational weaknesses, noted that the authorities had wrongly issued the origin certificates and subsequently hindered the determination of the authenticity of those certificates.

However, in the recent appeal, the CJEU disagreed with that Court ruling annulling the Commission's decision (considering the certificates invalid). It considered that the Commission had been correct in relying on the findings of the Latvian customs authorities as this was in line with the rules of the then applicable EU-Latvia Association Agreement. The CJEU also found that Commission reports referring to a climate of corruption within Latvian customs were not decisive in this case. The CJEU therefore held that the Commission was correct in concluding there was no "special situation" and that the duties could therefore not be remitted.

## Valuation

### EU public consultation on BVI decisions

From March to June 2018, the Commission undertook an exploratory public consultation on possible introduction of EU-wide Binding Value Information (BVI) decisions. The Commission was seeking input on whether there is an interest in and need for such a regime, and which customs value elements BVI decisions could cover.

200 responses and 9 position papers were received in this consultation. Over 85% of respondents declared that they would be interested in BVI (38% said that BVIs would be "essential", 30% found them "necessary", and 17.5% would find them "helpful"). The avoidance of disputes was rated as a key advantage by over 70% of respondents. 85% of respondents would like BVIs to be made public (while omitting confidential information), ideally on an EU website.

As a next step, the Commission could introduce draft legislation under the UCC with detailed rules on how a BVI regime would work. While such legislation now appears likely, it is still unclear what the scope might be.

# Procedures

## Application forms for customs action on IPR infringements

In April 2018, the Commission published a new application form for requests for customs action with respect to goods suspected of infringing intellectual property rights (IPR) under **Regulation 608/2013**. The existing application form has been updated to, *inter alia*, take account of practical experience and to ensure proper transmission and exchange of information via the EU's central database.

## EU Single Window environment for customs

In May 2018, the Commission requested initial feedback from stakeholders on a potential initiative involving a comprehensive framework for integrated and coherent single window services for customs in the EU. The aim of this initiative would be enhanced intergovernmental/agency cooperation, improved enforcement of cross-border regulatory requirements and trade facilitation. In October 2018, a further 12-week public consultation was launched, closing on **16 January 2019**. According to the Commission's Roadmap for this project, an impact assessment for such a framework could materialise in the **first quarter of 2020**.

The reasoning behind this initiative is to introduce a clear legal basis with precise definitions and roles for relevant stakeholders, in order to maximise the benefits of existing efforts. In 2015, a pilot project was launched for automated acceptance by Member States' customs administrations of electronic certificates issued by other authorities. This has evolved ever since and the plan is to roll out further functionalities in 2018. The system already covers, or will cover, for example, certificates in the area of live animals, food/feed of (non-)animal products, forest products, organic products, plants, and licences for ozone-depleting substances, F-gases and dual-use items.

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