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Binding Tariff Information

A Binding Tariff Information ('BTI') can be a useful for economic operators to obtain legal certainty on the tariff classification of their goods. On the other hand, with the aimed introduction of the Union Customs Code ('UCC'), economic operators applying for BTI's may want to consider the consequences and value attributed to an obtained BTI, especially economic operators with the Authorized Economic Operator ('AEO') status. With the aimed changes in the UCC, it becomes more important for economic operators to make a proper assessment before applying for a BTI.

In the following, we will firstly outline some general information on the BTI and subsequently provide an overview of the aimed adjustments in the (implementing) provisions of the UCC related to the BTI, the consequences of case law for the holder of the BTI and practical issues and implications of the aforementioned.

Binding Tariff Information

The European Community has created the BTI system as a tool to assist economic operators to obtain certainty on the tariff classification of goods they (intend to) import or export. A BTI is a written tariff classification decision issued by the customs administrations upon request. Under the current customs legislation, the Community Customs Code ('CCC'), a BTI is legally binding on all customs administrations within the European Union for up to six years from the date of issue. A BTI intends to provide legal certainty regarding the tariff classification of a product and a uniform application of the general rules for the interpretation of the Combined Nomenclature. To prevent "*BTI shopping*" the implementing provisions determine that applications for a BTI have to be made to the competent customs authorities in the Member State in which the information is to be used, or to the competent customs authorities in the Member State in which the applicant is established.

In contrast to the intention of the BTI, economic operators often experience the opposite when a BTI is obtained or applied for. For example, in the scenario that the BTI ceases to be valid when a classification regulation is adopted and the BTI no longer conforms to the respective regulation. In this case the applicant of the BTI will not always be informed proactively on the adoption of the (“negative”) classification regulation, which may lead to a harsh outcome, when confronted with a higher duty rate. A BTI also ceases to be valid where it is no longer compatible with the interpretation of one of the nomenclatures. This may be by reason of amendments to explanatory notes to the Combined Nomenclature, by a judgment of the European Court of Justice (‘ECJ’) or by reason of a classification opinion at the level of the World Trade Organization. Next to that, a BTI decision can also be annulled if it was issued on the basis of incorrect or incomplete information.

To mitigate the harshness in situations that agreements are already concluded for the purchase or sale of goods on the basis of the BTI before the measure was adopted, the holder of the BTI which ceases to be valid, may still use that BTI for a maximum period of in principle six months from the date of publication or notification.

An important article worth mentioning with regard to the customs debt incurred in relation to the BTI is article 217 CCC. This article determines that the customs debt must be calculated as soon as the customs authorities have the necessary particulars and entered into the accounting records, but may not exceed the amount of duty legally due on the basis of a BTI. This means that the customs authorities may not assess a higher amount of duties than due based on the respective BTI decision.

The upcoming customs legislation addresses a number of intended changes to the current system of BTI’s.

Modernised Customs Code / Union Customs Code

Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Modernised Customs Code (‘MCC’) aimed at the adaptation of customs legislation to fit, but also to govern, the electronic environment for customs and trade. This new Regulation aims to provide for an opportunity to carry out a major overhaul of the current customs rules and regulations in order to make them simpler and better structured. The MCC entered into force on 24 June 2008 and would become applicable on 24 June 2013 at the latest.

On 20 February 2012¹, the Commission submitted to the European Parliament and the Council a proposal for a Regulation laying down the Union Customs Code (‘UCC’), as a recast of Regulation (EC) No 450/2008, to repeal and replace it before its scheduled date of application. Technical and procedural considerations, such as the alignment of the MCC with the requirements of the Lisbon Treaty, the adjustment of some provisions that have proved difficult to implement and to provide administrations and economic operators adequate time to undertake the necessary investments that ensure a phased implementation of electronic processes.

The commission indicated that, to prevent serious difficulties with the customs legislation of the European Union (‘EU’) and to provide the legislature with adequate time to complete the process of adoption of the UCC, the ultimate date of application of the MCC, as laid down in the second subparagraph of its Article 188(2), is postponed. In this respect, the new date of application that is currently considered appropriate is 1 November 2013.²

¹ COM(2012) 64 final 2012/0027 (COD)

² COM (2013) 193 final 2013/0104 (COD)

Proposed changes to the Binding Tariff Information provisions (UCC / MCCIP)

As said, the UCC carries out a major overhaul of the customs rules in order to make them simpler and better structured. As a result, the provisions with regard to BTI decisions have also been revised. We have listed some of the main changes below;

- The BTI decision will be binding on the customs authorities, as well as for the holder of the BTI decision
- BTI decisions will be valid for a period of three years from the date on which the decision takes effect
- The holder of a BTI decision, when fulfilling customs formalities or having them fulfilled, must inform the customs authorities that the goods being subject to such formalities are covered by that decision. This information should be indicated on the customs declaration, and shall include the BTI decision reference
- Incorporation of the 'one type of goods' definition; which means goods that have similar characteristics and whose distinguishing features are completely irrelevant for the purposes of their tariff classification
- Revision of the procedure to resolve cases where Member States have different opinions regarding the classification of a certain product. In this procedure the Member States concerned must consult each other and endeavour to agree on the uniform classification of the goods and if successful take appropriate measures. The time for completing such consultations may not exceed three months from the time they are initiated. The Member States must submit cases to the Commission without delay where they have failed to resolve their differences of opinion.

When looking at the impact of the foregoing, the main changes in the UCC concern the fact that the holder will be bound to a BTI decision, the validity of a BTI is reduced to three years and reference to the BTI decision has to be made on the customs declaration. Some of these changes, however, could have a significant impact for economic operators, as the new legislation is not clear as to what extent the BTI will be binding to the holder. For instance, to what extent could an unfavourable BTI frustrate later discussion on the tariff classification of the product or frustrate later requests for repayment by the holder of the BTI?

Furthermore, from a Dutch legislation point of view, it can be challenged whether the proposed legislation whereby the holder of a BTI will also be bound to the BTI decision, will in practice be an actual change. Certainty from the BTI without challenging the BTI, is a risk from a criminal law point of view (filing an incorrect customs declaration) and shall also be considered from an AEO perspective.

The period of validity for classification decisions (formerly six years) has been aligned with origin decisions (three years). This takes into account the rapid changes in technology and patterns of trade. As the BTI will be binding for the holder of the BTI under the proposed new legislation, the decision-making process at the customs authorities when issuing a BTI and the need for specialized teams (technical knowledge) is getting more important. In this era where products get more and more sophisticated by the day, there seems to be a need for specialized teams doing the classification of different product groups, maybe even throughout the EU. In the Netherlands this could for example be achieved by consulting universities as the Wageningen University for agricultural goods or by specialized institutions as TNO (Netherlands Organisation for Applied Scientific Research) for complex technology products.

Contrary to the current legislation, where the customs authorities may require the BTI holder, when fulfilling customs formalities, to inform the customs authorities that he is in possession of a BTI, the MCCIP determines that the holder of a valid BTI decision must include this information on the customs declaration. This may lead to some practical problems. For instance in case an economic operator is in the possession of multiple BTI's for numerous products or spare parts. Furthermore, AEO certified companies may be affected, where documented procedures should be in place to guarantee compliance in this regard. On the other hand what are the consequences for the customs authorities if a customs declaration is accepted and verified, does it mean that the application of the BTI is confirmed for the specific product (e.g. in case of a customs declaration including multiple products)?

The codification with regard to the meaning of "one type of goods", as ruled by the ECJ in the Schenker case³, should in our view, be seen more as a clarification than a revision.

Please note that applying for a BTI concerning one type of goods could give false certainty. Firstly, what is exactly meant by "*similar characteristics and whose distinguishing features are completely irrelevant for the purposes of their tariff classification*"? Such a definition could be subject to various interpretations. Secondly, what if the outcome of the BTI is negative? This could mean that a whole product category is influenced by this unfavourable BTI. An economic operator should consider the foregoing before a BTI is applied for one type of goods.

The introduced procedure in the UCC in which member states must consult each other and endeavour to agree on the classification of the goods promotes the uniform classification throughout the EU. This consultation between member states might speed up the process to get clarity with regard to the classification of a product.

Finally, the UCC also incorporates a similar provision to article 217 CCC. In article 90 (1) (b) UCC it is determined that the customs authorities may not calculate a higher amount of duties than is due based on the BTI decision.

Applicability of a Binding Tariff Information

Article 10(1) of the implementing provisions of the CCC defines that a BTI may be invoked only by the holder. Next to the considerations to apply for a BTI, the holder of BTI should also assess its import procedures in order to make sure that the obtained BTI can be rightfully invoked. In the decisions of Intermodal⁴ and Sony Supply Chain Solutions⁵, the ECJ ruled with regard to the person who is able to invoke a BTI. The ECJ ruled that a BTI is binding on the customs authorities only where it is invoked by the holder or his representative and only with respect to the goods described therein.

"that it follows from Article 12 of the CCC that a BTI creates rights only for the holder and in respect only of the goods described therein..." (Intermodal - Consideration 27)

"Under Article 12(2) of the Customs Code and Article 11 of the implementing regulation a BTI is binding on the customs authorities only where it is invoked by the holder or his representative. If that is not the case, the court, seized in accordance with Article 243(2) of the Customs Code, and to which a BTI is submitted cannot give that BTI the legal effects attaching to it." (Sony Supply Chain Solutions - Consideration 40)

³ ECJ, 2 December 2010, nr. C-199/09 (Schenker)

⁴ ECJ, 15 September 2005, nr. C-495/03 (Intermodal)

⁵ ECJ, 07 April 2011, nr. C-153/10 (Sony Supply Chain Solutions)

“However, a BTI may be relied on as evidence by a person other than its holder.” (Sony Supply Chain Solutions – Consideration 41)

Depending on the situation, the holder or its representative should determine if the BTI can be rightfully invoked. In the Netherlands for instance, no customs representation can be used in case goods are imported into the EU and the BTI holder is established outside the EU. The non-EU BTI holder should then appoint an EU based logistic service provider who will import the goods in his own name and on his own behalf. To rightfully invoke a BTI in this situation, such BTI should then be applied for by the logistic service provider, instead of the non-EU entity.

The same issues arise where a logistic service provider files customs declarations (imports) for its clients by means of monthly declarations (local clearance) for which neither direct nor indirect representation is allowed (in the Netherlands). As the clients are not represented for customs purposes, the logistic service provider should, in principle, apply for the respective BTI's.

Conclusion

In the foregoing, we described that a BTI intends to provide legal certainty regarding the tariff classification of a product and a uniform application of the general rules for the interpretation of the Combined Nomenclature. The upcoming Modernised Customs Code ('MCC')/UCC addresses a number of intended changes to the current system of BTI's, some of which could have a significant impact on economic operators, for instance for AEO certified companies.

The main changes in the UCC concern the fact that the holder will be bound to a BTI decision, the validity of a BTI is reduced to three years and reference to the BTI decision has to be made on the customs declaration. Time will tell what is meant by binding for the holder, as the new legislation is not clear as to what extent the BTI will be binding on the holder. As the BTI will be binding for the holder of the BTI, it should be questioned whether this should not result in an improvement of the decision-making process at the customs authorities when issuing a BTI, e.g. by involving specialized teams with specific technical knowledge. Nevertheless, these proposed changes require the economic operators to make a proper assessment prior to issuing a BTI request.

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