

Rules of Origin – Still Fit for Modern Trade ?

The Practical Perspective - ENFORCEMENT

Yves Melin

Calculation of the duties levied

- How much duty is levied upon importation depends on three things:
 - What product is imported → **classification**
 - **The origin of the product → rules of origin**
 - **Preferential origin: the originating product is subject to a lower duty**
 - **Non-preferential origin:**
 - for trade remedies: high duties
 - For quotas: duty free until the quota is exhausted
 - **Often, classification matters to identify the applicable origin rule**
 - The value of the product (for ad valorem duties - %) → **valuation** rules

- Form A
- EUR1, EUR-MED
- More recently, certification on commercial documents (Canada, Korea, LTSD, GSP)
 - EU-Korea: approved exporters
 - CETA, GSP: REX (warning!)
- For anti-dumping and countervailing duties, minimum import prices : commercial documents with very specific language

Why complying with customs rules matters

- Declaring a wrong classification and/or a wrong origin may mean that the wrong duty percentage is applied
 - too low – a huge financial risk
 - too high – a contractual risk
- The difference can be recovered by customs up to three years after the release for free circulation, more if criminal intent
- Penalties may apply (in some member states, up to 10 times the evaded duty), criminal sanctions
- Contractual liability towards customers, in particular if a certain origin is certified or guaranteed

- Importers are responsible for the accuracy of the information on the declaration, and the accuracy of the supporting documents.
- Near objective liability: importers must pay the duty when owed, and good faith defence almost never works
- Customs will request the payment of duties for the past three years, possibly more (if criminal intent).
- **A valid Form A can be invalidated** if issued based on incorrect account of the facts provided by the exporter

- Good faith excuse has three cumulative conditions :
 - duties were levied as a result of an **error** on the part of the competent authorities themselves, **not resulting from the misleading information submitted by the exporter**
 - the error was such that it could **not reasonably have been detected** by a person liable for payment acting in good faith, and
 - that person **complied with all the provisions laid down by the legislation in force** as regards his/her customs declaration.
 - Will not be the case if “although there are **clear reasons for doubting the accuracy of a Form A** certificate of origin, an importer **failed to obtain, using his best efforts, information concerning the circumstances of the issue of that certificate** in order to verify whether those doubts were well founded. Such an obligation does not however mean that an importer is required, in general, to systematically verify the circumstances of the issue, by the customs authorities of the exporting country, of a Form A certificate of origin.”

Why complying with customs rules matters

- How can a company limit this risk?
 - Customs due diligence: do you classify your products properly, do you declare the right origin?
 - Often complex, time consuming
 - For origin, it can be a near impossible task
 - When possible, disclaim or limit liability in contract with customers, and shift liability in contracts with suppliers
 - **Binding Tariff Information (BTI) and Binding Origin Information (BOI) procedures**

Binding Information

- **Decisions** issued by the customs administration of one Member State
- **Binding** on all Member States' customs administration and on the holder of the decision
- Purpose:
 - ensure legal certainty for economic operators
 - facilitate the work of the customs services
 - secure a more uniform application of the Common Customs Tariff and rules of origin
- Must relate to an **actual transaction**
- To be filed with the customs where the applicant is established, or the BTI/BOI is to be used
- Valid for **3 years**. Possibly extended by 6 months
- Can be revoked earlier if change in EU or WTO/WCO law, or mistake by customs. BOI/BTI will remain valid for an additional 6 months in respect of binding contracts

Thank You !

Yves Melin
Steptoe & Johnson LLP
ymelin@steptoe.com
LinkedIn: yvesmelin