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CUSTOMS LAW – The European court of justice rules on the absence of legal force of the list rules of origin

On 10 December 2009, the ECJ issued a judgment that is likely to have a resounding impact on customs practitioners and companies that are asked to determine the origin of goods imported into the EU when these goods are made from raw materials or parts themselves originating in several countries. In the HEKO case[1], the Court was requested to comment on the status of the "list rules", which are widely applied in the EU for non-preferential origin of imported goods. The legal status of these rules had hitherto been uncertain, albeit treated as solid law by the customs authorities and by the European Commission alike.

In HEKO, the ECJ stressed that the rule governing the origin of goods made from parts assembled in several countries is Article 24 of the Community Customs Code ("the CCC") [2],, and that the list rules have no legal basis. They can in certain circumstances be useful guidance, but cannot have the effect of not conferring origin to goods meeting the criteria of Article 24 CCC.

The list rules were drawn up by the European Commission initially in order to satisfy the condition of the WTO Agreement on Rules of Origin[3]. This list was agreed by the Customs Committee and contains a number of criteria intended to assist customs authorities and applicants. However, the list rules have later become used by both the Commission and the customs authorities to interpret the definition in Article 24 of the CCC.

In May 2005, HEKO Industrieerzeugnisse GmbH ('HEKO') requested binding origin information ('BOI') from the Bundesfinanzdirektion for various types of steel cables coming under heading 7312 of the CN, manufactured in North Korea using stranded wire originating in China also coming under heading 7312 of the CN.

Following this request, the Bundesfinanzdirektion issued five BOIs under which Chinese origin was given to HEKO's steel cables. It considered that the cabling of the stranded wire carried out in North Korea did not constitute "substantial processing or working" within the meaning of Article 24 of the CCC.

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[1] Case C-260/08 Bundesfinanzdirektion West v HEKO Industrieerzeugnisse GmbH
[2] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302 p.1)
[3] The WTO Agreement on Rules of Origin stipulates that, when issuing determinations of general application, the requirements to be fulfilled must be clearly defined. Article 2(a) of that agreement provides: '(a) when [Members] issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular: (i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule; (ii)(…)'

The Bundesfinanzdirektion substantiated this finding by relying solely on the list rules, under which goods under heading 7312 of the CN cannot be regarded as having undergone their last substantial processing or working unless they change tariff heading, without fully considering the requirements of Article 24.

HEKO appealed this decision to the Finance Court in Düsseldorf, which disagreed with the findings of the Bundesfinanzdirektion and ordered it to issue BOIs in which North Korea was to be indicated as the country of origin of the steel cables.

As the Bundesfinanzdirektion appealed against that ruling, the Finance Court decided to refer to the ECJ the question of whether the term 'substantial processing or working' in Article 24 of the CCC must be interpreted as covering, with regard to goods classified under heading 7312 of the CN, only processing or working that has the effect that the resulting product is to be classified under a different heading of the CN.

In its judgement, the ECJ first noted that, although the list rules drawn up by the Commission contribute to the determination of the non-preferential origin of goods, those rules do not have binding legal force. In the Court's words, "*although the list rules drawn up by the Commission contribute to the determination of the non-preferential origin of goods, those rules do not have binding legal force*." [4]

The Court further noted that, by analogy with case-law concerning the Explanatory Notes to the CN, the content of the list rules must be compatible with the rules of origin as set out in Article 24 of the Customs Code, and may not alter the scope of those rules.

Referring to the relevance of the WTO rules in the interpretation of Article 24, the Court stated that with regards to rules of origin, according to the panel ruling in US – *rules of origin*[5] , WTO Members are free to determine the criteria which confer origin, to alter those criteria over time, or to apply different criteria to different goods.

The ECJ concluded that courts of the Member States may have recourse to criteria resulting from the list rules when interpreting Article 24 of the Customs Code, provided that that does not result in an alteration of that provision. According to Article 24 of the Customs Code, where more than one country is involved in the production of goods, those goods are considered to originate in the country in which they underwent their last substantial economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

The Court recalled its case-law regarding the interpretation of Article 5 of Regulation (EEC) No 802/68 on the common definition of the concept of the origin of goods[6], which preceded and is virtually identical to Article 24 of the CCC, that processing or working is 'substantial' only if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation. Activities altering the presentation of a product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of that product.

The Court finally concluded that "*an interpretation of the term 'substantial processing or working' in Article 24 of the Customs Code, in respect of goods coming under heading 7312 of the CN, that relies exclusively on the criterion of a change of tariff heading, without any indication of the specific processing or working undergone by those goods, is liable to restrict the scope of that article*."[7]

In light of the HEKO judgment, the list rules must be considered to be devoid of legal value, and thus merely of indicative value. The list of rules cannot go against the wording of Article 24 of the CCC nor can they unduly constrain its application. In order to properly determine the origin of goods, the customs authorities and the Commission should first look to the product-specific rules of origin, which were adopted by the Council and the Commission and are listed in Annexes 10 and 11 of the Regulation implementing the Code. In the absence of

[4] HEKO, para. 20.
[5] United States – Rules of Origin for Textiles and Apparel Products, WT/DS243/R, para. 6.23 and 6.24.
[6] Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods, OJ English Special Edition 1968(I), p. 165.
[7] HEKO, para. 36.

any product specific rules, the origin of a product must be assessed by applying Article 24 CCC on a case-by-case basis, with the transformation being the operative factor.

This is a significant change, which will have an impact on traders and customs law practitioners. They will find in Heko new opportunities of defending the origin of the last country of assembly, either proactively through binding origin information (BOI), or once they encounter difficulties with the customs authorities.

FURTHER INFORMATION

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