

# German Trade Info

*Guidelines for Legal Protection and Risk Prevention in Exports to Germany and the European Union*

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## Preamble

The legal framework for international trade is getting increasingly complex. For importers within the European Union ("importers") and exporters from countries outside the EU ("exporters"), these trade conditions are ever less transparent.

At the same time, this growing complexity leads more often to trade measures being wrongly imposed on importers, as well as exporters, and to import duties being fixed unlawfully.

Since many overseas exporters in Asia, Latin America, Africa, Australia and Eastern Europe are not aware of the existing instruments of legal protection which are available to them to combat against inaccurate trade measures imposed by the EU or its 25 Member States, those legal remedies are often insufficiently exploited. However, as

legal remedies often must be filed within a very short deadline, exporters should know *ex ante* about the main legal framework and their own options in order to avoid business disadvantages.

This Trade Info newsletter is designed to enable exporters and importers to spot basic risks in foreign trade with the EU, and in particular with Germany, as well as to provide solutions to problems which can be implemented. It does not cover all conceivable cases, but focuses on the most important issues related to international trade.

## Legal Structures, Risks and Problems in Foreign Trade

The common trade policy belongs to the core competences of the EU and is of crucial importance in cross-border trade. Elements of that policy are:

Anti-dumping  
 Authorized Economic Operator  
 Binding Tariff Information (BTI)  
 Binding Origin Information (BOI)  
 Certificate of Origin  
 Classification  
 Combined Nomenclature (CN)  
 Common Customs Tariff  
 Counterfeit Goods  
 Countervailing Duties  
 Customs Code  
 Customs Preferences  
 Dual-use Goods  
 ECJ/CFI  
 Export Control  
 Export Refunds  
 Export Subsidies  
 Free Trade Agreements  
 Relief from Duties  
 Remission of Duties  
 Risk Management  
 Subsequent Entry in the Accounts  
 Trade Barrier Regulation  
 Transit Procedures  
 WTO

- the autonomous trade policy (*i.e.* internal measures of the EU such as customs union, trade policy and sector-specific protection measures); and
- the contractual trade policy (*e.g.* foreign trade agreements with third countries, be it multilateral (WTO), plurilateral (EFTA/EEA, preference treaties) or bilateral (free trade agreements)).

The essential instruments of that policy are described below.

## Customs Law

*Example: A German importer imports rum from Cuba (or TV sets from Taiwan). In that context, import duties become due (import customs duties, import VAT, etc.). The customs debtor will, in principle, be the importer; however, if, for instance, the importer declared the goods on behalf of the exporter or if the exporter had provided wrong information on the goods' value, the exporter may be liable to duty, as well.*

The important elements of EU customs law are the prohibition of customs duties and of duties having an equivalent effect within the EU, as well as a Common Customs Tariff ("CCT") of the EU vis-à-vis non-EU countries. The essential legal principles of the common customs law are laid out in the Community Customs Code ("CCC") which was enacted as an EU regulation.

## Common Customs Tariff

The Common Customs Tariff contains provisions about nomenclature and classification of goods, as well as the individually applicable rate of duty. It is thus an essential precondition not only for the leverage of customs, but also for duties having an equivalent effect, and for the correct classification of goods

in the context of customs preferences and trade protection measures.

The CCT is implemented by way of the so-called Combined Nomenclature ("CN"). In doing so, an 11-digit code is used for the description and the coding of the goods. The first six digits are based on the Harmonized System ("HS") which is administered by the World Customs Organization ("WCO"); the following five digits of the code serve the allocation of rates of duty, textile categories, import prohibitions and import restrictions, as well as coded measures (such as antidumping regulations, tariff suspensions, tariff quotas, etc.).

The **classification of goods** into the CN is of **paramount importance for finding the applicable duty rate**. In the case of several different classification alternatives for the same goods (*e.g.* one classification resulting in an import duty of 10%, the other one triggering a duty of only 3%), the most favorable applicable classification must be established while paying attention to the pertinent classification rules. Given the impact of classification on the amount of duties, professional advice should be obtained at an early stage if there is any doubt.

## Customs Debt

**Customs debt** is the obligation of an individual to pay import or export duties for specific goods. Import duties are customs duties, agricultural duties, import value added tax (VAT), as well as several consumer taxes (*e.g.* on mineral oil, tobacco and brandy) which are levied on the import of non-EU nation goods. Export duties, on the other hand, are duties and agricultural duties, which are levied on the export of goods from the EU to non-EU countries.

The CCC regulates, *inter alia*, when a customs debt arises and which party is liable to pay the duty. In principle, a **customs duty arises** if, due to a correct declaration, dutiable non-EU goods (*i.e.* goods from non-EU countries) are released for free circulation within

the EU. However, a customs debt shall equally arise if, for example, goods are unlawfully imported into the customs territory of the EU or are unlawfully removed from customs supervision, or if other customs obligations are not being complied with or if the goods are being processed in a customs free zone.

**The customs debtor** is, in principle, the declarant who, in general, has to be an EU resident. Exceptions thereof are the occasional import of goods or their transfer into special customs procedures (like the transit procedure or the transport under customs supervision) or preliminary use. In the case of unlawful imports, removal from customs supervision or non-compliance with specific customs procedures, the circle of parties liable to duty is clearly broader and comprises basically all individuals who participated in the unlawful conduct.

**A non-EU exporter** may nevertheless become a customs debtor if, for instance, he provided wrong data on the value of the dutiable goods, was represented by the importer in the proceedings or smuggled goods into the EU.

For a correct calculation of all costs and expenditures, each market player may upfront request that the customs authorities provide a **binding tariff information** (BTI) on the correct classification of the goods imported to, or exported from, the EU.

→ ***Important: Only once the customs debt is fixed precisely, the exporter and importer, or seller and purchaser, can fix the purchase price plus additional costs without having to fear ex post surcharges. Exporter and importer have a considerable interest in a favorable and convincing classification of goods (whereas their competitors, i.e. the EU manufacturers of the same goods, will challenge too favorable classifications of imported goods).***

### **Post Clearance Collection of Duty (So-Called Post Clearance Entry in the Accounts)**

To the extent customs and duties have been calculated and fixed too low, the

correct higher customs amount may still be **subsequently recorded** and, therefore, levied on the customs debtor.

Such a post clearance collection of duty only may be avoided if:

- it is explicitly prohibited;
- it is based on an invalid legal provision (e.g. an antidumping duty regulation which has subsequently been annulled by the Community courts);
- there was an obvious error of the customs authorities upon clearance, whereas the customs debtor acted in good faith;
- only small amounts are concerned;
- the right to duty is time-barred; or
- the customs authorities default the rather short deadline for such post-clearance collection.

### **Other Administrative Acts of the Customs Authorities**

Apart from the classical collection of duties, there are further administrative acts of the customs authorities which are relevant for companies involved in the cross-border trade of goods between the EU and non-EU countries. Among these are BTI, binding origin information (BOI), as well as the withdrawal, cancellation or denial of customs allowances.

### **Legal Remedies**

A customs debtor may challenge a general obligation to pay import or export duties or the amount of such duty by requesting either a repayment or remission of duty in accordance with EU law and/or by filing the legal remedies available under applicable national (e.g. German) law. The EU and the national remedies pursue partially different objectives, but are also complementary to one another. Hence, an undertaking concerned needs to know both the EU and the national categories of available legal remedies in order to obtain adequate legal protection.

### Repayment/Remission of Duty

Duties which have been fixed unlawfully may be remitted or repaid. The CCC and its implementing regulation provide for approximately 20 situations in which such remission or repayment will be available. Thus the CCC provides for a remission or repayment of duties, for instance, in cases in which:

- the duties were not owed, according to applicable law, the moment payment was made or the duties were wrongly collected post clearance;
- a customs declaration has been declared invalid after the duty was paid;
- an importer rejects goods and subsequently exports them; or
- **a special situation is proven which results from circumstances** in which no deception or obvious negligence may be attributed to the customs debtor.

The last mentioned alternative, to remit or repay duties for reasons of **fairness or equity**, has been the subject matter of numerous Commission decisions and extensive case law of the Community courts (the European Court of Justice (ECJ), as well as the Court of First Instance (CFI)). Particularly relevant in practice are those cases in which the customs authorities themselves commit considerable mistakes which let it appear to be unfair to have the importer "suffer" for them. Here, the cases concerned are the ones in which the customs authorities do not realize the falsity of the certificates of origin or provide wrong information.

As a matter of principle, a request for remittance or repayment is to be submitted to the customs office which issued the pertinent customs duty order. In exceptional cases, a remittance or repayment can only be affected if the **European Commission** agrees to it by way of a formal **decision** which may be challenged before the CFI. A Commission decision on whether such remittance or repayment is justified is required if the amount of duty not levied exceeds EUR 500,000, the Commission committed an error or breach of duty,

or if the pertinent case is based on an investigation by the European Anti-Fraud Office (OLAF).

In order to detect relevant mistakes of the customs authorities and to be able to base an application for remittance or repayment on reasons of fairness, it is often necessary to access and **inspect the files** on site (*i.e.* possibly also at the Commission's Taxation and Customs Union Directorate-General (DG TAXUD)). In case such access to the files or other procedural rights are denied or restricted, this fact alone will, in many cases, pave the way for a successful lawsuit.

An application for remittance or repayment can be lodged by several concerned parties: these include the customs debtor, the party which, in fact, paid the duty and any individual on which the customs debtor transferred his rights and obligations. Hence, such an application may also be submitted by non-EU exporters.

The application for remittance/repayment may be repeated several times. This makes sense in particular if the legal situation has changed in the meantime (*e.g.* for reasons of changes in the case law of the ECJ).

### National (*e.g.* German) Objection and Court Proceedings

Customs duty orders and other administrative acts of the customs authorities may also be challenged by national legal remedies. In Germany, these remedies are administrative objections to the customs authorities, as well as lawsuits lodged before the relevant finance courts.

An **administrative objection** is to be lodged in writing within one month after notification of the disputed order and with the customs authority which issued the disputed order.

If the objection is not granted, an **application for nullification** of the pertinent order may be lodged with the competent **finance court**, again, in principle, within a period of one

month. Judgments of the finance courts may, in general, be appealed before the German Federal Finance Court (*Bundesfinanzhof*). Both in the first instance, as well as in the appeal proceedings, relevant EU issues may be submitted to the ECJ for a preliminary decision.

### Preliminary Legal Protection

Objections and lawsuits against duty orders do not suspend the enforceability of those orders. Hence, payment remains immediately due, notwithstanding the legal remedy. In order to avoid such payment or the execution of the contested customs order, the individual company concerned needs to seek preliminary legal protection, e.g. by way of requesting a **suspension of the implementation of the contested order**.

Such preliminary legal protection is subject both to EU law, as well as national law. Whereas the substantive conditions, security requirements and *ius standi* are subject to EU law, the formal proceedings themselves are governed by national (e.g. German) law.

Finally, there is always the possibility of applying for and eventually obtaining a **respite** from the customs debt.

*Conclusion: In the area of preliminary legal protection, EU and national rules often intertwine. Dealing with such an intertwined and complex body of legal rules indeed requires expert advice in advance.*

→ **Important: Particularly in the case of remittance/repayment and preliminary legal protection, legal remedies must be well-reasoned in accordance with the pertinent case law. Expert advice should be obtained at an early stage and not only just before the lapse of the pertinent deadline.**

### Recent Modifications of Customs Rules in Effect from 2005/2006

Due to Regulation (EC) No. 648/2005, several modifications of the CCC entered

into force on May 11, 2005; however, most of these modifications will only become practically relevant upon the still outstanding adoption of corresponding implementing provisions in the CCC-implementing regulation. The most relevant modifications are the following:

- Introduction of an EU-wide uniform framework for **risk management**. In that context, security, monetary and other risks and data shall be electronically collected, analyzed and, by means of more frequent inspections of goods, examined.
- Implementation of the so-called **Authorized Economic Operator** ("AEO"). Those who are compliant and are trusted traders can be granted the AEO status, if they comply with the pertinent requirements (solvency, adherence to customs provisions, adequate accounting and security standards). An AEO is entitled to benefit from more accommodations in regards to security controls and a simplification of customs procedures.
- **Summary, electronic declaration prior to export/import** (so-called pre-arrival/pre-departure declarations). In this context, traders (eventually including non-EU exporters) are required to provide customs authorities with information on goods prior to their import into or export from the EU via electronic summary declarations. Further reform plans include the introduction of the "single window" concept (a single electronic entrance point at which AEOs may submit the information required by customs and other agencies involved in border control) and the "one-stop shop" concept (which refers to the combined performance of customs control and other administrative controls (e.g. veterinary and environmental controls) so that the goods are being controlled by all relevant authorities at the same time and at the same place).
- **Aggravated criminal and administrative sanctions** on misdemeanors and formal errors. The German customs authorities are

determined to impose administrative fines even for minor formal and procedural errors; in doing so, the administrative fines shall also skim profits, prevent against unfair profit gains and be imposable, besides the parties concerned, also against acting individuals and the management of the parties concerned.

## Trade Protection and Defense Measures

### Antidumping

*Example: The European Commission receives data according to which a Taiwanese exporter ships to the EU recordable DVD and CD-R at allegedly dumped prices. In that situation, both the importer and the exporter each have a strong interest to rebut the dumping allegation in order to avoid having antidumping duties imposed. On the other hand, their respective competitors within the EU (i.e. the EU manufacturers of DVD and CD-R) have a considerable interest in enhancing the dumping allegation and causing the Commission to propose and levy an anti-dumping duty on those goods.*

### Introduction

In accordance with the GATT (General Agreement on Tariffs and Trade) and the GATT Antidumping-Code 1979, EU law provides for the adoption of significant measures against dumped imports. The legal basis for such measures is Council Regulation (EC) No. 384/96, i.e. the so-called basic regulation. Under the basic regulation, measures against imports may be adopted if those imports are price-dumped, threaten to harm an industrial sector considerably in the EU (through loss of market shares, ruinous pressure on prices, etc.), while the Community interest requires protective measures.

**Dumping** emerges if exports of a non-EU country are brought on the market of an EU Member State below their normal value, i.e. if the price of the exported goods is lower than their sales price in the exporting country itself. In practice, the determination of the so-called normal value brings up considerable problems, in particular with regard to exporting countries without market economy or countries in the transitional process towards market economy.

Among the antidumping measures, **antidumping duties** are adopted most often. Those antidumping duties are imposed, in addition to the regular rate of duty, up to the so-called dumping margin (e.g. the difference between trade value and normal value) in order to compensate for the unjustified price advantage of the imported goods compared to other goods in the EU.

Apart from imposing antidumping duties, the Commission may also:

- accept voluntary binding offers of the exporters of the dumped goods;
- carry out inspections, including in non-EU exporting countries, for the purpose of determining an individual dumping margin for new exporters;
- grant the repayment of antidumping duty paid;
- resume inspections if the antidumping measures imposed do not have the desired effect; and
- adopt measures against a circumvention of antidumping duties (e.g. assembly-dumping).

However, absent a Community interest, antidumping measures will not be adopted. In order to ascertain whether such a Community interest exists, the Commission will evaluate all interests at stake, including the interests of the affected industrial sector, the users and the consumers in the EU.

## Proceedings

The European Commission will adopt antidumping measures only after initiating precisely regulated **examination proceedings**. Initiating such proceedings in principle requires an application by an affected industry sector in the EU; however, proceedings may also be initiated *ex officio*. To the extent an application contains sufficient proof for the existence of dumping and an impairment of the pertinent industrial sector, as well as a causal link between dumped imports and the alleged impairment, the Commission will initiate examination proceedings within 45 days.

The initiation of such examination proceedings is being published in the Official Journal of the EU. In principle, these proceedings run for a year, at most 15 months. Applicable procedural principles include confidentiality, the right to a hearing and access to the files, as well as the chance for a confrontation hearing in which all interested parties can exchange their differing opinions. Each interested party may actively participate in the proceedings, apply for access to the file and submit statements.

After an examination procedure has been initiated, the Commission may adopt, and, in fact, very frequently adopts preliminary measures (**preliminary antidumping duties**). After the inquiry proceedings are closed, the Council of Ministers may adopt final measures (**final antidumping duties**) for a period of up to five years. Both preliminary, as well as final anti-dumping duties are being imposed according to EU regulations.

## Legal Remedies

Legal remedies against antidumping measures are available as follows:

- appealing antidumping duty regulations by way of filing an application for nullification of these regulations before the Court of First Instance of the European Communities (CFI);

- appealing national antidumping duty orders on the basis of applicable national law (in Germany, formal objections to the competent customs authorities and law suits before the competent finance court); and
- indirectly by way of preliminary proceedings before the European Court of Justice (ECJ) under Art. 234 EC Treaty.

Moreover, injunctive relief may be obtained before the CFI by a court order suspending the application of the contested act or interim measures (Art. 242, 243 EC Treaty).

In addition, the basic regulation provides for several additional structuring and legal protection alternatives. In that context:

- the **importer** has the chance to apply for a **reimbursement** of the levied antidumping duties if it can be established that the dumping margin in the exporting country was removed or decreased;
- the investigation proceedings may be resumed if there is a reason to believe that the antidumping duty has no impact on prices in the EU (e.g. if the non-EU exporter bears the antidumping duty himself); and
- exemption proceedings may be sought through which **exporters** are exempted from antidumping duties and, in return, accept special obligations.

→ ***Important: It is vital that, at the very least, after the dumping allegation has been published in the Official Journal of the EU, concerned exporters and importers seek legal advice in order to influence, still during the investigation, the decision-making of the European Commission. Vice versa, the affected Community industry has an interest to furnish early and comprehensive evidence for the alleged dumping and to press for the highest possible antidumping duties. Once the Commission or the***

***Council has made its decision, legal protection will be available for exporters, importers or their EU competitors only at increased costs and risks.***

### Anti-Subsidy

*Example: A Chinese exporter supplies car manufacturers in the EU with car parts and is suspected of receiving subsidies in the PRC. The subsidy allegation hits the Chinese exporter, as well as the corresponding European importers of the subsidized car parts. The allegation is being made by their European competitors, i.e. the EU manufacturers of car parts.*

#### Introduction

In accordance with the GATT and on the basis of the WTO Agreement on Subsidies and Countervailing Measures, the EU has adopted Regulation (EC) No. 2026/97, i.e. the so-called antisubsidy basic regulation.

That antisubsidy basic regulation aims at combating market distortions as caused by state aid (subsidies). Whereas the antidumping basic regulation aims at acts of the parties (dumping), the antisubsidy basic regulation takes on measures adopted by non-EU countries (subsidies).

**Export subsidies** are cash-value state benefits granted to support exports. Under WTO law, subsidies are generally prohibited — except for the agricultural sector — to the extent that there are specific subsidies in favor of individual companies, groups of companies or industry sectors. In exceptional cases, specific subsidies for research, environmental protection or disadvantaged regions may be permitted.

Under the antisubsidy basic regulation, **countervailing duties** may be imposed in order to make good for the subsidy advantage which renders the non-EU export goods cheaper vis-à-vis the EU-manufactured goods. The amount of the countervailing duty depends on the

advantage the export subsidies bring to the exporter, as well as the material injury that they convey to the Community industry.

#### Proceedings and Legal Remedies

In principle, the same rules apply here as in the case of antidumping. The antisubsidy and antidumping basic regulations mostly contain very **similar rules** on, for instance, establishment of injury and Community interest, initiation of proceedings, investigations, preliminary and definitive measures, and the termination of proceedings.

→ ***Important: Also, in the context of non-EU country export subsidies, it is important to seek expert advice early in order to be able to motivate the European Commission at an early stage – depending on the interest of the relevant exporter/importer/EU manufacturer – either to rebut or confirm the subsidy allegation and therefore either to seek and confirm or, rather, to challenge any countervailing duty regulations that the EU has imposed.***

#### Trade Barrier Regulation (TBR)

*Example: Brazil is among the largest markets for IT-products in Latin America. Brazil makes it difficult for foreign interests to access its IT-market by imposing import duties of 30%, which, in connection with additional taxes, have the effect of doubling the PC sales prices for Brazilian end-users.*

*Example: In the People's Republic of China, more than 100 products are required to bear a new examination certificate, the so-called China Compulsory Certification (CCC) seal, in order to be sold in China. The inspection required for receiving the CCC seal comprises, amongst other requirements, a visit on-site by representatives of the Chinese inspection authority. This inspection, which is not*

*required for Chinese goods, has caused the price for imported goods to increase vis-à-vis the price of Chinese products.*

## Introduction

The EU Trade Barrier Regulation (TBR; Regulation (EC) No. 3286/94) aims at **removing trade restraints imposed by non-EU countries** to the extent that they injure business sectors in the EU or damage trade on non-EU markets.

Trade barriers exist where a non-EU nation applies trade practices which, according to international trade rules (in particular WTO law), are prohibited. The TBR aims at removing such trade barriers not only with regard to **goods** but also with regard to **services** and **intellectual property rights**.

## Procedures

Where a trade barrier exists, an application for the initiation of TBR proceedings may be lodged with the European Commission if that trade barrier:

- causes injury to an industrial sector of the Community on the Common Market, *i.e.* within the EU; in such case, the application is to be submitted by the injured business sector;
- has a damaging impact on the trade on non-EU markets; in such case, the application may be submitted by a single party within the EU; or
- is reported by an EU Member State.

In all of these cases, there must exist a Community interest for adopting a TBR measure. Such Community interest is assumed if the disputed trade practice infringes WTO law.

After initiating preliminary proceedings an investigation is carried out by the Commission. Where the Commission establishes a trade barrier which is not voluntarily removed by the pertinent non-EU country, the Commission will eventually initiate WTO dispute settlement proceedings. However, where

the Commission is not obliged to do so, it may unilaterally impose TBR measures.

Those **unilateral TBR measures** may include:

- the suspension or withdrawal of trade concessions;
- the increase of existing rates of duty or the initiation of import duties or quotas; and
- any other measure which alters import or export conditions.

→ ***Important: Not only does the domestic EU industry need expert advice in seeking and implementing TBR measures in its favor, such advice should also be sought by non-EU countries or companies not based in the EU which are affected by EU TBR measures or wish to prevent such measures from being adopted.***

## Rules on Origin and Preferential Treatment

The rules of origin play a particular role in EU trade law.

*Example: The origin of the merchandise in a specific non-EU country determines which rate of duty applies, whether specific import quotas are available or exhausted, and whether specific antidumping measures need to be adopted.*

**Goods** are deemed to have originated in a country if they have been fully purchased or manufactured there. If goods are, however, manufactured in several countries, the country of origin will be the one country in which the last significant and economically justified processing of such goods was carried out.

Among the **rules of origin, the non-preferential rules** are to be distinguished from the so-called **preferential** ones. Preferential rules of origin are often stricter and only apply in the context of applicable regimes of preferential treatment.

*Example: A Thai exporter exports leather goods to the EU which are subject to a favorable preferential rate of duty agreed upon between the EU and Thailand.*

Preferential measures favor specific goods from specific countries. Preferential measures are typically the application of a favorable preference rate of duty. The basis of such measures are preference agreements between the EU and third countries or autonomous (*i.e.* unilateral) preference measures of the EU.

→ ***Important: For exporters, importers and the EU industry, rules of origin and preferential rules are of paramount importance. Those rules decisively influence the level of import duties; thus, they determine significantly the sales price of import goods. In that context, certificates of origin or preference certificates, which often only the exporter may obtain, are particularly important. Frequently, certificates of origin are faked in order to enjoy preferential treatment or circumvent antidumping duties. Again, early expert advice may help to protect against unwelcome surprises; this is particularly true if, for instance, customs authorities knew about CO fakes without intervening in time.***

## Product Piracy

*Example: A German importer imports digital cameras from Singapore. The goods are seized by the German customs authorities for suspicion of being so-called product piracy or counterfeit goods. As a consequence, the importer cannot supply his customers. He faces significant compensation claims from those customers and possible administrative sanctions against himself.*

Under the so-called Product Piracy Regulation (PPR; Regulation (EC) No. 1383/2003), the customs authorities of the EU Member States may **suspend**

**the clearance of goods or detain goods** if they are under suspicion of infringing intellectual property rights (under some national — *e.g.* German — laws, the customs authorities may even order such goods to be destroyed). Such suspension or detention shall enable the holder of the intellectual property rights to take appropriate legal remedies.

The customs clearance may be suspended if:

- the owner of intellectual property rights applies for action to be taken (such application must be submitted, in Germany, to the OFD Nuremberg, central office for intellectual property protection in Munich (ZGR)); or
- even before such application, if there is sufficient suspicion of IP infringements.

IP rights-holders and customs declarants are to be informed by the customs authorities about the suspension of the customs release. The IP rights-holder then has 10 days to prove that he has initiated proceedings for establishing the infringement of his intellectual property rights. If the competent authority does not adopt any safeguarding measures within that period, the customs authorities may hand out the pertinent goods against security even if IP rights are being infringed. If the IP holder fails to submit a notice in due time or if it turns out that there was no infringement of intellectual property, the relevant goods will be customs released.

Whether the IP rights are, in fact, being infringed (*e.g.* through product piracy) or whether there is a sufficient suspicion of such infringement, is subject to the pertinent national rules and to be examined by the competent national (*e.g.* German) courts of civil law.

→ ***Important: To the extent that the customs authorities temporarily suspend the customs release, an importer may find himself unable to comply with his own supply obligations. He could therefore face contractual penalties, while depending on his suppliers***

*for proof that IP rights are not being infringed. Therefore, the pertinent sales contracts between exporters, importers and their customers should provide for an ex ante transmission of relevant documents and, in case the exporter does not submit or belatedly submits those documents, provide for contractual penalties. Vice-versa, the owners of IP rights in the EU have a considerable interest in fighting product piracy already outside the borders of the EU.*

→ **Important:** *The EU and its Member States have significantly increased their anti-product piracy activities. Increasingly suspicious goods are being seized simultaneously in all 25 Member States by coordinated raids of all national customs authorities and the European Commission.*

## Import and Export Rules

### Introduction

As a matter of principle, imports into and exports from the EU are not subject to any quota or license. Quantity restrictions – e.g. import or export quotas for particular goods – are already excluded according to the GATT Agreement. Nevertheless, GATT allows numerous exceptions within the framework of which the EU continues to impose restrictions. Apart from **embargoes**, import and export restrictions emerge in the form of trade and security measures or **prohibitions and restrictions**.

### Import Rules

In accordance with the WTO Agreement on Protective Measures, the EU common import regime (established principally in Regulations (EC) No. 3285/94 (for WTO members) and 519/94 (for non-WTO members)) adopts free importation as the general rule. However, if imports significantly change, they nevertheless may be subject to surveillance and safeguard measures. Such measures require unforeseen import trends that threaten to cause serious injury to the

Community industry and to a sufficient Community interest for adopting such measures.

**Surveillance and safeguarding measures** may be adopted after going through a consultation and an investigation procedure. Surveillance measures may be the **request for documents** (e.g. certificates of origin) or the *ex post* statistical supervision. Safeguarding measures are the introduction of approval requirements or the fixing of **import quotas**.

With regard to non-WTO members, additional measures may be imposed such as import licenses, import bans or quotas.

### Particular Import Rules – Textile Sector

After the termination of the WTO Agreement on Textiles and Clothing (ATC) and some bilateral textile agreements with non-WTO countries, since 2005, **new import rules** apply with regard to specific textile goods originating in non-EU countries. These rules result in significant changes vis-à-vis the previous import rules for textiles and clothing:

- For textiles originating in WTO countries, in principle the general freedom of import continues to apply under Regulation (EC) No. 3285/94. However, in regard to China, import quotas may be imposed for specific goods until 2008.
- In regard to textiles originating in non-WTO countries with which the EU has signed bilateral agreements, there are annual import quotas according to Regulation (EC) No. 3030/93.
- For textiles originating in non-WTO countries which have no bilateral agreement with the EU, the import quantity restrictions apply pursuant to Regulation (EC) No. 517/94.

→ **Important:** *Particularly in the textile sector, knowing the pertinent rules is indispensable for any exporter, importer and their respective EU competitors. For instance, in*

*July through September 2005, huge quantities of Chinese textiles were detained by the EU customs authorities as applicable import quotas had been exhausted. As a consequence, importers and exporters who had not prepared themselves for such a situation suffered significant losses.*

## Export Rules

### General Export Rule

According to Regulation (EC) No. 2603/69, exports as a matter of principle do not require an export license. However, in exceptional cases, the export of goods may be subjected to **export permits** in order to prevent or counteract a lack of vitally important goods or to prevent national security know-how from becoming available to other countries. Further export restrictions may apply for reasons of public morality, order and safety, to protect health and the life of men, animals and plants, the national treasure of artistic, historic or archaeological value or intellectual property rights.

### Special Export Rules / Export Control Law

*Example: A German company exports to India weaving machines for weaving, knitting, working and plaiting for the manufacture of compound material structures which may also be used for military purposes and therefore are subject to export control.*

Special export rules apply in the context of export control law with regard to specific goods which relate to the security or foreign policy interests of the EU and/or its Member States. Such goods may be arms, hazardous chemicals or radioactively contaminated goods as well as so-called dual use goods. The term "goods" in that context not only refers to **goods** but also to **technologies** and **IT software programs**. Important export control rules may, in particular, be contained in:

- Regulation (EC) No. 1334/2000 (**Dual-Use-Regulation**) with regard to goods with a dual, i.e. civil and military use, according to a list of goods in the Annex of the Dual-Use-Regulation
- **embargo rules**
- the national level, e.g. in Germany, the external trade act (*Außenwirtschaftsgesetz (AWG)*) and the external trade ordinance (*Außenwirtschaftsverordnung (AWV)*) together with the export list (*Ausfuhrliste (AL)*) which contains all goods requiring an export permit. In that context it needs to be kept in mind that an export without a necessary export permit is a **punishable** felony pursuant to Section 34 AWG. Similar rules are set out in the German war arms control act (*Kriegswaffenkontrollgesetz (KWKG)*); and
- special rules such as the international convention on chemical weapons.

Under these rules, the export and shipment of goods, transit and even technological support may be subject to an export permit.

In Germany, the *Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)* is in charge of information on export permit requirements and is responsible for granting such export permits. If no such permit is required, the BAFA will issue a so-called "negative order" ("*Nullbescheid*"). Administrative acts of BAFA may be challenged by way of objections and subsequent lawsuits before the competent administrative courts.

## Prohibitions and Restrictions

*Example: An Indian company may export pharmaceuticals to Germany only if the requirements of the German pharmaceutical laws are fulfilled. A Chilean company exporting wine to the EU has to make sure that special designations are being applied on the wine bottles.*

Prohibitions and restrictions are mostly of a non-economic nature. They protect important legal interests such as public safety and order (e.g. protection against fake money and arms), health and life (e.g. protection of species, prevention of epidemics and nuclear contamination), environment (including the protection of animals and plants), and cultural assets and intellectual property rights (e.g. protection from false indications of origin).

Prohibitions and restrictions follow common principles:

- the customs authorities have all necessary powers of control;
- imports and exports of goods are subject to the submission of grants, allowances and other documents during customs clearance, the granting of which lies with specific German federal or state authorities;
- infringements of prohibitions and restrictions may lead to sanctions such as seizure, confiscation, (even draconian) administrative fines and imprisonment; and
- prohibitions and restrictions may constitute non-tariff trade barriers. Such trade barriers may include designation duties, technical norms and admission proceedings, discriminatory customs procedures, the threat of trade policy measures and other market access restrictions against foreign suppliers.

→ ***Important: Often third country exporters do not know the substantive rules and formalities regarding prohibitions and restrictions being applied in the context of exporting goods to Germany or the EU.***

## Penal and Administrative Fines in Foreign Trade

Incorrect foreign trade transactions may lead to different criminal or administrative sanctions being imposed. This applies in cases of tax evasion,

subsidy fraud, acquisition of services by false pretenses and missing export licenses (in particular in the context of export control and agricultural law).

Often, the respectively applicable criminal and administrative sanctions overlap.

## Conclusions

Non-EU exporters depend on knowing the foreign trade rules applicable in the EU and the specific country of destination. Only by knowing those rules may they pursue their interests, influence legislation or administrative decisions and/or lodge legal remedies successfully. The complexity of foreign trade law and the economic consequences therefore press for obtaining internal or external expert or legal advice early.

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## What Non-EU Exporters Should Keep in Mind

### Customs Debt

- Search the most favorable CN classification for your export goods in order to get the lowest customs rate; have that classification verified through a BTI.
- Watch out for circumstances which make you a customs debtor.
- Watch out for customs preferences and their requirements.
- Consider your legal remedies early (waiver of post-clearance duty, objections, repayment/remission of duty).

### Antidumping/Antisubsidy

- Consider participating in the Commission's investigation in order to influence the EU's decision-making favorably.
- Challenge unlawful antidumping/antisubsidy regulations before the Community courts and unlawful antidumping/antisubsidy orders before the national customs authorities.

### Product Piracy

- Anticipate and avoid raids, seizures and detentions of goods infringing IP rights.

### Legal and Procedural Issues

- Bear in mind that trade law is partly EU law, partly national law and that most procedures are handled locally at the port of entrance.
- Bear in mind that the earlier you know about applicable rules and available remedies, the less your interests will suffer.

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**Notes**

Brussels  
Chicago  
Frankfurt  
Hamburg  
Hong Kong  
London  
Los Angeles  
Milan  
Moscow  
Munich  
New Jersey  
New York  
Northern Virginia  
Orange County  
Paris  
San Diego  
San Francisco  
Shanghai  
Silicon Valley  
Singapore  
Tokyo  
Washington, D.C.

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