
**Problems of interpretation and application in tariff
classification; some consequential customs
compliance risks and mitigation**

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Abbreviations list

Binding Tariff Information	BTI
Combined Nomenclature	CN
Combined Nomenclature Explanatory Notes	CNEN
Common Customs Tariff	CCT
Court of Justice of the European Union	CJEU
Customs Code Committee	CCC
European Binding Tariff Information	EBTI
European Court of Auditors	ECA
European Union	EU
General Agreement on Tariffs and Trade	GATT
General Interpretative Rules	GIR
Harmonized Commodity Description and Coding System	HS
Harmonized System Explanatory Notes	HSEN
Her Majesty's Revenue and Customs (UK customs authority)	HMRC
Intra-Community Trade Statistics System	INTRASTAT
Local Area Network	LAN
Tarif Intégré Communautaire/Integrated Tariff of the European Communities	TARIC
Union Customs Code	UCC
Wide Area Network	WAN
World Customs Organisation	WCO
World Trade Organisation	WTO

1. Introduction

The tariff classification of goods may be described as a method, set down in a number of fixed rules, by which the position of imported (and exported) goods, ascribed to a given tariff heading, is determined in a particular country.^{1 2}

As at September 2017, the WCO's HS is accepted by its 196 Contracting Parties and used by 207 countries as the uniform tariff nomenclature applicable to all goods at the level of a six-digit code.³

These countries, customs unions and economic regions base their tariff arrangements and economic trade statistics on the HS. In practice, despite agreeing to a uniform tariff and uniform rules for tariff classification of goods, countries have divergent opinions on the tariff classification of the same goods.

The EU is a contracting party to the HS. At EU level, the EU tariff must follow the structure of the HS and tariff classification is performed according to the CN and/or TARIC, based on the HS. Tariff classification is determined by the customs administrations of the EU's 28 Member States. Divergent opinions - and therefore practice - on the application of tariff classification provisions exist as between Member States because of varied interpretations of tariff headings, relevant chapter or section notes, the scope of commodity codes themselves and explanatory notes.

Why do these divergences exist and what is the impact on businesses seeking to comply with customs tariff classification rules?

In this thesis, I examine the nature of tariff classification rules and procedures at a global level (section 2), and in the EU (section 3), identifying some of the reasons why divergence is inherent in the technical procedures and administrative structure of tariff classification arrangements (section 4). I then highlight the impact of uncertainty for business management caused by tariff classification divergence (section 5). I provide some recommendations for reducing divergence and suggest how businesses can manage the commercial and compliance risks which are inherent in tariff classification (sections 6 and 7).

2. Tariff classification at a global level

2.1 WCO and HS

The WCO has been pursuing correct and uniform application of the HS, since its introduction on 1 January 1988. The WCO has as its stated objectives the correct and uniform application of the HS in an efficient manner to facilitate international trade and investment and to promote compliance with fiscal and trade rules or laws.⁴

1 Nicolaj Kuplewatzky & Davide Rovetta, "The Divergence in Theoretical and Practical Use of Combined Nomenclature Explanatory Notes and Tariff Classification Regulations in the EU" [2012] *Global Trade and Customs Journal* Vol 7 Issue 11&12 454, 454

2 Tokio Yamaoka, "Why are Customs Classification Issues Adjudicated at the WTO?: Structural Issues and Possible Solutions" [2014] *Global Trade and Customs Journal* Vol 9 Issue 5 184, 184

3 <www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/overview/hs-contracting-parties/list-of-countries/countries_applying_hs.pdf?db=web> accessed 21 November 2017

4 <www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_recommendations.aspx> accessed 21 November 2017

The WCO describes the HS as contributing to the harmonization of customs and trade procedures, and the non-documentary trade data interchange related to such procedures, thereby reducing the costs of international trade.

The HS is also extensively used by governments, international organizations and the private sector for other purposes including internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis. The HS is thus a universal economic language and code for goods and facilitates world trade.

The maintenance of the HS is a WCO priority and includes measures to ensure uniform interpretation of the HS and its periodic updating, considering developments in goods and trade. The WCO manages this process through the HS Committee (representing the Contracting Parties to the HS), which examines policy matters, takes decisions on classification questions, settles disputes and publishes amendments to the HSEN.

2.2 HS

The goods nomenclature is based on the HS Convention and is commonly referred to as “HS Nomenclature”, “HS System” or simply “the HS”.

The HS is a closed system, providing a structure in which over 1,200 tariff headings are grouped in 96 chapters. The chapters are arranged in 21 sections. Each HS tariff heading is identified by a four-digit code, where the first pair of digits indicate the chapter in which the heading is based and the second indicate the position within the chapter. Additionally, most of the headings are further subdivided into one or two dash subdivisions, identified by an additional two digits, totalling six-digits for codes at HS level. If there is no sub-division then two zero (00) digits are added, so that there are always six-digits.

The HS Convention requires that HS headings, subheadings and numerical codes must be used as provided, without addition, subtraction or modification. Beyond this structure and subject to these limitations, Contracting Parties are permitted to adopt variations to the textual descriptions if required to give effect to the HS in national law and to further subdivide codes beyond the six-digit level, providing the structure and scope of the HS subheadings is not changed.

In addition to the six-digit coding structure, the extant version of the HS, (i.e. HS 2017) also contains 386 notes and 63 subheading notes which are applicable wherever the HS is followed.⁵

The EU adds additional notes in the CN (see section 3.2) which can have the effect of subtlety influencing the scope of the HS headings.^{6 7}

Since the HS is a closed system, all goods must be classified according to and within its structure, provisions and notes. This therefore requires that goods that did not exist when the HS was established (or last updated) must still nevertheless be classified according to the HS. Notwithstanding that the HS is updated approximately every five years, the rate of introduction of new goods or goods resulting from convergence of existing technologies inevitably means that the updating of the HS cannot keep pace in real time.

⁵ Carsten Weerth, “HS2002-HS2017: Notes of the tariff nomenclature and the additional notes of the EU revisited” [2017] World Customs Journal Vol 11, Num1 50

⁶ Ibid 53

⁷ Weerth, C. “HS 2007: Notes of the Tariff Nomenclature and the Additional Notes of the EC” [2008] World Customs Journal 2008 Vol2 No1 111 114-115

Coupled with this time lag, Contracting Parties are permitted an implementation period of two and half years to adjust and update their local tariff structure whenever the HS changes. With a regular five-year revision basis, this means that some local tariffs can be out of alignment with the HS for almost half of every five-year period. These are factors which stretch the objective of uniform application of the HS.

2.2.1 Harmonized System Explanatory Notes and Classification Opinions

The official interpretation of the HS is given in the HSEN, published and periodically updated by the WCO.

The HS Committee meets to work on updating the HSEs and to issue Classification Opinions relating to specific goods. The notes and opinions are not legally binding and cannot be applied retrospectively but can provide authoritative guidance on the application of the HS. To that extent, they are regarded as being an important means for ensuring the uniform application of the tariff and as having persuasive value in interpretation.^{7b}

It is the author's experience that many businesses do not refer to the HSEs or opinions when performing tariff classification; either because their existence is unknown, their role and purpose is not understood, or because there is a reluctance to budget for the modest WCO subscription access cost. This means that many businesses fail to equip themselves with one of the key resources for performing tariff classification. Considering that the HSEs contain extensive guidance on what is or is not within the scope of certain headings or sub-headings, this may be viewed as an impediment to effective business risk management relating to compliant tariff classification practice.

2.3 Issues with GIRs

Within the nomenclature of the HS, the six GIRs play a pre-eminent role in tariff classification. These comprise the primary methodology by which means goods are classified to a six-digit code. The GIRs must be applied in the order as set out in the HS.

The purpose of the GIRs is to ensure a uniform approach to tariff classification practice but that can be thwarted because the GIRs themselves are also open to varied interpretation as explained below.

2.3.1 GIR 1

The application of GIR 1 has been interpreted as requiring tariff classification to take place on an objective basis by reference to objective characteristics. However, neither the HS, CN or CCT provide an indication as to what the objective characteristics are by which goods must be judged to be proper to a given tariff heading.^{8 9 10}

7b Case C-206/03 SmithKline Beecham (C-206/03, ECR 2005 p. I-415) ECLI:EU:C:2005:31 The court findings stressed that the respective explanatory notes drawn up in relation to the HS are CN are interpretative in character and do not have legally binding force.

8 Case C-339/98 Peacock (C-339/98, ECR 2000 p. I-8947) ECLI:EU:C:2000:573 The Court highlighted that the objective characteristics of a network card should be considered for classification purposes and not the functions by which the card allows an automatic data processing machine, as a whole, to perform.

9 Siemens Nixdorf Informationssysteme AG v Hauptzollamt Augsburg [1994] EUCEJ C-11/93 The case held that if the objective description of a product is found in section or chapter notes, that is decisive for classification purposes.

Conversely, intended use should be considered where this is clearly a relevant criterion as indicated by the tariff heading(s) under consideration.

As discussed further below, intended use cannot be a relevant criterion for tariff classification, except where expressly provided for in the tariff heading or accompanying notes. That is because in addition to the requirement to consider objective characteristics, the pertinent time for consideration of relevant criteria is the point at which the goods are presented to the customs authority simultaneously with the time of lodging the import (or export) entry declaration for the goods.^{11 12 13 14} Failure to read closely the specific wording for a given tariff heading risks consideration of characteristics of goods which are not relevant to the performance of tariff classification.

2.3.2 GIR 2

GIR 2(a) deals with incomplete, unfinished, unassembled or disassembled goods and directs that such goods be classified as the complete or finished goods, providing they have the essential character of those goods.

Applying GIR 2(a) requires determination of the essential character of any given goods and then determination of whether the specific goods as presented manifest the essential character of such complete, finished or assembled goods.

GIR 2(b) applies to mixtures or combinations of materials and extends the scope of heading referring to only one material to include mixtures or combinations including that material. If in applying this rule, a given good appears classifiable under two or more headings, then GIR 3 must be applied.

2.3.3 GIR 3

GIR 3 therefore comes into operation when at face value goods are classifiable under two or more tariff headings. GIR 3 can only be applied if the terms of tariff headings under

10 Case T-243/01 Sony Computer Entertainment Europe Ltd v Commission of the European Communities EU (T-243/01,2003 All ER (D) 205 (Sep)) It was held that the decisive criterion for classification must be sought in the objective characteristics and qualities as defined in the relevant heading of the CCT and notes to the sections or chapters. Further that the case of goods composed of mixtures or combinations of materials, the essential character may be identified by whether a product would retain its characteristic properties where alternative constituent materials were removed from it.

11 VTech Electronics (UK) PLC v The Commissioners of Customs & Excise [2003] EWHC 59 (Ch) The case held that in considering whether a product should be classified as a computer or a toy, the way in which a product is marketed or its intended user group does not override the primacy of using objective characteristics of the product for classification purposes.

12 The Commissioners of Her Majesty's Revenue & Customs v Flir AB [2009] EWHC 82 (Ch) par6 The case held that the proper starting point for classification is an understanding of the objective characteristics of the goods concerned.

13 Case C-363/07 Kip Europe and Others (C-362/07 and C-363/07, ECR 2008 p. I-9489) ECLI:EU:C:2008:710 The Court stated that the objective characteristics of the goods concerned should be considered in the terms of the notes to the chapter and tariff heading of the CN (as is required by GIR1.) before determining whether subsequent GIRs should be considered.

14 Case C-142/06 Olimcom (C-142/06, ECR 2007 p. I-6675) ECLI:EU:C:2007:449C-142/06 [2001] ECR I-6675 The case held that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and further that the inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties.

consideration do not otherwise provide for a resolution to the issue of apparently equally applicable tariff headings.

GIR 3 comprises three parts: firstly, part (a) states that a heading is preferred which provides the most specific rather than a more general description; second, part (b) states that goods comprised of different materials or goods put up in sets for retail sale are to be classified on the basis of the material giving the goods their essential character; third, part (c) states that where parts (a) and (b) do not resolve the issue, the tariff heading occurring last in numerical order from those under consideration should be applied.

Similar difficulties arise in GIR 3 as with GIR 1 and GIR 2 in that determining the most “specific” heading or description and “essential character” of goods can involve a degree of subjectivity. Further, if there is a tariff heading with a specific description, GIR 1 should first apply according to the hierarchy of GIRs, making recourse to GIR 3 unnecessary. Therefore, if for some reason GIR 1 is not be applied, it is difficult to see how GIR 3(a) can add further clarification or resolution.¹⁵

2.3.4 GIR 4

GIR 4 comes into operation when GIRs 1, 2 and 3 cannot determine the tariff classification of goods. In those circumstances, goods are to be classified under the tariff heading to which they are most akin. In effect, GIR 4 relies on the essential character criterion of the other GIRs. Since appraising essential character can be a subjective matter, and “akin” involves judgements as to degree of likeness, GIR 4 can be difficult to apply. When questions about similarity arise - and equally dissimilarity – this adds to the complexity of ensuring uniform interpretation.¹⁶

3. Tariff classification at EU level

3.1 UCC

The Union Customs Code (UCC) (Regulation 952/2013/EU) refers to the CCT of the EU - which has existed since 1968 - including, *inter alia*, the CN of goods as laid down in Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

The preamble to UCC refers to measures which may be introduced to ensure uniform conditions implementing tariff classification provisions, including binding information, the classification of goods and classification of mixed consignments.¹⁷ Under UCC, the tariff classification of goods consists in the determination of one of the subheadings or a further subdivision of the CN under which goods under consideration are to be classified.¹⁸

Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amends Annex 1 to Regulation EEC No 2658/87 on the tariff and statistical nomenclature and CCT to provide

¹⁵ Paulette Vander Schueren “Customs classification: One of the Cornerstones of the Single European market, but one which cannot be exhaustively regulated” [1991] Common Market Law Review 28: 855 867

¹⁶ Fernando Pierola “The treatment of ‘Likeness’ and A New Rejection of the ‘Aim and Effects’ Test in *US - Clove Cigarettes*” [2012] Global Trade and Customs Journal Vol 7 Iss 7&8 347

¹⁷ Regulation 952/2013/EU para (5)

¹⁸ Regulation 952/2013/EU art 57

the eight-digit commodity codes and tariff rates to be used for EU customs purposes and procedures during 2018.

3.2 CN

The CN, as updated in Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, includes the GIRs to be applied when classifying goods using the CN. These rules precisely mirror the GIRs established by the HS. Consequently, they carry the same inherent issues of interpretation and application as outlined in section 2.3 above.

For EU customs purposes, goods must be classified according to the Combined Nomenclature. The CN follows the structure of the HS based on the six-digit nomenclature which is extended to further subdivide HS headings. The CN extends the six HS digits to eight digits used for EU export declarations and the EU's INTRASTAT reporting arrangements.

3.2.1 CNEN

The CNEN of the EU were established by Article 9(1) of Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. The foreword to the CNEN states that by Article 9(1)(a), the Commission adopts explanatory notes to the CN, following consideration by the Tariff and Statistical Nomenclature Section of the CCC. Although the CNEN may refer to the HSEN, they do not take the place of the HSEN, but are to be regarded as complementary to, and used in conjunction with, them when considering tariff classification in the EU.¹⁹

They do not have legally binding applicability but can be viewed as instruments of interpretation and guidance tools providing their content remains compatible with the CN.²⁰

The question as to whether the CNENs or EU classification regulations have precedence in resolving tariff classification divergences has been considered at length.²¹ Issues concerning categories of goods are more appropriate to the CNENs because this avoids the need to issue large numbers of regulations, whereas the tariff classification of a single specific good is more easily addressed in a regulation. Although CNENs are not law, they are soft-law in nature and non-binding and to that extent are not subject to legislative review and so are easier and quicker to publish to rectify divergent classification practice.²²

However, since 2009, BTIs must be amended or revoked if they conflict with the CNEN, so that the CNEN have come to have more elevated status than simply that of a source of soft-law offering guidance on interpretation.²³ The CNENs have come to be viewed as having persuasive force in tariff classification matters.

But this change in practice has resulted in a trend among Member States to use CNEN or CNEN amendments to pursue additional customs duties on past imports, perhaps urged to do so by the Commission in order to maximise own resources of the EU. However, given the non-binding nature of the CNEN, it is beyond the legal status of CNEN to apply them retrospectively to goods in situations that were not yet covered by a published CNEN.

This leaves businesses in a position of uncertainty in terms of computing customs duties liabilities which may arise on imports made in the previous three years.

In addition to breaching the reasonable expectation of uniformity of treatment in terms of the application of customs law, the retrospective recovery of customs duties for a period prior to the introduction of a CNEN, also runs contrary to the EU's commitments under GATT.²⁴

19 Explanatory Notes to the Combined Nomenclature of the European Union 2011/C 137/01 FOREWORD

20 Case C-35/93 *Develop Dr. Eisbein v Hauptzollamt Stuttgart-West* (C-35/93, ECR 1994 p. I-2655) ECLI:EU:C:1994:252. The Court held that the application and meaning of GIR 2 – integral to the CN - cannot be altered by reference to the CNEN.

21 Nicolaj Kuplewatzky & Davide Rovetta, "The Divergence in Theoretical and Practical Use of Combined Nomenclature Explanatory Notes and Tariff Classification Regulations in the EU" [2012] *Global Trade and Customs Journal* Vol 7 Issue 11&12 454, 454

22 Case C-15/05 *Kawasaki Motors Europe* (C-15/05, ECR 2006 p. I-3657) ECLI:EU:C:2006:259

23 cf Kuplewatzky & Rovetta (n21) 455

24 *ibid* 456

3.3 TARIC

The TARIC further subdivides the eight-digit CN tariff headings to produce a minimum of a ten-digit commodity code used when declaring imports of goods into the EU. The TARIC provides for digits beyond the first ten, to reflect the five categories of additional information relating to tariff, commercial and agricultural measures, restrictions of movement and gathering of statistical data, which may apply to certain goods imported into the EU. By integrating and encoding these measures, TARIC aims to ensure uniform application of tariff classification provisions and consequential consistency of treatment of goods for tariff and non-tariff purposes.

The table below illustrates the positions of digits relative to the structural component within a commodity code which that digit represents:

Digit position within EU commodity code	1	2	3	4	5	6	7	8	9	10	11+
Structural component											
HS chapter	x	x									
HS heading			x	X							
HS subheading					x	x					
CN subheading							x	x			
TARIC code(s) level									x	x	x x x x x ...

However, given some of the problems of interpretation and application of the GIRs at HS level, these problems can be magnified when using the GIRs in the context of the additional number of subheadings and subdivisions existing under the CN and TARIC.

3.4 Specific rules of interpretation

In addition to the HS, which in 2017 contained 386 notes and 63 subheading notes, the EU has added 109 additional notes within the CN and CCT. These 558 notes of the CN are legal rules that apply to 1,222 HS headings, 5,387 HS subheadings and 9,528 CN subheadings.²⁵ The totality of these provisions equates to more than 16,500 legal rules for tariff classification of goods, resulting in many specific rules to be considered when determining tariff classification in the EU.

Providing the meaning of HS headings or subheadings is not changed, the EU, through the additional notes, can influence the definition of goods and therefore their tariff classification in the EU. Clarifying descriptions, terms and scope of headings for EU tariff classification practice has the potential to create problems in the global dimension in terms of non-tariff measures and divergences in the application of the HS. This can be exacerbated since the HS and HSEN are updated at approximately five years intervals compared to the CN and CEN updated annually.

The number of specific legal rules governing the use of the CN in tariff classification means that the number of notes in themselves represent a significant obstacle to the uniform use of the goods nomenclature for businesses. The positioning of notes at the start of sections or

²⁵ cf Weerth (n5) 49-50

chapters also creates several problems. There is no direct link or reference between a heading, subheading or subdivision and the notes themselves, making it more difficult to identify whether a relevant note even exists. A relevant note may be overlooked given that the layout of the nomenclature physically separates notes from their applicable tariff heading, so that the connection between the two is remote or lost entirely.

For example, taking Chapter 84 in the CN, there are nine extensive notes at chapter level, four at subheading level and two additional notes, before the commodity codes of chapter 84 which themselves run to 118 pages in the printed nomenclature issued by HMRC - the UK customs authority.²⁶ The various notes also have to be understood in the context of the preceding Notes to Section XVI, within which chapter 84 falls.

Additionally, it can be matter of interpretation as to whether or not a note placed at the beginning of a Section or chapter specifically applies to certain headings or subheadings which follow thereafter.

These factors add to the potential for divergence of interpretation and non-uniform application of the CCT and highlight that the specific rules within the nomenclature have as important a role in determining tariff classification as the GIRs.

4. Tariff classification procedure

4.1 Performing tariff classification

As stated earlier, the tariff classification of goods may be described as a method, set down in a number of fixed rules, performed to determine the numerical commodity code for specific goods.

The application of the set of rules gives rise to questions of interpretation and application as to whether goods with particular characteristics should be categorised to a certain tariff heading. The starting point is therefore having regard for sufficient information as to the characteristics of the goods under consideration and then using the technical instruments and interpretative aids in performing tariff classification of the goods.

In the EU, these tools comprise the EU Tariff (commencing with the annual update to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff - and as transcribed into the national, Member State versions of the annual Tariff), the section and chapter heading notes which provide specific rules, the GIRs, the HSEs and CNENs, BTIs, CJEU cases or Member State national court or tribunal cases and any guidance issued by the European Commission or national customs administrations relevant to the classification of the goods under consideration.

There are two different approaches to classifying goods; the hierarchical and the keyword methods. Both approaches will identify potential headings for the goods, taking account of the specific rules in relevant sections of chapter notes while applying the GIRs.

4.1.1 Hierarchical method of tariff classification

The hierarchical method is an approach based on the tariff structure itself. It is designed so that any exceptions or exclusions indicated by the tariff heading or subheading notes are

²⁶ HMRC "Integrated Tariff of the United Kingdom - Volume 2 Schedule of duty and trade statistical descriptions, codes and rates" [2018] 84(1)

identified. As the approach follows a hierarchical logic, it is more challenging and more likely to be used by classification practitioners than those in business who may perform tariff classification less often and are less experienced.

It follows a logical number of steps as follows: identify the likely section(s) in which the subject goods might fall; check the notes to the section(s) and chapter(s); identify the likely heading(s) within the section using the GIR1, review whether objective or subjective/post importation characteristics are relevant in the tariff heading description; refer to GIR 2 and GIR 3 depending on the characteristics of the goods and number of headings to which the goods appear potentially classifiable; refer to the HSEN. After 6-digit level, EU provisions are relevant so recourse to the CNEN, classification regulations, BTI or published guidance should be made if the classification is not clear from the CN text.

As subheadings and more detailed divisions of a heading derive from the tariff heading itself, goods can only be classified at eight or ten-digit level for EU purposes if they are included in the scope of the two-digit chapter, four-digit tariff heading and six-digit sub-heading at the outset.

4.1.2 Keyword or Index method of tariff classification

The Keyword or Indexing method can be used based on either paper or electronic keyword and index searches. It can be a quicker method than the hierarchical method but can lead to errors if not applied with technical rigour.

From the keyword or index, potential tariff headings can be correlated. Having identified possible tariff headings, it is necessary to move up to the higher level of the tariff structure to check the provisions of those tariff headings, chapter or section notes. If the goods to be classified are excluded from the scope, then that tariff heading indicated by the search is incorrect.

If the goods are not excluded, it is still necessary to compare the characteristics of the goods with actual descriptions and provisions provided in the tariff - using the other interpretative aids where required - to finally determine the tariff classification.

4.1.3 Comments on classification methodologies

In the author's experience, the shortcoming of the keyword method for businesses is that a word or term is readily identified, and a four-digit tariff heading identified quickly, followed by a rapid scan down the list of subheadings to identify a commodity code. As a code is identified, the method is truncated at this point without recourse to the scope of notes at section, chapter or tariff heading level. Such review may exclude the goods, or else direct classification towards a different area of the tariff altogether, even though a keyword may be associated with that initial tariff heading.

In some cases, there is value in using both approaches: starting with the hierarchical method and taking this to its logical conclusion; then using the keyword approach to see if the same conclusion is validated.

Under either method, the tariff classification of parts or components of goods requires particular care since these may be required to be classified in their own headings, or under the same headings as for the goods of which they are part – depending on the rule applicable for the type of goods (and their parts) under consideration. For example, computers (automatic data processing machines) are classified under tariff heading 8471, though parts of computers

are classified under tariff heading 8473. Conversely, articles of furniture are classified to tariff heading 9403 and parts of those articles are also classified under that same tariff heading.

4.1.4 Information about goods to be classified

Use of a tariff classification procedure gives rise to the question as to what aspects, attributes, properties or characteristics of goods are relevant when considering tariff classification. By what criteria is tariff classification to be determined?

As discussed earlier, case law has established that when appraising the nature of goods and considering the selection of the most appropriate tariff classification, the appraisal is an objective one, based on the goods as presented to the customs authority at import (or export). The objective factors include the nature, form, material, character and function(s) of the goods under review.

In general terms therefore, the corollary is that the intention of a producer, manufacturer, importer or eventual user as to what use or purpose the goods might be put after importation are not relevant.

However, it is common for customs authorities to request all manner of documentation from importers when considering tariff classification, including manuals of use for the goods, or marketing, advertising and sales literature carrying descriptions of beneficial features available to end users/customers of the goods.

Such documents contain subjective elements not relevant to tariff classification unless the terms of tariff headings state that they are; for example, “used for”, “used in”, “for the purposes of...” or references to how and in what circumstances goods are designed to be used should play a role in determining tariff classification.

However, the subjective intentions of designers and producers in considering, indicating or prescribing eventual use are not relevant factors in tariff classification unless they are specifically mentioned within the terms of certain tariff headings.

Technical papers or specification sheets for goods are sometimes separate from marketing materials or user manuals and sometimes they are not. Unfortunately for many importers who are dealing with their customs authority on matters of tariff classification, the technical and specification elements are often included in the user manual or various types of sales literature and so these are submitted in their totality for consideration by the customs authority in cases of classification uncertainty, or as part of the information submitted with applications for BTI.

Even the name given to goods by a designer, manufacturer or seller should not be considered as an objective characteristic – sometimes names, descriptions or brand associations are created as part of the marketing, promotion and sale of the goods, and are crafted so as to create specific psychological reactions, feelings or experiences in potential users and buyers to move them along a sales pathway in the post importation phase particularly for food, beverage, retail and consumer goods; further the importer may have no control over the use(s) of goods which may therefore be unknown at the time of import. In determining tariff classification, the contribution of any expert witnesses, marketing consultants, technical advisers and other contributors, should be treated with care and limited to expounding the characteristics of the goods relevant to the tariff headings considered.

This tendency to amalgamate the objective characteristics of the goods presented at the time of import with characteristics associated with post importation purposes, use and activity,

results in an unrecognised confusion at the heart of tariff classification and is an incorrect approach. Only when specific tariff headings make the purpose or intention relevant considerations should these be used as criteria to determine the tariff classification of goods.

4.2 Binding Tariff Information

As the EU is a single customs union it has a uniform system of customs duties. The BTI arrangements provide the mechanism by which importers and exporters can apply for a determination of the tariff classification of goods in the EU. Although the BTI mechanism is provided for in UCC, BTIs themselves are issued by the customs administrations of the Member States because the EU has no central customs authority.

The objectives of BTI are twofold: providing legal certainty and facilitating the uniform interpretation and application of the tariff classification provisions. A BTI may therefore be invalidated as a result of a change in the HS or CN, by a CNEN or an EU classification regulation.²⁷

As to the first aspect, providing legal certainty ensures that an applicant has a defence for the classification declared on customs import and export entries, even if this proves to be incorrect at a later stage. However, legal certainty does not equate to correct classification; it is entirely possible for a business to hold a BTI, to declare goods in conformity with the BTI but for the goods to have been incorrectly classified by the customs authority issuing the BTI.

As to the second, the fact that responsibility for issuing BTI is distributed between the Member States means that there is a risk of divergent classifications in BTIs issued by different Member States for the same or very similar goods.

This divergence can give rise to so called BTI shopping, when different Member States issue different BTIs on the same goods. Businesses can therefore consider which Member State they think they will receive favourable treatment in terms of the tariff classification sought and so make their application to the customs authority in that Member State. The ECA has conducted research to establish the extent of BTI shopping practices and is aware of the potential negative effects of inconsistent BTIs.²⁸

The existence of the EBTI database should mean that the risk of divergent BTIs is reduced but this depends on whether it is routinely and rigorously consulted by customs authorities when considering tariff classification questions. The existence of the database at least provides the potential for a reduction in divergence. Further, a Member State which identifies an actual or potential divergence is also obliged to liaise with other Member States on the matter.²⁹

Additionally, the provisions of UCC Article 23(5) oblige holders of BTI to state such on their customs entry declarations. The customs authority is then aware that the declarant is the holder of BTI and use of the BTI cannot be avoided by omission from the customs declaration.

However, an area in the use of BTI which is not yet resolved concerns the expectations by businesses in corporate groups that a BTI issued to one member of the group in one Member

²⁷ Joint cases British Sky Broadcasting Group plc (C-288/09) and Pace plc (C-289/09) v The Commissioners for Her Majesty's Revenue and Customs (British Sky Broadcasting and Pace (C-288/09 and C-289/09, ECR 2011 p. I-2851) ECLI:EU:C:2011:248

²⁸ Shu-Chien Chen [2016] "In the name of legal certainty? Comparison of advance rulings systems for tariff classification in the European Union, China and Taiwan" [2016] World Customs Journal Vol10 Num2 51

²⁹ European Commission "Interim Administrative Guidelines On The European Binding Tariff Information (EBTI) Systems And its Operation (effective from 1 May 2016)" Sects 5 and 6

State can be adduced as evidence for identical classification of the same goods in another Member State. This difficulty arises due to the legal provision that BTI is issued to a single holder and that the holder is the only legal person who may rely on it and that a BTI binds only the Member States and holder when presented by the holder.

This situation appears anomalous but is consistent with other types of customs rulings issued by customs authorities which are addressed to the applicant and authorise, approve, confirm or permit a business to use a customs procedure or arrangement. The position with regard to holding of BTIs within a corporate group requires members of that group who wish to rely on a BTI to apply for a BTI in other Member States for the same goods. This carries the consequential risks to uniformity of interpretation and application of the tariff classification provisions.

4.3 Classification regulations

When conflicting BTIs are identified or when the Member States bring classification divergences to the Commission, the divergence may be resolved by the publication of a classification regulation. Such regulations identify the goods at issue, cite the GIR(s) used to classify the goods and the commodity code to which the goods must be classified. Since regulations are legally binding from the date of their publication, businesses and customs authorities are obliged to follow the classification thereby determined.

While providing for a uniform application of tariff classification provisions to the goods which are the subject of the regulation, such regulations can create some additional challenges. First, there is divergence among Member States as to whether classification regulations have retroactive effect. Can the customs authorities review the import record of business over the three years immediately preceding publication of the regulation and seek additional duty on the basis that the goods were mis-classified? Can an importing business seek repayment if the published tariff classification for an article results in a requirement to use a commodity code with lower customs duty rate compared to that levied against a different commodity code used in the preceding three years? As may be expected, each party seeks to maximise the perceived benefit of a retrospective application.

The CCC has provided some guidance on these points.³⁰ The CCC has stated that the impact of a classification regulation cannot be fundamentally different to a classification judgement. Regulations may be normative or interpretative and where the latter, they may have retroactive effect. The guidance provided under various scenarios may be summarised as follows:

	Classification regulation adopts a classification different to a previous classification regulation	Classification regulation with no previous regulation	Classification regulation where BTI has been used
New classification results in a lower customs debt	Customs duties may be repaid or remitted	Customs duties may be repaid or remitted	Customs duties may be repaid or remitted
New classification results in a higher customs debt	Customs duties may be recovered	Customs duties may be recovered - except where no	Customs duties are not recoverable in view of the legal

³⁰ European Commission "Impact of tariff classification regulations on the provisions of the Code governing repayment/remission and post-clearance recovery of duties" [2007]

		post-clearance recovery is justified under UCC	certainty afforded to holders of BTI
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Welcome though this guidance is, the possibility of divergent opinions and actions regarding repayment or recovery of duties resulting from classification regulations remains, since the document merely “invites” Member States to apply the principles set out.

A second consequence of classification regulations is divergence in terms of the wider application to goods themselves. Clearly the regulation is relevant to the goods which are its subject. But how far is it also legitimate to extrapolate from the regulation to similar goods and contend that they too should be classified to the same commodity code? This question can legitimately arise since classification regulations are like BTIs and explanatory notes in the general sense that they can be a source of interpretation of tariff classification provisions. It does not appear unreasonable to utilize them to inform classification practice. The issue that inevitably arises is to determine the degree of similarity between the goods in the regulation and other goods; whether other goods are generally or specifically alike those covered by the regulation; whether they have the same essential character and function. Dissimilarities may be overlooked or disregarded but may be more relevant in determining tariff classification.

Such approaches create the risk of disparities between businesses in terms of the treatment they receive for tax purposes and between Member States in terms of their administration of tax law.

An example from the author’s experience highlighting one of these issues concerns the classification of LED tiles. A number of LED tiles may be joined to form an LED panel or wall of any size, used as information displays in public areas or at music or entertainment events. Commission Implementing Regulation (EU)103/2012 of 7 February 2012 concerning the classification of certain goods in the Combined Nomenclature, classified an unassembled LED panel to tariff heading 8528, having the characteristics of an assembled LED panel, following GIR 2(a). A panel/wall is comprised of any number of individual tiles needed to create the size of panel/wall required. Individual LED tiles are classified to tariff heading 8529 as parts of goods of heading 8528. Some importers of LED tiles ignore the regulation when shipping an unassembled panel/wall and classify to 8529 declaring the goods as a consignment of individual tiles. Their objective is to avoid customs duty at 14% under 8528 on LED panels/walls and to pay duty at 3.2% under 8529 on shipments declared as individual LED tiles.

This situation arises because the technical nature of LED tiles makes it almost impossible to distinguish between unassembled panels and a number of individual tiles. The duty rate differential creates a motivation for the selected classification to 8529. The regulation provides clarity on the classification of the unassembled product which results in some importers denying their product is unassembled and selecting 8529 for their import declaration. Additionally, lack of verification of goods presented at import by some customs authorities provides an opportunity for dis-application of the regulation.

A business aiming to achieve a high standard of customs compliance either suffers commercial disadvantage or experiences unfairness in terms of a level playing field on which they can legitimately meet their customs obligations.

5 Specific issues of interpretation and application

5.1 Outdated nomenclature

The fact that the HS is a closed system inevitably means that new goods must be classified in the EU within the existing structure of the HS “as is”, the CN based upon it and according to the terms of chapter, section and subheadings notes and EU additional notes. Interpretation using the HSEN and CNEN is likely to be limited in the case of new or novel goods.

The challenge in classifying new goods is a technical issue in terms of the proper application of classification provisions. It is also a commercial and financial issue for businesses because the classification of new products carries a financial impact in terms of landed cost and whether the goods are subject to any tariff measures.

New goods are common in the technology, fashion/apparel and chemical sectors. Prior to the introduction of a tariff subheading for smart phones, importers and customs administrations were faced with classifying a device used for making calls, capable of computing operations, manipulating data, providing data storage, enabling internet access, email facilities, providing a communication link between the internet and a personal computer and incorporating a camera. Since other devices which had only one of these functions were classified to different tariff headings according to their individual function (and carried different customs duty rates), importers and customs administrations were faced with how to apply the tariff classification provisions to a multifunctional device. Which of these functions provides the essential character of the device?

Similar challenges arise in connection with fashion garments/items of apparel. The styling of garments along traditional lines for men or women becomes blurred when tailoring styles are combined, or when clothing designed for men is marketed towards women. What aspects of tailoring or design should predominate in considering tariff classification and is intended use post-importation a relevant factor in determining tariff classification?

Resolving divergent opinions can be protracted and reasons for delay are easily understood. Until divergence surfaces, there is no issue which can be formally addressed and since the rate of change in convergence or novelty is rapid, the presenting classification issue can change quickly so that product life cycle and product development is always moving forward at a pace such that both the WCO or EU are having to operate reactively. Whether at HS or CN level, a large number of countries have to be consulted with a view to arriving at a common position.

Economic, commercial, political and trade policy factors may also come into play, making the resolution of divergence not only a technical customs matter.

Such factors were arguably present in the protracted tariff classification dispute in the 1990's between the USA and EU over the classification of certain networking equipment used in local area networks (LAN) and wide area networks (WAN). The USA classified such equipment to 8471 as units of automatic data processing machines. The UK and Ireland of the EU Member States classified such equipment to 8517 as telephony equipment. With a duty differential of 10%, classification to 8517 represented a significant financial cost to EU importers. Under the Information Technology Agreement, the respective duty rates of 4% of 14% was subject to a phased reduction over several years and the differential eliminated until eventually all such equipment was admitted duty free into the EU. However, during the phasing out period, the EU position resulted in higher duties being charged for a longer period than was the case for other goods under 8471.

The WTO adjudged that the EU had not breached its obligations in the EC Schedule of duty reductions because these were correctly applied against the two tariff headings and because the classification of LAN and WAN to 8517 concerned the application of the tariff classification provisions. Despite this finding, the motivation in classifying LAN and WAN equipment to 8517 was widely viewed as not based on a purely technical assessment of the tariff classification provision, but as a revenue raising trade policy measure.

5.2 Tariff engineering

Tariff engineering is the widely accepted practice of configuring or reconfiguring goods such that at presented at import results in their tariff classification in a different tariff heading compared with goods not so engineered. In contrast to tariff evasion, tariff engineering is a legal, allowable approach to configure design, construction, material and principal use of goods. Changes made at design stage and as part of the manufacturing process can result a different tariff classification of goods at subsequent import with a significant decrease in the applicable customs duty.

It is a well-established principle that goods are to be classified in their condition as presented at the time of importation. If artificiality is not involved, and the goods as presented for customs examination are a commercial reality, then the approach is regarded as legitimate. The benefit of lower customs duty burden is a lower, more competitive sales price or achieving a higher profit margin - or both.

The chief classification and commercial issues for businesses engaged in tariff engineering is to consider what can be changed or altered and still have a result in goods which is still a commercial reality and which in technical design terms are viable, meeting supply chain or end customer requirements, while altering the tariff classification to achieve a lower rate of customs duty when importing.

Tariff engineering may on some occasions be linked to tariff shopping; the practice of seeking out a customs authority who will accept a tariff classification or issue a BTI favourable to an importer, but which view might not be accepted by other Member States. Tariff or BTI shopping may therefore mean that an importer engages in a more aggressive degree of engineering (and ingenuity) in the knowledge that a lack of uniformity as between Member States regarding tariff classification can result in a commercial advantage.

5.3 Sets of goods

The provisions of GIR 3 hold, in part (b), that goods put up in sets for retails sale are to be classified as if they consisted of the material or component which gives the set its essential character.

The classification of sets highlights again the issue of essential character. As discussed, this term is capable of divergent interpretation and is in the connect of sets is highly dependent upon the combination of constituent items making up the set of goods.

The ease with which essential character can be determined is no more straightforward when the goods comprising a set are all a similar kind than when they are disparate.

Sometimes it can be clear how to proceed because the structure of the tariff itself provides the tariff heading where sets of specific articles are to be classified. For example, in the case of

various types of tools, tariff heading 8205 (hand tools) provides for sets of articles of two or more subheadings of heading 8205; tariff heading 8206 provides for tools of two or more of the tariff headings 8202 to 8205 - covering various types of tools - put up in sets for retail sale.

However, if the component or material from which the retail set derives its essential character cannot be determined, then GRI 3(c) must be applied. GRI 3(c) requires that the goods are to be classified in the heading which occurs last in numerical order among those which equally merit consideration in determining their classification.

To address divergent approaches and provide clarity and support a uniform approach, concerning the classification of sets put up for retail sale, the Commission published guidelines in 2013.³¹

The guidelines define goods put up in sets for retail sale as consisting of i) least two different articles which at face value appear classifiable under different headings; ii) goods put up together to meet a need or carry out a specific activity; and iii) presentation in manner not requiring repacking before sale directly to users of the goods. If the three criteria are met, the goods are to be treated as a set. If the criteria are not met, the set is regarded as a failed set.

For a set of goods to meet a particular need or carry out a specific activity requires that the individual items are related to one another and are intended to be used together in or conjunction with each other to meet a need or carry out a specific activity. These terms carry a certain flexibility of interpretation; “particular need” covers circumstances where goods are required to be used in particular sequence or used randomly; specific activity means that a set of articles are usually used on a specific occasion or specific point.

Sets which include a minor or negligible value item (or items) can still constitute sets for the purposes of classification under GIR 3(b), even if that item would otherwise cause the set to fail as a set under the three criteria defined above. To qualify as a minor or negligible the following criteria must be met when applied to the article: i) it is incidental; ii) it does not alter the character of the set iii) the value of that item is negligible compare with the total value of the set; and iv) it has insignificant use on its own or has limited use such as not suitable for repeated use or as has limited durability.

If a presentation of several different goods qualifies as a set, the set is classified using GIR 3(b) or if not possible to determine the essential character of the set then according to GIR 3(c). If the set of goods fails to qualify for treatment as a set of goods for tariff classification purposes under the guidelines, then the presentation of the goods as a set is disregarded for tariff classification purposes. Consequently, all the goods in that failed set must be separately classified to their respective tariff headings following the GIRs and interpretive aids to classification.

Finally, to qualify as a set for tariff classification purposes, the requirement to put the goods up in a manner suitable for sale directly to users without repacking i) all the items of the set are presented together at the same time in the same customs entry declaration; all the items are packed together – allowing for variation in packaging according to the nature of the goods; and iii) repacking is not required post importation before sale to users.

This requirement to present all items to the customs authorities at the same time in the same importation may conflict with the customs procedures for split consignments. Articles imported in two or more consignments are regarded as separate importations. Each consignment will

³¹ European Commission: “Guidelines on the classification in the Combined Nomenclature of goods put up in sets for retail sale” 2013/C 105/01

contain only parts of complete articles and these parts may lack the essential character of the complete article and so may be required to be classified under the individual tariff headings proper to the composition of each consignment. This can result in complexity in tariff classification and higher duty overall than that due on the whole item. The split consignment facility permits consignments which together make up complete articles to be classified under the tariff heading which applies to the whole article when items are shipped disassembled or unassembled.

Although the Commission guidelines on classification of sets relate to goods for retail sale and most users of split consignments tend to be moving goods for industrial, plant, or construction use, the extent of the latter includes all goods of chapters 84 and 85 - which brings many goods sold in a retail context into scope. The classification of unassembled items presented in sets in different consignments could be very challenging. It is therefore at least possible that the guidelines on sets and split consignment arrangements could come into conflict at some points.

6 Business issues

6.1 Customs compliance

A business is obligated to be compliant with customs laws if any of its business structures, ways of operating or business activities are covered by customs legislation.

Customs compliance may be viewed in two ways: firstly, the activities undertaken to ensure customs compliance; second, the position of being in the state of fulfilling all customs provisions. Compliance activities, in being constantly undertaken by a business, result in a business being in a continuous state of compliance.

It requires having in place policies, processes and procedures which support being in compliance with customs laws. It means that a business must have knowledge as to which customs laws apply to its business and how they apply.

It includes the obligation to pay the right amount of duties, taxes and charges levied at importation at the right time. Successfully achieving this depends upon, amongst other aspects, ensuring that the tariff classification of the goods is correct. Failure to manage tariff classification within a business will inevitably result in the misclassification of goods and consequential mis-declarations in customs declarations. In this sense, tariff classification is an area of risk to a business. Therefore, compliance with customs obligations – including correct tariff classification - is part of managing risk to the business. And the potential risks are many: tax, legal, financial, commercial and reputational.

6.2 Business impact

The major implication of divergent tariff classification opinion for business are the consequential relative lack of certainty and the risk of subsequent demands for back duty.

As the EU is a customs union, businesses have a legitimate expectation that the Member States will apply the CN uniformly and therefore classify the same goods to the same commodity code and apply the same customs duty rate no matter which Member State the import takes place in. However, the fact that Member States have divergent opinions means that different rates of customs duty and different tariff and non-tariff measures may be applied to the same goods.

This arises directly because although the Member States comprise a single customs union, the application and interpretation of customs laws is distributed among them. Consequently, different views as to the tariff classification of goods lead to different tariff classifications, a problem exacerbated when those positions become firm through Binding Tariff Information. The impact for business is a divergence of treatment of economic operator businesses and distortion of competition both within the single market and internationally.

In common with other taxation matters, tariff classification is a matter of fact and law. As discussed, the decisive criteria for classification of goods are the objective characteristics and properties of the goods to be assessed at the time of import based on presentation of the goods to the customs authorities. The objective characteristics are often supplanted by additional criteria such as intended use referenced in sales/marketing literature where use of such criteria is not supported by the terms of the tariff heading(s) concerned. Divergent views on the criteria that are relevant for tariff classification can arise and the goal of uniformity is strained because the customs administrations of the Member States act independently.

Classification requires knowledge of classification rules – both GIRs and specific rules of the EU CN, and a sufficient understanding of the goods. Coupled with these requirements, the scope of certain headings or of individual commodity codes can be unclear in sectors undergoing rapid change.

This is compounded by the fact that different stakeholders in the tariff classification process all have different priorities; importers favour a lower customs duty rate or the absence of non-tariff measures; the customs authority may favour a higher duty rate and imposition of additional revenue raising measures; particular industry sectors may lobby for certain treatments to be imposed on or afforded to goods so that a purely technical appraisal of goods under tariff classification provisions become opaque and polluted.

Businesses are behoved to apply for Binding Tariff Information in cases of uncertainty. But the BTI arrangements do not guarantee correct tariff classification; rather they provide a degree of legal certainty. Even under the BTI arrangements, divergent practices exist with result that divergent BTIs are issued for the same goods in different Member States. This is evidence to the fact that the Member States do not always or consistently consult the BTI database intelligence available to them.

Even allowing for administrative error by a Member State or incomplete details on an applicant's request for BTI, the number of divergent BTIs could be reduced further if Member States approached the operation of the BTI arrangements more rigorously. In this regard there is nothing to prevent any economic operator or prospective BTI applicant scrutinising the publicly available EBTI database for goods identical or similar to their own. The limitation on this approach is that specific BTIs are only available in the language of the Member State which issues it.

Member States can refer tariff classification divergences to the CCC. However, oftentimes the CCC is consulted when divergent BTIs already exist or the tariff classification divergence is already long standing. Neither are conducive to creating certainty in a timely way for business. Indeed, the CCC arrangements do not in themselves prevent divergence, but their more judicious use could prevent divergences persisting for long periods of time. Cases brought often result in either a tariff classification regulation, an explanatory note to the CN or a statement of guidance – all designed to ensure uniform application of tariff provisions and consistent classification of goods by the Member States. However, recourse to the CCC may

resolve existing divergences but they cannot prevent continuing or new divergences from emerging. To that extent the actions of the CCC can only be reactive in nature.

Extensive discussion in the CCC prolongs the existence of divergent classification and often Member States are often reluctant to revoke divergent BTI until a solution is agreed – thereby extending the period for which goods may ultimately be wrongly classified.

It has been conservatively estimated that divergences persist for at least a year even after identified.³² This situation affects past, current and future imports of goods and has commercial, financial, reputational and compliance implications for businesses. It also affects business planning in terms of sourcing, manufacturing and sales/distribution strategies. It may also affect origin status of goods and origin determinations based on change of tariff heading or percentage thresholds of goods of certain tariff headings with commercial repercussions elsewhere in supply chains.

The ECA has recommended speedier resolution at the CCC and making it compulsory for holders of BTI to state this on import entries in line with the UCC requirement.³³ These approaches may result in the earlier detection of divergences but do nothing to prevent divergence in the first instance. As mentioned above, a key measure to preclude divergence would be more rigorous use of the EBTI by Member States but this approach has its limitations. Specifically,

- administrative error can cause a failure to identify divergence;
- keyword searches are limited due to the number of languages involved; and
- a search by commodity code will not identify divergence if a proposed commodity code in a BTI application under consideration has not already been used by a Member State when issuing an extant BTI.

In fact, the ECA has gone further, citing that some Member States do not verify that the holder of BTI actually uses it for the specific goods mentioned in the BTI.³⁴ This means that the holder of BTI who does not agree with the BTI can gain an advantage by misclassifying goods due to the lack of uniformity in verification practice.

Improvements in the operation of the BTI arrangements could be achieved if the Member States followed the rules more closely, developed a consistent approach to misclassification,³⁵ or if the BTI system was centralised within the EU - or all of these approaches.

32 Enrique Valerdi Rodriguez & Elena Dulguerova [2013] "Blues at the Border: The Quest for Uniform Tariff Classification in the European Union" *Global Trade and Customs Journal* Vol8 Iss11&12 368 373

33 *ibid* 375 Para 3

34 ECA Special Report "Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU" p35 para84

35 *ibid* p46 para106

6.3 Business mitigation

Tariff classification should form part of an integrated customs management plan created in a business. That plan should identify customs compliance risks, evaluate the likelihood of the risks occurring and how those risks are to be mitigated.

The approach should be based on use of the full current and extant tariff, rather than that of a previous year or use of certain online versions which are slimmed down versions of the full tariff and which do not include all accompanying notes.

The full range of interpretative aids and guidance should be available and used.

Appropriate training in tariff classification should be provided for those with responsibility for classifying goods as well as ensuring that knowledge is kept up to date.

Use of professional advisers in cases of uncertainty where the technical issue is complex, the customs risk implications are significant or both. The use of freight forwarders is a common source of advice in this area, but it is often not appropriate since freight forwarders do not have the legal or tax expertise to perform tariff classification.

As part of its tariff classification strategy, a business should maintain a master list of commodity codes used by the business and ensure it is updated whenever changes occur. In practice this can be problematic because businesses do not know about, or use, reliable sources of information on classification. Additionally, maintaining a global database can be challenging from an IT perspective. Many databases are designed to record details of products goods or commodities but only permit one commodity code for each specific product. Since tariff classification is harmonised to six-digit level and thereafter the additional digit will vary, this needs to be accommodated in databases. This is even without issues of divergence which the structure of many databases cannot accommodate either. A master file or database needs to be capable of recording the tariff classification for each customs jurisdiction where the business operates. Otherwise the database does not reflect the realities of doing business across international borders and can lead to disputes and misunderstanding even between colleagues operating the same global business.

There should be maintained a list of risk areas – areas of tariff which are sensitive, undergoing change or review or where the classification of goods in different countries – even within the EU - is a matter of divergent interpretation. Uncertainty may be countered using the BTI arrangements.

Within a business there should be engagement by the customs function with internal stakeholders in other functions whose actions and decisions may affect, or be affected by, tariff classifications. Similarly, there should be a mechanism for liaison and exchange with supply chain partners whose actions and decisions may impact on tariff classifications.

Not all risks relating to tariff classification can be avoided although they can be managed provided there is a transparent and informed flow of information about what the tariff classification uncertainties are and their potential impact.

7 Conclusions

Tariff classification is an area of customs law which carries inherent difficulties of interpretation and application. It is challenging for business that the completion of the single market requires uniformity and yet tariff classification cannot itself be regulated to the degree necessary.³⁶

The aids to interpretation and the formal rulings in BTI and classification regulations themselves cannot be predictive of all situations requiring clarification which may arise particularly given pace of change in certain fields or sectors.

Further centralisation coupled with more rigour in the operation of tariff classification procedures in the EU would go some way to addressing issues of uniformity of interpretation though these would still exist at an international level between different trading nations.

Economic operators could probably do more to help themselves regarding ensuring compliance in the field of tariff classification; seeking to be better informed and taking advice from third parties competently qualified to provide it. In the author's experience, businesses seek professional advice from taxation advisers or lawyers so late in the context of a given classification dispute or uncertainty, that their options for resolution are greatly reduced as particular courses of action are already exhausted or are out of time.

In view of the above aspects, the main conclusions of this thesis are described below.

7.1 Conclusion 1

There are technical challenges when performing tariff classification which are inherent in any activity resting heavily on interpretation by different parties involved. This means that such streamlining of the administration of processes and procedures which could be achieved at WCO (HS) or EU (CN) level, although desirable, cannot exclude or address all possible scenarios which could arise in the future and thereby ensure complete uniformity of interpretation and application.

7.2 Conclusion 2

The European Commission and individual EU customs authorities could do more - and act more quickly - to resolve divergences between Member States in terms of the use of CNENs, BTI arrangements, classification regulations and guidance notes. Similar action is required at international level as well when divergences arise with trading partners globally. At the same time, it is recognised that political and trade policy imperatives are often interwoven into divergences, despite attempts to maintain a purely technical approach to performing tariff classification. In addition to business uncertainty, the opportunity for tax fraud is increased due to the lack of uniform approaches.

7.3 Conclusion 3

Economic operators could, and as part of their approach to customs compliance should, better inform themselves about the aids to interpretation at their disposal when performing tariff classification, as well as the formal processes involved to litigate or negotiate resolution of divergences, including taking professional advice and engaging with the customs administrations - where appropriate and proportionate to the issue at stake.

³⁶ cf Schuere (n16) 874

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