

# EU Customs Developments in 2019

International Trade





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# This digest covers a selection of key EU customs developments in 2019.

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# EU Customs Policy

## Amendments to the UCC and related legislation

Key developments relating to proposed and adopted amendments to the Union Customs Code (UCC) in 2019 include the following:

- On 17 April 2019, **Regulation 2019/632** of the Council and the European Parliament (EP) was adopted, amending the UCC in light of the fact that **certain new IT systems will not be ready by the end 2020 deadline**. As a result, Article 278 UCC (“Transitional measures”) was amended to **extend the deadline to end 2022** for the following system upgrades: notification of arrival, declarations for temporary storage, and the Import Control System (ICS) for Entry Summary Declarations. The **deadline was extended to end 2025** for the upgrade of the Computerised Transit System (NCTS) and Automated Export System (AES) to include the export component of the national Special Procedures System, and for the electronic system for Centralised Clearance for Import (CCI), Proof of Union (PoU) and Guarantee Management (GUM). **Commission Implementing Decision 2019/2151** of 13 December 2019 establishing the new UCC Work Programme reflects this development. In a **report on the state of implementation of the IT systems**, the Commission states that most IT systems for completion in the period 2020-2025 are on track, assuming no new political initiatives imposing obligations on customs systems are taken.
- On 19 March 2019, **Regulation 2019/474** was adopted, introducing a number of **technical amendments** to the UCC with respect to the inclusion of certain Italian enclaves in Switzerland and Lake Lugano in the EU customs territory, the temporary continued use of revoked Binding Tariff Information (BTI), the customs debt related to goods removed unlawfully from temporary storage, the invalidation of entry and exit summary declarations, and limits to relief from customs duties under the outward processing procedure.
- On 14 March 2019, the Commission adopted **Delegated Regulation 2019/1143** to amend the UCC Delegated Act (DA) with respect to **simplified declarations for low value consignments**. This amendment takes into account the fact that the EU VAT rules from **2021** will abolish the VAT exemption for shipments below EUR 22. The amendment introduces a reduced data set for customs declarations for most shipments with a value below EUR 150.
- On 4 April 2019, a corrigendum was published to **Commission Delegated Regulations 2016/341** (the Transitional UCC Regulation) and **2015/2446** (the UCC DA), correcting the Article numbers for the provisions relating to Proof of Union Status.
- On 10 September 2019, the Commission adopted **Implementing Regulation 2019/1394** to **amend and correct Commission Implementing Regulation 2015/2447** (the UCC Implementing Act (IA)). The amendments cover: information on VAT exempt importations, the deadline for transitional use of paper declarations, the upgrade of the Import Control System, entry into the declarant’s records, special inward processing cases, and the determination of the customs office of exit in certain circumstances.

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# EU Customs Policy (continued)

- Throughout 2019, the Commission, Member States and business community **discussed a definition of “intrinsic value”** which is relevant in the context of EU duty relief rules, for inclusion in the UCC DA. The Commission initially proposed that this be based on the customs value of an item. In light of significant opposition from various Member States and businesses to the inclusion of VAT and transport costs (which in their view do not reflect a product’s intrinsic value), the discussions moved towards intrinsic value being based on price minus transport and insurance costs and minus other taxes and charges (if indicated separately). The definition will be included in a UCC Delegated Regulation expected to be published in **Spring 2020**.

## EU Customs Foresight Project

In February 2019, the European Commission’s Joint Research Centre launched a project to reflect on the Future of Customs in the EU 2040, also referred to as the Foresight Project. A vision statement is likely to be adopted in **early 2020** and a Communication is expected for **late 2020** with a long-term Customs Action Plan.

# EU Tariffs

## Duty Suspensions and Tariff Quotas

On 27 December 2019, two Regulations containing the lists of autonomous duty suspensions (DS) and tariff quotas (TQs) available in 2020 were published in the Official Journal. **Council Regulation 2019/2197** contains the updated list of DS (now with serial number in addition to TARIC number, and with a series of partial suspensions specifically intended to promote integrated batteries production in the EU), while **Council Regulation 2019/2220** contains the current TQs.

On **1 July 2020**, the two lists will be updated again, following the conclusion of the ongoing discussions of the European Commission and Member State experts.

## Additional customs duties on certain US products

On 30 April 2019, the European Commission published **Delegated Regulation 2019/673** updating the EU “retaliation” list of US-origin products subject to additional duties. These duties have been in place since 2005 following the condemnation by a World Trade Organisation (WTO) panel of the US Continued Dumping and Subsidy Offset Act (CDSOA). Under this most recent annual update, the list of products subject to an additional duty has not changed, but the additional duty as of 1 May 2019 will be 0,001%, down from the previous level of 0.3%. The products covered are **sweetcorn** (0710 40 00), **spectacle/goggle frames and mountings of base metals** (ex9003 19 00), **crane lorries** (8705 10 00), and **denim trousers for women/girls** (6204 60 31).

## GSP developments

### a) Graduation—list for 2020-2022 adopted

On 12 February 2019, the Commission adopted **Implementing Regulation 2019/249** updating the list of country/product combinations which no longer benefit from generalized tariff preferences under **EU Regulation 978/2012** (the “EU GSP Regulation”). This is because the average value of EU imports of such products exceeded certain thresholds in three consecutive years. This list is reviewed every three years. Compared to the graduation list published in **Commission Implementing Regulation 2019/249** (which applied until the end of 2019), the new list (applicable from **1 January 2020 through end 2022**) reveals the following changes: the list of graduated product sectors for **India** now also includes railway or tramway locomotives and rolling-stock (S-17a), but mineral products (S-5) are no longer graduated. For **Indonesia**, two sectors have been added to the list: mineral products (S-5) and wood, articles of wood and charcoal (S-9a). The list of graduated sectors for **Kenya** will remain unchanged, and **Ukraine** has been taken off the list as it now has a bilateral free trade agreement in place with the EU.

### b) Update of list of beneficiary countries—removing Nauru, Samoa and Tonga from 2021

On 25 November 2019, the Commission published a draft Delegated Regulation removing **Nauru, Samoa and Tonga** from the list of GSP beneficiary countries as of **1 January 2021** to take account of their classification by the World Bank as upper middle-income countries in the years 2017 through 2019. This Regulation is not expected to be opposed by the Council and EP and should therefore be adopted and published formally in **early 2020**.

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# EU Tariffs (continued)

## c) Safeguard measures imposed on Indica rice from Cambodia and Myanmar

With **Commission Implementing Regulation 2019/67** of 16 January 2019, safeguard measures were imposed with regard to Indica rice originating in Cambodia and Myanmar/Burma. The investigation into whether the duty-free treatment of such rice under the GSP should be suspended was launched in March 2018 at Italy's request. The measures consist of a temporary re-introduction during three years of the normal EU customs duties on rice falling under four CN codes: in the first year, the full normal duty of EUR 175 per tonne will apply; it will be lowered to EUR 150 in the second year and EUR 125 in the third year. An appeal by Cambodian rice growers and the Cambodian government is pending before the EU's Court of Justice.

## d) Investigation into possible suspension of preferences for Cambodia

On 11 February 2019, the European Commission adopted **Implementing Decision 2019/212** initiating the procedure for temporary withdrawal of GSP tariff preferences provided to Cambodia. Based on reports from the United Nations (UN) and the International Labour Organisation (ILO), and its own fact-finding mission in July 2018, the Commission considers the country to be seriously and systematically violating the principles laid down in various international labour and human rights conventions. Under the rules laid

down in the GSP Regulation, by **12 February 2020**, the Commission must conclude the procedure, either by terminating the procedure or by temporarily withdrawing the GSP preferences. On 12 November 2019, the Commission sent a preliminary report with its findings to the Cambodian government pointing out the country's alleged shortcomings.

## e) Monitoring mission in Myanmar

On 22 February 2019, the European Commission issued a press release reporting on its monitoring mission in Myanmar to evaluate progress on human rights and labour rights. This mission followed a previous visit in October 2018 following "deeply worrying developments" highlighted in various UN reports. The Commission and the European External Action Service will analyse the mission's findings and continue to engage with Myanmar with the aim to achieve "sustained and concrete progress in all areas in the near future."

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# EU FTA Update

## **New EU Commissioner—new climate action and enforcement plans**

On 1 December 2019, the new European Commission took office. Phil Hogan has replaced Cecilia Malmström as EU Trade Commissioner. The new Commission has announced in its European Green Deal that it will consider the introduction of a carbon border adjustment mechanism, as part of its efforts to reduce the risk of carbon leakage. Such a mechanism would aim to ensure that EU producers are not disadvantaged compared to non-EU producers which have to comply with less strict emission controls in their home country. Under the Green Deal, the Commission intends to step up efforts to implement and enforce sustainable commitment provisions in the EU's Free Trade Agreements (FTAs). To this end, on 12 December 2019, the post of Chief Trade Enforcement Officer was created.

## **EU FTAs with both Japan and Singapore entered into force in 2019**

On 1 February 2019, the **EU-Japan Economic Partnership Agreement (EPA)** entered into force, six years after the negotiations were launched. In view of some unusual preferential origin provisions (e.g. on proof of origin), the European Commission also issued guidance documents in early 2019.

On 21 November 2019, the **EU-Singapore Free Trade Agreement (EUSFTA)** finally entered into force, after many years of delay over the controversy in the EU in relation to investment dispute settlement. The EUSFTA's preferential origin rules allow for cumulation of origin within the ASEAN region if certain conditions are satisfied.

## **EU FTA with Vietnam signed in 2019, but not yet in force**

On 30 June 2019, the EU and Vietnam formally signed their bilateral FTA and Investment Protection Agreement (IPA). The negotiations on the trade agreement were finalised in late 2015, but it was delayed by the internal EU discussion on competence of the EU in investment matters as well as concerns over human rights in Vietnam. The domestic ratification procedures are ongoing. On the EU side, the EP will need to give its consent to both agreements, and the IPA will also have to be ratified by all EU Member States.

## **EU-Mercosur FTA—political agreement reached**

On 28 June 2019, the EU and Mercosur announced that they had reached political agreement on an EU-Mercosur FTA after about 40 rounds of negotiations, launched two decades ago. The FTA will next undergo a legal revision, after which the text will be translated into all official EU languages and submitted to the Council and the EP for their approval.

## **EU-United States FTA—EU negotiating mandate adopted**

On 15 April 2019, the EU Council approved negotiating directives authorising the Commission to launch negotiations with the US on a limited FTA, covering the elimination of tariffs in industrial goods and fisheries and conformity assessment of testing, inspection and certification of new products, but excluding agriculture (which the US wants to include) and public procurement. The EU may suspend the negotiations if the US were to impose new tariffs on EU products (e.g., on EU cars), and any agreement negotiated will not enter into force as long as the US maintains its current tariffs on EU exports of steel and aluminium. Bilateral FTA negotiations have not yet started.

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# EU FTA Update (continued)

## EU-South Korea FTA – discussion on labour rights

On 21 January 2019, the European Commission announced that the EU had begun **government consultations with South Korea** on South Korea's implementation of commitments under the EU-Korea FTA (in force since 2011) related to trade and sustainable development. The aim is to arrive at an amicable and mutually satisfactory solution to the **EU's concerns on labour rights**, in particular with regard to freedom of association and the right to collective bargaining. A panel was established on 30 December 2019 and its report is expected for **late March 2020**. An **ex-post evaluation report** commissioned by the EU published in March 2019 shows that the FTA has generally been "effective in making trade and investment easier, simpler and less costly."

## Pending and stalled EU FTA negotiations

At the end of 2019, negotiations on FTAs were ongoing with **New Zealand, Australia, and Indonesia**, as well as negotiations with **Mexico** and **Chile** to update existing FTAs. Negotiations to deepen trade relations with **Eastern and Southern African countries** were launched in October 2019.

Meanwhile, FTA negotiations with **Thailand, Malaysia, Philippines** and **India** remained on hold in 2019, although the EU Council adopted a statement calling for the resumption of the talks with Thailand soon.

## Horizontal bilateral safeguard regulation

On 13 February 2019, **Regulation 2019/287** was adopted to implement bilateral safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain EU trade agreements (see [here](#) for our **client alert** on this Regulation.)

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# Brexit

## Brexit on 31 January 2020

Originally, Brexit Day (i.e., the day the UK will leave the EU) was foreseen for 30 March 2019, but this was postponed until 12 April 2019, then again until 30 October 2019 to allow for UK elections. In view of the absolute majority achieved by Prime Minister Boris Johnson's Conservative Party in the UK general elections on 12 December 2019 and the UK Parliament's agreement on UK legislation endorsing the Withdrawal Agreement a week later, **Brexit will now happen on 31 January 2020. This will be based on the Withdrawal Agreement** (as amended with respect to Northern Ireland prior to the UK elections).

A **transitional period will apply until the end of 2020, unless it is extended** by mid-2020 for a further period. During this transitional period, essentially nothing changes in EU-UK trade in goods (e.g. no tariffs apply), but the UK will officially become a "third country" in relation to the EU, and this will have implications for EU FTAs if partner countries choose to consider UK input materials to be "non-originating".

Depending on progress in EU-UK negotiations on a future trade agreement in 2020, **a no deal scenario could still occur on 1 January 2021** as PM Johnson has indicated that he does not intend to seek an extension of the transitional period.

## Post-Brexit trade relations

Following the latest delay of Brexit Day, the EU started preparations on a **draft negotiating mandate for the future EU-UK trade agreement** which it hopes to propose formally to EU Member States on **1 February 2020**. Under the terms of the Withdrawal Agreement, the EU and UK would have until the end of the transition period to put an FTA in place. Unless the transitional period is extended, this leaves less than a year to reach agreement. Most trade experts consider this to be an extraordinarily short period to put an FTA into place.

In October 2019, UK International Trade Secretary Liz Truss noted the UK had by then **signed 19 "continuity trade deals"** to roll over existing EU agreements with certain third countries, including Israel, Chile, Switzerland, South Korea and Morocco. In November, Boris Johnson said **discussions on future UK FTAs are ongoing** with India, China, Australia and New Zealand.

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# Classification

## 2020 Combined Nomenclature

On 31 October 2019, the European Commission published its annual update of the EU Combined Nomenclature (CN) in Commission Implementing Regulation 2019/1776.

## 2019 Classification Regulations

In 2019, the following Classification Regulations have been published covering a wide variety of goods:

- **Commission Implementing Regulation 2019/612** classifies two kinds of decorated textile fabrics to be attached to a high bed for children under CN code 6304 92 00 as other furnishing articles, excluding those of heading 9404, not knitted or crocheted, of cotton (rather than under CN heading 9503 as a toy).
- **Commission Implementing Regulation 2019/613** classifies a threaded stainless steel article in the form of a nut with a flange on one end designed for use in the pipeline assembly of automotive braking systems under CN code 7318 16 39 as other nuts of stainless steel.
- **Commission Implementing Regulation 2019/643** classifies articles of steel and plastic destined to be used to organise cables in cabinets under CN code 8302 42 00 as other base-metal mountings, fittings and similar articles suitable for furniture.
- **Commission Implementing Regulation 2019/644** classifies “liquid handlers” used in laboratories under CN code 8479 89 97 as other machines and mechanical appliances having individual functions, not specified or included elsewhere.
- **Commission Implementing Regulation 2019/645** classifies a textile article composed of three pockets stitched together to store small items for children’s rooms under CN code 6307 90 98 as other made-up articles.
- **Commission Implementing Regulation 2019/646** classifies a “track-chain” for use in earth-moving machinery under CN code 8431 49 20 as other parts suitable for use solely or principally with the machinery of headings 8425 to 8430; of case iron or steel.
- **Commission Implementing Regulation 2019/647** classifies a “soundbar” used with another sound-reproducing apparatus or TV or to reproduce audio files stored on USB or an internet radio under CN code 8519 81 45 as other sound-reproducing apparatus using semiconductor media.
- **Commission Implementing Regulation 2019/705** classifies a spinning top with launcher and ripcord under CN code 9503 00 95 as other toys of plastic.
- **Commission Implementing Regulation 2019/822** classifies a “screw pile” used in timber construction under CN code 7308 90 59 as parts of structures of steel.
- **Commission Implementing Regulation 2019/823** classifies a strand of human hair under CN code 6704 20 00 as switches and the like, of human hair.
- **Commission Implementing Regulation 2019/830** classifies a moulded plastic mobile phone cover under CN code 3926 90 97 as other articles of plastic.
- **Commission Implementing Regulation 2019/921** classifies a food supplement tablet for the liver and for detoxing under CN code 2106 90 92 as a food preparation not elsewhere specified or included.

- **Commission Implementing Regulation 2019/922** classifies a food supplement tablet to stop hair loss and encourage hair growth under CN code 2106 90 92 as a food preparation not elsewhere specified or included.
  - **Commission Implementing Regulation 2019/923** classifies an alcoholic liquid for use in cocktails under CN code 2208 90 69 as other spirituous beverage in containers holding two litres or less. It classifies another alcoholic liquid presented in bulk for use as a base in the formulation of alcoholic beverages under CN code 2208 90 99 as other undenatured ethyl alcohol in containers holding more than two litres.
  - **Commission Implementing Regulation 2019/924** classifies an optical box with connectors under CN code 8536 70 00 as connectors for optical fibres, optical fibre bundles or cables.
  - **Commission Implementing Regulation 2019/925** classifies an activity belt for use during, for example, sports activities under CN code 6307 90 10 as other made-up knitted articles.
  - **Commission Implementing Regulation 2019/926** classifies a camping/beach mat under CN code 6306 90 00 as other camping articles.
  - **Commission Implementing Regulation 2019/927** classifies a basket under CN code 6307 90 98 as other made-up textile articles.
  - **Commission Implementing Regulation 2019/928** classifies an optical fibre box without connectors under CN code 3926 90 97 as other articles of plastic.
  - **Commission Implementing Regulation 2019/1082** classifies a self-clinching stud of steel under CN code 7318 15 95 as other screws of steel.
  - **Commission Implementing Regulation 2019/1401** classifies a pair of tips of plastic and steel specially designed for Nordic-walking sticks under CN code 9506 91 60 as parts of articles and equipment for general physical exercise.
  - **Commission Implementing Regulation 2019/1661** classifies a fish oil-based product for processing in the food, feed and pharmaceutical industry under CN code 2106 90 92 as other food preparations.
  - **Commission Implementing Regulation 2019/1811** classifies a mobile, self-balanced, electrically powered “telepresence robot” under CN code 8428 90 90 as other lifting, handling, loading or unloading machinery.
  - **Commission Implementing Regulation 2019/1812** classifies a reusable water bottle under CN code 7013 99 00 as other glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes.
- Other classification-related legislation resulting from European case law or Harmonised System (HS) opinions adopted in 2019 includes the following:
- **Commission Implementing Regulation 2019/321** repealed Implementing Regulation 2017/1232 and classifies an article made of spheroidal graphite cast iron used as a sewer cover under CN code 7325 99 90 as other cast articles of other iron.
  - **Commission Implementing Regulation 2019/368** repealed Implementing Regulation 444/2013, which classified a product obtained from defatted soy beans under CN code 2309 90 31 as other preparations of a kind used in animal feeding.

# Classification (continued)

- **Commission Implementing Regulation 2019/648** repealed Implementing Regulation 113/2014, which classified so-called “high-speed cameras” designed to capture a sequence of images and incorporating volatile memory for temporary storage under CN code 8525 80 19 as other television cameras.
- **Commission Implementing Regulation 2019/1391** repealed an entry in Commission Regulation 1218/1999 and Commission Implementing Regulation 670/2013 with respect to the classification of a garden canopy in light of a HS Classification Opinion.

## CNEN consolidation and new CNENs

A new consolidated version of the CN Explanatory Notes (CNENs) was published in the EU Official Journal on 29 March 2019. It replaces the 2015 consolidated version and incorporates the numerous amendments made since then.

Since this consolidation, further CNENs have been published in 2019 for: writing cases (CN codes 4202 91 to 4202 99), multi-axial glass fibre fabrics (CN code 7019 39 00), glass microspheres (CN code 7018 20 00), screwdrivers (CN code 8205 40 00), optical fibre cables (CN code 8544 70 00), pasteurised liquid birds’ eggs (CN code 0408 99 80), certain fermented beverages (CN subheadings 2206 00 and 2208 90), certain hormone, co-enzyme and co-factor preparations (CN heading 3004), garment bags (CN code 4202 91 through 4202 99), certain fish products and caviar (CN codes 0305 20 00 and 1604 31 00/1604 32 00), pseudo-cereals (CN code 1008 90 00), creativity kits for children (CN code 9503 00 70), and toy building blocks (CN subheading 9503 00).

## EU endorses HSENs and Classification Opinions

On 3 April and 22 October 2019, the European Commission published communications endorsing Explanatory Notes

and Classification Opinions approved by the HS Committee of the World Customs Organisation (WCO) in September 2018 and March 2019. As a result, in line with the rules laid down in the UCC and related legislation, EU Member States have to revoke any BTI which conflicts with these HS instruments. These HSENs and Opinions concern certain products classified in Chapters 3, 4, 12, 16, 17, 25, 26, 28, 29, 30, 32, 37, 38, 39, 42, 44, 70, 87, 84, 85, 87, 90 and 94.

## Court Judgment—classification of large LCD monitors for use in public spaces

On 11 April 2019, the Court of Justice of the EU (CJEU) delivered its judgment in a dispute between an unnamed Dutch company (Company X) and the Dutch Ministry of Finance on the classification of large flat LCD screens for use in public spaces such as airports or train stations (C-288/18, *X BV v. Staatssecretaris van Financiën*).

Company X considered these screens to be classifiable under CN code 8528 51 00 as monitors for use solely or principally with automatic data processing machines (benefiting from 0% import duty). However, the customs authorities argued that because there is no interaction between the user of the screen (e.g., a passenger checking a flight check-in desk number) and the user of the automatic data processing machine (i.e., the party entering relevant data for display), CN code 8528 59 40 for “other” LCD monitors was more appropriate, resulting in import duty. The customs authorities also referred to an HSEN to heading 8528, which suggests that monitors used in airports, etc. are classifiable under the latter subheading, while classification under the former CN code would require the possibility for use for a longer period at short distance.

The Court only partially sided with Company X: the Court considered that in deciding whether flat LCD screens were for use “principally or solely” with automatic data processing

machines, the referring court must assess what the principal function of the screen is and in doing so, pay specific attention to whether use at short distance for a longer period is feasible. The fact that the user of the monitor is not also the user of the underlying automatic data processing machine was deemed irrelevant.

Company X had attempted to obtain classification under CN code 8528 51 00 on the basis that this type of product was clearly intended to be covered by the Information Technology Agreement (ITA). However, the CJEU stated that while the ITA may entail an obligation to offer duty-free treatment for certain products, the ITA cannot amend the product scope of classification codes.

### **Court Judgment—classification of GPS navigation systems**

On 2 May 2019, the CJEU ruled in Case C-268/18 (*SC Onlineshop SRL v. Agenția Națională de Administrare Fiscală (ANAF) Direcția Generală a Vămilelor*) on the customs classification of a multifunctional GPS navigation system for use in motor vehicles, in a reference from a Romanian court. The product was used for navigation, for reproduction of sound and video, for reception of radio transmission signals and as a display. Onlineshop had requested BTI for this product, proposing classification under CN code 8526 91 20 as an apparatus for radio navigation. However, the Romanian customs authorities decided to classify the product within CN subheading 8528 59 as a monitor.

The CJEU ruled that in this case, the main function of the product at issue was radio navigation and the three other functions relied on by the customs authority for classification as a display merely added some extra value but did not give the product its essential character. The CJEU also did not accept the application of a 2012 Classification Regulation by analogy as the products were not sufficiently similar (in terms of connectivity, dimensions, etc.).

### **Court Judgment—classification of hearing aid connectors**

On 16 May 2019, the CJEU ruled in Case C-138/18 (*Skatteministeriet v. Estron A/S*) on the customs classification of certain specially developed and shaped connectors for hearing aids in a reference from a Danish High Court. Estron, the importer and supplier of hearing aids, considered these connectors to be classifiable under CN code 9021 90 10 for parts and accessories of hearing aids. The Danish customs authorities, however, ordered classification under CN code 8544 42 90, the residual code for insulated and other electric conductors, whether or not assembled with electric conductors or fitted with connectors.

While both parties agreed that the connectors are part of a hearing aid, Danish customs argued that this did not mean they were classifiable under heading 9021. Its reasoning was based on HS Note 2(a) to Chapter 90 which states that “*parts and accessories which are goods included in any of the headings of this Chapter or of [certain] headings of Chapter [...] 85 [...] are in all cases to be classified in their respective headings.*” Danish customs considered that this reference did not cover six- and eight-digit subheadings, and the connectors should therefore be classified in Chapter 85.

The CJEU agreed that Note 2(a) does not apply to subheadings, but sided with Estron on the basis that (a) the connectors were undisputed parts of hearing aids; (b) there was an explicit subheading for such parts; and (c) Note 1(m) to HS Section XVI (Chapters 84-85) gives priority to Chapter 90. Note 1(m) states that Section XVI does not cover articles of Chapter 90, and this means that a part which is classifiable in Chapter 90 cannot also be classified in Chapter 84 or 85. In other words, the CJEU confirmed that an exclusion note (such as Note 1(m)) requires that it must first be established whether the product is classified in the priority Chapter and that only if that is not the case, other Chapters can be considered.

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# Classification (continued)

## Court Judgment—classification of welded steel parts for radiators

On 15 May 2019, the CJEU rendered judgment in Case C-306/18 (*KORADO a.s. v. Generální ředitelství cel*), in a reference from a Czech Regional Court. The case concerned the classification of certain welded steel parts used for radiators. KORADO applied for BTI seeking classification under CN code 7322 19 00 as “radiators and parts thereof”, but the BTI was issued for CN code 7307 93 19 as “other butt welding tube or pipe fittings of steel”. The customs authorities relied on a pre-existing Classification Regulation issued for a similar product. The referring court was inclined to agree with KORADO that the parts were specific parts for radiators and essential for their functioning, and not “parts of general use” covered by heading 7307 (as per Note 2 to HS Section XV).

The CJEU ruled that the parts were parts of general use classifiable under heading 7307, relying on previous case law that a “part of general use” cannot be classified as a “part” under another heading.

## Court Judgments clarify link between customs classification of products and excise duty legislation for alcohol and tobacco products

In 2019, the CJEU was asked twice to look at the customs classification of certain tobacco products and beverages to assess if certain excise duties applied. In Case C-195/18 (a reference from a Polish Regional Court, judgment of 13 March 2019), the CJEU had to consider the definition of “beer” under **Directive 92/83/EEC** on the harmonisation of the structures of excise duties on alcohol and alcoholic

beverages. In Case C-638/17 (a reference by the Supreme Administrative Court of Lithuania, judgment of 11 April 2019), it looked at the concept of “cigars or cigarillos” under **Directive 2001/64/EU** on the structure and rates of excise duty applied to manufactured tobacco.

In essence, the CJEU only looked at the customs classification of items in the first case because the underlying legislation specifically referred to the customs classification of the relevant beverages. In the second case, it rejected arguments based on customs classification of tobacco products as the underlying legislation did not explicitly refer to customs classification codes and these were therefore not relevant.

## Court Judgment—classification of static converters

On 5 September 2019, the CJEU rendered judgment in Case C-559/18 (*TDK-Lambda Germany GmbH v. Hauptzollamt Lörrach*) involving a German referral concerning regulated power supplies. The applicant considered that the power supplies should be classified under CN code 8504 40 30 as static converters of a kind used with telecom or data processing equipment, but the customs authorities insisted on 8504 40 90 as “other” static converters. The customs authorities argued that the converters were not solely or principally used with telecom or data processing devices, but could also be used for a wide range of other devices.

The CJEU considered that the converters would only fall under CN code 8504 40 30 if the main use for which they are intended is with telecom or data processing equipment.

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## Court Judgment—classification of mastectomy bras

On 19 December 2019, the CJEU delivered its judgment in Case C-677/18 (*Amoena Ltd. v. Commissioners for Her Majesty's Revenue and Customs*) in a reference from a UK court concerning the customs classification of certain mastectomy bras. Amoena sought the invalidation of EU Classification Regulation 2017/1167 as this classified its product as an ordinary bra (under heading 6212) rather than as an accessory for an artificial body part under heading 9021. The company considered that by virtue of legally binding Note 2(b) to Chapter 90, the bra was an “accessory” suitable for use solely or principally with an artificial body part (breast forms) and should therefore be classified under the same heading.

The Commission in its Regulation noted that the objective characteristics of the bra at import were those of an ordinary bra (in terms of form and construction) and that, even though the bra could also be worn by women following a mastectomy, the final use of the bra could not be assessed objectively at the time of import, and was therefore irrelevant. The rationale was that the side openings in the bra could not only be used for the insertion of breast forms (i.e. medical purposes), but also for the insertion of padding for the enlargement of breasts (i.e. for aesthetic purposes). The CJEU agreed with that reasoning.

## WCO Council—HS 2022

In June 2019, the WCO during its annual General Council meeting adopted a Recommendation concerning the amendment of the HS as agreed during the latest 5-year review cycle (HS 2022). The Recommendation concerns over 350 amendments, relating to, among others, new or major technologies (such as 3D printers, smartphones, drones and novel tobacco products), electronic waste, various gases with high global warming potential, diagnostic kits for certain viruses, and cultural objects. HS Contracting Parties had until late December to object to certain amendments and only amendments for which no objections were filed will apply from **1 January 2022**.

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# Origin

## Court Judgment—origin labelling for food from Israeli settlements

On 12 November 2019, the CJEU delivered its judgment in Case C-363/18 (*Organisation juive européenne, Vignable Psagot Ltd v. Ministre de l'Économie et des Finances*).

This was a dispute concerning the requirement under French rules (based on EU food labelling legislation) that labels of foodstuffs originating in Israeli settlements within the territories occupied by the State of Israel should bear an explicit indication to this effect (and not only state the provenance).

The CJEU confirmed the legality of such a requirement, as the relevant EU legislation was intended to avoid misleading consumers by allowing them to make informed choices, taking into account, *inter alia*, ethical choices or considerations relating to the observance of international law. The CJEU considered that consumers cannot be expected to guess whether a product comes from an Israeli settlement if only the provenance is indicated.

## EU/Norway/Switzerland/Turkey cumulation of origin under GSP

On 31 March 2019, Notices were published in the EU Official Journal concerning the entry into force of Exchanges of Letters between the EU and Switzerland and between the EU and Norway on the cumulation of origin between the EU, Norway, Switzerland and Turkey in the context of the preferential origin rules applicable under the EU's GSP regime. These agreements entered into force on 1 February 2019. They provide that (with the exception of the agricultural products in Chapters 1-24) products originating in any of these territories will be considered "originating" materials for the purpose of determining the origin of the final product in which they are used.

## PEM diagonal cumulation possibilities

On 4 October 2019, the latest update was published of the Commission notice concerning the application of the preferential origin rules by the Contracting Parties to the Pan-Euro-Mediterranean (PEM) Regional Convention. The notice shows the Contracting Parties among which diagonal cumulation of origin is possible (September 2019 status), even if the puzzle is not yet complete. Diagonal cumulation is possible if the PEM parties involved have all adopted the current version of the relevant PEM origin rules. This type of cumulation of origin allows materials/components to be treated as if they "originate" even when sourced in a third PEM country, and this facilitates the fulfilment of the origin rule for the processed product using these inputs, thus promoting regional economic integration with the PEM region.

The Contracting Parties include the EU, Norway, Iceland, Switzerland (including Liechtenstein), the Faroe Islands, the nine countries participating in the Barcelona Process (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, West Bank and Gaza Strip, Syria and Tunisia), Turkey, the countries participating in the EU's Stabilisation and Association Process (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, and Kosovo), Moldova, Georgia and Ukraine.

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# Valuation

## **Court Judgment—Oribalt case—deductive method**

On 20 June 2019, the CJEU delivered its judgment in Case C-1/18 (*Oribalt Rīga SIA v. Valsts ieņēmumu dienests*) which concerned the determination of customs value for a shipment of generic medicines. The customs value could in this case not be based on the transaction value method because of the nature of the arrangement between Oribalt and the Indian supplier, so another method had to be used instead. This method essentially involves using the transaction value for “similar goods” sold for export to the EU in the largest quantity to an unrelated party, at the same time or shortly after the import in question. If that is not possible, the value will be based on the unit price at which the same or similar goods are sold in the same time frame.

The referring Latvian court asked the CJEU whether in identifying similar goods, the market position or popularity of the medicines on the market and the identity of the manufacturer had to be taken into account. The CJEU confirmed this principle. In addition, the CJEU ruled that the 90-day limit foreseen for identifying similar goods sold as close to the date of import as possible was a strict requirement which cannot be interpreted flexibly, as interpretative guidance to these rules seemed to suggest. The CJEU also ruled that reductions on the sales price cannot be taken into account when setting the unit price.

## **Court Judgment—CEVA case—downward post-clearance revision**

On 10 July 2019, the CJEU delivered its judgment in Case C-249/18 (*Staatssecretaris van Financiën v. CEVA Freight Holland BV*) in a Dutch case concerning post-clearance revision of the transaction value of media players initially declared under a CN code attracting 0% import duty but found to have been misclassified. In view of the higher tariff applying to the corrected CN code, CEVA asked for a downward revision of the customs value as a lower price had in fact been charged by the Asian producer than the transaction value declared in the original customs declaration. The importer originally had not considered the customs value very relevant in view of the zero duty treatment under the declared code and now wanted to correct this mistake. Dutch customs rejected this request.

The CJEU sided with the company and ruled that if in the context of a post-clearance audit, a product is re-classified into a heading with a higher tariff, the importer can request that a valid lower transaction value be used.

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# Miscellaneous

## Proposed amendments to 2014 Trade Enforcement Regulation

On 12 December 2019, following the paralysis of the WTO Appellate Body, the European Commission proposed a series of amendments to **Regulation 654/2014** concerning the exercise of the EU's rights for the application and enforcement of international trade rules.

The proposal stems from the EU's objective to be able to act when third countries adopt illegal measures and simultaneously block a dispute settlement process. If adopted as such, the amended legislation will no longer require a final ruling of the WTO Appellate Body before the EU can take action. The adoption of the amendments by Council and EP could be concluded by **mid-2020** and would allow the EU to take retaliation measures against, for example, the United States as long as it continues to block the WTO dispute settlement process.

## IPR infringements and Illicit Trade

In January 2019, EU Council conclusions were published in the Official Journal on the EU **Customs Action Plan to combat IPR infringements for the years 2018 to 2022**. In the conclusions, the Council invites the Commission to prepare a Roadmap to facilitate the implementation of the Action Plan. The new Action Plan builds on the previous plan (for the period 2013-2017) and strategic objectives for ensuring effective customs enforcement throughout the EU: tackling major trends in IPR infringing goods; tackling trade of IPR infringing goods throughout the supply chain; and strengthening cooperation with the European Observatory on infringements on IPRs and the law enforcement authorities. Numerous concrete actions are set out in an Annex to the Action Plan, including on better exchange of information and best practices, and monitoring changes in the Universal Postal Union in the area of e-commerce, as well as increased cooperation with certain countries.

Meanwhile, the Organisation for Economic Development and Cooperation (**OECD**) is developing a draft **"Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones"**. While many countries have set up free trade zones (FTZs) in an effort to spur economic development, effective oversight of operations in FTZs has not been secured in parallel, and criminal networks can abuse this situation. The OECD – supported by, among others, the EU – therefore wants to increase transparency in FTZs and seeks coordination of international efforts to improve law enforcement for FTZ activities. Parties adhering to the Recommendation would ensure that a legal framework is established and enforced for FTZs, that statistics on goods entering and leaving FTZs and on non-compliance are made available, and that awareness is promoted among all stakeholders.

## Plurilateral negotiations and standards on e-commerce

In March 2019, the **first round of negotiations on WTO rules and commitments** on e-commerce took place, with 80 WTO Members participating at this stage. Within the broad goal of facilitating and enhancing global electronic commerce, the EU proposal includes a call for zero-duty treatment of electronic transmissions.

Meanwhile, the **WCO** has also included e-commerce as **one of the 9 priorities of the WCO Strategic Plan for 2019/2022**. In June, the WCO Council endorsed certain technical specifications relating to the WCO "Framework of Standards on Cross-Border E-Commerce" (2018) and certain guidance materials in the "WCO E-Commerce Package", which will be updated further in **2020**.

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## Court Judgment—data protection in the context of an AEO application

On 16 January 2019, the CJEU issued its judgment in Case C-496/17 (*Deutsche Post AG v. Hauptzollamt Köln*) in a dispute related to Deutsche Post's application for Authorised Economic Operator (AEO) status and whether the customs authorities could insist on receiving certain data. Deutsche Post had argued that the customs authorities could not collect tax identification numbers of the natural persons handling customs matters as employees.

The CJEU ruled that the collection of such tax identification numbers is possible, but only *"to the extent that that data enables those authorities to obtain information on serious or repeated infringements of the customs legislation or taxation rules or on serious criminal offences, committed by those natural persons and relating to their economic activity."*

## EU Customs Trader Portal launched

On 1 October 2019, the European Commission formally launched the EU Customs Trader Portal. This electronic single point-of-access system should ultimately allow traders to gain access to all EU electronic systems, and is secured through the new Uniform User Management and Digital Signature System (UUM&DS). So far, however, traders can only use the Portal for applications for BTI and AEO status.

## EU customs training accreditation

In 2019, the European Commission launched the EU Customs Recognition initiative aimed at issuing EU Customs Certificates of Recognition to universities or business schools that provide quality customs-related Bachelor and Master's study programmes. (As of 10 December 2019, seven institutions in Spain, Bulgaria, Germany, Hungary, France, and the Netherlands have been recognized.)

## EU Regulation on imports of cultural goods

On 17 April 2019, Regulation 2019/880 on the introduction and import of cultural goods was adopted. It introduces restrictions and licencing obligations for certain goods when introduced into the EU, e.g. when entered into a customs warehouse or free zone, or when released for free circulation. The purpose of the Regulation is to ensure humanity's cultural heritage is safeguarded and to prevent illicit trade in cultural goods (other than those created or discovered in the EU). Cultural goods are defined as items of importance for archaeology, prehistory, literature, art or science and an Annex is provided to further clarify the scope of the Regulation. Certain provisions will apply from **late 2020**, while some will take effect later when the necessary IT systems to handle import licences and importer statements should be in place.

## EU Dual-Use Export control list and correlation table updated

On 30 December 2019, **Commission Delegated Regulation 2019/2199** was published, updating the Annexes to the **EU Dual-Use Regulation 428/2009** on EU controls on exports, transfer, brokering and transit of dual-use items. This annual update ensures that the list of controlled items reflects the latest changes of the international control lists on which the EU list is based. The European Commission's correlation table (between TARIC and the EU Dual-Use List) was updated around the same time.





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