

# WTS Customs Newsletter



## Editorial

Dear reader,

These days it is more than difficult to focus on other things than the horrible developments in Ukraine. We all hope of course that the suffering and the military action will end soon.

In the wake of these developments, topics closely linked with customs are now influencing companies' daily business more than Covid-19 - the global sanctions that have been declared against Russia and Belarus, their leaders and many other people from there have an immediate effect on the supply chain. Questions like the following need to be answered almost every day:

- is it allowed to send the respective goods to countries/regions affected by the sanctions?
- are the ultimate customers listed?
- how can payment be organised?
- will we find someone to transport the goods? and
- is it morally acceptable to have economic relationships with the sanctioned countries?

Our customs and trade experts from across our WTS Global network are available to answer all these questions and to help you meet the economic challenges arising from this terrible war. Please feel free to contact me and I will gladly connect you with our specialists all over the globe.

Our German-speaking readers may also like to read through our special newsletter edition focusing on the latest sanctions against Russia and Belarus, which can be found here:

[WTS Customs Newsletter DE](#)

Nevertheless, in this newsletter we have compiled a huge variety of the latest global customs developments for you. These articles cover the whole world and the whole range of customs issues.

We do hope that the content is interesting for you and that we can again - as in our previous editions - meet your expectations.

Enjoy reading the newsletter and stay safe!

Best regards,  
Kay Masorsky

## Contents

<b>Austria:</b> Customs law thwarts VAT law .....	3
<b>Belgium:</b> E-commerce: Belgium changes VAT rules on importer of record .....	4
<b>Brazil:</b> Brazilian Superior Court of Justice defines the calculation of penalty and interest on drawback .....	5
<b>Brazil:</b> Ex-Tariff saved from extinction .....	6
<b>China:</b> Major updates in China customs .....	6
<b>France:</b> The Goods and Services Tax Code – (A way to clarify the applicable rules!).....	7
<b>Hungary:</b> Changes to customs administration in Hungary .....	9
<b>Italy:</b> Importer not established in the EU – operative clarifications.....	10
<b>Senegal:</b> The recent customs reforms of 20 December 2021 .....	10
<b>Singapore:</b> Asia's FTA Spree: benefits galore for businesses but <i>caveat emptor</i> .....	11
<b>Sweden:</b> Swedish Import VAT – Is Swedish Customs the competent authority? .....	18
<b>United Kingdom:</b> National Security and Investment Act.....	19
<b>United Kingdom:</b> Brexit 2022 update .....	21
<b>United States:</b> Outcome of "De Minimis" will have Major Effects on E-Commerce Importations and the US FTZ Program .....	23
<b>Vietnam:</b> Import of software to Vietnam .....	24

Please find the complete list of all contacts at the end of the newsletter.

## Austria



### Customs law thwarts VAT law

For distance sales of imported goods under § 3 (8a) VAT Law, the supply is deemed to have been carried out where the transport or dispatch ends, if either the goods are imported in a Member State other than the one where the transport or dispatch ends, or the trader makes use of the special regulation under Article 25b VAT Law (=IOSS). According to the customs provisions of Article 221 (4) UCC-IA, the release of goods for free circulation for low-value consignments (up to EUR 150) and for deliveries between private individuals (up to EUR 45), which are exempt from import duties under the Customs Exemption Regulation and for which the IOSS does not apply, must be carried out in the Member State of the goods' destination. As a consequence of this customs provision, the place of supply rule for VAT purposes under § 3 (8a) no. a VAT Law no longer applies.

The Austrian VAT regulations (§ 3 (8a) VAT Law) give an example of how to correctly handle such distance sales of imported goods, which has been adapted to the customs provisions of Article 221 (4) UCC-IA. In the example's solution, it is concluded correctly that the place of supply must be determined according to the place of supply rules under § 3 (8) VAT Law (the place of supply is where the transport begins) or § 3 (9) VAT Law (the place of supply is where the goods are imported if the supplier is liable to pay the import VAT) as the new place of supply rule for distance sales of imported goods does not apply.

Although this conclusion conforms with the law, it does not fully reflect the new provision's desired effect for distance sales of imported goods, which is to make third-country traders liable for tax and the handling of such deliveries in practice. From the point of view that a delivery of goods with a consignment value of more than EUR 150 leads to the supplier in the Member State of destination having a mandatory VAT registration obligation and that deliveries below this value also trigger a registration obligation in the EU area under the IOSS's application, it is actually not consistent that there appears to be a 'grey' area for low-value consignments that does not entail a mandatory VAT registration obligation. This would be the case if § 3 (8) VAT Law must be applied as the place of supply rule for deliveries covered by Article 221 (4) UCC-IA. However, if the actual customs handling in practice is considered, then the possibility of applying § 3 (8) VAT Law is only of a theoretical nature.

Distance sales of imported goods presuppose that the supplier must take care of the tax/customs duties on the customer's behalf. In compliance with customs law non-Union goods must be brought from the port of entry to the Member State of destination by means of a customs transit procedure by the supplier. In practice, there will probably be no case in which the private customer will or can handle the import (the release of the goods into free circulation) itself following the customs transit procedure, so that de facto these delivery constellations will inevitably lead to the application of § 3 (9) VAT Law and thus also trigger a mandatory VAT registration obligation for the supplier. Should the customer actually handle the import customs clearance, this can only mean that the characteristics for distance sales of imported goods are not given anyway.

*Günther Platzer*  
guenther.platzer@  
icon.at

*Sarah Ecker*  
sarah.ecker@icon.at

## Belgium



### E-commerce: Belgium changes VAT rules on importer of record

Customs law does not define “importer of record”. The Belgian customs authorities’ administrative guidelines refer to the concept of “importer of record” for VAT purposes. Following this perspective, importers should carefully assess this concept as during summer 2021 Belgium updated its VAT rules on importer of record in connection with the new VAT rules for e-commerce.

When importing goods with a value below or equal to EUR 150 in Belgium without any IOSS application, the exemption for import VAT will not apply. Consequently, the importer of record will be liable to account for the import VAT due. To determine who will be deemed to act as the importer of record in this scenario, a distinction must be made based on whether the simplified import procedure is applied, in which the import VAT is paid by a courier or postal service:

- When the simplified import procedure is used, the final consumer will always be deemed to act as the importer of record. The import of the goods will be subject to VAT, since the VAT exemption under the IOSS does not apply in this case. The courier or postal service will collect the VAT from the final customer and will subsequently transfer that VAT amount to the VAT administration.
- When the simplified import regime is not applied, the seller will be deemed to act as the importer of record. As a result, the sale from the seller to the final customer will be deemed to take place in the Member State of importation, i.e. Belgium. Consequently, the seller will be required to register for VAT purposes in Belgium and will have to account for both the import VAT and the VAT on the local sale to the final customer. Although the import will not be exempt from VAT, the vendor will be able to recover this VAT through its periodic VAT return, ensuring that the VAT is only effectively paid to the Belgian State once.

On the other hand, where consignments with a value over EUR 150 are imported in one Member State and then are shipped to a final consumer in another Member State, VAT is in principle payable by the consumer both upon the import in the Member State of import and in the Member State of arrival if the final consumer is named as the importer of record on the import document. As a solution to this situation, Belgian VAT law now stipulates that the seller should always act as the importer of record for import VAT in such a scenario. Since the IOSS cannot be applied, the seller will be required to obtain an individual Belgian VAT number. Although the import will not be exempt from VAT, the vendor will be able to recover this VAT through the periodic VAT declaration. In addition, the seller will also be required to apply for a VAT number and account for VAT on the extra-community distance sale in the Member State of the final customer.

We advise e-tailers that import goods into Belgium to carefully analyse these importer of record rules to avoid being confronted with a VAT registration in Belgium following a VAT audit. Existing policies on determining the importer of record for customs purposes should be aligned on this issue.

*Stijn Vastmans*  
*stijn.vastmans@*  
*tiberghien.com*

*Gert Vranckx*  
*gert.vranckx@*  
*tiberghien.com*

## Brazil



### Brazilian Superior Court of Justice defines the calculation of penalty and interest on drawback

Brazil's Superior Court of Justice (STJ) issued a very important judgment, establishing the initial term of the penalty and interest calculation on the drawback customs regime under the "suspension" modality, when the imported goods are nationalised.

Drawback suspension is a special customs regime that aims to boost exports by exempting the taxes levied on imports and the local acquisitions of inputs to be used in manufacturing products for export, and so reduces the manufacturing costs in Brazil. It should be noted that, although some taxes levied on imports may be booked as tax credits, their payment must be made fully in cash upon customs clearance, which significantly impacts the cash flow on imports.

Under the drawback suspension modality, inputs are acquired with the suspension of the relevant taxes levied on the transaction, and are conditional on the export of the manufactured products within one year, which is extendable by another one year. For this to happen, the interested party must submit a request to the federal government, and agree on the quantity of inputs to be acquired and products to be manufactured and exported within the one-year period, which is then formalised by a concession decision.

Once the export commitment has been complied with, the tax suspension will be converted into the tax exemption. If part of the imported inputs has not been fully used in the manufacturing of goods that should have been exported, then the beneficiary may adopt procedures regarding these remaining inputs up to 30 days from the deadline set by the concession decision, especially: (a) returning unused imported goods; or (b) nationalising the remaining inputs for consumption, with the payment of the suspended taxes and interest.

In view of the above, several controversies have arisen because taxpayers have understood that interest and late payment penalties can only be charged when the taxpayer is in default, which is from the 31st day after the deadline set by the concession decision.

On the other hand, the authorities have understood that the tax suspension does not change the fact that the tax triggering event occurred upon the customs clearance of imports and thus the non-payment of the taxes will be conditional on exports. In view of such a condition, the nationalisation of the goods not used in the manufacturing will be a breach of the drawback, making the suspended taxes fully payable with interest and a penalty calculated based on the customs clearance date.

However, in motion of divergence EREsp 1.580.304, the STJ ruled that the nationalisation of goods imported under the drawback regime should be subject to: (a) interest calculated from the customs clearance, regardless of when it is carried out, agreement with the tax authorities, as the taxes were due but suspended; and (b) late payment penalty, only from the 31st day after expiry of the deadline set by the concession decision, as customs law establishes that the beneficiary may nationalise the goods and pay the suspended taxes up to 30 days from that deadline and thus may not be penalised if it takes such measures in a timely manner.

*Júlio M. de Oliveira*  
*jo@machado*  
*associados.com.br*

*Gabriel Caldiron*  
*Rezende*  
*gcr@machado*  
*associados.com.br*

## Brazil



*Júlio M. de Oliveira*  
jo@machado  
associados.com.br

*Gabriel Caldiron*  
Rezende  
gcr@machado  
associados.com.br

### Ex-Tariff saved from extinction

As commented upon in Customs Newsletter # 3.2021 (November 2021), Brazil was authorised by Mercosur to reduce Import Duty rates to up to 0% by means of the tariff exception ("Ex-Tarifário" or "Ex-Tariff") until 31 December 2021.

The Ex-Tariff is an Import Duty benefit for those capital goods and computer and telecommunications goods that do not have a national equivalent in Brazil. The intention is to develop the Brazilian market by reducing the costs of incorporating new technology not produced in Brazil, and so making Brazil's industries more competitive in international markets.

Nevertheless, it should be noted that Brazil is a Mercosur member, and its members agreed that goods originating in Mercosur are subject to a 0% Import Duty (or a similar tax rate to other countries), but goods from outside Mercosur are subject to a certain rate by all Mercosur members. Thus, as the Ex-Tariff is an exception to such an agreement, it was temporarily authorised by Mercosur until 31 December 2021.

However, on 13 December 2021, Mercosur issued CMC Decision 08/2021 that allows the granting of the Ex-Tariff to continue until 31 December 2028, which is a significant success for Brazilian industrial and technological development.

## China



### Major updates in China customs

#### RCEP in force boosting Asia-Pacific trades

The 15-nation trade pact, Regional Comprehensive Economic Partnership (RCEP), has officially taken effect from 1 January 2022, initially among ten countries that have completed their ratification procedure, including Japan.

RCEP's major interest concerns how it can add vitality to the Asia-Pacific countries and boost global trade. Japan in particular is not a part of any free-trade agreements (FTAs) that China has established before RCEP. RCEP enables China and Japan to build a tariff-friendly trade partnership for the majority of their trade. In particular, RCEP's distinctive country of origin (CoO) rules now apply to the exports between the two countries.

The two distinctive CoO rules under RCEP are:

- a) The accumulative rule  
Goods originating from one RCEP country, when being used for production by another RCEP country, can be recognised as originating from the latter.
- b) Back-to-back CoO certification  
CoO of the goods from one RCEP country and re-exportation to another RCEP country may be maintained, if the re-exporting country can issue proof of a "back-to-back" CoO, for goods without further processing except for:

- Repacking;
- Unloading, reloading, storing, splitting up;
- Labelling as required by the importing country;
- Necessary operations for preserving or transporting to the importing country.

Companies with both China and Japan in their supply chain can now have more flexibility in arranging their supply chain, involving material supply, manufacturing, packing and distribution, etc. in the region, without losing the tariff benefit.

### China is simplifying its customs-supervised zones

China used to have a dozen types of special customs zones that offered different sets of priorities and operational focuses (e.g. bonded logistic parks are for warehousing and logistics). This complexity has sometimes posed challenges to business operators when choosing the right type of zone(s) and applying the correct customs and tax treatments. Unification and simplification of these zones has been ongoing for some years and is near to completion.

The majority of the zones have been consolidated and upgraded into the "comprehensive bonded zone" (CBZ). There are so far 155 CBZs, with some others still being transformed.

The CBZ, while embracing the major functions and beneficial treatments of various zones, also has its own features. One is that it can accommodate different types of businesses. Businesses, which had to spread in different types of zones, can now operate entirely in a CBZ, covering manufacturing, repairs, storage, distribution, financial leasing, cross-border e-commerce, goods' display, entrepot business, transshipment, port operations, and bonded (tax-free) delivery of goods.

Conrad Lin  
conrad.lin@wts.cn

Business operators no longer need to struggle with the choices of zones. The streamlined customs and tax treatments of CBZs have offered much better clarity to business operations.

## France



### The Goods and Services Tax Code – (A way to clarify the applicable rules!)

Since 2020, the French government's ambition has been to 'marry' the management and collection of different, notably customs, taxes in the hands of a single directorate, **to provide companies with a single tax interlocutor.**

Over the past few years, responsibility for taxes has been in the process of being transferred from French customs to the French tax authorities: in 2019, for non-alcoholic beverages; and in 2020 and 2021 for general taxes regarding polluting activities. In 2022, it is the turn of French import VAT, consumption taxes on electricity, gas and carbon, and the annual registration fee. 2023 is likely to see the transfer of customs penalties and, in 2024, the domestic taxes on energy products and the collection of the indirect contribution on alcohol and tobacco.

Act Two of this streamlining has involved the implementation of the Goods and Services Tax Code, and the general application of the reverse charge of import VAT, which went into effect on 1 January 2022.

### **1. Presentation of the Goods and Services Tax Code**

The French government has been empowered by the French parliament to recodify taxation directly or indirectly affecting certain products, services or transactions, with the aim in particular of harmonising the methods of payment, collection, refunding and auditing.

In this context, the new Goods and Services Tax Code, which came into force on 1 January 2022, recodifies tax elements (until now contained in the General Tax Code and the Customs Code) and also transposes various standards of domestic law and European Union law, which were previously fragmented within several sources.

The Goods and Services Tax Code currently includes general provisions; the general system of excise duties on energy; alcohol and tobacco; taxes on transport as well as on industrial and craft products.

Despite consolidating such taxes, to date, the Goods and Services Tax Code does not establish a uniform and common regime for tax procedures and penalties that are set in Tax Procedures legislation, the Customs Code, and the General Tax Code.

### **2. General application of the reverse charge of import VAT**

Prior to 2022, companies that imported taxable goods from third countries ordinarily had to pay VAT to the customs authorities. They could nevertheless usually recover this import VAT when filing their VAT return. Companies could opt for the reverse charge mechanism on import VAT to avoid the cash advance but a number of special conditions applied.

The reverse charge of import VAT is now mandatory and is no longer an optional procedure – it applies to all importers into France, who must be registered for VAT in France.

Part of the information is pre-filled or completed in the VAT return from the customs system. This pre-filling will be implemented over time depending on the type of information.

We will be following such measures closely and will provide additional information especially if practical aspects are encountered by businesses.

*Najat Akodad*  
*najat.akodad@*  
*fidal.com*

*Justin Hayden Miller*  
*justin-hayden.miller@*  
*fidal.com*



## Hungary



### Changes to customs administration in Hungary

Two-thirds of Hungary's online customers order their goods from sellers inside and outside Hungary. Until 1 July 2021, consignments with a lower value than EUR 150 (except for alcoholic products, perfumes, grooming water and tobacco products) were exempt from import duties. If the value of the consignments were lower than 22 EUR, they were even exempt from VAT liability, which is 27% in Hungary, and one of the highest in Europe.

Since 1 July 2021, this VAT exemption has been canceled for consignments from non-EU countries, but advantages for import duties remain in force. On the other hand, the EU introduced administrative simplifications for goods under EUR 150, with less information having to be given on import declarations. Connected to administrative simplifications, a new change was implemented in Hungary. The tax authority now informs private individuals who have submitted a goods declaration with a value lower than 150 EUR about the release of goods by electronic communication instead of by a decision. Excise goods are an exception to the rule.

For VAT payments, there are now two options. Sellers from outside the EU can register into the Import One Stop Shop (IOSS) system. Using this system, the customer pays VAT to the seller at the time of purchase. It is enough to register only in one EU Member State, and the VAT is divided between the Member States according to the posting addresses. The second option is the Special Arrangement (SA), which generally affects companies performing postal or parcel delivery services.

There are more options to speed-up the process of certifying customs and VAT payments and so releasing the goods from customs procedures prior to recording the payment on the tax accounts by the State Treasury. The first one is the Electronic Duty Payment. The bank informs the customs authority about the money transfer electronically based on its agreement, although the payment has not been booked yet on the taxpayer's tax account. After being informed, the customs authority releases the goods. The second option is the Instant Payment System. There is no need to conclude an agreement between the bank and the Hungarian State Treasury. For an amount under HUF 10 million, the money is transferred immediately and the Hungarian State Treasury informs the customs authority about the payment. The third option, available since 1 July 2021, is payment via VPOS by credit card. This option is available for an amount under EUR 150 only. The bank informs the authority about the successful transaction and the goods can be released.

A further change relates to the language used in customs procedures and aims to harmonise the Hungarian rules with the EU's. Since 1 July 2021, English item descriptions can be used in goods declarations, if consignments are under 150 EUR. Moreover, the general 8 day administration 'window' for judging exclusions, certificate requests and objections to delivery has been increased to 30 days. An important change is connected to the penalties. Previously, if the unpaid duty was less than HUF 50,000, the Hungarian tax and customs authority was able to apply reduced penalties. This threshold is now HUF 100,000. Finally, the customs authority can give an electronic certificate for penalty payments made in cash, instead of giving a receipt that is filled out manually.

## Italy



### Importer not established in the EU – operative clarifications

With Circular Letter no. 40/2021 of 14 December 2021, the Agency for Excise, Customs and Monopolies (ADM) has provided some operational clarifications regarding imports made by entrepreneurs not established in the EU who make use, for various reasons, of customs representatives or tax representatives for VAT purposes.

In particular, the ADM has clarified who can correctly be the importer and who can be the declarant in front of the Customs Office.

**The importer** is the person able to provide all the information required for the application of the provisions governing the customs procedure for which the customs declaration is presented. This position can be held by an entrepreneur not established in the EU, who, however, must obtain an EORI number (under Article 9 of EU Regulation 952/2013 - UCC).

**The declarant**, on the other hand, must be a person established in the EU; the customs declaration can be presented by a person not established in the EU, but for this purpose, he/she must make use of a customs representative established in the EU (Article 18 UCC) who acts **via an indirect representation**, and thus assumes the role of the declarant for customs purposes.

The tax representative for VAT purposes (but it is the same for direct VAT identification) is relevant only for VAT purposes and it is not entitled to submit a customs declaration on behalf of an unestablished person; the VAT number issued to the tax representative, however, must appear in field 44 of the customs declaration exclusively for the purpose of fulfilling the obligations required by Presidential Decree 633/1972.

Consequently, if a person not established in the EU, with a VAT representative in Italy, wishes to import goods into Italy, they cannot do so using this VAT representative, but they will have to use a forwarder established in the EU who operates via a direct representation regime with the Italian customs.

*Paolo Dragone*  
*paolo.dragone@*  
*ra-wts.it*

## Senegal



### The recent customs reforms of 20 December 2021

Senegal, like other developing economies, relies primarily on taxes as the main source of revenue to avoid, as much as possible, indebtedness and to ensure a better consolidation of its public finances.

Thus, with this desire to improve its customs revenues, Senegal recently introduced two new customs measures in the 2022 budget law, namely a levy under the Customs Administration Modernisation Programme (the so-called PROMAD) and a discharge ticket.

PROMAD is part of the policy to strengthen the customs revenue authorities so that they can continue to play their fair share in an effective revival of the Senegalese economy.

Indeed, according to the provisions of Article 23 of the 2022 Finance Act, this important programme of Senegalese customs modernisation is financed by a specific levy of 1.5% on the customs value of goods.

According to Decree No. 2021-928 of 8 July 2021, which established PROMAD, the basis for this levy is the customs value of eligible goods.

However, excluded from this levy are goods placed under customs and tax regimes that promote investment, in particular goods of WAEMU and ECOWAS origin, in accordance with the Customs Administration memorandum No. 2433 of 23 August 2021.

Other exemptions are also provided for certain essential products such as rice, wheat, wheat flour, medicines, oil, and gas products.

Through this programme, Senegalese customs aims to achieve three major objectives for 2022, namely: the general computerisation of procedures and formalities, the strengthening of the means to fight against fraud, and the acquisition of the latest generation of equipment and infrastructure.

PROMAD has also introduced a single payment system for fees collected exclusively by the customs administration for commercial overtime work (so-called TSC), customs IT services (so-called PID) and escort fees.

Under the discharge ticket, a 0.5% levy has been introduced, which includes, in a single payment, the fees due for commercial operations carried out outside the legally-prescribed hours and for the customs' IT services. The basis for this levy is the customs value of eligible goods, excluding those placed under customs and tax regimes that promote investment as noted above.

*El Hadji Sidy Diop*  
[sidy.diop@faceafrica.sn](mailto:sidy.diop@faceafrica.sn)

The implementation of this discharge ticket aims to rationalise and reduce the costs inherent in the various escort, unpacking and removal operations.

## Singapore



### Asia's FTA Spree: benefits galore for businesses but *caveat emptor*

Asia has been actively entering into Free Trade Agreements ("FTAs") since the 1980s. This trend shows no sign of abatement.

Since the beginning of 2022, most Asia-Pacific ("APAC") economies are starting to show signs of post-pandemic economic recovery. The Regional Comprehensive Economic Partnership ("RCEP"), which came into effect on 1 January 2022, paves the way for more Free Trade Agreements ("FTAs") to be signed across the APAC region.

For businesses, more FTAs in the APAC is beneficial as it enables savings in supply chain costs and heightened transparency in trading lanes. However, more FTAs also mean new operational challenges for companies, especially as demands on supply chains become more complex.

This commentary will address three main points:

- First, we will review the new FTAs that have recently been signed, upgrades in existing FTAs as well as ongoing negotiations. We will comment on the trend towards plurilateral FTAs. We will also address the EU's engagement in Asia and whether the EU-Singapore and EU-Vietnam FTAs could potentially be a harbinger of further FTAs between the EU and countries in Asia.
- Second, we will explore how businesses can benefit from the FTAs. While the use of the tariff concessions continues to be the top use of FTAs, more sophisticated companies are now looking beyond tariff concessions. Instead, they are looking into trade facilitation, the removal of non-tariff barriers and the mutual recognition of testing standards. We will also comment on how businesses can utilise self-certification and Mutual Recognition Agreements to manage the risks involved to ensure that companies maximise benefits.
- Third, we will discuss audit trends and the role of technology. We will touch on the rise of origin verification audits. With the sheer volume of data and complexities involved when dealing with origin verification audits, we will also discuss the role of technology in trade operations within companies.

### 1. Free Trade Agreements trends across Asia-Pacific

According to the United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP"), there were 15 Preferential Trade Agreements ("PTAs") signed during 2020-2021. Due to Covid-19, the progress of trade negotiations slowed globally. Many countries shifted their focus onto health emergencies and economic contractions.<sup>1</sup> Hence, the number of new agreements signed decreased annually from 13 to 11 agreements in 2019 and 2020, and to only 4 new agreements in 2021.

Nevertheless, 2021 was significant in advancing Asia Pacific's role in negotiating global trade agreements as seen from the following. First, RCEP was finalised and came into force on 1 January 2022. Second, China submitted its accession proposal for membership to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") in September 2021, highlighting China's eagerness to participate in global trade.

#### A trend towards more bilateral FTAs compared to plurilateral FTAs

Presently, 78% of FTAs signed by Asia-Pacific economies are bilateral, which starkly contrasts with plurilateral FTAs, which only account for 10% of all FTAs.<sup>2</sup> Most of the countries who are part of the bilateral and plurilateral agreements are among common member countries.

That said, RCEP and CPTPP demonstrate the increasing willingness by Asian economies to enter into large, multi-party FTAs. The CPTPP also shows that plurilateral FTAs often enable the deepening of trade relationships across different regions.

Plurilateral FTAs have the benefit of creating a common set of preferential trade rules that cover a large number of countries. This development is positive and could significantly reduce operational and supply chain complexities for businesses.

However, it is important that these plurilateral FTAs continue to have an open architecture that allows for future membership by non-members and does not create closed trading blocs.

1 UN.ESCAP (2020). Preferential trade agreements in Asia and the Pacific: trends and developments 2020/2021. Retrieved from: <https://hdl.handle.net/20.500.12870/196>.

2 UN.ESCAP (2020). Preferential trade agreements in Asia and the Pacific: trends and developments 2020/2021. Retrieved from: <https://hdl.handle.net/20.500.12870/196>.

### **A trend towards more comprehensive Preferential Trade Agreements – heightened regulation on domestic policies relating to digital and environmental provisions**

Several existing PTAs have been upgraded to become more comprehensive. Eight PTAs across the Asia Pacific region were upgraded after being active for 10 years or more. For example, the e-commerce chapter in the Australia-Singapore FTA added a provision on cross-border data flows. In addition, there has been a general trend for more PTAs to include environmental provisions. According to ESCAP (2021), 85% of PTAs signed in the region after 2005 contained at least one climate-related provision.<sup>3</sup>

### **Digital Economic Partnership Agreements**

On the digital front, digital trade represents the next frontier in economic development in APAC and is a potential engine for significant growth for Southeast Asian countries.

Leading the region on this front, Singapore has signed multiple Digital Economy Partnership Agreements (“DEPA”) with Chile, Australia, New Zealand and most recently, South Korea. Most recently, China has expressed interest in joining Singapore’s DEPA with New Zealand. It is expected that countries in APAC will follow suit to pursue cooperation on digital issues.

### **EU engagement and the focus in Asia**

Noticeably, the EU has increased its trade and economic engagements with the APAC market. In 2021, bilateral exchanges in goods between the EU and Association of Southeast Asian Nations (“ASEAN”) amounted to approximately €200 billion, and the EU remains ASEAN’s largest investor.<sup>4</sup> This presents a good opportunity for EU businesses to expand into key APAC markets to capitalise on their resilient growth.

Since signing the EU-Singapore FTA in 2019 and the EU-Vietnam FTA in 2020, Thailand and the EU have resumed negotiations on the EU-Thailand FTA. The EU also resumed negotiations with Indonesia in November 2021. An EU FTA with ASEAN as a whole is less likely at this point given the issues with Myanmar but these all suggest that the EU is keen to increase its trade engagement with countries in ASEAN and APAC.

## **2. How businesses can benefit from FTAs**

### **Tariff Preferences and Rules of Origin**

FTAs eliminate customs duties for substantially all trade between Member States. Tariff preferences are the most commonly used FTA benefits by businesses.

FTAs have Rules of Origin (“ROO”) that determine whether goods originate from one FTA partner State and qualify for preferential tariffs when imported into the market of another FTA partner State.

However, as ROOs are not unified between different FTAs, businesses need to grapple with increasingly complex and overlapping ROOs. This makes it difficult for businesses to comply with the requirements to enjoy reduced tariff rates.

<sup>3</sup> UN.ESCAP (2020). Preferential trade agreements in Asia and the Pacific: trends and developments 2020/2021. Retrieved from: <https://hdl.handle.net/20.500.12870/196>.

<sup>4</sup> Reddington, K. (2022, January 27). *It's time for EU firms to capitalise on the growing Asia-Pacific Market*. [www.euractiv.com](http://www.euractiv.com). Retrieved March 3, 2022, from <https://www.euractiv.com/section/economy-jobs/opinion/its-time-for-eu-firms-to-capitalise-on-the-growing-asia-pacific-market>

Unfortunately, despite RCEP, the ROO in Asia-Pacific will not be subsumed into a single unified rule. The RCEP ROO chapter lists minimal operations and processes and is insufficient to confer originating status on goods using non-originating materials. This means that companies must continue to use FTAs on a per country basis, which puts more strain on their internal processes as the number of FTAs and models they must handle continue to increase.<sup>5</sup>

For businesses that intend to rely on preferential tariffs as a cost saving mechanism, the different criteria of substantial transformation under each ROO may result in onerous compliance requirements.

The demands of modern complex supply chains (e.g. regional hubs, just-in-time production, vendor managed inventory, global or regional manufacturing locations, demand to make procurement changes, etc.) also compound the difficulties faced by companies seeking to apply the appropriate ROOs to qualify for duty preferences in a fully compliant manner. It is often difficult to ascertain where the finished goods are destined for and hence which ROO needs to be complied with until the goods have been manufactured and are in storage awaiting shipment.

#### Self-certification – panacea for dealing with complex ROOs?

The trend towards self-certification has been more prominently featured in FTAs and PTAs lately. In 2020, the ASEAN-Wide Self-Certification ("AWSC") Scheme was put into effect. The AWSC enabled a single unified self-certification scheme to be adopted across all 10 ASEAN Member States.

This simplifies customs procedures and allows participating companies to claim tariff privileges.<sup>6</sup> For businesses, this means that once they have obtained approval as a certified exporter, then they can claim preferential tariff rates. The implementation of self-certification procedures aims to simplify customs procedures while strengthening supply chain connectivity despite disruptions caused by the pandemic.

The question still stands – should companies embrace self-certification? Some arguments for self-certification include the following:

- to reduce the administrative costs, transaction time and administrative costs for businesses to obtain a preferential certificate of origin;
- to enable businesses to better utilise preferential tariff rates offered under an FTA;
- to improve the origin knowledge and origin skills of manufacturers and traders; and
- to increase importers' responsibilities.

However, businesses continue to face difficulties because of procedural nuances that continue to change at a rapid pace, making it tough for companies to continually keep track of new developments. Businesses may also lack experience in self-certification or have difficulty in securing a self-certificate of origin from a big supplier – in resisting or refusing larger clients' origin requests.

Although this article is primarily focused on tariff preferences, we also highlight some of the other benefits that can (and should) be used by businesses in the remaining part of this section.

5 Ball, A., Asia-Pacific, E. Y., & Ohira, Y. (2021, July 16). Regulating Free Trade Agreement Management in Asia-Pacific. *International Tax Review*. Retrieved March 3, 2022, from <https://www.internationaltaxreview.com/article/b1snx8hc4p4xp7/regulating-free-trade-agreement-management-in-asia-pacific>

6 Ascutia, R. (2020, September 28). Romelda Ascutia. *Asia Customs Trade*. Retrieved March 3, 2022, from <https://customstrade.asia/asean-self-certification-scheme-takes-effect-firms-happy>

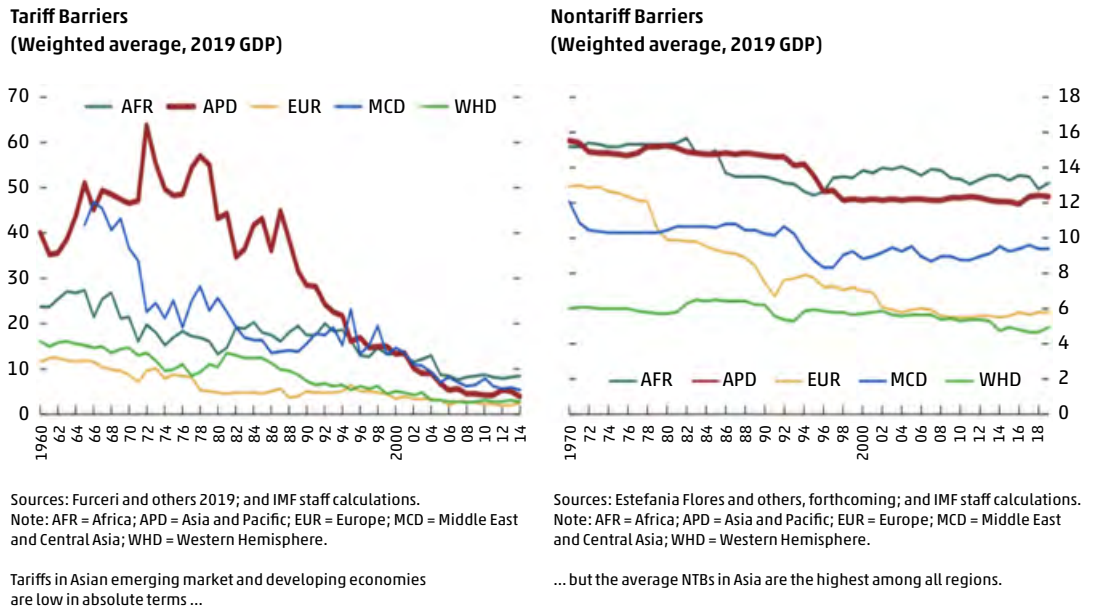
**Reduction of Non-Tariff Measures**

Many modern FTAs being signed in APAC, both intra-regionally and inter-regionally, have provisions aimed at reducing Non-Tariff Measures ("NTMs").

Unlike tariffs, NTMs remain high. The average NTM for emerging markets and developing economies in Asia is the highest across all global regions. According to the official UNCTAD database, approximately 58% of trade volume in the Asia-Pacific is covered by non-tariff measures, and each product (at HS 6-digit level) faces on average 2.5 non-tariff measures. (see Figure 1 below)

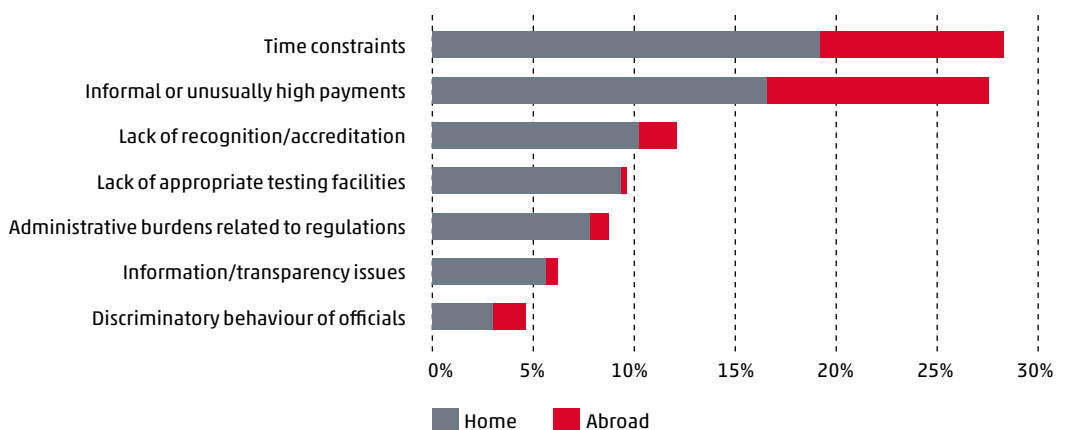
This growth in the number of NTMs is a response to general consumer demands for better health and environmental standards; as incomes have risen in developing economies it is natural that regulatory standards have tightened.

Figure 1: Comparison of Tariff Barriers and Non-Tariff Barriers between different continents globally



The biggest challenge facing APAC exporters are not NTMs themselves, but because it is difficult to get the relevant certification to comply with procedural obstacles. (see Figure 2 below)<sup>7</sup>

Figure 2: Procedural obstacles faced by importers and exporters in APAC



<sup>7</sup> Evaluating the impact of non-tariff measures on trade and investment in Asia and the Pacific. (2019). Asia-Pacific Trade and Investment Report 2019, 37-59. <https://doi.org/10.18356/b61eb80a-en>

### Businesses can rely on Mutual Recognition Agreements

Businesses can overcome procedural obstacles by relying on Mutual Recognition Agreements ("MRAs") to reduce the multiple conformity assessment that products, systems, processes and materials may need to undergo, especially when they are traded across borders.

MRAs provide for mutual recognised standards of testing and equipment procedures undertaken by accredited bodies when accessing technical regulations of the equipment. For example, it was estimated that MRAs would save 5% of the cost of new product placement, reduce by six months the placement of new products on markets, and reduce marketing costs for new products by up to 30%.<sup>8</sup>

In addition to easing the barriers to trade in goods, MRAs also support the liberalisation of trade in services. Businesses can employ MRAs to facilitate the mobility of professionals and skilled labour with partner countries. In addition, businesses can make use of the investment protection provisions that spur investments between MRA partner countries to facilitate growth.

### 3. Audit Trends and the Role of Technology

Due to the Covid-19 pandemic, most governments have experienced a windfall loss in revenue. In APAC, many governments are strategising about mechanisms to raise much needed national fund injections to propel their individual economies to thrive in a post-pandemic landscape.

#### Post-clearance customs audit

Businesses should take note that to make up for the revenue shortfall, governments would most probably increase post-clearance audits. This trend has already been proved true for some APAC countries. In May 2021, Thailand's Customs Department was reported to carry out stricter post-clearance audits where importers were challenged on complex issues.

In addition to conventional issues such as tariff classification, origin of goods, and import and export requirements, the Thai Government went further to access customs valuations and the utilisation of customs and trade privileges.<sup>9</sup> Similarly, in 2021, the Indonesian Directorate General of Customs and Excise also stepped up efforts to perform comprehensive audit inspections to increase the collection of import duties, import taxes, and excise.<sup>10</sup>

Therefore, importers must meticulously check the transaction value declared to the Customs Department, as well as the transfer pricing measure, to avoid a challenge or dispute concerning customs valuation – the risk of which has increased significantly at this time.

#### Origin verification audits

Although customs audits in Asia have traditionally been focused on classification and valuation issues, there is an increasing trend towards origin verification audits. Origin verification audits have historically been difficult for several reasons:

<sup>8</sup> Evaluating the impact of non-tariff measures on trade and investment in Asia and the Pacific. (2019). Asia-Pacific Trade and Investment Report 2019, 37–59. <https://doi.org/10.18356/b61eb80a-en>

<sup>9</sup> Thailand: Thai customs sharply focused on post-clearance audits and post-review activities. Global Compliance News. (2021, May 21). Retrieved March 3, 2022, from <https://www.globalcompliancencnews.com/2021/05/22/thailand-thai-customs-sharply-focused-on-post-clearance-audits-and-post-review-activities05042021>

<sup>10</sup> Basuki, H. S., Febrina, R., & Indonesia, S. F. C. C. (2021, June 5). Trends in customs value disputes in Indonesia. International Tax Review. Retrieved March 3, 2022, from <https://www.internationaltaxreview.com/article/b1rzlkbhrlgl3s/trends-in-customs-value-disputes-in-indonesia>



- (a) Certificates of Origin were typically issued by government authorities in the country of export that was responsible for ensuring compliance with the relevant ROOs;
- (b) whilst importers were responsible for ensuring that they made accurate declarations of imports, including whether they qualified for FTA preferences, importers typically would be highly reliant on information provided by the exporters overseas; and
- (c) it was difficult for a customs authority to audit records of exporters overseas and hence it was difficult to obtain sufficient proof in an audit of non-compliance with ROOs.

That said, FTAs do provide for mechanisms for origin audits – namely direct and indirect verifications. For direct verifications, the importing country's customs authority directly investigates the exporters of its contracting partner. For indirect verifications, the importing country's customs authority makes enquiries to the exporting country's customs authority for verification.

We note that customs authorities in Asia have resorted to indirect as well as increasingly direct verifications to audit origin issues. For instance, in July 2021, it was reported that Korea's scope of quantitative analysis expanded, and more aggressive direction verification inspection methods of direct verification were applied. This resulted in an increase in the number of origin investigations and the number of additional penalties imposed on corporates.

#### **Role of technology**

Businesses have tried different techniques in the past to comply with the problems due to the number of different rules of origin that they need to comply with to ensure that their goods qualify for preferential duty treatment. Such techniques include creating a single rule enterprise of origin that will comply with all FTAs that are being relied on, etc. However, none of these approaches have been completely satisfactory and have required a certain amount of rigidity to the supply chain that can impact the nimbleness required in modern business.

As businesses use more FTAs for tariff preferences, we have the view that more technology solutions will need to be incorporated to ensure compliance. Manual processes are no longer sufficient due to the increasing number of FTAs as well as the increased complexity of supply chains. Some of the technology solutions include:

- Enterprise Resource Planning software, which centralises data and streamlines information flows in a business to hasten the customs declarations process.
- Global Trade Management software with FTA Management solutions that automate the supplier solicitation, qualification, and certificate management processes, enabling importers and exporters to take advantage of preferential duty programs and save on customs duties and taxes.
- Import and Export Management system software that lowers the risk of noncompliance or overpaying duties as businesses will align their information in a centralised database. Further, it automatically calculates costs and expenses for businesses.

- Global Duty Optimisation software that leverages a network of duty suspension programs to achieve cost savings and generate Return on Investment. The software supports various savings opportunities worldwide including free trade agreements.

### Conclusion

As businesses face cost pressures with initiatives to increase supply chain resilience, there is a greater need for businesses to latch onto the numerous benefits offered by FTAs. These benefits need to go beyond tariff concessions to include other areas such as NTMs, trade in services, investments, etc.

However, businesses will also need to focus on beefing up their compliance capabilities and incorporate technology solutions to ensure that FTA ROOs are complied with while satisfying the demands of modern complex supply chains (e.g. regional hubs, just-in-time production, vendor managed inventory, global or regional manufacturing locations, the demand to make procurement changes, etc.). Customs authorities are likely to increase origin verification audits to cope with the pressure of meeting government funding needs.

In conclusion, FTAs hold immense potential for businesses to reduce costs and improve efficiency in their supply chains. However, businesses need to ensure that they have the necessary compliance and technology processes and solutions to withstand government scrutiny in audits.

*Eugene Lim*  
*eugene.lim@*  
*TaxiseAsia.com*

## Sweden



### Swedish Import VAT – Is Swedish Customs the competent authority?

The Supreme Administrative Court of Sweden has recently ruled in a case about how customs debt incurred due to the failure to comply with customs legislation is to be calculated when the goods are subject to exemption from custom duties because of preferential tariff measures.

In this matter, a Turkish company, the holder of an A.TR certificate, transported goods from Turkey to Sweden through a transit movement procedure. The goods were transported directly to the importer, a Swedish company, without being presented at Swedish customs. After an enquiry by Swedish customs, a customs representative lodged a customs declaration on behalf of the Swedish company. As the goods had been removed from customs supervision, a customs debt was incurred for non-compliance with the customs legislation, and the Turkish company was appointed as the debtor.

According to Article 86(6) of the Union Customs Code, when goods are relieved from customs duty due to, among other things, a preferential tariff measure, the same preferential treatment should also be applied on a customs debt incurred through non-compliance under Article 79. This provided that the circumstances that led to the occurrence of the customs debt was not an attempt at deception. The Supreme Administrative Court held that the A.TR certificate provided by the Turkish company constituted a preferential tariff measure in accordance with Article 56(2)(d). Since there was no reason to question the A.TR certificate or that the failure that led the incurrence of a customs debt was a mistake, the Supreme Administrative Court set the customs debt to SEK 0.

Swedish customs have since stated that the case solely concerns the application of Article 86(6) in relation to Article 56(2) points (d) to (g) of the UCC, and not the rest of the provisions referred to in Article 86(6). This interpretation entails that the judgment cannot be advisory in calculating import customs in matters with other circumstances, for example other procedures like inward and outward processing.

The Supreme Administrative Court also ruled concerning VAT. According to the Swedish VAT and customs legislation, VAT is not to be imposed by Swedish customs if the declarant is registered for VAT at the time of the customs decision. In this case a customs representative had filed a declaration on behalf of the transporter after the goods had been removed from customs supervision, but before Swedish customs had decided in the matter. The Supreme Administrative Court found that there was a declarant at the time of the decision, and that the Swedish Tax Agency was the correct tax authority for the VAT, not Swedish customs.

Prior to this ruling, Swedish customs has habitually appointed the holder of the procedure (normally the transporter) as the debtor and the person liable for import VAT duty, i.e. not the real importer. As such goods were not transported for the sake of the transporter's business, a deduction of the import VAT was denied. Thus, the import VAT was a cost for the transporter, with normally no opportunity for the transporter to be compensated by the customer.

*Ulrika Grefberg*  
*ulrika.grefberg@*  
*svalner.se*

*Pontus Kartberg*  
*pontus.kartberg@*  
*svalner.se*

The decision is welcomed and will have a big impact in cases of failure to comply with the customs legislation, as the companies who have failed to comply but who have notified Swedish customs about the mistake can, in some cases, be relieved of the locking effects related to import VAT.

## United Kingdom National Security and Investment Act



### Why export control is important in acquisition planning

#### What is the National Security and Investment Act?

The National Security and Investment Act ("NSI") came into effect on 4 January 2022, alongside a series of guidance notes. The NSI Act allows the UK government to scrutinise and intervene in certain acquisitions made by anyone, including businesses and investors, that could harm the UK's national security. Acquisitions of 25% or more in a target active in the 17 sensitive sectors are subject to the mandatory notification requirement, and clearance is required before completing the acquisition. The UK government is also able to "call in" transactions for in-depth review where it reasonably suspects they give rise to a risk to national security. At the end of an assessment period, the UK government will either clear, impose conditions on, or unwind or block an acquisition.

The NSI Act applies broadly in its scope and jurisdiction. It applies to acquisitions of control over qualifying entities (covering different legal structures, including companies, limited liability partnerships and trusts) and qualifying assets (covering both tangible assets and intangible assets). It also has a very broad UK nexus definition. Non-UK based target entities or assets are subject to the NSI Act if they carry out activities in the UK, or supply goods or services to persons in the UK.

The UK government is encouraging parties to seek informal guidance from the Investment Security unit ("ISU") as to the application of the NSI Act to particular transactions, both prior to and after the NSI Act's formal commencement. The Secretary of State will be able to call in any acquisitions of control of legal entities and assets that took place on or after 12 November 2020.

### **Notifiable acquisition**

Subject to certain criteria, it is legally required to notify the UK government about acquisitions of certain entities in 17 sensitive areas of the economy (called "notifiable acquisitions"). The 17 areas of the economy are:

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Military and Dual-Use
- Quantum Technologies
- Satellite and Space Technologies
- Suppliers to the Emergency Services
- Synthetic Biology
- Transport

### **The NSI Act and Export Controls**

Export controls and the NSI Act have the shared objective of safeguarding national security, but with different remits and factors considered. With military and dual-use being one of the 17 sensitive areas of the economy, it is legally required to submit a notification if a business is seeking to acquire a qualifying entity that researches, develops, or produces restricted goods or technology that are controlled by the aspects of the export control legislation that concern national security controls. Export controls operate with specific regard to the exporting of items specified on a "control list". These export control lists form the basis of determining whether any products, software, or technology that are intended for export are "controlled". The relevant lists are:

- UK Military List
- UK Dual-Use List
- UK Radioactive Sources List
- Dual-Use List (taken from Annex I to Council Regulation (EC) No. 428/2009)

A mandatory notification is not required if the activities of the qualifying entity concern goods or technology that appear on the Human Rights Strategic Export Control Lists and the Non-Military Firearms List - unless they also appear on the Military and Dual-Use Lists.

It is not always easy to tell if the entity you are seeking to acquire is researching, developing, or producing export controlled items. It is not uncommon that a business is unaware that its product is export controlled. Therefore, due diligence would be key when evaluating whether the target has any export controlled items.

Asset acquisitions are not subject to the mandatory notification requirements under the NSI Act. However, the UK government may call in an asset acquisition if there is reasonable suspicion that it has given or may give rise to a risk to national security.

In the case where the two systems both consider the same asset, the UK government, when using the powers under the NSI Act, will take account of any controls and licences issued by the Export Control Joint Unit.

### Key takeaways

Businesses engaged in acquisition should:

- check if the NSI Act applies to your acquisition. This will depend on what is being acquired and how much control you have over it.
- check if the mandatory notification requirement applies to your acquisition.
- pay special attention to entities that research, develop, or produce export controlled items (including technology) as it is one of the 17 sensitive areas of the economy that you should notify the UK government about.

*Jim Huish*  
*jim.huish@*  
*fticonsulting.com*

## United Kingdom Brexit 2022 update



The UK has entered the next stage of Brexit. As part of the phased implementation of the UK Operating Border Model, most of the simplifications for entering and exiting goods in the UK have now been removed.

The changes include the introduction of customs controls, the pre-lodgment notifications via the good vehicle movement service (GVMS), as well as pre-notifications for sanitary and phytosanitary goods. In the first months of 2022, this has led to significant challenges and delays with importing and exporting products in the UK.

### GVMS

GVMS is the UK platform for moving goods into or out of Great Britain via most ports and the Eurotunnel. For Transit movements, GVMS has been in use since 1 January 2021. From 1 January 2022, GVMS is also required for all import and export movements that require a pre-lodged customs declaration; this includes all movements via Dover and Eurotunnel. More than 80% of all shipments into and out of the UK now require a GVMS entry to be lodged. Up to 10% of these shipments fail to clear customs, resulting in lorries/trucks being refused permission to board the ferry or train.

A key issue is failing communication between the parties involved in importing and exporting products. The haulier is responsible for lodging the GVMS entry, but the haulier often does not have all the required information (on time), which makes it impossible to lodge the appropriate GVMS entry.

The customs reference number that needs to be used to create the GVMS entry depends on the type of movement (e.g. transit) and/or the customs declaration system that is used in the UK (i.e. CHIEF or CDS). This may confuse EU hauliers and lead to GVMS entries being invalid and/or not linked to the relevant customs declarations in the UK.

Furthermore, it appears that the GVMS system and communications with the customs declaration systems occasionally experience technical issues. This results in mismatches in GVMS, missed arrival clearances, as well as 'ghost' clearances of shipments that have not arrived yet, making the submitted GVMS entry invalid for the shipment itself.

In each of these situations, the only resolution is for all the parties involved to work together and to establish transparent lines of communication.

### **Sanitary and Phytosanitary**

The partial introduction of sanitary and phytosanitary controls also leads to additional red tape for importing products into the UK. All products that are subject to sanitary and phytosanitary controls now require a pre-notification to enter the UK.

Products originating from the EU and most products that have undergone sanitary and phytosanitary controls upon their importation into the EU can – until 30 June 2022 – enter the UK without presentation of the shipment to the Border Control Post (BCP).

All other products already need to be presented to the BCP, in addition to the requirement of pre-notification to enter the UK.

It is important that the traders, the hauliers, and the customs clearing agents have a full understanding of the products being shipped, including whether any sanitary and phytosanitary controls may apply. Otherwise, the goods are at risk of being stopped, seized and potentially destroyed when arriving in the UK.

*Arjen Odems*  
*odems@cutraco.com*

*Maartje Meijer*  
*meijer@cutraco.com*

### **Next steps**

The next phase of the UK Customs Border operating model will commence on 1 July 2022, which will introduce further certification and border controls on imports. This will include controls on sanitary and phytosanitary products as well as 'organic' products originating from the EU.

## United States



### Outcome of “De Minimis” will have Major Effects on E-Commerce Importations and the US FTZ Program

#### Growth of E-Commerce

As has been widely [reported](#), e-commerce sales have risen dramatically in recent years. While Covid-19 has clearly accelerated this trend, consumers increasingly prefer direct-to-consumer and e-commerce purchasing channels. This growing trend places strain not only on companies managing such transactions, but also on the regulatory agencies responsible for enforcing international transaction regulations, which in the US is primarily Customs and Border Protection (CBP).

E-commerce fulfillment relies heavily on a US importation procedure known as “de minimis”.

#### The US De Minimis Provision

The “de minimis” or “Section 321” provision, in reference to its statute,<sup>11</sup> is a customs procedure whereby US imports under \$800, which are imported by one person on one day, are permitted entry without the payment of duty or filing of a formal customs entry. In 2016, the Trade Facilitation and Trade Enforcement Act (TFTEA) raised the de minimis value from \$200 to \$800, which is likely to have contributed to the growing use of this provision.

CBP reported \$771.5 million in de minimis entries in FY21, a 21% increase from the prior year. Given the informal nature of the procedure, CBP lacks visibility in many trade data elements that would otherwise be required on formal entries. CBP also reported over 800 million de minimis entries were processed in FY21.

#### Why US Foreign Trade Zones cannot use De Minimis

While lower-value importations into the US from other countries are eligible for this duty-free provision, withdrawals into US commerce from US foreign trade zones (FTZ) are not. This restriction stems from the Section 321 statutory language as FTZ withdrawals are not considered “importations” but rather “entries.” CBP rulings also concur with this interpretation.<sup>12</sup>

#### Looking Ahead

The US House of Representatives recently passed legislation within the America COMPETES Act of 2022 (H.R. 4521) that proposes to restrict the use of de minimis for goods from China,<sup>13</sup> but is silent on the treatment for US FTZs.

If this bill in its current form becomes law, then effectively the only types of transactions that would not have access to the de minimis provision are importations from China and withdrawals from US FTZs. For some retailers operating in US FTZs, from a customs and duty perspective this potential result incentivises them to offshore their distribution operations, often to Canada or Mexico.

The lack of FTZ access to the de minimis provision is not a new problem; however, the dramatic rise in e-commerce fulfillment combined with the opportunity for Congress to

11 19 U.S. Code § 1321(a)(2)(C)

12 HQ H275567 (May 8, 2018) and HQ H282601 (September 18, 2018)

13 This legislation specifically prohibits goods from countries that are both non-market economies and on the U.S. Trade Representative’s (USTR) Priority Watch List.

correct the statutory limitation has prioritised this issue for US retailers and US economic development champions.

Changes to de minimis have the potential to dramatically shift the location from which hundreds of millions of shipments destined for US consumers originate. If the law continues to preclude US FTZs from utilising it for US warehouse withdrawals, then US retailers may be incentivised to move offshore (to any country other than China, which would also be restricted). If the new de minimis provision does allow for access for US FTZs, then it is likely that the US would experience a sharp increase in investment and FTZ designation for e-commerce fulfillment warehouses and similar distribution centres.

*James Grogan*  
*james.grogan@*  
*fticonsulting.com*

## Vietnam



### Import of software to Vietnam

On 21 December 2021, the General Department of Customs issued new guidance on importing software.

#### 1. Key concepts

Software is classified as "system software" or "application software".

"System software" allows the user to operate or control a machine or equipment, and the software is integrated into that machine or equipment.

"Application software" enables data processing equipment (e.g. a desktop computer, laptop, tablet) to perform a specific task or produce a particular outcome at the user's request. The software is installed in such equipment.

The import of software can be via the internet or an intermediate like a temporary storage medium.

#### 2. Limitations for foreign-invested companies

A foreign-invested company cannot import or distribute data storage items like USBs or CDs. This restriction includes joint venture companies.

#### 3. Importing software via the internet

If the software is imported via the internet, no customs procedure is required. Software does not have an HS Code.

#### 4. Physical import of storage mediums with software

Vietnamese-invested companies can import these without restrictions.

Foreign-invested companies can import the system software together with the machinery and equipment.



**a. Calculating customs value of software**

→ For system software

Import at the same time with the machine	Import after importing machinery/equipment using carrier media		Import to update or replace the first software
	separated	not separated	
Value of machine + software	Value of machine + software excludes the value of carrier media	Value of machine + software + the value of carrier media	Value of carrier media In these cases, it is considered as independent software (not considering, determining the customs value together with the value of machinery/equipment)

→ For application software

If the invoice separates the value of the software and the value of the carrier media, only the value of the carrier media is relevant. The value of the software is not considered.

**b. Declaring when importing software**

Import at the same time with the machine	Importing software before/after importing machine (including import to update or replace the first software)
Declare customs value of machinery/equipment, including the value of the software and carrier media (if any)	<ul style="list-style-type: none"> <li>→ Must state which machinery and equipment the software will be used for when declaring the description of software;</li> <li>→ Must declare the HS code of the machinery and equipment;</li> <li>→ The later declaration form must state the previous reference number when importing the machine or software;</li> <li>→ In the case of importing software used for a separate production line machine, the HS code should be the HS code of the primary device.</li> </ul>

*Vo Thi Xuyen*  
 vo.thi.xuyen@  
 wtsvietnam.com

*Nguyen Thi Hang Nga*  
 nguyen.thi.hang.nga@  
 wtsvietnam.com

## Contact

### Austria

**Günther Platzer**  
guenther.platzer@icon.at  
**Sarah Ecker**  
sarah.ecker@icon.at  
T +43 732 69412 0  
**ICON Wirtschaftstreuhand GmbH**  
Stahlstrasse 14  
4020 Linz  
www.icon.at

### Belgium

**Stijn Vastmans**  
stijn.vastmans@tiberghien.com  
**Gert Vranckx**  
gert.vranckx@tiberghien.com  
T +32 2 773 40 22  
**Tiberghien Lawyers BV**  
Havenlaan 86C, box 419  
Brussels  
www.tiberghien.com

### Brazil

**Júlio M. de Oliveira**  
jo@machadoassociados.com.br  
**Gabriel Caldiron Rezende**  
gcr@machadoassociados.com.br  
T + 55 11 3819 4855  
**Machado Associados**  
11th floor  
Av. Brigadeiro Faria Lima, 1656  
01451-918 São Paulo – SP  
www.machadoassociados.com.br

### China

**Conrad Lin**  
conrad.lin@wts.cn  
T +86 21 5047 8665-202  
**WTS China Co., Ltd.**  
Unit 06-07, 9th Floor, Tower A,  
Financial Street Hailun Center  
No.440 Hailun Road, Hongkou District  
200080, Shanghai  
www.wts.cn

### France

**Najat Akodad**  
najat.akodad@fidal.com  
T +33 6 76 82 81 11  
**FIDAL**  
Immeuble l'Astrolabe  
79, boulevard de Dunkerque  
13235 Marseille Cedex 02  
**Justin Hayden Miller**  
justin-hayden.miller@fidal.com  
T +33 6 70 59 04 27  
**FIDAL**  
91, Avenue Antoine de St-Exupéry  
76235 Bois-Guillaume Cedex  
www.fidal.com/en  
**Germany**

### Germany

**Kay Masorsky**  
kay.masorsky@wts.de  
T +49 40 320 86 66-159  
**WTS Steuerberatungsgesellschaft mbH**  
Brandstwiete 4  
20457 Hamburg  
www.wts.de

### Hungary

**Tamás Gyányi**  
tamas.gyanyi@wtsklient.hu  
T +36 18873736  
**WTS Klient Tax Advisory Ltd**  
Stefania út 101-103  
Budapest 1143  
www.wtsklient.hu

### Italy

**Paolo Dragone**  
paolo.dragone@ra-wts.it  
T +39 045 4722187  
**WTS R&A Studio Tributario**  
Vicolo Oratorio 5/A  
37121 Verona  
www.ra-wts.it

## Contact

### Senegal

**El Hadji Sidy Diop**  
sidy.diop@faceafrica.sn  
T +221 77 639 73 65  
T +221 33 869 91 66  
**Face Africa tax & legal**  
2, Place de l'Indépendance  
Aliou Ardo Sow Building  
10 000, Dakar  
www.faceafrica.sn

### Singapore

**Eugene Lim**  
eugene.lim@TaxiseAsia.com  
T +65 6304 7978  
**Taxise Asia LLC**  
61 Robinson Road  
#17-01A  
Singapore 068893  
www.taxiseAsia.com

### Sweden

**Ulrika Grefberg**  
ulrika.grefberg@svalner.se  
T +46 76 899 69 10  
**Pontus Kartberg**  
pontus.kartberg@svalner.se  
T +46 73 687 97 63  
**Svalner**  
Smålandsgatan 16  
111 46 Stockholm  
www.svalner.se

### United Kingdom

**Jim Huish**  
jim.huish@fticonsulting.com  
T +44 (0) 207 6325010  
**FTI Consulting**  
200 Aldersgate, Aldersgate Street  
London EC1A 4HD  
www.fticonsulting.com

### United Kingdom

**Arjen Odems**  
odems@cutraco.com  
T +44 208 144 6408  
**Maartje Meijer**  
meijer@cutraco.com  
T +44 20 8144 5098  
**Customs and Trade Consultancy Limited**  
First Floor  
85 Great Portland Street  
W1W 7LT, London  
www.cutraco.com

### United States

**James Grogan**  
james.grogan@fticonsulting.com  
T 512-922-4697  
**FTI Consulting**  
First Floor  
1301 McKinney St., Suite 3500  
Houston, TX 77010  
www.fticonsulting.com

### Vietnam

**Vo Thi Xuyen**  
vo.thi.xuyen@wtsvietnam.com  
**Nguyen Thi Hang Nga**  
nguyen.thi.hang.nga@wtsvietnam.com  
T +84 28 7302 5771  
**WTS Vietnam**  
8th floor, No. 172, Dakao Ward, District 1  
Hai Ba Trung Street  
Ho Chi Minh City  
www.wtsvietnam.com

### About WTS Global

With a representation in over 100 countries, WTS Global is one of the leading global tax practices offering the full range of tax services without the constraints of a global audit firm. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

The exclusive member firms of WTS Global are carefully selected through stringent quality reviews. They are typically strong local players in their home market being united by the ambition of building the tax firm of the future. WTS Global effectively combines senior tax expertise from different cultures and backgrounds be it in-house, advisory, regulatory or digital.

For more information please visit [wts.com](https://www.wts.com)

### Imprint

WTS Global  
P.O. Box 19201 | 3001 BE Rotterdam  
Netherlands  
T +31 (10) 217 91 71 | F +31 (10) 217 91 70  
[wts.com](https://www.wts.com) | [info@wts.de](mailto:info@wts.de)

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the authors.