BUSINESSEUROPE

COMMENTS

27 March 2015

Commission proposal concerning Rules of Origin proof

BACKGROUND

The European Commission has informally contacted Member States and industry stakeholders to provide input on a proposal that would change the proof of preferential origin for traded goods. The proposal was prompted by the on-going EU-US negotiations and is supposedly a way to align EU and US rules when it comes to preferential origin proof. The Commission is also considering extending this proposal to other FTAs. The proposal consists of the following elements:

- Importers would be responsible for information stating the goods have preferential origin;
- As such, there would be no need for a Certificate of Origin (COO) or any official document from the part of the Exporter;
- Customs authorities in Member States could deny preferential origin, ask for documentation or undergo inspections in case of suspicion of fraud or incorrect information;
- In case a good is considered as not having preferential origin, the burden of proof will be on the importer.

This document outlines BUSINESSEUROPE's comments on this proposal.

SUMMARY

The proposal raises very basic questions on how customs procedures can and should be simplified in the future. It also requires a balance between reducing the administrative burden and the level of risk and responsibility importers face. The current system where customs authorities verify origin declarations are tried and tested. Origin verification is well controlled, for example through customs audits. Under the current proposal, however, the supplier seems to benefit most while at the same time placing a considerable burden on the EU importer. The importer would have to know the rules of origin applicable to a given product or have a trusting and contract-tied relationship with its supplier. This could be a difficult task particularly in the case of finished goods with long and complex supply chains. It is questionable whether every EU importer would know to apply these rules when he has no sight of what processing operation may have taken place in the third country; how and where the different product components were manufactured; and what its value content may be – this could have to be confirmed again by the third country supplier. The majority of world trade is based on the global value chain business model and this proposal does not appear to be in line with the demands of modern supply chains and trade facilitation.

We believe this proposal would (1) unduly shift the burden of proof from the exporter to the importer; (2) cloud the legal responsibility for proving origin; (3) disregard that importers do not normally have access to information on how and where the different

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components are manufactured; and (4) neglect the difficulty of proving origin without a COO or other official document that can verify origin.

In our view, this proposal will significantly enhance the compliance risk of using COO – and may well increase the already large numbers of importers opting to ignore potential duty savings under FTAs. So at this stage we fail to recognise any positive impact.

BUSINESSEUROPE COMMENTS

1. Shift in the burden of proof from exporter to importer

If implemented, this proposal would constitute a further shift in the burden of proof from the third country exporter to the EU importer. In the context of complex supply chains, it would become practically impossible for the importer to rightfully claim a preference without having done a detailed assessment on the correctness thereof. It would also place the responsibility of verifying or challenging origin on individual Member States. Not only would this create a burden on importers and Member States, but differences in conducting checks between Member States could lead to a situation where non-preferential goods could falsely enter the EU under preferential origin. The exporter might be tempted to give misleading information to the importer in order to obtain preferential origin and thus conclude the business operation.

It is also unclear who would bear the costs if an audit by a Member State concludes that goods previously imported do not qualify as preferential. Under the current system, exporters bear this responsibility via the COO. And if this responsibility is included in the purchase contract, the importer would be able to bring legal action against the supplier to claim back the duty owed. Under the new system, importers would have to verify or trust the origin of imported goods in the absence of a COO. If they were held responsible for the consequences of an audit without the ability to bring action against the supplier to claim back the duty, then this would offset any gains made from simplifying Rules of Origin and further discourage importers from making use of preferential imports. If the costs related to verification of origin are too high, it might significantly reduce the utilisation rate of free trade agreements.

More importantly, shifting the burden of proof also raises the question of how importers would prove origin in the absence of a COO. Since the exporter is the only entity who has access to the information needed to determine preferential origin (see point 3), the exporter ought to be responsible for verifying the origin.

2. Legal responsibility for proving origin

In the current proposal, there is a tension between the seller of the goods who alone is in a position to provide the COO, and the buyer of the goods who takes legal responsibility for using it. Importers would need to manage that tension as best they can – and the best of them will periodically assess their suppliers' knowledge and process to ascertain whether the trust placed in them by the action of using the COO they provide is justified by the partners' on-going processes. That practice aims to

protect the importer's reputation with the customs authorities – thereafter, contractual terms could try to ensure that the supplier rather than the importer suffers the financial cost of using an invalid COO. The problem with the current proposal, however, remains two-fold:

1) It unduly places the burden of proof on importers
2) Smaller importers would run into difficulty as their capacity to assess their suppliers' knowledge and process would be limited

Under the current proposal, clear rules and solid law enforcement by the home state customs authorities would be lost. Instead, law enforcement would solely rely on private law disputes that may entail high costs either for enlisting international law firms or risk loading. In case origin is challenged, the importer would have to choose between costly redress through private law or accepting the damage. Small and medium enterprises could be deterred by the higher risk involved with conducting legal disputes in a foreign court.

3. Importers do not have access to the list of components or intermediary products

The proposed system would leave the importer solely responsible for the adoption of any preference claim – but he is in no position to know whether or not the product qualifies. In the likely case the importer has not established an affiliated business or joint venture with the supplier, he has no access to Bills of Material, to classification codes of component parts, or to the sort of detail of manufacturing processes that typically go with "product specific" origin rules. Under competition law, this information is typically classified and is part of the reason why authorities in the exporting country issue statements of origin if exporters meet the criteria of the list rules for preferential treatment.

As an example, if the preferential origin rule requires that a garment is produced out of a fabric that has to undergo certain finishing operations with a minimum value added threshold, it will be difficult for the importer to know if indeed those operations took place and the minimum value added threshold was respected.

If the exporter is not obliged to provide evidence or a declaration testifying the preference, it is very likely the information will be lost along the supply chain that in many cases is quite fragmented, spanning along different countries/regions.

4. Difficulty of proving origin

There is also the action of clearance agents to consider. For example, many US companies use Mexican Maquiladoras for manufacturing purposes. It is not guaranteed that these goods will have preferential origin in the context of an EU-US agreement. Much will depend on cumulation and minimal operations' conditions.

But a clearance agent, seeing such goods arrive from the US, may well claim the preference on the importer's behalf – simply because goods from the US in general would benefit from preferential treatment once the agreement is in place.

We see this already with agents making claims to simplified inward processing relief (IPR) and outward processing relief (OPR), where the importer is aware that he lacks the resources to manage a "count them in and count them out" process, but the agent who handles both imports and exports makes a unilateral decision to use a Simplified IPR CPC in Box 37, which has to be unwound when the principal, who is unaware of the use of the process, fails to submit the required IPR certificate of discharge.

BUSINESSEUROPE would also like to ask for clarification on the following aspects:

- Would this system be proposed in all on-going free trade negotiations including with developing countries or only in the negotiations with developed economies such as the US and Japan?
- If the system is adopted will it be extended to existing FTAs for the purpose of harmonisation?
- Would the system cover all preferential trade including unilateral preferences like the GSP? BUSINESSEUROPE notes that the Commission published a new regulation amending origin certification for GSP beneficiaries on 14 March 2015 which implies origin certification will continue.
- It is assumed that origin verification will be left to Member States Customs Authorities. How to ensure a harmonised approach across the EU?
- To what extent have data protection and confidentiality been considered? Exporters are not willing to provide confidential information such as prices, bills of material, etc.
- How will the importer be able to prove origin? If no official rules require the exporter to report origin information to the importer, this information deficit will be solved by contract law and lead to many different levels of reporting given that the bargaining power of importers differ.
- How would the proposed regulation affect or interact with the system of Approved Exporter Status, which does not require a certificate of origin?
- What is the intended objective of this regulation?