

Rules of obtaining binding tariff information in the EU—analysis of selected problems

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Abstract

The institution of binding tariff information (BTI) has been present in the European Union (EU) since 1991. The importance of BTI continues to increase, which is confirmed by the number of issued decisions. Technological advances contribute to new products, making it difficult to determine the correct tariff code. Therefore, it is essential for entities trading in goods on the international level to apply for BTI decisions. Despite its increasing importance and the relatively lengthy existence of this institution, the provisions of the law concerning BTI include solutions that make it difficult for entrepreneurs and issuing authorities to use it.

1. Introduction

The member states of the EU constitute a customs union. This implies that the countries have common rules that apply to the international trade in goods, and that they apply identical provisions in relation to entrepreneurs from different member states involved in international trade. Thus, customs authorities are obliged to apply the provisions of the customs code uniformly.

The new EU customs code regulations have been in force since 1 May 2016. They include the Union Customs Code,¹ the Delegated Regulation,² and the Implementing Regulation.³ The new regulations introduced changes in scope of binding tariff information. However, despite changes, there are still some solutions that might cause problems in issuing BTI decisions, both from the perspective of an applicant and customs authorities. Taking this into account, the purpose of this article is to indicate these incorrect solutions and the direction of changes.

2. Concept and role of BTI

BTI refers to the classification of goods. Generally speaking, it is a written decision of an authority that specifies a relevant code of the customs tariff for a specific product. BTI strives to eliminate classification mistakes, which benefits both importers and customs authorities (Naruszewicz & Laszuk, 2005, pp. 111–112). It should be noted that the classification of goods creates many problems, even for specialised entities and authorities. Although establishing a relevant combined nomenclature (CN) code can be extremely difficult, it is a crucial calculation element that has an impact on both the amount of customs duties on imports and the scope of commercial policy measures in international trade of goods.

It is not obligatory to have BTI to be able to import or export goods, but it does give legal certainty about how Customs will treat your goods. It is not a licence, nor does it confer any special status on the goods to which it refers. It is simply a decision given by Customs to a single trader stating the tariff classification of specific goods (Valentine, 2008, p. 414).

Since the introduction of BTI in 1991, there has been steady growth in the numbers of BTI decisions issued annually. This is because holding a BIT decision:

- gives certainty about the correct tariff classification of goods
- gives a commodity code for goods imported or exported
- assists in determining customs duties, export refunds, licensing requirements, quotas and other restrictions in advance.

Information concerning all BTI decisions issued in EU member states is stored in the system of the European BTI (EBTI), owned by the European Commission (EC). Pursuant to Article 17 of the Implementing Regulation, customs administrations are legally bound to consult the EBTI database and keep a record of such consultations. This is aimed at ensuring a uniform tariff classification of goods in the EU and thus limiting the potential risk of issuing BTI divergent decisions. Besides, this activity is necessary in relation to combating BTI shopping (Article 16 section 4 of the Implementing Regulation).

Table 1. Number of BTI decisions issued in individual EU member states

Country	BTI decision	
	Total	Since 1 Jan 2014
Austria	3,712	2,706
Belgium	2,378	1,651
Bulgaria	1,120	924
Croatia	388	358
Cyprus	373	265
Czech Republic	5,972	4,752
Denmark	1,878	1,198
Estonia	40	28
Finland	1,069	689
France	37,703	31,977
Germany	127,306	92,619
Greece	311	224
Hungary	1,709	1,268
Ireland	4,065	2,912
Italy	2,813	1,979

Latvia	351	192
Lithuania	262	189
Luxembourg	34	29
Malta	199	101
The Netherlands	11,125	7,157
Poland	8,734	6,229
Portugal	256	142
Romania	1,311	944
Slovakia	1,687	1,129
Slovenia	973	653
Spain (excluding XC XL)	4,520	3,360
Sweden	4,447	3,253
United Kingdom	26,202	15,981
TOTAL	250,938	182,909

Source: The European Binding Tariff Information

Table 1 shows that the largest number of BTI decisions were issued in Germany, France, Great Britain and The Netherlands. However, it is worth noting that these are countries that have been part of the EU for a long time and have been using BTI since it was introduced. Among countries that joined on or after 1 May 2004, the largest number of BTI decisions were issued in Poland and the Czech Republic. The number of issued decisions is closely connected with the product turnover made by the countries. The largest importer among EU member states is Germany. Import to Germany accounts for almost one-fifth of imports to the whole EU—18.9 per cent. Other significant importers in the EU are the United Kingdom (14.8% of total import to the EU), The Netherlands (14.7% of total import to the EU) and France (9.0% of total import to the EU) (Eurostat, 2017).

Luxembourg and Estonia have the least number of issued BTI decisions. These are small countries in terms of the area and population and their international turnover is significantly smaller.

In Table 1 the number of issued certificates is indicated from 1 January 2014. Since member states joined at different times, the number of issued certificates will be different. However, the period analysed in the last part of the table includes all 28 countries. It should be noted that this part confirms a tendency indicated in relation to all years, namely, the largest number of BTI decisions is issued by the customs authorities of countries where import is significant.

3. The rules for obtaining BTI decisions

According to Article 33 the Union Customs Code (UCC) ‘the customs authorities shall, upon application, take decisions relating to binding tariff information (BTI decisions), or decisions relating to binding origin information (BOI decisions)’. It means that individual member states decide independently which customs authorities are responsible for issuing a BTI decisions. Most member states have appointed only one authority competent to conduct proceedings and issue BTI decisions (except Belgium, Denmark and Finland). The purpose of appointing only one authority in a country is to ensure the highest competence and knowledge of people who make binding classification decisions and consistency of those decisions. The list of authorities designated by member states to receive applications for, or issue BTI, has been published in Official Journal C 261(2015/C 261/05) of 8 August 2015 (European Union, 2015).

In Poland, for example, the authority competent to conduct proceedings in the first instance relating to BTI, pursuant to Section 1.2 of the Regulation of the Minister of Economic Development and Finance, is the Director of Revenue Administration Chamber in Warsaw.⁴ The Regulation was issued on the basis of Article 70 section 3 of the Customs Law Act.⁵ The appeal authority (in the second instance) is a minister competent for public finances.

Decisions relating to BTI only take place when a concerned party submits an application to a competent authority. The application should be submitted in a country in which the entity is legally established or where it intends to import or export goods. This is not an absolute principle, as the applications may be submitted in other countries. However, in the case of receiving a BTI application from an applicant from another member state, customs authorities should be aware that ‘BTI shopping’ may occur. It should be noted that the customs authority that accepts the application must notify the customs authority in the country in which the applicant is based within seven days of its acceptance. The customs authority that receives such notification may, within 30 days, transmit information that it considers relevant for the issuance of the BTI to the customs authority conducting proceedings. Entrepreneurs that are based outside the EU may also submit applications for the issuance of a BTI decision to the customs administrations. In this case the application should be submitted to the customs authority that assigned the applicant’s Economic Operator Registration and Identification (EORI) number.

The application may relate to only one type of goods, classified according to the customs tariff and should include:

- the customs nomenclature in which classification is to be made
- a precise description of the goods, which will enable their identification and classification in customs nomenclature
- specification of product composition or material used to make it
- expected classification
- any information considered confidential.

If it is relevant to a product classification, the applicant should submit product samples, photographs, catalogues, and quality or quantity certificates and any other required documents. It should be stressed that the applicant is responsible for submission of all necessary information required to classify the goods.

Pursuant to Article 33 of the UCC, the application will not be accepted if it is made, or has already been made, at the same or another office issuing BTI decisions, by or on behalf of the holder of a valid decision in respect of the same goods, or if the application does not relate to any intended use of the BTI decision. In other cases, the application is accepted and a decision is issued. Although decisions are issued free of charge, where the issuing authority considers that correct classification requires them to conduct examinations, analysis and sampling, then costs of the above procedures will be covered by the applicant.

All BTI applications that have been correctly completed must be entered into the EBTI database, even if some data is unavailable or the application is withdrawn at a later stage. No circumstances exclude this obligation.

A BTI decision specifies the correct classification of goods according to CN and indicates the eight-digit code of the customs tariff. Its basic purpose is to ensure:

- transparency of customs information
- the uniform application of the Common Customs Tariff (CCT)
- that differences in tariff classification in EU member states are eliminated
- equality and legal protection of economic entities within the EU.

A BTI decision should be granted without delay, no later than within three months from the date of submission of a completed application. If the decision is not issued within this period, the authority providing information is obliged to inform the applicant and specify the reason for the delay and the date on which the decision relating to BTI will be issued. If an applicant is not satisfied with the decision, they may lodge an appeal to a relevant minister in charge of public finances within 14 days from the date of its delivery. However, a correctly issued decision will not be changed.

Within the shortest possible period of time, a copy of the BTI should be transferred to the EC by the authorities in the relevant member state. Information transfer is made electronically. In the case of divergence between two or more BTIs, the Commission, on its own initiative or at the request of the representative of a member state, will transfer the case to the deliberations of the Customs Code Committee. It should be noted that the EC should, as quickly as possible (not later than within 6 months after the date of deliberations), undertake measures that ensure uniform application of provisions concerning CNs. A solution adopted by the legal regulations allows unification of decisions classifying goods according to CNs issued by member states.

As previously noted, information supplied for the purposes of obtaining a BTI will be stored on the EBTI and may be used by customs authorities throughout the EU to ensure uniform application of the customs tariff. However, any information in respect of which confidentiality is sought will be included in the database but not disclosed to the public or customs administrations of other member states.

A BTI decision is valid for a period of three years from the date on which the decision takes effect. It is binding in the scope of tariff classification on both customs authorities and the entity at the request of which it was issued. The authorities are bound by their decision as against the holder of the decision, only in respect of goods for which customs formalities are completed after the date on which the decision takes effect. As regards the entity at the request of which the BTI was issued, the decision is binding as against the customs authorities, only with effect from the date on which they receive, or are deemed to have received, notification of the decision.

Pursuant to Article 34 section 1 of the UCC, a BTI decision shall cease to be valid before the end of the period of three years; where it no longer conforms to the law; or as a result of either the adoption of an amendment to the nomenclatures, or the adoption of measures in order to specify tariff classification of goods.

A BTI decision may also be cancelled where it is based on inaccurate or incomplete information from the applicants.

Further, customs authorities shall revoke BTI decisions where they are no longer compatible with the interpretation of any of the nomenclatures⁶ resulting from explanatory notes; a judgment of the Court of Justice of the European Union; and classification decisions, or classification opinions or amendments of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System (Article 34(7) UCC). However, a BTI decision may still be used in respect of binding contracts that were based upon that decision and were concluded before it ceased to be valid or was revoked (Article 34(9) UCC).

4. Problems in the functioning of BTI

The customs regulations specify timeframes for issuing BTI decisions. The legislator specifies deadlines concerning authorities' activities connected with processing applications, consultations among member states and issuing BTI decisions. A BTI decision must be issued, at the latest, within 120 days from the date of the acceptance of the application. However, if customs authorities are not able to issue the decision within the specified time limit, they should notify the applicant of that fact before the expiry date and explain the reason for the delay. The additional time limit for issuing the decision should not exceed 30 days. However, this may be exceeded where it is not possible to complete the required analysis within that time.

It should also be noted that Article 20 of the Commission Delegated Regulation (EU) 2015/2446 provides for a special situation when the Commission suspends issuing a BTI decision in relation to goods without the correct and uniform tariff classification. In such a case, the time limit for issuing BTI is further extended until the EC notifies the customs authorities that the correct and uniform tariff classification is ensured. The additional extension shall not exceed 10 months or, in exceptional circumstances, 15 months.

It is clear that established time periods are lengthy—in particular the time limit for issuing a decision concerning the correct and uniform tariff classification. It should be noted that the problem with the correct tariff classification of goods occurs frequently. Such a long waiting period may result in significant delays for imports, which may have negative consequences for entrepreneurs. For example, in the United States the initial time limit for issuing binding information is 30 days, and in cases when sampling or other consultations are necessary the maximum period is 90 days, which is shorter than the initial period established in the EU regulations.

The next problem relates to the required intention to import goods. There is no clear regulation requiring proof of intention to import. While Article 19 section 1 of the Commission Delegated Regulation (EU) 2015/2446 states, 'an application for a BTI decision may be submitted to the competent customs authority in the Member State in which the information is to be used', this cannot refer to hypothetical situations. There are also no regulations that would explain how the intention to import goods should be proved. This gives customs authorities of the member states considerable freedom in specifying the evidence required to confirm such intention. However, obtaining information concerning the classification of goods, and hence the amounts due, is a matter of great importance when making a decision relating to planned transactions and determining the risk level, therefore limiting the possibility of obtaining BTI to actual situations only is unjustified. After obtaining the information, an entity may withdraw from a planned transaction due to unfavourable conditions of applied classification.

The intention to import goods is not a requirement in many countries. For example, regulations in the United States stipulate the necessity to submit confirmed information (e.g. name, addresses, email addresses and a producer's code), if it is known, together with the application for BTI. Therefore, it should be interpreted that a BIT decision may also refer to future and uncertain events.

Another issue is the prohibition of BTI shopping, which is specified in the EU's customs regulations. Pursuant to Article 16 of the Commission Implementing Regulation (EU) 2015/2447, in case of receiving an application for a decision relating to BTI from the applicant established in another member state, the customs authority shall notify the customs authority of the member state where the applicant is established within seven days. Such an obligation is connected with the prohibition of BTI shopping. BTI shopping is an illegal practice consisting of submitting more than one application for the same product, usually in customs administrations of different member states. Therefore, it is important for the authority to check the database to ensure that the same applicant did not submit an application or receive a BTI decision for identical or similar goods in a different member state. Such a database search should include applications submitted and decisions issued in all EU member states.

Risk indicators regarding BTI shopping may include situations where:

- more than one tariff item deserves consideration
- significant differences in customs duty or tax rates are visible which result from different tariff items deserving consideration
- other EU measures apply (e.g. import permit, tariff quota or antidumping customs duty).

The above situation in practice results in the possibility of submitting applications for BTI decisions by the entities (e.g. companies that function within an international holding) only in a country where they have their head office. It constitutes a freedom limitation for entities which may run their international business activity in every member state. As EBTI serves to eliminate discrepancies, prohibition of BTI shopping introduced by the EU customs code is not understandable. It should be underlined that the name itself is misleading as to the situation it specifies, which has nothing in common with 'shopping'.

Analysing the issue of the EBTI database searching, it shall be indicated that member states' authorities are obliged to include in the EBTI database BTI decisions in the language of the country that issued it. Only key words are translated, which are very general, and so do not enable the precise classification of goods, and complicates the work of customs authorities in the scope of data check. Thus, consideration should be given to extending the scope of translated data included in the EBTI database.

It should also be noted that customs authorities of member states issuing BTI decisions use descriptions of goods that are not very precise, and that they seldom include additional documentation in the form of photographs. This significantly impedes the work of other customs authorities and therefore it is suggested that in legal regulations the data scope that customs authorities should include in the BTI decision should be adjusted.

The introduction of relevant legal solutions is recommended, which would significantly improve the functioning of the BTI institution for both entrepreneurs and customs authorities. It would also be appropriate to consider a principle change that a BTI decision is issued only in relation to one entity. On the other hand, entities that have an analogous situation also have to submit applications to customs authorities for BTI decisions. This represents a situation of issuing a decision in relation to the same factual condition. Taking the above into account, it should be indicated that information about issued BTI decisions should be included in the TARIC, and also a decision issued with reference to a specific product should be recognised by other authorities.

5. Conclusions

The number of issued BTIs is increasing because there is now a larger number of member states and because new technologies and new commodities, which are difficult to classify, have emerged. Assigning adequate CN codes is problematic, despite the existence of the General Rules for the Interpretation of the Combined Nomenclature. As indicated above, most BTIs are issued in the countries that have a significantly high level of international trade in goods. BTI directed at importers and exporters facilitates running a business, but also provides legal certainty in relation to the classification. However, achieving this certainty is based on conditions that are not always favourable to an entrepreneur.

Although BTI has been functioning in the EU since 1991, there are still problems with its application, such as the long waiting period for a BTI decision to be issued, which might lead to negative consequences for entrepreneurs. Introducing the obligation to confirm an intention to import a commodity in the procedure of applying for BTI is also an unfavourable solution for entities trading in goods with other countries. Another concern is the BTI provision in the UCC that is intended to avoid 'BTI shopping', which inhibits the freedom of the entities that conduct their activity in scope of international trade in each member state. Addressing problems described in the article by introducing changes to the regulations would be beneficial for both entrepreneurs and customs authorities and may, in the longer term, contribute to an increase in trade facilitation.

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Notes

- 1 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 *Laying down the Union Customs Code*, OJ L 269, 10.10.2013, p. 1–101
- 2 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 *Supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code*, OJ L 343, 29.12.2015, p. 1–557
- 3 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 *Laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code*, OJ L 343, 29.12.2015, p. 558–893
- 4 Regulation of the Minister of Economic Development and Finance of 1 February 2017 *On appointing the Director of Revenue Administration Chamber in Warsaw to conduct certain customs matters* (Journal of Laws of 2017, item 228)
- 5 The Act of 19 March 2004 *the Customs Law* (Journal of Laws of 2016, item 1880)
- 6 The Combined Nomenclature of goods and any other nomenclature which is wholly or partly based on the Combined Nomenclature or which provides for further subdivisions to it, and which is established by Union provisions governing specific fields with a view to the application of tariff measures relating to trade in goods.

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