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Subject: Draft RECOMMENDATION OF THE CUSTOMS COMMITTEE ESTABLISHED UNDER THE FREE TRADE AGREEMENT BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF KOREA, OF THE OTHER PART, on the application of Article 27 of the Protocol concerning the definition of 'originating products' and methods of administrative cooperation

DRAFT

**RECOMMENDATION No 1/2020 OF THE CUSTOMS COMMITTEE
ESTABLISHED UNDER THE FREE TRADE AGREEMENT
BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES, OF THE ONE PART,
AND THE REPUBLIC OF KOREA, OF THE OTHER PART**

of ...

**on the application of Article 27 of the Protocol
concerning the definition of ‘originating products’
and methods of administrative cooperation**

THE CUSTOMS COMMITTEE,

Having regard to the Free Trade Agreement (hereinafter, ‘the Agreement’) between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, in particular Articles 15.2(1)(c) and 6.16(5) thereof,

Whereas:

- (1) Article 27 of the Protocol of the Agreement, concerning the definition of ‘originating products’ and methods of administrative cooperation (hereinafter, ‘the Protocol’), lays down the procedure for the verification of proofs of origin and the tasks and responsibilities of the customs authorities of the importing and exporting Parties.
- (2) The European Union and the Republic of Korea (hereinafter, ‘the Parties’) have identified a need for a common understanding of the main characteristics of the verification procedure laid down in Article 27 of the Protocol and of the different steps in that procedure. Such a common understanding should be in the interests of the customs authorities that are in charge of ensuring compliance with the rules of origin and of ensuring the equal treatment of the economic operators subject to such verification, on the territory of each Party.
- (3) The Customs Committee is empowered by Article 6.16(5) of the Agreement to formulate recommendations which it considers necessary for the attainment of the common objectives and sound functioning of the mechanisms established in the Protocol. The Parties consider it appropriate for the Customs Committee to formulate a recommendation for a common understanding and the sound implementation of the verification procedure laid down in Article 27 of the Protocol,

HEREBY RECOMMENDS:

1. Main characteristics of the verification procedure

- (1) The main characteristics of the verification procedure of Article 27 are twofold: it is a system of so-called ‘indirect verification’ and it is based on mutual trust between the customs authorities of the Parties.
- (2) ‘Indirect verification’ means that the customs authorities of the importing Party do not conduct the verifications themselves but they send a request for verification to the customs authorities of the exporting Party and it is for the latter to carry out the verification by contacting the exporter. The result of the verification is transmitted by the customs authorities of the exporting Party to the customs authorities of the importing Party. The rationale is that the customs authorities of the exporting Party, in which the proof of origin (origin declaration) is made out, are best placed for the verification of that proof because of the proximity to the exporter (knowledge of the exporter’s activities and history, ease of access to the information, familiarity with the national accounting system, no language barriers). It is therefore for the customs authorities of the exporting Party primarily to determine whether the products concerned are originating or not, according to the applicable rules of origin.

(3) ‘Verification of proofs of origin’ will be carried out based on mutual trust between the customs authorities of the Parties. ‘Mutual trust’ herein implies that the customs authorities of the exporting Party should thoroughly verify the issues submitted by the customs authorities of the importing Party, and communicate the results of this verification to the customs authorities of the importing Party, who relies on the results of work carried out by the customs authorities of the exporting Party. However, the customs authorities of the importing Party still have the right to request additional information to the exporting Party if they consider that the reply is not complete enough or that it does not allow understanding the position expressed by the exporting Party. The details of which information can be requested by the importing Party to the exporting Party is further elaborated under sections 2.4.2 (Findings and Facts) and 2.4.3 (Sufficient Information).

2. Different steps in the verification procedure

2.1. Launching a request for verification

- (4) The Customs authorities of the importing Party may launch a request for subsequent verification of proofs of origin when they have reasonable doubts as to:
- the authenticity of the documents. Example: doubts whether the invoice containing the origin declaration is a false invoice made up by the importer or the exporter in view of benefitting from preferential origin;

- the originating status of the products concerned. Example: doubts whether the products meet the origin conferring criteria laid down in Annex II of the Protocol (the Product Specific Rules);

or
 - the fulfilment of the other requirements of the Protocol related to proofs of origin. Example: doubts as to whether the exporter had or still has the status of approved exporter.
- (5) In addition to cases of reasonable doubt on the above-mentioned elements, the customs authorities of the importing Party have the possibility to launch a request for verification for cases selected at random. This covers the cases which do not fall within the scope of the above 3 elements covered by the reasonable doubt.

2.2. Sending the request for verification

- (6) The Customs authorities of the importing Party are to send the request for verification to the customs authorities of the exporting Party responsible for verifying proofs of origin. The request will indicate if it is launched at random or on the grounds of reasonable doubts. Article 27 paragraph 3 provides that the request would indicate, where appropriate, the reasons for the enquiry.

- (7) Indicating the reasons for the enquiry allows the customs authorities of the exporting Party to deal with the request in the most efficient way in terms of costs and administrative burden.
- (8) On the other hand, if the customs authorities of the importing Party request an enquiry at random, they need not indicate a reason for the enquiry.
- (9) In accordance with paragraph 3 of Article 27, however, the proofs of origin or a copy of these documents of the products subject to the enquiry should be sent to the customs authorities of the exporting Party.

2.3. Execution of Verification

- (10) Under the system of indirect verification, verification of proofs of origin made out by exporters in the exporting Party is under the responsibility of customs authorities of the exporting Party. However, with the application of paragraph 8 of Article 27 (See 2.9, Joint Inquiry, for further details), the customs authorities of the importing Party may, under some conditions, be involved in the verification process in the territory of the exporting Party.

- (11) In case of verification of proofs of origin provided by the importer, the customs authorities of the importing Party would launch a verification request to the customs authorities of the exporting Party. The customs authorities of the importing Party would not ask the importer to collect himself from the exporter the information specified in paragraphs 2.4.2 and 2.4.3.
- (12) Moreover, the provisions of Article 27 do not provide that the customs authorities of the importing Party can directly require exporters to provide data or information to them.
- (13) However, these provisions do not preclude importers and exporters of both parties, by mutual consent and on a voluntary basis, from exchanging data or information with each other and submitting them to the customs authorities of the importing Party. The exchange or submission of such data are not obligatory and any refusal to provide the information is not a reason for the denial of preference without verification. It is not part of the verification process.
- (14) Evidence of direct transport submitted in respect of Article 13 will not be considered as proofs of origin and is as such not concerned by verification of proofs of origin of Article 27.

2.4. Treatment of Results of the verification

- (15) The Customs authorities of the exporting Party would inform the customs authorities of the importing Party about the results of the verification, including findings and facts, as soon as possible. In particular, the Customs authorities of the exporting Party should minimize to the extent possible the response time for verification requests concerning the validity of an approved exporter status.

2.4.1. Auxiliary communication means

- (16) The communication of requests for verification and of the notifications of the results thereof between customs authorities of both Parties would be made through conventional postal mail. In parallel, customs authorities of both Parties may use auxiliary means such as electronic mail in order to swiftly communicate and make sure the requests or the replies reach the addressee in the relevant Party.

2.4.2. Findings and facts

(17) The terms ‘findings and facts’ mean that the reply on the verification provided by the customs authorities of the exporting Party would include some details on the verification procedure executed by them. The scope of ‘findings and facts’ is limited to the following elements:

- the conclusion on the authenticity of the documents, the originating status of the products concerned or the fulfilment of the other requirements of the Protocol;
- the description of the product subject to examination and the tariff classification relevant to the application of the rule of origin;
- and
- information on the manner in which the examination was conducted (when and how).

2.4.3. Sufficient information

(18) In case of verification at random, the customs authorities of the importing Party will not request more information than what is listed in point 2.4.2 (findings and facts) to the customs authorities of the exporting Party.

- (19) In case of verifications on the grounds of reasonable doubts, if the information provided by the customs authorities of the exporting Party is considered by the competent authorities of the importing Party insufficient to determine the authenticity of the documents or the real origin of the products, the customs authorities of the importing Party may request additional information to the customs authorities of the exporting Party. The additional information requested may not go beyond the following list:
- where the origin criterion was ‘wholly obtained’, the applicable category (such as harvesting, mining, fishing and place of production);
 - where the origin criterion was based on a value method, the value of the final product as well as the value of all the non-originating used in the production;
 - where the origin criterion was based on changes in tariff classification, a list of all the non-originating materials including their tariff classification (in 2, 4 or 6 digit format depending on the origin criteria);
 - where the origin criterion was based on weight, the weight of the final product as well as the weight of the relevant non-originating materials used in the final product;

- where the origin criterion was based on a specific processing, a description of that specific processing that conferred origin to that particular product; and
 - where the tolerance rule is applied, the value or weight of the final products and the value or weight of non-originating materials used in the production of the final products.
- (20) If a reply does not contain the sufficient information mentioned above for the customs authorities of the importing Party to determine the authenticity of the documents in question or the real origin of the products, the requesting customs authorities shall refuse entitlement to the preference, except in exceptional circumstances (See section 2.7 on Exceptional Circumstances).
- (21) The customs authorities of the exporting Party will not transmit to the customs authorities of the importing Party the confidential information whose disclosure is deemed by the exporter to put at risk its commercial interests. The non-disclosure of confidential information will not be a sole reason for the customs authorities of the importing Party to refuse entitlement to the preference, provided that the customs authorities of the exporting Party will provide reasons for not transmitting confidential information and prove the originating status of the good, to the satisfaction of the customs authorities of the importing Party.

2.5. Deadline for replying to a request for verification

- (22) Article 27 paragraph 6 stipulates that the results of the verification must be communicated as soon as possible.
- (23) Article 27 paragraph 7 provides that the importing Party should in principle refuse entitlement to the preference but only when 2 conditions are simultaneously met:
- the verification request was made based on reasonable doubts;
 - and
 - there is no reply within 10 months of the date of the verification request or the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the products.
- (24) This provision implies that for cases selected at random for verification the importing Party cannot refuse the entitlement to the preference without the reply from the exporting Party.

2.5.1. Deadline in case of verification at random

(25) Customs authorities of the exporting Party will do their best to reply to verifications at random within a deadline of 12 months. However, as Article 27 does not define a deadline for verifications at random, the customs authorities of the importing Party will not refuse the preference on the sole reason that the customs authorities of the exporting Party have not provided a reply within the deadline of 12 months on a request for verification at random.

2.5.2. Deadline in case of verification at reasonable doubts

(26) For cases selected at reasonable doubts, the importing Party shall refuse entitlement to the preference when there is no reply within 10 months of the date of the verification request except in exceptional circumstances.

2.6. Reversal of the results

(27) The results of a verification may exceptionally be reversed by the customs authority of the exporting Party. The reversal of the original reply will be made within 10 months of the date of the verification request.

2.7. Exceptional circumstances

- (28) However, even if the two abovementioned conditions for refusing entitlement to preference are met, the text of Article 27 paragraph 7 stipulates that granting of preferential treatment is still possible on the basis of the clause of ‘exceptional circumstances’.
- (29) Indeed, the importing Party still has the discretion to decide that there are exceptional circumstances justifying that the entitlement to preference is not to be refused as such.
- (30) The exceptional circumstances include notably the following situations:
- The exporting Party is not in a position to provide a reply to the verification request submitted by the importing Party when:
 - (a) accidents which the exporter could not reasonably have been expected to foresee such as fire, flooding or other natural disasters, and war, riot, terror, strike and the like, resulted in partial or complete loss of supporting documents of origin or delay of submitting those documents;
or

(b) the reply was delayed by uncontrollable causes such as administrative or judicial appeal procedure in accordance with the Party's laws and regulations although the exporter and the customs authority of exporting Party did their due diligence in complying with obligations under this Protocol.

- It was found out that either the request or the reply to the request did not reach their destination because of mistakes made by the authorities involved.
- The request or the reply to the verification request failed to be delivered because of problems in the communication channels (e.g. change of the address of the person in charge of the verification, the return of mails caused by administrative mistakes of the postal authorities, etc.).

2.8. Reminder

(31) When no reply has been received yet, it is recommended that the customs authorities of the importing Party send a reminder to the exporting Party before the end of the 10 months period.

- (32) It is recommended that the customs authorities of the exporting Party which would not be in a position to reply within the 10 months deadline would inform the requesting authority thereof before the expiration of the deadline with an estimation of how much longer would their verification procedure still have to last and the reason of the delay of the reply.

2.9. Joint Enquiry

- (33) Paragraph 8 of Article 27 provides that the importing Party may be present at an origin verification conducted by the customs authorities of the exporting Party and that in such a case, both Parties will refer to Article 7 of the Protocol on Mutual Administrative Assistance (MAA Protocol) in Customs matters for the execution of the request of participation by the importing Party. In such cases, the conditions of Article 7 apply. In particular, Article 7(4) of the MAA Protocol stipulates that only duly authorised officials of the importing Party may be present at enquiries carried out in the territory of the exporting Party, and that the conditions of the joint inquiry are set by the exporting Party.

Done at ..., ... 2020.

For the EU-Korea Customs Committee

On behalf of the European Union

On behalf of the Republic of Korea
