IVA e imposte indirette

Impacts of the European Union Customs Code Non-preferential Rules of Origin on the “Made in ...” Indication

The Italian (and Swiss?) perspective

1. Background

Rules of origin are used to determine the nationality of goods traded at international level in order to distinguish between products by their place of production. They are instrumental for the application of discriminatory trade policy measures such as preferential duties, and trade remedies such as anti-dumping duties. Rules of origin also determine the country of origin for “Made in ...” origin indication purposes.

Country of origin determination is based on whether a product has been wholly manufactured in one country or whether manufacturing operations have taken place in two or more countries. While in the former case there is, in principle, little room for doubts about the accuracy of origin determination, in the latter the country of origin is the one where the last substantial or sufficient transformation took place. Rules of origin are product-specific and set out the criteria for each category of products about the relevant manufacturing transformations that need to be performed in a country on non-originating materials so that end products acquire the origin of that country.

Preferential rules of origin allow preferential duty treatment in the context of preferential trade regimes, either reciprocal free trade agreements or unilateral schemes of generalized tariff preferences granted in favour of developing countries. The rationale of preferential rules of origin is to avoid trade deflection, that is that the benefits of preferential duty accrue to countries not party to a free trade agreement or not included in the list of countries benefiting from a unilateral scheme of tariff preferences.

2. Non-preferential rules of origin apply for all other discriminatory trade policy purposes

Since rules of origin are centred on specific manufacturing operations, industry tries to influence their negotiation process so that origin rules take into account their core manufacturing capabilities. Small and medium enterprises (SMEs) and developing countries may be severely impacted by origin rules whenever their needs are not taken into account during the negotiation process. Awareness of the strategic implication of taking part to the negotiation of rules of origin greatly differs at company level; SMEs are penalized by the lack of technical knowledge and resources. Associations may be of support in the negotiation of rules of origin to the extent they are not faced by divisive interests of the companies they represent.

Available international disciplines have addressed selected aspects of country of origin indications, i.e. those indications often rendered using the expression “Made in ...”. The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 mainly provides procedural rules about measures, e.g. seizure, that can be enforced by contracting parties to deal with goods bearing misleading indications of source. Article IX of the GATT Agreement, dedicated to Marks of origin, while recognizing that Member States may implement laws and regulations on marks of origin to protect consumers against fraudulent and misleading indications, it requires products imported from different countries to be treated according to the non-discrimination principle. Such article also contains some trade facilitation provisions, like those allowing marks of origin to be affixed at the time of importation and those prohibiting the application of duties and penalties for failure to comply with marking requirements prior to importation, unless deceptive marks have been affixed or the required marking has been unreasonably delayed. The fact that goods are produced in certain countries, like
Switzerland, Italy and the USA, is synonym of manufacturing excellence, therefore of the country of origin indication is a marketing tool. More generally speaking, the main rationale of the country of origin indication is to inform consumers. In absence of detailed international country of origin disciplines, each State is free to regulate or not this matter, deciding whether affixation of a country of origin indication is voluntary or compulsory, if it concerns imported and/or domestic goods, and what are, if any, the substantive manufacturing conditions to be complied so that the goods can legally bear the name of the country where they are produced. In such a perspective, the mere fact that country of origin marking can be regulated differently from country to country represents a non-tariff trade barrier.

3. The determination of non-preferential origin according to the new European Union Customs Code

At EU level the relevant provisions concerning preferential and non-preferential rules of origin are set forth by the regulations of the new EU customs legislation, in force as from the 1st May 2016. The main legal acts of the Union Customs Code (UCC) architecture are:

- The Commission delegated regulation (EU) No 2015/2446, supplementing certain non essential elements of the UCC (the UCC Delegated Act);
- The Commission implementing regulation (EU) No 2015/2447, having the purpose to ensure uniform implementation and application of procedures by all Member States (the UCC Implementing Act).

Principles for the origin acquisition have remained unchanged under the UCC and continue to reflect the disciplines established by the WTO Agreement on Rules of Origin which is binding on the WTO Members States. Article 60 of UCC is based on the distinction of goods wholly obtained in one single country and manufactured in more than one country or territory; in the latter case goods acquire the origin of the place where they have undergone “the last substantial, economically justified processing or working in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture”. The fact that the principles of origin acquisitions have remained unchanged and the wording of article 60 of UCC equals the text of Article 24 of the European Community Customs Code (CCC), renders fully applicable the interpretative line of the judgements of the European Court of Justice (the Court) about Article 24. According to the Court, “the processing or working is substantial, only if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before the process or operation. Activities altering the presentation of a product for the purpose of its use, but which do not bring about a significant quality change in its properties, are not of such a nature to determine the origin of the product” [1]. According to Article 32 of the UCC Delegated Act, which refers to Article 60 of UCC, goods are considered to have undergone their last substantial processing or working in the country or territory in which the rules set out in Annex 22–01 to the UCC Delegated Act are fulfilled. Annex 22–01 therefore contains the product specific concrete rules for the non-preferential origin determination. Article 34 of the UCC Delegated Act lists the minimal operations, i.e. those transformations that, whether performed alone or in combination, do not confer the non-preferential origin. If we compare the wording of Article 38 of the Implementing provisions of the Community Customs Code (IPCCC)[2], we find some additions to the list of the insufficient operations:

- Operations facilitating shipment or transport have been added to the operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying removal of damaged parts and similar operations);
- The simple placing in bottles, cans and flasks, has been added to the simple placing in bags, cases, boxes, fixing on cards or boards, and other simple packaging operations and to the changes of packing and the breaking up and assembly of consignments;
- The disassembly or change of use has been added.

In the UCC Delegated Act, the minimal operations are clearly applicable to all category of goods, while under the old provisions they were part of a set of articles referred to textiles and textile articles.

The interpretation of the concept of simple assembly was and remains, in some instances, critical to determine the substantive nature of the manufacturing operations performed on non-originating materials. Qualifying the origin-conferring nature of assembly operations is crucial whenever anti-dumping duties are applicable to products imported into the EU. Company practices of circumvention, aimed at avoiding anti-dumping duties by relocating assembly or partial manufacturing operations outside the country targeted by the anti-dumping measures, have led to a series of judgements indicating the principles to be taken into account. Particularly, with the leading case Brother, the Court has pointed out that “[s]imple assembly operations means operations which do not require staff with special qualifications for the work in question or sophisticated tools or specially equipped factories for the purpose of assembly”[3].

While the principles for non-preferential origin determination have remained the same, there are changes in the practical criteria of non-preferential origin acquisition based on product-specific non-preferential list-rules, which are meant to support the determination of whether the last substantial transformation has taken place. Product specific list-rules can rely on three main criteria: the change in tariff heading method, the technical test, and the ad valorem percentage rule. The change in tariff heading method provides that the process or operation carried out in the EU must result in a product that is classified under a different heading of the customs tariff classification than the pre-process/operation goods were. All transportable goods are classified on the basis of the Harmonized Commodity Description and Coding System.
Based on this system, which establishes a nomenclature, a “heading” is a four-digit code and the corresponding description of goods. Lists of manufacturing or processing operations are the basis of the “technical test” prescribing which production operations confer non-preferential origin. Finally, the ad valorem percentage rule requires that either a maximum import content of non-originating materials is utilized, or that a certain percentage of domestic content is added. According to the IPCCC, non-preferential product-specific list-rules for textile products were dealt with by Article 37 and Annex 10 of the IPCCC. List-rules for some products different from textiles were instead listed in Annex 11 of the IPCCC. In order to provide a practical guidance and promote the uniform interpretation of non-preferential rules of origin, the European Commission had published on the website of its Directorate General Taxation and Customs Union, the list rules proposed by the EU in the context of the WTO harmonization of non-preferential rules of origin (EU proposed list-rules) foreseen by Article 9 of the WTO Agreement on Rules of Origin (ARO). Despite substantive progress, the harmonization negotiations have come to an almost complete standstill because of a number of differences in the opinions of the WTO Member States involved. As a matter of fact, a more fundamental question emerged relating to the need to conclude the harmonization process[4]. The Court has underlined that such EU proposed list-rules do not have binding legal force and that they can be relied upon provided that their utilization does not result in an alteration of Article 24 of the CCC (now Article 60 of the UCC)[5]. In practice, there has been a strong tendency of the customs administrations and economic operators to rely on the EU proposed list-rules in an acritical manner, i.e. in isolation from the guiding principles underlying the substantial transformation concept as interpretted by the Court. Annex 22-01 encompasses the list-rules of the “old” Annex 11 of the IPCCC and many, but not all, the EU proposed list-rules. By way of their insertion in Annex 22-01, such EU proposed list-rules, to be considered as primary rules, have acquired a binding character. When the non-preferential origin cannot be determined on the basis of the primary rules, a residual rule is always applicable. The residual rules allocate the origin to the country in which the major portion of the materials originated. This practical criteria for the non-preferential origin determination risks to be problematic for a number of reasons. First of all the primary rules, being de facto the EU proposed list-rules, in accordance with the principle of the ARO are, most of the times, based on the change in tariff heading criterion. The Court has been critical as regards the suitability of the change of tariff heading criterion to express the substantial transformation; in some cases, the Court has in fact explained its preference for the ad valorem criterion. The main reason for this is that the Harmonized system was not meant to be utilized for origin determination purposes[6]. It follows that the list-rules based only on the change on tariff criterion, which will be applied because they have a binding character, unless they are interpreted in light of the principles of origin determination, as set forth by the UCC, the ARO, and especially, by the indications of the Court’s jurisprudence, risk to unduly restrict the rationale of the non-preferential origin disciplines. Providing, by means of residual rules, a residual alternative based on the country of origin of the major portion of the materials worsens the risk of determining origin in disregard of the substantial transformation core principle. For this reason, the Annex 22-01 cannot be taken and applied in isolation.

For those products not listed in Annex 22-01, the non-preferential origin will have to be determined on a case-by-case basis following the guidance of the Court’s jurisprudence. In principle it looks possible to continue relying upon the EU proposed list-rules, but only in light of the Court’s guidance. At the time of writing the European Commission Guidance Document on non-preferential rules of origin is yet to be issued, but there are good grounds to think that, always for sake of clarity and uniform interpretation throughout the EU single market territory, the EU proposed list-rules can be relied upon as a supporting non-preferential origin supporting tool.

4. Implications on the Made in Italy determinations according to the Italian and Swiss perspective

At EU level, for origin indication purposes, the country of origin is generally defined on the basis of non-preferential rules of origin. In absence of EU provisions on the “Made in ...” origin indication, each Member State is free to decide whether or not to regulate origin indication, but any national legislative initiative has to comply with EU law and principles.

In Italy the country of origin indication matter is regulated by Article 4, para. 49 of Law No 350 of 2003 (the Law), concerning false or misleading indications of source on products. According to the Law, the “Made in Italy” indication on products that do not originate in Italy according to the European rules of origin is considered false. A critical assessment of the interpretative issues raised by the Law goes beyond the scope of this article, which aims at highlighting how the changes in the practical criteria of non-preferential origin determination may impact on the country of origin indication as regulated at Italian level. The relationship between EU non-preferential origin regulations, as in force under the UCC, and the “Made in ...” origin indication, as regulated at Italian level, is potentially problematic. A lot will depend on the interpretation of the different provisions set forth by the UCC legal package by the customs administrations and the courts.

According to the Law, products manufactured in Italy may bear the “Made in Italy” country of origin indication to the extent the manufacturing operations carried out on the Italian territory comply with the origin determination and acquisition criteria established by the UCC provisions on non-preferential origin. Such formulation of the Law is, in all evidence, in contrast with
the EU principle of free circulation, in that operations carried out in other EU Member States, different from Italy, are considered as if they were carried out outside the EU territory! The new criteria of origin acquisition set forth by Annex 22-01 of the Delegated Act and the provision of a residual rule based on the country of origin of the major portion of the material utilized risk to result in an interpretation of the Law that does not take into account the value added of the products Made in Italy, especially in those cases in which the Italian contribution consists in engineering, design, value added assembly operations and technical controls and not in the mere utilization of input materials of Italian origin often unavailable on the Italian territory.

The changes in the practical criteria for non-preferential origin seem destined to have a potential impact also on the exports of products bearing the “Made in Italy” indication, manufactured in Italy, from Italy to Switzerland in the near future. The country of origin marking in Switzerland is regulated by the Federal Act on the Protection of Trade Marks and Indications of Source (Trade Mark Protection Act, TmPA). As from 1st January 2017 the amended version of the TmPA will enter into force. According to Article 48.5 of the TmPA, the foreign indication of source is deemed to be correct to the extent it meets the statutory requirements of the country concerned. Based on this provision, opening the door to the extra-territorial application of the Italian Law, the correct interpretation of the Italian origin marking legislation, in its relation with the novelties of the EU non-preferential rules of origin, becomes even more crucial.

5. Conclusions
Also at EU level, non-preferential rules of origin apply for a number of purposes. The entry into force of the new UCC legal package has left unchanged the core general principles at the basis of the origin determination. However, the supplementing provisions have brought some changes in the concrete criteria of origin determination. The interpreter has a crucial task. The indications of Annex 22-01 should not be interpreted alone and in isolation from the factual context of each concrete case and without taking into account the main principles for origin determination established by the UCC on the background on the WTO ARO. Particularly, the guidance of the judgements of the Court will have to be taken into consideration to avoid an undue restrictive, out of context, interpretation of the concept of substantial transformation. How the new UCC legal architecture concerning the EU non-preferential origin rules will be interpreted will highly impact on the application of the Italian Law on origin marking, and ultimately, on the application of the Swiss TmPA.

Elenco delle fonti fotografiche:

[1] Case C-49/76 Gesellschaft für Überseehandel, para. 6; Case C-93/83 Zentrag, para. 13.