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First Sale Appraisalment in the EU:
Alive and Well

International traders in the United States are very aware that U.S. Customs and Border Protection (“CBP”) is [attempting to do away with “first sale” appraisalment](#). This proposed action has met with [strong opposition](#) from importers, trade associations, senators and congressmen, with the legislators issuing to CBP a “Sense of Congress” statement in the recently enacted [Farm Bill](#), requesting that no new action be taken until 2011.

The U.S., however, is not the only nation that had allowed first sale appraisalment. The EU does as well. In light of the proposed changes by the US we were curious as to whether or not the EU was seeking to eliminate or limit first sale appraisalment too. We contacted a colleague of ours, **Luc Manneval**, an attorney with the Paris-based law firm of **Cabinet Héliée**, www.heliee.com, to ask him about first sale appraisalment in the EU and the criteria necessary for qualifying for reduced duty treatment through its application. The following is our Q+A with Mr. Manneval on this topic:

Barnes, Richardson & Colburn (“**BRC**”): In the United States, to be able to utilize first sale valuation there are several requirements that must be fulfilled: 1) a *bona fide* sale between the factory and the middleman, negotiated at arm’s length, 2) free from any non-market influences, and 3) involving goods clearly destined for the United States. What are the requirements for first sale valuation in the EU?

Luc Manneval (“**LM**”): In a certain way, the European requirements are similar to American ones, but some differences exist. In the EU customs law, if the goods are cleared under the customs regime “release for free circulation,” it is considered as a sufficient indication that they were sold for export to the EU territory (article 29 of Customs Code). However, the goods can be declared on the basis of a “previous sale” or “first sale” if the “declarant” proves that this sale was concluded “in order to export the goods into the EU territory”.

To implement a first sale solution, the importer must demonstrate that appropriate and specific circumstances have led to export of the goods into the EU. He has also to explain the link between this first sale and the final destination of the goods.

Different criteria were defined by the EU regulations to accept a first sale solution (Article 147 of the Provisions for implementation for Customs Code):

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- Goods are manufactured under European specifications or are identified (with the mark for example) as not having other use or destination.
- Concerned goods were manufactured especially for a buyer who is located in European Community.
- Specific goods are ordered to a middleman who gets the goods from a manufacturer and these goods are directly shipped to European Community.

This list of criteria is not exhaustive.

BRC: The U.S. places great emphasis on a party seeking to establish first sale valuation to describe the roles of each party to the transaction and to have underlying documentation to support each step of the transaction. What documentation does the EU require to establish first sale valuation?

LM: First of all, in EU regulations, the importer who requests a first sale solution is supposed to know “all the details for the sale”. The different steps of the operation must be presented and explained very clearly to the Customs Administration. Meetings and memos presenting the different transactions are generally used at this stage.

In this discussion with the authorities, documents are presented for review. These documents include:

- commercial invoice (Art 181 of Provisions for Implementation of Customs Code)
- contract (Art 35 of Customs Code)
 - transport and insurance documents
 - accounting books
 - others

A frequent problem we see is maintaining the confidentiality of commercial data. Because of the obligation for a total transparency of this transaction, the documents, prices and details of contracts are presented.

To solve this issue of confidentiality, we can benefit from the professional status of a custom broker. This agent could be the only firm which has information of both sides of the commercial chain. By this way, the importer could ignore the intermediate price. The first sale solution could be managed by the seller using a DDP incoterm.

BRC: In the U.S., first sale valuation may still be established in certain circumstances even though there has been a “drop shipment”, where the physical possession of the goods passes directly from the manufacturer to the U.S. importer. Does the EU also allow first sale valuation where the middleman never takes physical possession of the goods?

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LM: There is no obligation for the different actors to take possession of the goods. The definition of first sale doesn't need this possession: the juridical property is enough.

The following example comes from the EU regulation ("Réglement particulier" which means is a specific explanation of Regulation) and illustrates this point:

CEO of X during a trip in South Africa buys a 25,000 meters of silk for 35.000€, F.O.B. Johannesburg. He buys and sends the silk to France by boat on June 6th. On June 9th, he meets with an European manufacturer who accepts to buy the silk, which are on its way to Europe, for 50.000€

The transaction between the South African supplier and the CEO is not the last one. It can be proved that this first transaction was concluded in order to send the goods to the EU. It is an international transfer where the middleman never takes physically possession of the goods.

On the contrary, physical possession could present some difficulties with respect to the criteria required for first sale. Let us take another example:

Goods are manufactured by firm A, sold to firm B in the same country and finally sold to C in EU. The stock of the goods (physical possession) under the possession of firm B could lead the Customs Administration to refuse the benefit of the first sale for this operation. In order to accept the first sale solution, a traceability process would be required to show that the order C to B was previous to the order from B to A and that the concerned goods are those which are finally exported. Then, it will possible to explain that the sale between A and B was made with respect to the European technical specifications.

BRC: Does the EU have any specific rules for first sale valuation regarding the passing of risk of loss and title to the middleman?

LM: There are not particular rules, but we can conclude that a lack of risk will not equate to a "real sale".

For this reason, it is important for first sale appraisalment that a real transaction be established between the seller and the buyer. If the goods are imported by a middleman who doesn't buy the goods, this operation would not be considered as a sale.

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Questions about this article can be posed to your BRC attorney, or to Rick Van Arnam (rvanarnam@barnesrichardson.com) or Alan Goggins (agoggins@barnesrichardson.com).

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