INTERPLAY BETWEEN CUSTOMS VALUATION AND TRANSFER PRICING IN THE EU: GENERAL OBSERVATIONS AND ADMINISTRATIVE PRACTICES IN FOUR COUNTRIES AFTER THE *HAMAMATSU* CASE

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1. *Background*

Transactions between "related parties" (term often used to indicate a parent company and its subsidiaries or companies under common control) today make up the majority of international trade transactions[1].

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[1] OECD, WTO & UNCTAD, Prepared for the G-20 Leaders' Summit in Saint Petersburg (Russian Federation) September 2013: Implications of Global

Given that the parties involved often pursue the same objectives due to the affiliation to the same multinational group, the related parties may want to influence the price paid for the goods exchanged, both upwards and downwards.

Both international (i.e. OECD) and national law laid down specific transfer pricing rules to ensure that the price paid for the goods exchanged between related parties is in line with the price paid for the same goods in a transaction carried out between independent parties.

Nonetheless, the application of different sets of rules, which in most cases have different objectives, could give rise to problems regarding their relationship and the consequences resulting from them.

This applies for transfer pricing methods, which follows the "*OECD transfer pricing guidelines for multinational enterprises and tax administrations*" and the customs valuation methods applied between related parties, which are regulated by the EU in the Union Customs Code[2] (UCC).

This paper aims to examine the link between Transfer Pricing methods and customs valuation rules and, most importantly, how the problems arising from their compatibility are addressed both at an international, EU and national level, especially in light of the Hamamatsu case of the ECJ[3].

In this paper, we would like to give an overview of the current situation, starting from the EU perspective then focusing on the national practices of specific EU Member States. The paper is organised as follows: in the first section we set the scene by explaining the legal background of determining transfer prices and customs values from an EU law perspective. In the second part, we then offer a theoretical overview of the issues, highlighting any points of convergence and divergence between the valuation of transactions between

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Value Chains for Trade, Investment, Development and Jobs which estimated that up to 60% of global trade takes place between associated enterprises.

[2] 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, 1-101.

[3] ECJ 20 December 2017, C-529/16 (Hamamatsu), ECLI:EU:C:2017:984.

related parties for customs purposes and the valuation of the same transactions for corporate income tax purposes. The third section examines the position assumed by two international organisations, while the fourth summarises the relevant arguments of the Court in the Hamamatsu case and the various interpretations that can be given after having read the case. In the fifth section, we present how some EU Member States (i.e. Germany, the Netherlands, Spain and Italy) treat transfer pricing adjustments for settling the final customs values, pre- and post-Hamamatsu. In section six, we then share some general observations about the national practices, after which, in section seven, we make some proposals for a smooth administrative reconciliation of transfer price adjustment for customs valuation purposes. Finally, in section eight, we draw some conclusions and highlight some possible solutions.

1.1. *Transfer Pricing*

Transfer pricing refers to the terms and conditions surrounding transactions within a multi-national company that could be used to shift income from one country to another (often a country with low-taxation, opaque and/or with Double Taxation Conventions that allow avoiding taxation) by applying higher or lower prices in intra-group transactions compared to prices that would be set between independent companies. With this technique, the group could increase the costs of importing goods and reduce its taxable profit.

Due to the potential distortion of taxable income arising from the application of TP, tax authorities can adjust intracompany transfer pricing that differs from the price that would be applied for the same transaction between unrelated enterprises dealing at arm's length (i.e. the so-called arm's-length principle).

In order to do so, the OECD Transfer Pricing Guidelines set out five methods that could be used to assess whether the price paid follows the arm's length principle.

At the core of some methods, especially transactional profit methods, there is an adjustment mechanism which allows the taxpayer to adjust (upward or downward) the declared transaction values.

In other words, TP allows follow-up adjustments to prevent the transfer price from over- and underestimating the taxable profit for direct tax purposes.

1.3. *EU customs law*

For customs valuation purposes, the main rule applied by the UCC, in line with the Agreement on the Implementation of Article VII of the GATT of 1994, is the price paid or payable for the goods when they are sold for export.

According to Art. 70, the transaction value is the primary valuation method to determine the customs value of imported goods, which is the price paid or payable by the buyer of the imported goods.

The fact that the buyer and seller are related is not enough to prohibit the declarant from using the transfer value as the customs value. However, if the circumstances surrounding the sales raise concerns about the potential impact of the parties' relationship on the price paid or payable, customs authorities may request additional information[4].

If this is the case, Art. 134 of the UCC Implementing Regulation[5] states that the declarant must be given the opportunity to show that the parties' relationship has had no impact on the transaction value by providing additional detailed information ('circumstances of sales test'). In any case, the declarant succeeds in proving so if the declared value closely approximates one of the test values, which are similar to the secondary methods described in Art. 74 UCC ('test values').

If the declarant fails to fulfil this burden of proof, the customs

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[4] Generally, the burden of proof rests with the customs administration, which can request documents and information from the declarant, which the declarant is required to provide. Customs has met its burden of proof if the declarant fails to provide these documents or information (which a diligent declarant should have).

[5] 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, 558-893.

authorities will use one of the secondary methods to calculate the customs value[6].

It is worth noting that the Customs Valuation Compendium states that the circumstances surrounding a sale should only be examined if "there are doubts about the acceptability of the price"[7].

Therefore, the customs authorities should initially determine whether the price is acceptable and only request further information if there are any doubts. In short, the test value tool allows the declarant, after a thorough analysis by the customs authority, to demonstrate that the transaction value has not been influenced by the existence of a relationship – i.e. that it is arm's length – while also offering the importer a margin of tolerance.

2. *The differences between transfer pricing rules and customs law on the valuation of transactions between related parties (TbRP)*

In addition to the different objectives pursued by the two disciplines, there are some other differences between TP and customs legislation, which potentially rule out any convergence between the two values.

The major challenges that arise as a result of these discrepancies can be divided into two groups: the use of transfer pricing documentation for customs purposes and the impact of transfer pricing adjustments on customs values.

The purpose of both transfer pricing and customs valuation is to ensure that the parties' relationship hasn't influenced the price (or is at arm's length), which requires revenue and customs agencies

[6] The end goal must always be the same: find the actual value of the goods.

[7] Compendium of customs Valuation Texts, 2022, 11, "Paragraph 1 provides that where the buyer and seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs authorities have no doubts about the acceptability of the price, it should be accepted without requesting further information from the declarant".

inspecting the company's financial records, finances, and any other relevant information.

Companies prepare specific information, known as transfer pricing studies, to provide all the relevant important information.

The concern is whether transfer pricing studies can be used for customs purposes, specifically to ensure that the prices of related-party transactions are unaffected by the relationship.

However, while those studies may provide important information for customs purposes, it should be noted that the data is compiled with direct taxes in mind and is based on the OECD Guidelines, which provide different valuation criteria. The influence of transfer price adjustments on customs valuation, which is the second question, raises a slew of issues originating from the inherent discrepancies between the two sets of rules.

First, whereas the UCC is a set of legally binding provisions that do not allow Member States to introduce different rules on customs valuation, the OECD Guidelines are simply a soft law instrument that their Members can disregard without any national or international repercussions.

Secondly, the customs value is determined for each transaction, whereas Transfer Price is often calculated based on the company's overall profit. As a result, transfer pricing frequently uses aggregated data, which makes it particularly difficult to identify the value of individual transactions, and which, in turn, makes it hard to use it as part of the customs framework.

Thirdly, the fact that two different bodies are responsible for transfer pricing and corporate taxation raises the possibility of double taxation.

One of the main aims of the Transfer Pricing regulation, as mentioned above, is to prevent profits from being transferred from high-tax countries to low(er)-tax countries. As a result, tax authorities are concentrating their efforts on cases where prices are excessively high.

At the same time, EU customs law aims to ensure that the price paid is as close as possible to the actual value, therefore customs authorities are more concerned when the price is too low.

When we add in a lack of communication and coordination between the two authorities, it's clear that the business operators have

become the puppets of the government and may face double taxation.

The valuation criteria provided by both EU Customs law and the OECD Guidelines, as well as the meta rules for identifying the method to be used, differ significantly. On the one hand, the OECD Guidelines allow the taxpayer to choose the best suited criterion on a case-by-case basis without any restriction.

On the other hand, under Art. 74 of the UCC, the choice of the appropriate customs valuation method is attributed to the rigid hierarchical order between the methods, which allows progression to the next method only if the previous one cannot be used to appraise the imported goods. In other words, the declarant and the customs authorities cannot pick and choose which criteria are the most appropriate; instead, they have to follow a top-down approach.

Last but not least, whereas Transfer Pricing frequently permits retroactive year-end adjustments, EU customs law permits the amendments of customs declarations including changes to the customs value only under limited circumstances and for specific items of the customs value[8].

However, the need for certainty and coherence in the market would benefit from a greater convergence between the two frameworks, while at the same time, recognising their differences.

3. *The first step: TCCV Commentary 23.1*

The first step towards a better understanding of the interplay between transfer pricing and customs value stems from two joint conferences between the OECD and the WTO held, respectively, in 2006 and 2007. During the second conference, the two bodies de-

[8] In C-468/03 Overland Footwear, for example, the ECJ affirmed that the declared customs value should be amended if, by mistake, it included the buying commission, because this item is explicitly to be taken out from the customs value, according to the EU customs code. On the contrary, in C-529/16 Hamamatsu, the ECJ ruled that retroactive adjustment of the declared customs value following a corresponding adjustment for transfer pricing is not allowed, because such an adjustment is not explicitly mentioned in the EU customs code.

cided to establish the "Focus Group on Transfer Pricing" and tasked it to deliberate upon "issues of convergence between transfer pricing and customs valuation, intangibles and greater certainty for business".

This group, composed of representatives of the World Customs Organization (WCO), OECD, World Trade Organization (WTO), customs administrations, tax administrations and the private sector, decided to refer the question of the impact of transfer pricing rules on the "circumstance surrounding the sales"[9] to the Technical Committee on Customs Valuations (TCCV)[10].

Following the work of the focus group, the TCCV adopted the 2010 Commentary 23.1 ("*Examination of the expression circumstances surrounding the sale under Article 1.2 (a) concerning the use of transfer pricing study*") and the two following Case studies 14.1 and 14.2, developed to illustrate the conclusion reached in Commentary 23.1.

Commentary 23.1 focuses only on the first of the two issues described in the previous paragraph with the aim of establishing whether customs authorities could use a transfer pricing study produced by the importer for direct taxation purposes in order to determine the "circumstances surrounding the sale".

The TCCV concludes that although TP data is not always a reliable source of information in order to determine the "circumstances surrounding the sale," in some cases, however, those studies could be a reliable source of information. Therefore, the TP data could be of use on a case-by-case basis.

In other words, Commentary 23.1 allows companies to provide TP studies in order to prove that the relationship between the buyer and the seller did not influence the price, information that should be taken into account by the customs administration on a case-by-case basis.

The conclusions expressed by the TCCV in Commentary 23.1 were subsequently better explained in the two following case studies (14.1. and 14.2.) developed to better illustrate how transfer pricing

[9] TCCV Minutes of Meeting of 18 Oct. 2007 (published on 8 Nov. 2007).

[10]

studies can be used by customs authorities to ascertain whether or not a price has been influenced by the relationship between a buyer and seller in a practical scenario.

However, it is important to point out that the TCCV does not provide any guidance regarding the impact of retroactive transfer pricing adjustments on customs valuation, but focuses solely on the possibility of using TP studies to determine whether the "circumstances surrounding the sale" did or did not influence the sale price.

3.1. *The ICC Policy Statement*

Another decisive contribution to the study of the interplay between customs valuation and transfer pricing comes from the 2012 policy statement of the International Chamber of Commerce (ICC), amended in 2015[11].

In this document, after recognising the differences between transfer pricing and customs value, the ICC advocates for harmonisation between the two valuation methods, which should be done without introducing any new set of rules but by finding a solution within the existing principles.

Regarding the issues of using Transfer Pricing documentation for customs purposes, consistent with Commentary 23.1 of the WCO TCCV, the first of the six proposals states that TP documentation should be considered a solid basis for how customs administrations can evaluate the circumstances surrounding the sale.

However, the ICC goes a step further than Commentary 23.1, suggesting that "businesses that establish prices between related parties in accordance with the arm's length principle (as per Article 9 OECD Model Tax Convention) have generally demonstrated that the relationship of the parties has not influenced the price paid or payable under the transaction value basis of appraisement, and consequently that the prices establish the basis for customs value".

[11] Although the ICC is not part of the WCO, the views of this international business association are often taken into account by the WCO, as showed by the inclusion of the 2015 policy statement in the WCO Guide to Customs Valuation and Transfer Pricing.

This is because the arm's length principle should be directly aligned with the "circumstances surrounding the sale" test.

Moreover, the following proposal (number six) states that if the customs administration requires additional information beyond that included in TP documentation, those data requirements should be clearly defined and published in advance by the customs administration in order to incorporate them into transfer pricing documentation to serve both purposes.

Regarding the issues of the impact of Transfer pricing adjustments on customs values, one of the crucial suggestions made by the ICC is the one outlined by the second proposal, under which customs authorities should recognise post-transaction adjustments made either "as a result of a voluntary compensating adjustment – as agreed upon by the two related parties – or as a result of a tax audit".

The most relevant aspect of this proposal is, without a doubt, the recommendation to allow post-transaction adjustment without setting up a provisional valuation procedure or being subject to penalties due to valuation adjustments. Instead, as further outlined by the fourth proposal, the importer should submit only a single recapitulative return referring to all the initial customs declarations.

Moreover, the third proposal recommends that in the event of post-transaction TP adjustment, the customs authorities should allow the importer to choose one of two methods to review the customs value.

The importer should be able to choose between the application of the weighted average customs duty rate method, which allows calculating the weighted average customs duty rate by dividing the total amount of customs duties for the year by the respective total customs value for the same year in order to make a lump-sum adjustment at the end of the year, and the application of the transfer pricing adjustment method to individual transactions.

To summarise the content of the policy statement, it seems that the ICC recommends a substantial (but not complete) harmonisation between transfer pricing and customs valuation as regards the usability of transfer pricing data for customs valuation purposes and the possibility of adjusting customs duties following transfer pricing post-transaction adjustments without excessive burdens or penalties on importers.

3.2. *The WCO Guide*

The last international document that should be mentioned is the "WCO Guide to Transfer Pricing and Customs Valuation", first published in June 2015 and later updated in September 2018[12].

Although "The Guide does not provide a definitive approach to dealing with this issue", it "provides technical background and offers possible solutions regarding the way forward, and shares ideas and national practices, including the trade view".

The WCO underlines that in most cases, the "adjusted price" will be closer to the "uninfluenced" price paid or payable for customs valuation purposes. Therefore, "Customs may not be able to make a final decision on the question of price influence until any adjustments have been made (or quantified). It is therefore in Customs' interest to study the impact of transfer pricing adjustments on the Customs value".

However, Customs' treatment of transfer pricing adjustments is somewhat inconsistent around the world. On the one hand, some Customs administrations considers both upwards and downwards transfer pricing adjustments and, accordingly, allow importers to make corresponding duties adjustments; on the other hand, other authorities do not consider downward adjustments or none at all.

In this regard, a helpful principle can be found in Commentary 4.1. – Price review clauses, which "considers the Customs value implications of goods contracts which include a "price review clause", whereby the price is only provisionally fixed at the time of importation. […] This scenario can be compared to situations where the price declared to Customs at importation is based on a transfer price which may be subject to subsequent adjustment (for example to achieve a predetermined profit margin). Hence, the possibility of a transfer pricing adjustment exists at the time of importation"[13].

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[12] WCO, Guide to Customs Valuation and Transfer Pricing 2018. The guide "is designed primarily to assist Customs officials responsible for Customs valuation policy or who are conducting audits and controls on multinational enterprises", although "It is also recommended reading for the private sector and tax administrations who have an interest in this topic".

[13] WCO TCCV, Royalties and licence fees under Article 8.1 (c) of the Agreement, Royalty that the seller requires the importer to pay to a third party (the patent holder), Adopted, 2nd Session, 2 October 1981, 27.960.

In relation to the use of transfer pricing studies for customs valuation purposes, the guide, after a brief summary of the previous work of the TCCV and the ICC, not only encourages the use of transfer pricing information to examine the "circumstances surrounding the sale" but also provide further guidance.

First, the WCO states that, although customs authorities make their decision based on the 'totality of the evidence', "in certain cases a decision may be reached based primarily on transfer pricing data".

Moreover, paragraph 5.2. of the guide analyses some of the key issues of the usefulness of transfer pricing data in depth (in particular, single product v. product range and the date range).

Last but not least, the WCO also encourages customs authorities to allow business operators to seek an advance ruling in order to know whether or not the relationship between buyer and seller influences the price in question. Those decisions, based on all the relevant information provided by the importer, could also be derived from a transfer pricing study or an Advance Pricing Agreement (APA).

Regarding transfer pricing adjustments that only affect tax liability (i.e. no actual change to the amount paid for the goods), Customs may consider whether this constitutes price influence. More precisely, "Where the adjustment is initiated by the taxpayer and an adjustment is recorded in the accounts of the taxpayer and a debit or credit note issued, it could be, depending on the nature of the adjustment, considered to have an impact on the price actually paid or payable for the imported goods, for Customs valuation purposes. In other cases, particularly where the adjustment has been initiated by the tax administration, the impact may be only on the tax liability and not on the price actually paid or payable for the goods. Where such an adjustment takes place before the goods are imported then the price declared to Customs should take into account the adjustment. If, on the other hand, the adjustment takes place after importation of the goods (i.e. it is recorded in the accounts of the taxpayer and the debit/credit note issued after Customs clearance of the goods), then Customs may consider that the Customs value is to be determined on the basis of the adjusted price, applying the

principles established in Commentary 4.1. In other words, there is an acknowledgement that the original price was not arm's length for transfer pricing purposes, but the price actually paid has not been adjusted".

Since the WCO Guide is not a legally binding document, it is up to national Customs authorities to determine the procedure required to allow a duties review following a TP adjustment. However, as a basic rule, it is clear that a transfer pricing policy should be in place prior to the importation or clearance of the goods concerned that indicates the criteria (or 'formula') that will be applied to establish the final transfer price.

In conclusion, the WCO, following the groundwork laid out by both the ICC and the TCCV WTO, adopts a more detailed approach to recognising the significance of transfer pricing adjustment for customs value purposes, while maintaining national competence in the matter.

As can be seen, international organisations have presented a number of ideas for discussion at international level. Despite the fact that these recommendations are worthy of consideration, they are admittedly only a proposal and the solutions outlined are not legally binding, as they hinge on the approval of the national customs authority responsible for customs and tax controls.

4. *The EU perspective*

Currently, with the exception of the ECJ Hamamatsu case (see below), neither the UCC nor guidance documents mention the relationship between customs valuation and transfer pricing[14].

[14] There are some dated cases in this regard. See ECJ 24 April 1980, C-65/79 (Procureur de la République against René Chatain), ECLI:EU:C:1980:108, ECJ 4 December 1980, C-54/80 (Samuel Wilner, director of SA Victory France), ECLI:EU:C:1980:282. However, since all of those cases were ruled under the old Brussel Value Definition, it could be argued that the conclusion of the Court in those cases are no longer relevant. In this regard see S.I. Marsilla, Towards customs valuation compliance through corporate income tax, *World Customs Journal*, V. 5, 1, 2011, 73.

In this respect, in view of the differences between them, it seems difficult to achieve a purely 'interpretative' reconciliation of the two values. It is unlikely that provisions in the UCC would acknowledge the use of a transfer pricing method because they are valuation methods provided in the corporate income tax legislation, which is within the EU Member State's competence. This may provide a challenge to the uniform application of EU customs law as each EU Member State may have its own transfer pricing rules, considering that the OECD Transfer Pricing Guidelines are not legally binding for the EU Member States. It is also unlikely that a direct reference to the OECD standard will be included in the UCC because it would imply that the guidelines drafted in an international forum would have immediate effect.

However, a legally binding, standard position for all EU national customs administrations could result from the rulings of the Court of Justice (i.e. the legally binding interpretation of the UCC). Under the current customs valuation framework, the first case referred to the Court of Justice on this matter was the Hamamatsu case, as explained below.

4.1. *The ECJ Hamamatsu case*

Hamamatsu GmbH is a German company that is part of a worldwide group whose parent company, Hamamatsu Photonics, is based in Japan.

The Germany-based Hamamatsu company purchased goods from its parent company at inter-company transfer prices under the APA reached between the group and the German and Japanese tax authorities (based on the "Residual Profit Split Method" or RPSM).

At the close of the relevant accounting period, the company's operating margin fell below the range set for same, resulting in a transfer price adjustment and consequently, the recognition of a tax credit.

Therefore, Hamamatsu asked the Munich customs authorities to refund the excess duties paid under the TP adjustment without allocating the adjustment amount to the individual imported goods.

However, the customs authorities denied the refund because the request was incompatible with Article 29(1) of the Community Customs Code (CCC, the predecessor of the UCC), which refers to the transaction value of individual goods, not that of a number of consignments that may include diverse types of goods that attract different import duty rates.

The national court referred two questions to the ECJ. First, it was asked if Article 28 ff. of the Customs Code permits an agreed transfer price, which is composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, using an allocation key, regardless of whether a subsequent debit charge or credit is made to the declarant at the end of the accounting period. If so, the national court asked if the customs value may be reviewed and/or determined using a simplified method where the effects of subsequent transfer pricing adjustments (both upward and downward) can be recognised.

The Court stated that the CCC allows subsequent adjustment only in a few specific and limited cases, after recalling that the customs value has to reflect the real economic value of the transaction.

Furthermore, "the Customs Code does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is adjusted subsequently upwards, and it does not contain any provision enabling the customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments".

Therefore, with the words of the Court, "the Customs Code, in the version in force, does not allow account to be taken of a subsequent adjustment of the transaction value, such as that at issue in the main proceedings".

4.2. *The possible repercussions of the Hamamatsu case*

At first, the reasoning of the Court seems to imply total incompatibility between Customs value and TP due to the differences between the two legal frameworks.

However, as already pointed out in literature, the judgment of the Court could be interpreted in several different ways.

First, the decision could be read in light of the language of the first question posed by the referring national Court, which asked if the CCC "permit the adoption, as the customs value, of an agreed transaction value which consists partly of an amount initially invoiced and declared and partly of a flat-rate adjustment made after the end of the accounting period".

The main objective of the ruling is to ascertain whether the transfer price is a suitable criterion for demonstrating the absence of influence between related parties to permit the use of the "value of the transaction".

If this is the case, the ECJ meant only to exclude the possibility of using the transfer price as the "transaction value" due to the relationship between the parties involved in the transaction. Hence, in those cases, the Customs value can only be determined through a secondary valuation method.

Indeed, both transfer pricing and the secondary value test have very similar goals. TP, under the arm's length principle, aims to verify that the price charged in a controlled transaction between two related parties should be the same as that in a transaction between two unrelated parties on the open market; the alternative transaction values aim to ensure that the declared customs value is the same customs value of identical or similar goods.

Another possible interpretation of the ruling could be that the Court, while allowing the TP as the "transaction value", does not allow any retroactive adjustment, either upward or downward.

However, this interpretation seems to give rise to several problems that cannot easily be overcome.

As stated by the Court in the ruling, the customs value must reflect the economic value of the imported goods. Hence, not allowing any adjustment would inevitably permit the use of a value different from the actual one.

Moreover, not taking into account any adjustment could also lead to abuse, given that the parties could set the price lower than the actual economic value.

Last but not least, this interpretation seems to be contradicto-

ry to the position of the Court regarding royalty' payments, where it established that royalty payments should be included in the customs value even if the amount of the payment is not certain until the end of the year[15].

The final and last reading of the judgment focuses on the facts of the case at hand.

More precisely, three relevant factors that could lead to the argument that the ruling should only be interpreted in identical cases.

First of all, the Court explicitly refers to the Customs Code "in the version in force" (which was the CCC and not the UCC), implying that the new version of the code could give rise to a different conclusion.

Secondly, prior to the TP adjustment and the request for a partial refund of overpaid customs duties, Hamamatsu did not submit a simplified declaration, nor did the company sign an agreement with the customs authorities, as is the practice in most EU Member States.

Lastly, the judgment of the Court could be influenced by the RPSM method used by Hamamatsu. Based on the company's profitability, this method focuses not on the individual transaction, as is common in customs matters but, on the contrary, on the profits of the company as a whole. Therefore, the Court may have intended to exclude the use of a flat rate adjustment.

In summary, although extremely concise, the ruling of the Court must be interpreted in a way that does not preclude the usability of the transfer pricing for customs value purposes.

After the judgment of the Court of Justice, the Munich Finance Court, on 15 November 2018, rejected Hamamatsu's lawsuit as unfounded. The company appealed against the decision before the Federal Fiscal Court, the proceedings of which are still pending at the moment of writing.

At the same time, companies in Germany have been submitting applications for reimbursement and appeals in order to keep comparable procedures open.

However, it is still unclear what the Federal Fiscal Court might decide.

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[15] ECJ 9 March 2017, C-173/15 (GE Healthcare), ECLI:EU:C:2017:195.

One of the possible outcomes could be to allow the use of the fall-back method, which could potentially result in the question being resubmitted to the ECJ.

5. *Selected administrative practices of national customs authorities before and after the Hamamatsu case*

While there are certain problems in bridging the gap between transfer pricing and customs value from a theoretical legal standpoint, we feel it is more suitable to look at the administrative processes in place at the national level. This appears possible, at least in theory, given the discretion granted to each national customs authority in managing their customs controls, and the broad authority granted to each tax authority to enforce audits on transfer pricing.

When exploring the alignment of customs values and transfer prices for administrative purposes, one should consider the reciprocal influence of the two, i.e. transfer price to determine the customs value, and vice versa. Companies or the tax authority might use the customs value as baseline for determining the transfer pricing, which is relevant for corporate income tax purposes[16].

This would be possible because the customs value is usually stated and established before the transfer prices are set, as any import goes through a clearance procedure. In other words, the customs value has already been declared by the importer for customs purposes at the time the transfer pricing for income taxes should be defined; it would seem reasonable therefore to use this value as a starting point for determining the inventory value for income taxes

[16] This is the approach adopted by the United States, where, under the 26 US Code, § 1059A(a). "If any property is imported into the United States in a transaction (directly or indirectly) between related persons (within the meaning of section 482), the amount of any costs– (1) which are taken into account in computing the basis or inventory cost of such property by the purchaser, and (2) which are also taken into account in computing the customs value of such property, shall not, for purposes of computing such basis or inventory cost for purposes of this chapter, be greater than the amount of such costs taken into account in computing such customs value".

purposes. A form of entrustment – relative to the fixed price – in favour of the companies vis-à-vis the fiscal authorities, albeit often not the same authority, may be deemed upheld in relation to the fixed pricing.

Nonetheless, the practice of inferring transfer prices from customs value does not appear to be in use anywhere in Europe. Neither the companies nor the authorities responsible for the controls on transfer pricing consider this approach.

There are several possible explanations for this. The first is based on the traditional separation approach, which states that a value defined for direct tax cannot be used to assess other taxes, even if the tax base refers to the same transaction. While rules on customs value are contained in the UCC and have the status of EU law, transfer pricing rules are national in nature and tend to comply with the international standard endorsed at OECD level. This approach, which might be referred to as "the autonomy of each tax", is well-established in the legal traditions of the European states and, most importantly, it has also been sanctioned by the ECJ. The same ECJ, in a decision from the '80s[17], explicitly ruled out the possibility of using customs value for reasons other than the application of customs law, assuming the autonomy of customs values[18].

Furthermore, one should consider that not taking customs values as the basis for (initial) transfer prices has to do with the mere fact that the methodology framework for transfer prices is more advantaged compared to the methodology framework for customs valuation. Moreover, although customs values are to be determined at the time of import, while transfer prices are typically tested at end year; the benchmark studies resulting in the initial transfer price are typically already completed before the time of import. Therefore, also the sequence of events does not necessarily support using customs values as the basis for (initial) transfer prices. It is generally the other way around, although that gives rise to the infamous question of what should be done with issue of retroactive transfer price

[17] ECJ 24 April 1980, C-65/79 (Chatain), ECLI:EU:C:1980:108.

[18] It is useful to point out that the decision was adopted not under the CCC, but under the Brussels Definition of Value (BDV). Therefore, the decision may no longer be compatible with the new regulatory environment.

adjustments for customs valuation purposes, which is addressed extensively from a theoretical and operational point of view in this article.

However, there may be another rationale for not using the declared customs value as the basis for transfer pricing. Admittedly, in the interests of EU Member States, issues related to transfer prices, and therefore to proper income taxation, take precedence over determining the correct customs value of the very same transactions. Transfer pricing, from a disenchanted standpoint, raises difficulties connected to income taxation, which is intertwined with the fiscal self-interest of the Member States because income taxes provide direct revenues for them. As a result, State tax administrations have an incentive to prioritise transfer pricing assessment, since the difficulties relating to income taxes and their impact on revenue outweigh those concerning customs control. This could be viewed as an unintended consequence of the EU customs system, which requires national administrations to collect income taxes for their respective States and to collect customs revenue for the EU budget. However, it should also be acknowledged that in recent times, the EC bodies (OLAF and DG Budget) are intensifying the audits on national customs authorities, which in turn are under increasing pressure to carry out detailed and accurate controls on customs evaluations. In other words, the possibility of recovering additional EU revenues (customs duties) from national budgets became more concrete in recent years[19].

Whatever the reasons are, we focus on the following, assuming that transfer pricing rules have a certain precedence, and we focus on the scenario of customs value adjustments due to a different transfer pricing value determined for the specific transactions.

As a result, we examine the perspective taken by four member states – Germany, the Netherlands, Spain and Italy – concentrating on the eventual misalignment and on the practices followed by the respective national customs administrations.

In each of the following national reports, we begin with the administrative organisation of the customs and tax authority, we then

[19] See, for example, ECJ 14 June 2022, C-308/14 (Commission v UK), ECLI:EU:C:2016:436.

concentrate on how customs authorities deal with the valuation of imports linked to transactions between related parties.

We begin by enquiring as to what value the national authority places on transfer pricing documentation in terms of establishing that declared customs values are unaffected by the surrounding circumstances, including the relationships between the parties of the import transactions.

Then we look at the impact of transfer pricing adjustments on determining the final customs values, focusing on the most common scenario in which a transfer pricing adjustment – made by the revenue authority following an audit; or by the taxpayer in applying his intragroup TP policies for allocating profits to each branch of the group – theoretically lead to a downward adjustment of the already declared customs value, and a request for overpaid customs duties.

We were particularly interested in the changes in administrative control practices following the Hamamatsu decision, to see if this had any impact on administrative practices relating to the interplay between transfer pricing and customs value for transactions involving related parties.

5.1. *Spain Administrative Practice*

5.1.1. *The Spanish Customs authority*

The Tax Agency (*Agencia Estatal de Administración Tributaria, AEAT*) was created by Article 103 of Act 31/1990 of 27 December, the 1991 Budget, and effectively constituted on 1 January 1992.

It was structured as a public entity linked to the then Ministry of Economy and Finance through the former Secretary of State for Finance and Budget. As a public entity, it has its own legal regime which differs from that of the General State Administration. This, without prejudice to the essential principles that should govern all administrative actions, gives it a certain autonomy in budgetary and staff management matters.

The Tax Agency is entrusted with the effective application of the State tax system, as well as those resources of other Spanish public administrations or of the European Union whose management is entrusted to it by law or by agreement. Customs lies within the competences of the Tax Administration.

The territorial organisation and the attribution of functions in the Customs and Excise Area are regulated by the Resolution of 13 January 2021 of the Presidency of the Tax Agency, on organisation and attributions of functions in the Customs and Excise Area.

5.1.2. *Before Hamamatsu*

The relationship between customs value and transfer pricing in direct taxation has always been a pending issue in Spain due to the difficulty of coordinating tax matters as disparate (in terms of objectives and purpose) as income tax and customs duties.

Regarding this matter, the Spanish Supreme Court had repeatedly pointed out the necessary coordination of the valuation of related party transactions in both areas, direct taxation and customs, as the only possible solution because both are based on the price of the specific transaction, which has to be "arm's length".

However, Article 18 of the Corporation Tax Act[20], which regulates related-party transactions, in section 14 provides that the market value, for the purposes of Corporate Income Tax, Personal Income Tax or Non-residents Personal Income Tax, does not produce effects with respect to other taxes, unless expressly provided otherwise. And vice versa, the same occurs in the opposite direction with respect to the remaining taxes on Corporate Income Tax, Personal Income Tax or Non-residents Personal Income Tax. That is, the taxes are in watertight compartments without reciprocal influence.

[20] Act 27/2014, of 27 November, of the Corporation Tax. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2014-12328&b=29&tn=1&p=20210710#a19 This Act was passed after the Supreme Court judgments and seems to have the clear intent of limiting their applicability. No equivalent provision was found in previously applicable article 16 of Royal Law-Decree 4/2004, of 5 March, that approves the consolidated text of the Corporation Tax Act.

The Spanish Customs authority, aware of the problem, issued a resolution[21] and included new instructions for the Single Administrative Document (SAD, or DUA in Spanish) – which regulates the presentation of customs declarations – providing new rules regarding the declaration of the customs value in transactions between related parties. According to these new rules, the declarant in related party transactions will be able to use the simplified declaration (Article 166.2 UCC) and then lodge a supplementary declaration (Article 167 UCC) within the time limits provided in Article 147.3 DA (the reference should now be understood to be to Article 146.3b DA, after its amendment). This time limit is for a maximum of two years from the date of the release of the goods "in exceptional duly justified circumstances related to the customs value of goods". Therefore, in essence, this procedure allows the filing of customs declarations with a provisional value that is subsequently revised once the transfer price adjustments have been defined and the resulting value is final.

The request for authorisation to use the simplified declaration must be made by the importer (i.e. not by the customs representative) and must explain the criteria, the provisional value they intend to use, how it was calculated and the time by which the final value will be available. The authorisation will provide the provisional value that should be used in the simplified declaration, the time limit to lodge the supplementary declaration and whether or not it can be recapitulative.

5.1.3. *After Hamamatsu*

Although the Hamamatsu case is frequently mentioned in some of the resolutions of the Spanish Central Administrative Economic

[21] Resolution 25/8/2017, published in the Spanish Gazette on 1/9/2019. More info in: https://www.boe.es/buscar/doc.php?id=BOE-A-2017-10089. It is very likely that this amendment was made in anticipation of the Hamamatsu case. The Central Administrative Economic Tribunal, despite its name, is not a court of justice; it is an administrative body that decides tax appeals. In Spain it is mandatory to appeal first to these Administrative Economic Tribunals in order to be able to appeal later to a proper court of justice.

Tribunal (e.g. Resolution 2818/2015/00/00 of 19 June 2018)[22], it is never part of the 'ratio decidendi'.

This is an example of how the Spanish Central Administrative Economic Tribunal refers to the case: "The CJEU therefore denies the possibility of modifying the customs value of the goods when there are adjustments in intra-group transactions aimed at ensuring that a certain profit range is obtained for the different entities that are members of the group concerned. Adjustments, on the other hand, not foreseen at the time of sale of the goods for export in the customs territory of the Union and which do not refer specifically to imported goods, but constitute flat-rate adjustments linked to the amount of benefits that has been foreseen for each of the group's entities"[23].

In our opinion, the judgment of the Tribunal, far from solving the problem, introduces new uncertainties, and even questions the use of transaction value in these cases. One possible solution could be to use other valuation methods to determine the customs value. However, this solution entails a lack of coordination with direct taxation.

Spanish Customs has recently issued an Interpretative Note19 informing that the 'supplementary declaration' can be made in the regular form and, in some cases where the authorisation so provides (including in particular in case of transactions between related parties), in the form of making available the supporting documents (art. 163 UCC) for the final determination of value. Those documents can then be subject to control procedures to make a tax determination. Even if the Note is not explicit about it, it is possible that this development could allow to take a global approach to the determi-

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[22] This resolution can be found in: https://www.iberley.es/resoluciones/resolucion-teac-2818-2015-00-00-19-06-2018-1476611.

[23] Original version in Spanish: "El TJUE niega, pues, la posibilidad de modificar el valor en aduana de las mercancías cuando existan ajustes en las transacciones intragrupo encaminados a garantizar la obtención de una determinada horquilla de beneficio para las distintas entidades integrantes del grupo en cuestión, ajustes, por otra parte, no previstos en el momento de la venta de las mercancías con destino a la exportación en el territorio aduanero de la Unión y que no se refieren de manera específica a mercancías importadas, sino que constituyen ajustes a tanto alzado ligados al montante de beneficios que se ha previsto para cada una de las entidades del grupo".

nation of the final value, as opposed to a consignment-by-consignment approach[24].

5.2. The Italian Case

5.2.1. *The Italian Customs authority*

The correct identification of the competent authority for customs matters in the country is an essential prerequisite to comprehending the current interpretative position adopted in the Italian legal system regarding the impact of transfer pricing on the determination of the customs value.

The Italian legal system is characterised by two (mostly) autonomous Agencies: the Revenue Agency, which has a general jurisdiction regarding direct and indirect taxes, and the Customs Agency (transformed into the "Customs and Monopolies Agency" by Law Decree no. 95 of 6 July 2012), which "carries out, as a customs authority, all the functions, and tasks assigned to it by the law in the field of customs, movement of goods, internal taxation in connection with international trade"[25].

Therefore, every decision regarding Customs matters, which is not attributed exclusively to the law, must be made solely by the Customs Agency.

5.2.2. *Before Hamamatsu*

5.2.2.1. *The compatibility between customs value and Transfer Pricing*

Before the 2017 *Hamamatsu* judgment, the Italian Customs Agency (hereinafter, also "ICA"), following a Joint Working Group

[24] NI DTORA 01/2023 de 16 de febrero, de la Directora del Departamento de Aduanas e Impuestos Especiales, sobre declaraciones en aduana simplificadas y complementarias.

[25] Articles of Association of the Customs Agency adopted by the Management Committee.

with the Central Assessment Directorate of the Revenue Agency, published Circular 16/D , on 6 November 2015, followed by Circular 5/D on 21 April 2017, both aiming to align customs value with transfer pricing.

As expressly stated in the first few pages of Circular 16/D/2015, in compliance with European legislation, Article 29(2) of the Community Customs Code (now Article 70, paragraph 3 of the UCC and 134, paragraph 2 Regulation (EU) 2447/2015) contains a fundamental principle for customs value. Transactions between related parties are not, in themselves grounds for regarding the transaction value as unacceptable, provided that the declarant demonstrates that such value closely approximates to one of the values indicated in point b of the same Article. Failing to do so allows the Customs Authority to apply one of the alternative criteria laid down by Article 30 (now Art. 74 UCC).

At the same time, for direct tax purposes, the method known as "transfer pricing" allows multinational enterprises to determine the prices of goods and services brought and sold within the group via the so-called "arm's length principle".

While the aim of customs authorities is to verify that the declared price is not underestimated in order to reduce the amount of the duties due, the direct tax authorities want to avoid an overestimation of the transfer price, which could be used to increase the costs sustained by the company which, in turn, could reduce the overall taxable profit.

With this clear distinction in mind, the ICA, in the 2015 Circular, analysed the compatibility between customs value and the various transfer pricing methods as outlined by the "OECD transfer pricing guidelines for multinational enterprises and tax administrations".

Overall, all the traditional OECD transfer pricing methods (CUP, RPM, CPM, TNMM, and PSM) may constitute, with the appropriate adjustments, an indicator of the circumstances of the intra-group sale referred to in Art. 29 of the Community Customs Code (also, CCC).

In any case, multinational enterprises must first prove to what extent the transfer price adjustments refer to imported goods.

5.2.2.2. *Applying Transfer price in customs practices: the simplified declaration*

The ICA outlines two possible solutions that aim to reconcile customs values and transfer pricing values.

The first method is the so-called "Incomplete declaration" laid down by Art. 76, let. a) of the CCC and Art. 254 of the Dispositions regarding Commission Regulation (EEC) No. 1993/2454 of 2 July 1993 (now, under the name of "Simplified declaration" under Article 166 of the UCC), which allow customs authorities (following an authorisation granted by the Director of the competent customs office) to accept a simplified declaration without some of the necessary elements and documents, postponing its integration to a later date.

In this respect, despite the general provision requiring the submission of the additional documentation within a month (term extendable up to a maximum of four months), Art. 256, par. 6 of Reg. 1993/2454 of 2 July 1993 (now Art. 147 of Regulation (EU) 2015/2447) states that "In the case of a document required for the application of a reduced or zero rate of import duty, where the customs authorities have good reason to believe that the goods covered by the incomplete declaration may qualify for such reduced or zero rates of duty, a period longer than that provided for in the first subparagraph may, at the declarant's request, be granted for the production of the document, if justified in the circumstances".

However, as expressly stated by the Italian Customs Authority, the simplified declaration presents two critical problems: on the one hand, this procedure cannot be applied to export operations; on the other hand, an "open door" for every single customs declaration could be problematic both for the ICA and the Multinational enterprises.

5.2.2.3. *The determination of customs value based on specific criteria*

As an alternative to the incomplete declaration, for the import regime only, the flat-rate value adjustment procedure can be used under certain conditions.

This method, originally laid down by Art. 178, par. 4 of Regulation 1993/2454 (today Art. 73 of the Union Customs Code) allows tax authorities to determine the customs value "on the basis of specific criteria, where they are not quantifiable on the date on which the customs declaration is accepted".

This method, as outlined by the ICA, allows the operator, aware of the possible impact of non-determinable elements on the transfer price, to request authorisation to identify an amount defined *ex-ante* which, together with the value of the transaction as declared, will constitute the taxable amount for the application of the duties due.

In other words, contrary to the simplified declaration, the flat-rate procedure makes it possible to avoid keeping the assessment suspended for an extended period by identifying *ex-ante* a flat rate value, based on the "weighted averages of reported adjustments over the previous three years".

It must also be pointed out that, as stated in the 2017 Circular, following the entry into force of the UCC, which transposed the provision from the implementing regulation to the Customs code, the predetermination based on specific criteria is now also expressly allowed regarding the entire value of the transaction.

5.2.2.4. *Corrections and adjustments*

Last but not least, the ICA takes an explicit position on the possibility of making corrections and adjustments following the acceptance of the declaration.

As stated by the Italian Supreme Court, decision no. 7715/2013 and no. 7716/2013, in a case regarding transfer pricing in customs practices, "apart from errors or omissions made unintentionally by the importer in the import declaration, and in cases where the incomplete declaration procedure is admissible – except in cases of fraud – per Article 76 CCC and Article 254 CCIP, no subsequent rectification of the import declaration is possible as a result of voluntary choices by the party concerned".

Therefore, any correction and adjustment resulting from a prior transfer pricing agreement must be excluded.

Nevertheless, if the circumstances considered for authorising the use of the transfer price should change, a consequential amendment of the relevant authorisation (i.e. Art. 73 UCC authorisation) shall occur.

This "new" authorisation will affect the operations concluded after its release.

5.2.3. *Practical issues*

The remedies of the two ICA circulars must address two important difficulties of purely practical application.

The first is due to a lack of coordination between the ICA and the Italian Revenue Agency ("IRA"): while the ICA must assess the customs value three years after the customs declaration is submitted, the IRA is used to adjust TP values five years after the relevant declaration is submitted. As a result, it is clear that this discrepancy makes it nearly impossible to correct the customs value.

The second issue is connected to the simplified declaration procedure in particular.

This solution is currently not practicable due to a lack of suitable channels (i.e. IT problems) for delivering the so-called simplified declaration. However, the new procedure for the digitisation of customs import declaration data, effective from 9 June 2022, aims to solve this type of problem as well.

Therefore, despite the ICA's explicit statement, that the streamlined declaration procedure can be used to reconcile customs value and transfer price, the lack of the essential instruments makes this alternative virtually impracticable.

5.2.4. *After Hamamatsu*

Although the *Hamamatsu* case seems to contradict the interpretative position adopted by the Italian Customs Authority, the ICA has not released any statement or official document taking these changes into account.

Therefore, the situation remains unchanged.

However, it must be noted that the CJEU decision could be deemed to be in line with the decision of the Italian Supreme Court on the possibility of making subsequent adjustments to the customs value based on intra-group agreements for the definition transfer pricing.

5.3. *The Dutch Case*

5.3.1. *Dutch authorities responsible for transfer pricing and customs valuation*

In the Netherlands, the customs authorities and the tax authorities are two separate organisational units of the Ministry of Finance. The Directorate-General for Tax is responsible for tax legislation, whereas the tax authorities are responsible for collecting the taxes. The Directorate-General for Customs carries out customs supervision over the EU cross-border trade of goods, levies and collects import duties and other import taxes, and enforces safety, economic, health and environmental laws and regulations.

Transfer pricing is dealt with by the tax authorities, whereas customs valuation is the responsibility of the customs authorities. There are no regular meetings between the transfer pricing team of the tax authority and the valuation specialty team of the customs authorities, nor is data related to intercompany pricing and transfer price adjustments automatically exchanged between those teams. However, one member of the valuation specialty team has a transfer pricing background and both teams are allowed to exchange data (on request).

5.3.2. *Before Hamamatsu*

5.3.2.1. *Legislation*

In EU and Dutch customs legislation, it is not stipulated how transfer pricing and customs valuation (rules) relate to each other.

In other words, it is not established whether transfer pricing documentation can be used to substantiate that the relationship between related parties did not influence the price paid or payable and it also does not provide rules on how to account for transfer price adjustments.

5.3.2.2. *Jurisprudence*

There have been two, unpublished national court cases about the impact a transfer price adjustment has on determining the customs value of imported goods[26]. In one of the cases, X BV declared textile products on behalf of party B in its capacity as customs representative. The textile products had been purchased by party B from related party C. Party C bought the textile products from third-party manufacturers in the Far East. The tax authorities and party B had an argument about the transfer prices being used and party B appealed the case all the way to the Dutch Supreme Court. From the decision of the Dutch Supreme Court, it can be determined that part of the internal transfer price was not related to the imported goods, but in fact related to other payments like dividends (which are not dutiable from a customs perspective). As the declared customs values had been based on the initial internal transfer price used between parties B and C, party B submitted a request for a partial refund of overpaid import duties. The customs authorities however refused to repay overpaid import duties. The Tariefcommissie (Administrative Court for Customs and Excise), until 2002 the highest Dutch court for customs matters, ruled under reference to the case *Procureur de la République against René Chatain*[27] of the ECJ that the refund request was indeed rightfully rejected.

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[26] Tariefcommissie 25 November 1997, Nos. 88/95 until 90/95, 118/95 until 122/95, 131/95 until 155/95 and 10/96 (not published, elaboration in the main text is based on a commentary in Douane Update 1997/1115). See also Tariefcommissie 21 December 1994, Nos. 12986, 12988, 12989 and 13049 (not published).

[27] ECJ EEC 24 April 1980, C-65/79 (Procureur de la République against René Chatain), ECLI:EU:C:1980:108, para. 8.

5.3.2.3. *Guidance and practice ('law in action')*

On an EU-level, guidance is lacking on how transfer pricing and customs valuation rules interact. In the Netherlands, the Handboek Douane (Handbook on customs matters) provides guidance on how customs officers should interpret and enforce the UCC. This guidance is published on the website of the Dutch customs authorities and is freely accessible for stakeholders different from the customs authorities. Related party transactions are discussed in para. 2.33 of the guidance. Here it is explicitly mentioned that under certain conditions, the arm's length principle used to determine transfer prices can also be used for levying customs duties. After explaining the background and purpose of transfer pricing, the guidance stipulates that in the case of related-party transactions, both transfer pricing and customs valuation rules look for ways to determine the prices that would have been established if the parties had not been related. The guidance also makes reference to the court cases of the Tariefcommissie. It summarises that customs values need to be established based on customs valuation criteria. Values established for the purpose of other taxes – insofar as not proven otherwise in customs legislation – are not decisive for determining customs values.

The matter of price-influencing for the purpose of determining corporate income tax should not be taken into account in case there is a dispute about determining the customs value, according to the Handbook on customs matters, simply because the customs valuation rules have not regulated this (other than rejecting the transaction value).

In practice it is possible to obtain a customs valuation ruling from the valuation specialty team of the Dutch customs authorities. In related-party transactions, this valuation ruling can give legal certainty that the arm's length principle used for determining the transfer prices can, in the case presented, also be used for determining the customs values. Additionally, practical arrangements can be made about how a transfer pricing adjustment can be taken into account for the purpose of determining the final customs values. With regard to the latter, the customs authorities allow importers to file normal import declarations and declare the goods using

the initial transfer price as the customs value. A reconciliation sheet should subsequently be submitted after the transfer price adjustments have taken place. If these corrections result in an uplift of the customs value, customs duties will be retroactively assessed, whereas the importer is entitled to a partial refund of overpaid import duties in case the correction results in a downward adjustment of the declared customs value. This method of taking into account transfer pricing adjustments can, however, only be applied if the importer has previously discussed and agreed with the customs authorities his method of calculating the customs value and how transfer pricing forms the basis of this (and what evidence and documentation the importer can submit to substantiate that the transactions are from a transfer pricing perspective, indeed at arms' length). Other arrangements with the customs authorities, like filing a simplified import declaration under Article 166 of the Union Custom Code, are not common as these places significant administrative burden on both the customs authorities as well as the importer. In exceptional cases, the Dutch customs authorities take the view that an Article 73 – authorisation can be obtained. In that case, transfer prices adjustments are not taken into account retroactively but can play a role for determining the fixed mark-up in subsequent years.

5.3.3. *After Hamamatsu*

The Dutch customs authorities take the view that the Hamamatsu-case should be interpreted narrowly, meaning that it should only be applied in identical cases. Therefore, their way of dealing with intercompany transactions, as set out in the above, has not changed significantly. They do, however, mention in newly issued customs valuation rulings that the pragmatic arrangement – *i.e.* allowing importers to file normal import declarations and submit reconciliation sheets after the transfer pricing adjustments have taken place – is part of a broader discussion in Brussels about how to account for transfer pricing adjustments for the purpose of determining customs values. This means that although Hamamatsu did not really change something from a Dutch customs valuation perspective, this may

change in the near future depending on the outcome of the discussions in Brussels.

5.4. *The German Case*

5.4.1. *German authorities responsible for transfer pricing and customs valuation*

In Germany, the tax authorities are responsible for assessing the admissibility of transfer pricing adjustments.

On the one hand, this affects the federal authority "Federal Central Tax Office". This central tax authority is technically subordinate to the Federal Ministry of Finance in Berlin. The Federal Central Tax Office is also responsible for the mutual agreement procedure for advance pricing agreements.

On the other hand, the tax authorities of the federal states also deal with transfer pricing in the context of tax collection and tax audits. The tax authorities of the federal states include tax offices as well as the superior regional finance directorates. These are subordinate to the respective finance ministries of the federal states.

The German tax authorities have no competences in customs law. EU customs law is implemented, checked and monitored in Germany by the German Customs Administration. The German customs administration is also subordinate to the Federal Ministry of Finance and is divided into a central authority and several local authorities. The General Customs Directorate is the central authority that decides on technical issues relating to customs valuation law. At the regional level, there are a total of 41 main customs offices, with 250 customs offices where the operational part of customs clearance takes place.

After all, there is the Federal Customs Value Office in Germany. Organisationally, the department is part of the main customs office in Cologne. However, the Federal Customs Value Office provides technical support to the entire customs administration with questions about the customs value. This department has a decisive influence, particularly in transfer prices and customs values.

5.4.2. *Before Hamamatsu*

5.4.2.1. *Legislation*

Neither EU customs law nor the supplementary national customs law in Germany provide for regulations on the recognition of transfer prices. The German customs administration has issued an administrative regulation on the customs value, in which the submission of advance pricing agreements is addressed as a means of verification[28]. However, this administrative regulation has no legal basis and is only an internal instruction to the respective customs officers.

5.4.2.2. *Jurisprudence*

The Hamamatsu lawsuit began in Germany at the Munich Finance Court[29]. The Munich Finance Court submitted this case to the ECJ for a preliminary ruling, thereby drawing more attention across Europe to the problem of determining the customs value in the event of subsequent transfer price adjustments.

After the decision by the ECJ, the Munich Finance Court ruled in favour of the German customs administration and rejected a subsequent adjustment of the customs value[30]. However, the appeal was allowed, not least because the Munich Finance Court itself had doubts about the ECJ's decision.

The plaintiff appealed against the judgment of the Munich Finance Court to the German Federal Fiscal Court[31]. A decision by the Federal Fiscal Court is still pending.

On 17 May 2022, there was an oral proceeding before the Federal Fiscal Court. Hamamatsu, after acknowledging the ruling of the ECJ, pointed out that the ECJ decision did not take into considera-

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[28] See Administrative regulation of 15.09.2021, E-VSF Z 5101 (para. 36).
[29] Finance Court Munich, Court order of 15.9.2016, 14 K 1974/15.
[30] Finance Court Munich, Verdict of 15.11.2018, 14 K 2028/18.
[31] German Federal Fiscal Court, Revision procedure, VII R 2/19.

tion the fall-back method. A new submission to the European Court could therefore be necessary. The respondent, on the other hand, rejected this option, stressing that the ECJ had clearly stated its opinion by referring to Art. 28 to 31 CC. In addition, the respondent reinforced the fact that the declarant was legally bound by the value originally declared in the customs declarations.

If the ECJ decision is to be considered unambiguous, given the importance attributed to the essential principles of import date reference and goods reference (individual transactions) in customs valuation law, a further referral to the ECJ is unlikely and the case will most likely be dismissed[32]. This, however, would consequently imply that reverse cases of post-collection are likely to be decided in the same way.

Due to the ongoing proceedings at the Federal Fiscal Court, many proceedings with similar content in Germany are pending a final court decision. These comparable proceedings are on hold until the Federal Fiscal Court, as the highest German court for taxes and customs, decides in the Hamamatsu case.

5.4.2.3. *Guidance and practice ('law in action')*

The transaction value method is based on purchase transactions between contractual parties that are not related to one another. Accordingly, Art. 70 para. 3 d) UCC makes it clear that this customs valuation method can only be considered for related companies if the relationship of the contracting parties has not influenced the purchase price. This is usually ensured by examining the circumstances surrounding the sale (cf. Art. 134 UCC-IA).

Accordingly, a company that determines customs values based on transfer prices must be able to prove to the German customs administration that these prices correspond to the "arm's length principle". To provide proof of this, the most important thing is to explain how the respective transfer prices were calculated. This means

[32] The Federal Fiscal Court could also decide to remit the case to the Munich Finance Court for the distribution key because the first instance might not have sufficiently elaborated the findings on this key.

that the German customs administration, eventually, is guided by the method used to determine the transfer prices.

In the case of subsequent price adjustments – as in the case of Hamamatsu – the German customs administration takes a restrictive approach. So far, the German customs administration has followed the administrative practice that subsequent increases in the customs value due to transfer price adjustments are levied, but subsequent reductions are not reimbursed, provided that no product-related or at least tariff-related breakdown of the subsequent price adjustment is possible. This form of selective valuation of transfer prices was the reason for the original Hamamatsu lawsuit.

5.4.3. *After Hamamatsu*

The Hamamatsu lawsuit has been widely discussed in German literature[33]. Due to the unclear wording of the ECJ ruling, both the German customs administration and business-friendly literature opinions felt confirmed in their view[34]. The German customs administration is therefore sticking to the previous administrative practice even after the Hamamatsu decision. According to this, different criteria are considered by the customs authorities for the assessment. Which standards are applied in the individual case depends on the transfer pricing method used by the companies.

Subsequent credits due to transfer price adjustments – as in the case of Hamamatsu – are not considered to reduce customs duties and do not lead to any reimbursement of import duties. Subsequent charges due to transfer price adjustments will continue to be offset against the customs value and levied as import duties.

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[33] See *Eder*, RIW 2018, 1; *Vonderbank*, ZfZ 2017, 170; *Roth/Rinnert*, DStR 2018, 2090; *Rinnert*, ZfZ 2018, 70; *Felderhoff/Wemmer*, AW-Prax 2019, 242; *Stein/Schwarz/Hundebeck*, IStR 2017, 468; *Rehberg/Boulanger*, EU-UStB 2018, 21.

[34] See also *Müller-Eiselt/Vonderbank*, EU-Zollrecht/Zollwert, 2020, fold 7500, No. 27, Paragraph 2.

6. *General appreciation of the national practices*

The picture appears to be quite clear based on the above-mentioned reports. There are various legal bases, particularly in the EU, for a clear and definitive relationship and alignment between transfer prices and customs value. At present, there are a number of obstacles that make this extremely challenging, if not impossible.

As we pointed out in the first section of this paper, from a theoretical point of view there are various legal grounds for the separation of customs value and transfer pricing, ranging from the different types of taxation to the different levels of regulation of the two taxes. On the other hand, there is a common call at the international level for an alignment between the two valuation systems, moving away from the inherit inconsistency of two different transaction evaluation methods. As we previously stated, the EU law lacks a clear norm establishing links between the two values, and as we can see from the reports above, none of the EU Member States examined have national transfer pricing laws that include a link to EU customs legislation. This is likely owing to the differing levels of regulation, as transfer price legislation – although inspired by the international OECD standards – is domestic law, whereas customs law is European law. This does not, however, preclude the existence of certain interrelationships in the administrative practice of customs control. From a practical point of view, national customs authorities (NCA) are aware of the theoretical separation: evaluation rules for related parties' transactions for customs value and income tax are separated, and each set of rules is independent of the other. In any case, the NCA acknowledge that customs officials cannot overlook documentation drafted for transfer pricing purposes and vice versa. So far, no EU Member States Customs Authority has completely disregarded or dismissed documentation drafted in accordance with the OECD guidelines for establishing the customs value of imported goods when the transaction occurs between related parties.

This is particularly noteworthy if one considers that in almost all of the countries considered, there are two separate authorities in charge of income tax (and consequently, transfer pricing) and customs duties, respectively.

It still remains unclear what relevance should be assigned to the complex documentation that businesses, especially groups of companies typically produce for TP purposes according to the OECD standard. In each of the countries analysed, the transfer pricing documentation is seen as a useful instrument, acknowledged by NCA for gaining a better understanding of the value chain in the intra-group transaction and as an indirect source of information for the determination of the customs value. Despite the fact that taking the TP into account is not legally required by Customs authorities, and therefore the lack of this documentation cannot be blamed on importers, the general attitude endorsed by Customs authorities in the countries examined is to consider the documentation as a good starting point for understanding the surrounding circumstances, rather than as the core document to refer to for fixing the customs value of the intra-group transactions.

This may lead to the conclusion that there is a widespread acceptance at the administrative level that a degree of consistency between the valuations of the same transactions, even if done for two separate taxes, is required[35].

In three out of the four countries examined, the customs administrations expressly allow retroactive adjustments of the declared

[35] The Spanish position is somewhat peculiar. The Supreme Court issued the Coca-Cola judgments, affirming a logical need for reconciliation of Customs value and transfer pricing. Nevertheless, parliament reacted by affirming the separation between customs value and TP and stating in the national law the prohibition to use transfer pricing values for purposes other than income taxation. This confirms the position of the Spanish legislation to assume a clear separation between taxation by endorsing an atomistic approach. Anyhow, from an administrative point of view, following the indication of the TC for Customs Evaluation, the documents drafted for TP are considered valid tools to be used for demonstrating whether the existence of relationship has had an influence on the price. This may sound quite strange and contrary to the separation principle laid down in section 14 of Art. 18 of the Spanish Act 27/2014 on the Corporation Tax, but note that the relevance recognised here is not to decide the value, but the way in which the parties arrange their business (arm's length or not), so it does not imply that the customs value should be aligned with TP value. A very similar position is assumed in Italy. Here the Supreme Court affirmed the separation between the two values and the Italian customs authority formally follow this separation approach. Nevertheless, the Italian customs authorities accept transfer pricing documentation as a viable documentation to infer the customs value of the import goods in transactions between related parties.

customs value, based on the downward adjustments related to the inventory imported.

German administrative practice appears to be somewhat asymmetrical (customs authorities only acknowledge customs value adjustments on the upside, i.e. when greater import duties would apply), and this asymmetry was most likely the rationale for the preliminary ruling request to the Court. The pragmatic Dutch approach of allowing ex-post adjustments of values (either upwards or downwards) on the basis of a reconciliation option deserves special emphasis. Nonetheless, it appears that this practice lacks a strong, clear and precise legal basis at EU level. The use of a provisional customs declaration to obtain the alignment, which has been endorsed by Spain and Italy and is also permitted by Dutch customs, appears to have a clear legal basis in the wording of UCC, but it may be burdensome for businesses and customs authorities that must comply with high numbers of provisional customs declarations and reconcile them with a single prospectus drafted for TP purposes.

In the end, Hamamatsu does not appear to have had significant impact on national practices relating to the interplay between customs value and transfer pricing. After all, as the literature has pointed out, the judgment may be viewed in a variety of ways due to its conciseness and the unusual circumstances of the facts. It is clear that national authorities did not regard the judgment as being of paramount importance, nor did they change their control practices as a result of it.

National procedures within the EU customs administrations are still relatively different, and there is no uniform view on them at the EU level. This, in our opinion, is the real challenge so far and the main goal should be to have consistent administrative practices that allow enterprises to reconcile CV and TP throughout the EU. The uniform application of customs duties is one of the main objectives of the entire European customs discipline; it would be appropriate to achieve a clear and unified position on this point at EU level: common administrative practices that should be simple to implement, putting no additional administrative burdens on them, and that are also likely to avoid fraud. This would eliminate

the uncertainty created by Hamamatsu and make the set of fiscal regulations for international trade involving European countries more affordable.

The following sections introduce several proposals that appear to be effective in combating the enduring fragmentation in the EU.

7. *Some proposals for a smooth administrative reconciliation (based on the EU rules)*

At this time, it does not appear that a legally binding convergence of transfer pricing and customs valuation rules will be accomplished, at least not in the near future. This would require a legislation at the EU level, but given the current situation regarding income tax harmonisation in the European Union, and the unanimity rule for direct taxation, this will be difficult to achieve.

An automatic regulatory acceptance of transfer pricing rules for the valuation of imported goods for customs purposes in case of transactions between related parties is also unlikely. Customs legislation on valuation has a certain link with the EU's international agreements, and customs law in the EU claims a certain autonomy from income taxes, even if both income tax and custom duties must be applied to the very same transactions.

Building on administrative practices, with some enhancement possible through the revision of the UCC, would be a good option that respects the autonomy of the two realms.

As we have shown, the UCC currently lacks an *ad hoc* method for predictable adjustments in customs value due to correlative transfer pricing adjustment. Importers have a number of options available to them and none of them seem to be ideal.

We focus on two of them, which appear to be the two most viable options: the simplified-supplementary declaration scheme (Art. 166-167 UCC) and the issuance of a license for submitting customs declarations based on particular criteria (Art. 73 UCC). Some national customs administrations, as shown above, already permit the use of these two approaches.

Each of them has advantages and disadvantages, which we will attempt to outline in greater detail in the following paragraphs. Furthermore, each of them would necessitate regulatory adjustment that might be highly beneficial in resolving the issue of mismatches between customs valuation and transfer pricing.

7.1. *Simplified-supplementary declaration (Art. 166-167 UCC)*

For transactions between related parties, the Italian and Spanish customs authorities recommend using a simplified preliminary declaration and a supplementary declaration to reconcile the customs values and transfer pricing adjustments. The Dutch Customs Authorities occasionally allow it, but do not endorse this option due to the administrative burden on both the customs authorities and the importer. In Germany, national customs legislation does not allow for the submission of a simplified customs declaration (in which a provisional customs value is declared) and subsequently supplementing it with a definitive declaration.

This approach, according to the UCC, should be undertaken by traders and permitted by national customs authorities in any circumstances where an element of the customs declaration, including the value of goods, is not final at the time of importation.

The regular use of a simplified declaration is subject to an authorisation issued by the customs authority, which is not required when the use of the simplified declaration is only occasional.

The simplified declaration shall be supplemented with a declaration that may be either of general nature (referred to a single simplified declaration) or of a periodic or recapitulative nature. To make this procedure more attractive for business, and at the same time easy to deal with by the customs authorities in term of control, some amendments have been recently introduced at the regulatory level, and specifically in the European rules.

In short, the 2020 amendment[36] clarified the distinction between three types of supplementary declaration: a supplementary

[36] See Del. Reg. Commission 2020/877 of 3 April 2020, as amending – inter alia – the Art. 146 and 147 of the Delegate Regulation.

declaration of a general nature, on one hand, and a periodic or recapitulative supplementary declaration on the other. As a result, the rules provide declarants with a time limit in which to submit the supplementary declaration according to its type (general, periodic, or recapitulative).

The time limit for submitting the supplementary declaration of a general nature is relatively strict: only 10 days after the release of the goods. Instead, the time limit for submitting a recapitulative and periodic supplementary declaration may be extended by up to two years from the date of release of the imported goods, subject to customs authorisation and only in justified circumstances.

As a result, Articles 146-147 UCC DA now provide the legal basis for national customs practices to allow a supplementary declaration to be submitted within reasonable time restrictions using an adaptable approach based on the facts of the case. However, it is unclear what conditions may justify extending the deadline for submitting the supplementary declaration.

In any case, this practice may need to be properly implemented and supervised by national customs administrations in the EU.

Because of the inherent nature of customs value as the value of specific goods at the time of import, flat-rate adjustments may be regarded as inadequate as they consider multiple consignments as a single unit. As a result, even if the transfer prices can be retroactively reflected on the customs value of the very same goods, the declarant must give a detailed adjusted value to each of the imported goods, avoiding flat-rate adjustments.

This is burdensome because transfer pricing adjustments are made, normally, on a company's overall profit base, assuming an adjustment of the overall transactions between related parties and with the aims of allocating profits throughout the group.

Therefore, our proposal is for an official interpretation of the legislation at EU level to clarify that transactions between related parties are *per se* circumstances that justify: the granting of authorisation to use the simplified-supplementary declaration scheme (Art. 166, par. 2 UCC), allowing the submission of a simplified and supplementary declaration, and providing the related documentation,

within the time span of two years from the release of the imported goods (Art. 146 UCC DA, par. 3b).

7.2. *Art. 73 authorisation*

The approach outlined in Art. 73 UCC could be an alternative to the burdensome practice of simplified and recapitulative declaration. This allows importers to be authorised to declare certain amounts that must be included in the declaration (including the value of the imported goods), based on *specific criteria* as long as these amounts are not quantifiable at the time the customs declaration is filled out.

This procedure can only be used after the trader has been granted authorisation, which can only be granted if the simplified declaration procedure entails (i) an excessive administrative burden and if (ii) the determined customs value does not differ significantly from the value determined, in the absence of an authorisation. Therefore, it is a scheme that may be considered subsidiary to the simplified-supplementary declaration procedure.

However, this procedure can be of great interest and a good way of reducing, at least in terms of administrative requirements, the dichotomy between customs value and transfer prices. As we have seen, this solution has received support from both Dutch and Italian customs authorities, albeit at national administrative level.

Nevertheless, there are certain concerns about European law because it is not clear that these administrative practices are legally backed by EU rules. It is currently unclear if the procedure can be utilised for all elements to be included in the value and whether the specific criteria can also include those for determining the transfer prices, based on the wording of Art. 73 UCC.

Again, amendments to the legislation would be necessary to make this procedure safe and quick to use. First, it could be specified, even in the UCC DA, that the Art. 73 procedure is by default usable for transactions between related parties, because ex post alignment procedures based on transfer prices would impose a disproportionate administrative burden on the importers (which is un-

doubtedly a disproportionate burden for the importers that follow the scheme simplified-supplementary declaration), and by default, the alignment leads to very similar, if not identical, values.

Of course, there is still the possibility that issuing an authorisation will allow a group of companies to deviate significantly and excessively from customs valuation rules for intra-group imports. This would certainly be unacceptable from an EU customs perspective since it would be incompatible and inconsistent with the autonomy and uniformity that must be ensured in the application of customs legislation across the EU. Therefore, it should be obvious that the "*specific criteria*" on which the assessment should be based, must be determined before the authorisation is issued. It could be provided that, in the case of transactions between related parties, an authorisation can be obtained by specifying what "specific criteria" the importers will use at the time of application and filing the subsequent transfer price documents at the time as the authorisation application.

The decision to issue this authorisation should be based on the verification that the "*specific criteria*" are compliant with the customs valuation rules although the customs authorities' ability to control the correct application of these criteria would be unchanged. Transfer pricing documentation could be crucial in this respect and, as it would be made available to them, they would have easy access to it. Similarly, any changes to the group's pricing policy should be notified promptly as updates to the documentation.

Because transfer pricing documentation, which is typically drafted and prepared by international company groups, is already widely accepted by customs authorities – despite the fact that it is not legally binding – it may serve as the standard baseline for a discussion about granting the authorisation. At the same time, the requirements that businesses should meet in order to participate in the system provide enough assurance to customs authorities about the risks of major fraud.

The timing of taxation would remain a problem since the customs value is normally assessed at the time of importation, whereas transfer pricing is assessed on an annual basis as profits of the overall group are allocated to the companies within the group ac-

cording to the results achieved over a period of time (normally one year).

In any case, it should be accepted that under Art. 73 authorisation, the customs value should not be considered as a value assigned to each item imported at the precise moment the import occurs; but rather as the customs value assigned to various imports related to the overall transactions between related parties over a span of time (normally one year). It should be noted that many misalignments between TP and customs value occur because the timing of the two is not aligned: imported goods must be given an immediate value at the time of import and for customs clearance, which may result in a higher or lower value than the transfer pricing assigned to the very same goods at the end of the year.

It is worth emphasising that declarations following specific criteria properly submitted and agreed by customs, should be considered definitive. In theory, this would eliminate the difficulties of having to supplement the submitted simplified declarations.

At the same time, it should be borne in mind that, in the event of a TP adjustment made by revenue – i.e. in case of an audit where the transfer price assessed differs from the one in the documentation – the retroactive adjustment is also possible through ex post amendment of the customs declaration.

Last but not least, in order for this solution to be effective, another crucial issue that must be addressed is the possibility of broadening the scope of Art. 73.

Importers from outside the EU seem not to be able to apply for an Art. 73 license.

If this is true, the method's efficiency would suffer significantly, needing a Code change.

7.3. *The "Dutch solution" (Art. 173)*

The Dutch administrative procedure may provide a final viable way to harmonise Transfer price and customs valuation.

As previously said, this technique would allow economic operators to submit a reconciliation sheet.

Customs duties will be levied retroactively if the pre-adjustment

value is increased, but if the correction results in a downward adjustment, a refund should be feasible.

However, there are two basic requirements that must be met in order for this practice to be implemented across the EU.

First and foremost, a sound legal basis for the reconciliation sheet procedure must be identified within the UCC framework.

In this case, the best alternative can be found in Article 173 of the UCC, which allows for customs declaration amendments within three years of the date of acceptance of the declaration.

However, as with the simplified statement and Art. 73 authorisation, legislative changes would be required to widen the scope of Art. 173 and allow national customs administrations to apply the "Dutch solution".

For example, adding a new fourth paragraph to Article 173 UCC that allows the submission of the reconciliation sheet in the case of related party transactions could be useful.

This strategy not only solves the problem of reconciling transfer pricing and customs value, but it also addresses some of the criticisms levelled at the previous suggestions.

To begin with, it is obvious that submitting a simple reconciliation sheet at the end of the year (or for a shorter time) is a less cumbersome practice than filing a supplemental declaration, which would ease the administrative load.

Second, the Dutch solution is "cleaner" than Art. 73 UCC because it takes TP adjustments into account retroactively and applies them to non-EU importers.

However, there is still a disconnect between customs valuation, which considers the value of imported goods and transfer pricing, which is frequently based on the company's overall profit.

Allowing the economic operator and the customs authorities to enter into an agreement prior to the importation that specifies how the adjustment will reflect on the value of the imported goods is one possible solution in this regard, which would necessitate another amendment to the current legal framework.

At the same time, the business should preserve accurate accounting records to determine how adjustments are distributed in connection to particular imports.

8. *Conclusions*

The decisions established by the Court of Justice in the Hamamatsu case do not yet appear to have fully found recognition in the practice of some of the Member States, as is evident from the aforementioned considerations.

However, there are a variety of approaches, each of which might be in line with the Customs Code's current structure and achieve (at least tendentially) harmonisation between customs valuation and transfer price. These are, however, methods that in order to achieve the desired results inevitably call for a legislative intervention aimed at extending the reach of some of the current provisions or, at the very least, establishing precise and trustworthy interpretive standards.

Finally, it must be noted that the much-discussed inclusion of a tool to enable economic operators to request binding valuation Information ("BVI")[37] within the UCC could enable customs authorities to work with importers to align customs value and transfer price (including how adjustments are accounted for).

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[37] Similar to Binding Origin Information (BOI), Binding Value Information (BVI) should also be binding in all Member States, ensuring that customs administrations follow a uniform protocol.

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