GENERAL REPORT

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This General Report is a summary of the country reports indicated below. It therefore follows the pattern of the national reports by comparing their main findings.

It highlights some common aspects regarding the structure of customs authorities and customs controls in the Member States (MS) examined, namely Germany, the Netherlands, Spain and Italy. It also identifies some best practices.

Every Member State is aware that in matters of the Common Customs Union there is an exclusive competence of the European Union, and that Member States are bound by European law. All national customs systems should therefore comply with the relevant EU legislation (UCC, its Implementing Regulations, and Delegated Acts), as well as the case law of the Court of Justice of the European Union.

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1. *Structure of the customs authority*

In all the Member States examined, the authority in charge for customs controls is clearly identifiable and it is a public body.

In some countries, the customs authority is a branch of the Ministry of Finance (Germany and the Netherlands), whereas in others it enjoys greater independence (Italy and Spain), being an independent public body with its own internal organisational rules and hierarchy. However, even in these cases, there is a link with central government: in Italy an agreement is made between the Ministry of Finance and the customs authority and the top positions in the hierarchy are appointed by the government on the advice of the Ministry of Finance.

In the countries under examination, therefore, the structure of the customs authority is to some extent nationally centralised, and in any case there is some supervision/surveillance by the Ministry of Finance.

In some countries, the authority in charge of customs controls also has responsibilities in other areas of revenue collection, such as excise duties and other forms of taxation, i.e. road tax, lottery taxes (this is the case in Germany, Spain and Italy), however, it seems that customs duties and controls on revenues connected to customs (VAT at import) are their main activity.

In principle, the general services of the customs authorities (risk analysis offices, valuation offices) are centralised while customs controls on goods entering the EU is a responsibility of local offices located in different areas of the country, mainly at the borders. There are also some bodies that may carry out random customs inspections even at the premises of the operators and of vehicles, even after customs clearance procedures have been completed.

In some cases, a specific office is dedicated to intelligence services with a view to combatting customs fraud. This is the case, for example, in Germany where the Zollkriminalamt operates as a functional unit of the Ministry of Finance. In some cases, such as in Italy, a militarised body like (Guardia di Finanza) shares the responsibility for customs control with the customs administration, poten-

tially tackling some of the most serious customs fraud. In Spain, the customs authority may also carry out joint investigation with the Guardia Civil. In the Netherlands, there is also a special office for financial fraud (FIOD) which could also investigate customs fraud, particularly when it relates to other financial crimes such as money laundering, illicit trafficking, and international organised crime.

These offices/bodies, whose task is to combat serious customs fraud, are an example of good practice because they allow for a centralised and unified strategy to fight customs fraud and can also be excellent and direct interlocutors with the bodies in charge of customs control at European level.

In general, customs authorities, as national bodies, must comply with national law as well as the general principles of public administration. They therefore carry out their activities according to the principles of public law. In all Member States, customs officers are civil servants, who are required to comply with the provisions related to the principles of fairness, loyalty, impartiality, proportionality, etc. It is widely accepted that the UCC, its IR and DA, as well as the case law of the CJEU are of paramount importance in the performance of customs controls. According to the principle of the primacy of EU law, it takes precedence over national provisions.

As a rule, any decision made by a customs authority can be challenged in court. Every country has dedicated administrative judges who are entitled to review customs decisions. However, in some countries (Spain and Italy), there are also internal (to the customs administration) appellate bodies responsible for administrative reviews of customs decisions. This internal review is to some extent an extension of the right to be heard, which is granted in all national systems. In addition, internal appellate bodies are helpful in reducing the number of customs litigation cases. In general, an excessive length of time in resolving customs disputes has not been reported in any country, nor have other significant cases of unfairness of judiciary proceedings in customs matters been reported.

2. *Risk analysis*

Risk analysis is, as stated in Article 46 of the UCC, the heart of the control system and generally all countries rely on risk analysis for managing the entire system of customs controls. Risk analysis allows controls to be concentrated on those situations where it is most needed, i.e. when there is a particular risk of evasion. In this context, the analysis of the financial risk makes it possible to strike a balance between the efficiency of controls and the speed of trade.

In the Member States examined in this study, the risk analysis is carried out by the central offices of the national administration. These offices transmit instructions to the offices in charge of carrying out controls. This risk analysis is largely inspired by the implementation of the European Commission inputs, which are not public. Customs financial risk analysis tools and profiles are kept confidential by national customs authorities. For this reason, it might not be possible to investigate/confirm whether the risk analysis carried out by national customs authorities is conducted in a uniform manner. Nevertheless, there seems to be a certain degree of coordination as regards risk analysis, as European criteria and European databases are used as a risk analysis tool also at national level.

Ideally, risk analysis for the EU customs union should be performed at EU level or, at least, it should be supervised at EU level, and therefore it is good practice that European databases be used for risk analysis.

In Italy and the Netherlands, there is a specific reference to statistical analysis tools implemented at European level (AMT/Theseus, the European Fair Price lists), for conducting risk analysis.

Although the risk analysis criteria and profiles are not public, it appears that all countries consider an unusually low import value as a risk indicator. Therefore, the existence of low value consignments generally triggers customs controls.

This is in line with the case law of the European Court of Justice, which in several judgments upheld that abnormally low customs values may give rise to reasonable doubt as to the accuracy of the declared customs value, and therefore require checks and assessments by national customs authorities.

The result of national risk analysis are communicated to the local offices which carry out the customs controls. The Italian and Spanish IT systems use risk analysis to break down the flow of import into "lanes" (or "channels") and makes recommendations to the local offices to focus controls on specific import declarations. The system of dividing the flows of goods into "lanes" for customs control purposes is also in place in the Netherlands.

A specific kind of control (documental control, inspection of goods, scanner control, etc.) is normally associated with the assigned lane, although the customs officer can still use his discretion to decide the most suitable control to carry out, given the actual circumstances of the import.

In Germany, this method of funnelling controls into "channels" or "lanes" does not seem to be in place formally. Nevertheless, risk analysis is carried out at IT facilities and the indications of the risk analysis are promptly passed on to the local offices together with suggestions regarding the type of control to be performed. Customs officials are also free to carry out controls other than those indicated by the risk analysis, but in practice most of the controls are carried out following the indications of the analysis.

In all of the countries examined, it is common practice not to communicate the results of the risk analysis to the economic operator that is subject to the control. Sometimes, the risk analysis indicators are intuitable by the operator, e.g. an unusually low customs value, but in other cases it is difficult for the operator to understand the reasons that triggered the control (e.g. purchase from non-EU traders reported as unreliable, local risk indicators).

To ensure greater transparency, this practice could be reconsidered, at least when requesting justification from the customs operator, i.e. when the economic operator can exercise his right to be heard. At that moment, he could be made aware of the reasons that triggered the customs inspection and this would give the importer the opportunity to better exercise his right to a proper defence.

One practice worth mentioning (put in place by the Dutch and Spanish customs authorities), is to periodically communicate certain operational guidelines regarding customs control to the public of operators, indicating the areas on which the controls are going to

focus, as well as the matters that will be subject to customs controls. This practice, although not binding as regards the operation of the administration, provides transparency and accountability to the actions of the national customs administration.

3. *Undervaluation as a means of risk analysis*

As mentioned, 'undervaluation' is one of the risk analysis criteria used in all Member States. The declared value of imported goods is compared with average statistical values based on national or European databases. This risk analysis methodology complies with the risk analysis indications provided by the European Institutions.

The identification of undervaluation may lead to a "reasonable doubt" as to the accuracy in the declared customs value and may trigger an additional inspection.

Undervaluation is a criterion for risk analysis leading to a reasonable doubt regarding accuracy in all Member States.

This reasonable doubt, if not justified by the economic operator, can lead to the dismissal of the transaction value as a taxable basis for customs duties. In this case, the customs authority will adjust the declared value according to secondary methods provided for by the Customs Code (Art. 74 UCC). The authorities of all Member States use secondary methods for determining the customs value in hierarchical order. The 'fall back' method is the method of last resort.

4. *Use of statistical value-databases for customs value adjustment*

The subject of statistical value, and the possibility of using it for the adjustment of the declared customs value, is particularly relevant.

All the Member States examined use statistical average values for the adjustment of an abnormally low value of imported goods, although this occurs in some specific cases and when certain circumstances are met. Therefore, statistical values are never used as

a method for the automatic adjustment of import declarations with declared values lower than average statistical values.

In order to use statistical values to adjust declared customs values, any supplementary information/justification offered by the operators must be regarded as being unsuitable for resolving the doubts of the customs authority. Also, the other UCC secondary methods cannot be used to properly determine the customs value.

It seems that this approach, based on the use of the statistical value as a method of last resort, has been endorsed by the national case law of the Supreme Courts of the Member States. This was the case for example in Germany and the Netherlands, even though the Courts upheld a caveat pointing out that statistical value adjustment is an exceptional tool and may be used in the context of the fall-back method.

It may then be inferred that statistical values are used for the adjustment of low customs values in the Member States examined, but only as a last resort, and in the absence of specific indications from the operator (or if the clarifications offered by the operator are poor and completely inadequate to justify the undervaluation).

This aspect must be emphasised. The reports point out that the hypotheses in which this method of determining customs value is used are very few. This is because discussions with the importer in the context of the right to be heard often allow customs authorities to establish an acceptable customs value.

In the following paper on European case law regarding customs value, it has been pointed out that the European Court of Justice has not yet made its position entirely clear on the role of statistical data in the adjustment of the customs value. The Court ruled that in the context of recovery of own resources due to the incorrect application of customs controls, the Commission may use statistical average values from European databases, i.e. the so-called 'fair price' (for further details see the paper on the CJEU case law), to determine the amounts subtracted from the EU Budget.

However, the CJEU has not yet clarified whether, and under which circumstances, a statistical value based on a national or Eu-

ropean database may be used to "adjust" the customs value, in the context of the recovery by national customs duties of duties from private operators.

5. *Units specialised in customs valuation*

In some Member States (Germany and the Netherlands), the customs authority has set up a central office dealing with customs valuations and provides assistance in this specific field to local offices and private operators. Central offices are often involved in complex valuation operations and distribute valuation techniques and methods, as well as carrying out operational activities.

In many cases, national customs valuation offices are also staffed with transfer pricing experts. This is certainly to be welcomed, since – in reality – transfer pricing and customs valuation regulations have the common objective of identifying the value that would have been established had the seller and the buyer not been related. However, these offices have no direct relationship with their direct tax counterparts, and more specifically with transfer pricing offices.

In some cases (Germany), the "valuation office" provides legal assistance and support to the customs offices responsible for customs clearance and controls. It may also express opinions to third parties (private operators), but the opinion is not legally binding. Neither the officials who carry out the controls nor the operators who receive the advice on customs valuation are required to comply with it. However, in practice, the opinions issued by these offices are particularly important.

In other cases (the Netherlands), the "valuation office" has a direct and close relationship with economic operators and, for large operators, even holds periodic meetings.

It also plays a very important function in the process of issuing rulings on assessments, requested by economic operators. The procedure for obtaining a ruling is not very quick and it normally takes several months. The rulings, although strictly speaking not legally

binding, may create a legitimate expectation for the economic operator. The reference number of the ruling may then be included in customs declarations, designating them as reliable operations.

In Italy, a binding ruling on the valuation of import goods may be obtained under Article 73 UCC. This ruling is issued only on the basis of a disclosure of the trade flows by the operators, and the transfer pricing documentation. In this way, "Art. 73 UCC authorisation" allows the operators to reach a common valuation of import goods for transfer pricing and customs purposes. However, this procedure does not establish a form of "general binding valuation tool" because it can be applied only in Transfer prices cases.

Establishing a dedicated office for valuation matters for all national customs authorities is good practice, as customs valuation is very important. For even closer coordination between national customs administrations, one could envisage establishing a network of national "valuation offices" dealing with customs valuation. In this way, the main issues would be addressed in a unified manner and, by asking for advice, all customs authorities would tend to understand and conform to certain standards.

6. *Cooperation with OLAF and other national customs authorities*

Two additional aspects of the cooperation of customs authorities are examined in the reports, i.e. relations with OLAF and relations with other national tax authorities.

As regards relations with OLAF, it appears that all customs authorities have a very good cooperation relationship with OLAF and frequently exchange views.

Cooperation takes place with reference to a precise legal basis, Regulation 515/97, and consist of a constant exchange of information and views on customs controls to be carried out.

In some countries (the Netherlands), a general liaison office has been set up to provide a link between OLAF and national customs authorities. In principle, the national authorities follow the control directives given by OLAF and are willing to carry out joint con-

trols. These controls have proved to be particularly efficient from the point of view of combating customs fraud. All the national authorities interviewed reported having an excellent relationship with OLAF, based on an efficient exchange of information. Germany reported direct and constant communication via electronic tools, such as the AFIS IT platform.

At the same time, OLAF, in certain cases, carries out on-the-spot checks. In other cases, national authorities are asked by OLAF to perform customs clearance and/or post-clearance inspections.

Joint OLAF-Member State customs controls can be considered a best practice. These controls mix national and European perspectives, safeguarding national and European financial interests. The Spanish report gives further details on a specific case, showing how this cooperation can be particularly effective in the situation of large-scale fraud at European level. Such fraud must necessarily be tackled with a national and European joint effort.

7. *Relations with other national tax administrations (with particular attention to valuation)*

Another key aspect on which reports have focused are the relations with other (national) tax authorities, i.e. national authorities whose mandate is to oversee the implementation of taxes related to the activities of economic operators, mainly income tax.

In general, the reports show that customs and national tax authorities do not cooperate regularly. In some cases, for example in Germany, this is due to the central federal structure of the customs authority, whereas the structure of the income tax authority is territorially based.

In other cases (Spain), the departments dealing with income tax and the customs authority are part of the same body – the general tax agency. Nevertheless, communication and cooperation are not regular.

Fundamentally, it seems that there is still much room for improvement regarding cooperation between customs and other authorities. One area where this improvement can be developed is

in the field of transfer pricing and customs value for related party transactions.

Particular attention was given to this topic in the research project and more detailed information can be found in the dedicated paper.

The reports confirm a different approach to the subject of relationship between transfer pricing and customs value. In some countries (Spain), there is a clear separation and autonomy between the two values. In this case, it is the national legislation that provides that the valuation performed for income tax purposes cannot apply to other taxes.

In other cases, it appears that transfer pricing documentation has some effect on the customs value and is taken into consideration when assessing the customs value between related parties.

The country reports indicate that even after the CJEU Hamamatsu judgment, some sort of administrative realignment between transfer pricing and customs values continues to operate. Nevertheless, the terms of this realignment are unclear. Furthermore, the legal basis for the administrative realignment between transfer pricing and customs value (related to transactions between related parties) is unclear.

The dedicated paper sheds light on some national practices currently in place in some states (Italy and the Netherlands). Such practices seem to guarantee a safe and smooth approach to realignment.

Reference is made to the possibility of a realignment of the customs value to the value defined in the transfer pricing documentation. This could be done by the importer submitting a provisional declaration, which would then be supplemented by a final declaration, to be submitted within a reasonable time and taking into account the value of the goods defined for transfer pricing purposes.

Another solution, adopted by Italy, is to guarantee to certain parties, based on a prior authorisation (Art. 73 UCC authorisation), the use of specific criteria for determining the customs value, thus realigning the criteria used for income tax on transfer pricing to the criteria used for the customs valuation of imported goods (in case of a transaction between related parties).

Unfortunately, these solutions are not shared by all Member States. Therefore, an intervention at EU level would be welcomed on this point. This would face the challenge of other important third countries (USA, China) which have launched administrative programmes. Their aim is to reduce the complexity faced by international trade operators in dealing with different sets of rules connected with the same trade flows.

8. *Right to be heard*

Rooted in European legal traditions and expressly affirmed in the UCC (Article 22(6)), the right to be heard is relevant in customs matters in all jurisdictions examined.

There are various forms and stages at which this right of private operators is exercised in practice and it depends on the administrative organisation that carries out the controls. All Member States examined have a very high standard of guaranteeing this right and provide for procedural mechanisms prior to the final decision.

In general, before issuing a negative decision, the economic operator must be informed and must be given the opportunity to provide, within a reasonable deadline, documents and explanations regarding the decision that is expected to be issued against him.

In many cases, there is a direct contact between the customs administration and operators, as part of the control procedure. The actual application of this procedure may be different. Very often it takes place by exchanging written documents, e.g. the operator submits further documentation or explanatory notes about the circumstances of the case. In certain cases, meetings between the operator's representatives and customs officials are also possible.

Moreover, in most countries, the obligation to clarify the reasons for the decision must also include the outcome of this preliminary stage. In other words, the administration must always take into account the justification given by the operator and cannot simply ignore it by issuing its final decision.

Although the right to be heard is strictly connected to the pro-

cedural framework of customs controls, it is a key step that allows customs administrations to adjust declared customs values.

In this context, the national reports reveal a close connection between the right to be heard and the possibility to use statistical data under the fall-back method for customs valuation. Therefore, giving the operator the opportunity to express his view is a legal requirement for applying the fall-back method, as well as for the use of statistical values for the purpose of customs value adjustments.

9. *Sanctions*

The provisions concerning the application of sanctions for offences under the EU customs law is one of the most discussed topics at European level. To date, there is no harmonised sanctions system for the infringement of customs legislation by private operators.

Article 42 of the UCC provides for general principles regarding sanctions for the infringement of customs legislation, i.e. that sanctions must be proportionate, effective, and dissuasive.

However, the actual provisions concerning sanctions for infringements of customs law are laid down in national legislation.

All the countries examined provide for both criminal and administrative penalties for breaches of customs legislation. This is partially due to the transposition of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In general, in all Member States, the administrative authorities are responsible for imposing administrative fines, whereas national judicial authorities are responsible for prosecuting criminal customs fraud[2].

Accordingly, two different bodies (administrative and criminal) are potentially responsible for the same ascertained facts. Adminis-

[2] The recently established European Public Prosecutor's Office is also responsible for prosecuting and bringing to trial those who commit fraud that affects the financial interests of the EU, including customs fraud. The role of the EPPO is not covered by the reports, since so far there are insufficient cases of customs fraud investigated and prosecuted by the EPPO in the countries covered.

trative and criminal sanctions follow different routes, although national customs authorities might be involved in both criminal and administrative investigations; de facto, most investigations that lead to criminal prosecution of the customs fraud are carried out by the customs authority.

In some Member States (Germany), the distinction between administrative and criminal sanctions is linked to fraudulent intent, i.e. deceptive conduct is relevant. For example, the use of false documents and/or the issuing of false customs declarations may trigger criminal proceedings for imposing criminal sanctions related to customs offences, normally due to the evasion of customs duties.

In certain Member States (Italy, Spain and the Netherlands), there is also a minimum threshold for evaded customs duties for the offence to be considered as a crime. Offences connected to an incorrect declaration of the customs value also lead to criminal sanctions.

In any case, procedural provisions often determine minimum thresholds e.g. for determining which customs law offences should be prosecuted under criminal law, or the minimum amounts of duties evaded. Moreover, even the conduct might involve a minimum level of deception.

From a pragmatic point of view, it seems that only infringements to the customs law of a certain severity are prosecuted under criminal law for the purpose of imposing sanctions such as imprisonment. Less serious criminal customs offences are punished with a quick and simplified procedure, by issuing a criminal order imposing moderate sanctions, and without resorting to a full criminal trial.

Sometimes (this is particularly the case of Spain), initiating criminal proceedings is used to induce the economic operator to paying its customs debt.

In all Member States, the 'ne bis in idem' principle prevents the application of administrative and criminal sanctions and penalties for the same customs infringement (including undervaluation), although the mechanism for selecting the sanction to be applied are different.

The criminal significance of the customs offences committed has also consequences on the limitation period for the recovery of unpaid duties (connected to the infringement/fraud).

Article 103(2) of the UCC provides that the 3 years limitation period starting from the moment of the clearing procedure shall be extended from 5 years up to a maximum of 10 years in case the customs infringements are also punishable according to national criminal law.

Each Member State examined implemented the extension of limitation period in the case of infringements punishable under criminal law, as it is set out in the UCC. In Spain and Germany, the extension for the recovery of unpaid duties (5 years in Spain and 10 years in Germany) is linked to the statute of limitations under criminal law for smuggling, whereas in Italy there is a specific independent extension of up to 7 years, in case of conduct punishable under criminal law.

In certain Member States (the Netherlands), because of the broad notion of customs criminal offences, the extension of the limitation period to 5 years applies by default in most customs offences that have been ascertained. De facto, the 3 years statute of limitations is only applied in exceptional cases.