CUSTOMS VALUATION ADJUSTMENT IN RECENT CJEU CASE LAW

*Giangiacomo D'Angelo**

SUMMARY: 1. Introduction. – 2. The aim of EU customs valuation legislation, and the essential nature of the customs valuation. – 3. The autonomy of the customs valuation. Renè Chatain case C-65/79 and Hamamatsu Photonics case C-529/16. – 4. Procedural requirements as inherent to the adjustment of customs value. Carboni e Derivati, C-263/06. – 5. Respect for genuine trade agreements between the parties in determining customs value, although they appear uncommon. Lifosa, C-75/20. – 6. Reasonable doubts (for disregarding the transaction value), differences of statistical value, right to be heard. Euro 2004. Hungary, C-291/15. – 7. Reference to databases (national or European) in the context of customs valuations using comparative methods. Fawkes, C-187/21. – 8. De facto control between the parties to the transaction, and reasonable flexibility in adjusting the customs value. Baltic Master, C 599/20. – 9. Admissibility of statistical methods when recovering resources (customs duties) lost to the EU Budget. Commission vs UK C-213/19. – 10. Conclusion.

1. *Introduction*

The purpose of this paper is to take stock of the most recent CJEU case law on customs valuation, focusing in particular on judgments on the adjustment of customs value by the customs authorities.

Note, firstly, that the following judgments (most of them are preliminary rulings) originate mainly from national proceedings

* Associate Professor of Tax Law at University of Bologna.

where importers challenged adjustments made to the declared customs value by national customs authorities.

In this scenario, the Court of Justice of the European Union (CJEU) ruling is part of the domestic legal proceedings brought by private operators (normally importers) against the national customs authority.

In recent times, the European Commission and OLAF has been proactive in controlling member states' customs controls. The seminal case Commission vs UK (C-213/19) dealt with the recovery of duties illegitimately collected by the UK. The European Commission challenged the UK for having long maintained an inefficient system of customs controls, especially in the context of controlling the undervaluation of goods at customs. These customs control inefficiencies have resulted in systemic and very considerable customs frauds that have generated significant shortfalls for the EU budget.

2. *The aim of EU customs valuation legislation, and the essential nature of the customs valuation.*

Certain legal matters are well-settled in the CJEU case law on customs valuation, and the CJEU generally recalls these issues in each judgment dealing with customs valuation.

It is settled in case law that "the objective of the EU legislation on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values" (Gaston Schul, C-354/09; Mitsui & Co. Deutschland GmbH, C- 256/07).

The first judgment containing this general approach dates to 1990 (C-11/89 Unifert), and the CJEU derived the aforementioned conclusion from a recital of the customs regulation in force at the time (Reg. 1224/80).

In Compaq Computer International Corporation C-306/04, the CJEU went further and added that "The customs value must thus reflect the real economic value of an imported good and, therefore, take into account all of the elements of that good that have economic value".

This judgment introduced the reference to the real economic value, as a general baseline rule.

3. *The autonomy of the customs valuation. Renè Chatain case C-65/79 and Hamamatsu Photonics case C-529/16*

In a case dating back to 1980 (Renè Chatain, C-65/79) the Court affirmed the autonomy of EU customs valuation rules from other national measures and laws.

European customs valuation rules cannot be used for valuations of imported goods that are relevant for purposes other than customs rules.

It stated that

> … the adjustments to the value for customs purposes … are upward adjustments designed both to prevent deflection of trade or activities and distortion of competition which would be the consequence of an undervaluation of imported goods and also to ensure for the Community the full collection of customs duties. It follows also from the specific nature of the provisions in question that the determination of the value for customs purposes in accordance with the rules of Regulations No. 803/68 and No. 375/69 cannot have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than the application of the Common Customs Tariff.

The autonomy of EU customs valuation rules, i.e. their independence of domestic rules on the valuation of imported goods for other purposes has also been reaffirmed by the well-known Hamamatsu case.

In Hamamatsu (C-529/16 – Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München), a German company claimed repayment of excessive custom duties based on a downwards ex post adjustment of the customs value of the imported goods. This downwards adjustment was, in turn, linked to the (downwards) adjustment made in the context of a transfer pricing agreement.

The Court ruled out that downward adjustments of the customs value of imported goods due to a transfer pricing agreement between a party to the transactions and the relevant tax authority, may be relevant also for customs purposes. The CJEU ruled as follows,

in relation to upwards or downwards adjustments of the transaction value of imported goods:

> 33 … it must be stated that, in the version in force, 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.

4. *Procedural requirements as inherent to the adjustment of customs value. Carboni e Derivati, C-263/06*

In Carboni e Derivati, the Court was requested to give a preliminary ruling on the proper interpretation of customs value for the purposes of anti-dumping duties. It made a number of observations, in this context, which clarified the procedure for customs adjustments by the customs authorities.

The CJEU affirmed that the procedural requirements provided for in the Union Customs Code (UCC) and its Implementing Regulation (IR) concerning the adjustment of customs value are inherent in the whole system of customs valuation:

> 52 In this context, Article 181a of the implementing regulation, (the current Article 140 of the implementing regulation) … provides that the customs authorities need not necessarily determine the customs valuation of imported goods on the basis of the transaction value method if they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable, and they may refuse to accept the declared price if those doubts continue after they have asked for additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts.
> 53 … that provision of the implementing regulation … codifies … a customs practice common at both international and Community level … In addition, Article 29(2)(a) of the

> Community Customs Code lays down the same procedural requirements when the customs authorities have grounds for taking the view that the relationship between the buyer and the seller influenced the price. The conclusion must therefore be drawn that those procedural requirements are inherent in the valuation system.

5. *Respect for genuine trade agreements between the parties in determining customs value, although they appear uncommon. Lifosa, C-75/20*

In the Lifosa case (C-75/20), where transport costs were at issue, the customs administration adjusted the customs value of certain goods by adding transport costs incurred by the seller up to the border of the EU territory. These costs, according to the contract based upon the Incoterms 2000 Delivered at Frontiers (DAF), were covered by the producer, and were therefore not included in the customs value since they were not part of the transaction value of the goods.

However, the transport costs incurred by the producer were higher than the selling price agreed for the goods, thus the producer was selling at a loss.

Therefore, the customs authority adjusted the customs value by adding the transport costs incurred by the producer for the retail transport up to the border of the EU.

The Court took the view that this adjustment practice was not in line with EU customs law and emphasised that the customs value should be linked to the *actual economic value of the goods* which should be valued based on the surrounding commercial circumstances of the transaction. When no doubt exists as to the veracity of the contractual agreements, they cannot be disregarded even if they are not in line with normal trade practice and/or may appear unusual. Accordingly, even a customs value that is unusually low, and thus out of step with normal trade practice, may not be disregarded if the transaction is based upon genuine contractual agreements.

More specifically, the Court ruled that:

> 35 Whilst an economic operator cannot evade EU law by invoking its contractual obligations, nevertheless the customs value of imported goods cannot be determined in the abstract. In accordance with the Court's case-law, it is determined based on the conditions under which the sale concerned was made, even if they do not accord with trade practice or may appear unusual for the type of contract in question (see, to that effect, judgment of 4 February 1986, Van Houten International, 65/85, EU:C:1986:53, paragraph 13). Thus, the Court has held that, in order to determine whether the customs value of imported goods reflects their real economic value, the specific legal circumstances of the parties to the contract of sale should be taken into account (see, to that effect, judgment of 15 July 2010, Gaston Schul, C-354/09, EU:C:2010:439, paragraph 38). Accordingly, a failure to take account of the conditions of sale when determining the customs value of those goods would not only be contrary to Article 29(1) of the Community Customs Code and Article 70(1) of the Union Customs Code, but would moreover lead to a result that does not allow the real economic value of the goods to be reflected.

6. *Reasonable doubts (for disregarding the transaction value), differences of statistical value, right to be heard. Euro 2004. Hungary, C-291/15*

The Court judgment in the case Euro 2004 is of paramount importance, since it held that it was possible to adjust a declared customs value without questioning the veracity of the price paid or to be paid for the transaction. In this respect, the judgment may appear difficult to reconcile with the Lifosa case.

First, in Euro 2004 the Court was requested to clarify the scope and meaning of "reasonable doubts" which might cause the customs authority to disregard the transaction value and, to this extent, stated that a connection existed between the reasonable doubts of customs authorities and the average detected price of certain goods.

The Court stated that

> 35 The customs authorities can, for the purposes of determining the customs value, disregard the declared price of imported goods and use secondary methods to determine the customs value of imported goods, as laid down in Articles 30 and 31 of the Customs Code and, in particular, the sale price of similar goods, if their doubts concerning the transaction value of those goods persist after they have requested additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts.

The CJEU then went further, clarifying that

> 39 … a difference in price, such as that established (i.e. lower than 50% of the average statistical value based on national databases), appears sufficient to substantiate the customs authority's doubts and its rejection of the declared customs value of the goods at issue.
> 41 … for the purposes of the application of Article 181a of the Implementing Regulation, the authenticity of the documents showing the transaction value of the imported goods is not the determining factor but is one of the factors which the customs authorities must take into account. Those authorities may have doubts, despite the authenticity of those documents, as to the accuracy of the customs value of the imported goods.

Furthermore, the Court stated that the importer should be afforded the right to be heard, i.e. the opportunity to present evidence and justifications confirming the accuracy of the declared customs value. If the importer, despite being invited to do so, does not provide any evidence or justification regarding the accuracy of the declared customs value, the customs authority is entitled to consider the reasonable doubts unresolved and thus to reject the declared transaction value.

7. *Reference to databases (national or European) in the context of customs valuations using comparative methods. Fawkes, C-187/21*

In Fawkes, the CJEU ruled on the possibility of adjusting the declared customs values by reference to methods provided for by Article 30 para. 1, lett. a) and b) of the former Comunity Customs Code or CCC (currently Article 71, para. 1, lett. a) and b) of the UCC) – the so-called comparative methods, i.e. adjustment through comparison with identical or similar goods imported at the same time or about the same time.

The first question for the Court was: can the national customs authority adjust the customs value by applying comparative methods, and by referencing data contained in a national database?

The CJEU held that the national customs authority is entitled to use data and information from a national database in the context of the so-called comparative methods for the adjustment of declared customs values.

> 41 The national databases thus created are therefore capable, as a rule, of referencing the information necessary for the application of Article 30(2)(a) and (b) of the Customs Code. Moreover, each of those national databases is, by definition, freely and immediately accessible to the customs authority of the Member State that compiles and manages it.
> 42 In those circumstances, whether or not a customs authority of the Member State in which the customs clearances take place has an obligation to use the information contained in databases set up and managed by the customs authorities of other Member States or by the services of the European Union, depends on whether the customs authority concerned is in a position to determine the customs value in accordance with Article 30(2)(a) and (b) of the Customs Code, on the basis of the information immediately available to it. If that authority, on the basis of databases which it compiles and manages, already has in its possession the materials necessary for that purpose, the information contained in the databases managed by other customs authorities or by the departments of the European Union will be of no particular use.

Furthermore, the Court addressed two questions concerning the data that may be used for the adjustment of the customs value. The questions may be summarised as follows:

- Which data, contained in the national databases, may be used, and which data must be disregarded in determining the customs value?
- In referring to the national databases for adjusting the declared customs value, is the national customs administration entitled to exclude some items related to previous imports by the same operator, operating on the assumption that these items contain inaccurate customs valuations?

The Court held that, when adjusting declared customs values by reference to national databases, the national customs authority is entitled to ignore certain items included in the databases which relate to previous imports by the same operator on the assumption that these items provide inaccurate customs valuations, but provided that the value of these imports was previously challenged under customs code procedures.

In other words, previously declared values referred to other imports by the same operator cannot be excluded in the adjustment of customs value for imports by the same operator, unless they have been previously called into question and adjusted according to appropriate procedures.

This does not apply for data related to imports into other Member States (and therefore contained in national databases of other MS).

> 64 The situation is different where the operator concerned relies on transaction values relating to imports into other Member States. Since the customs authority of a Member State is not in a position to influence the choices of its counterparts from other Member States as regards the application of Article 181a of the Implementing Regulation to one or more imports, the fact that the authorities of other Member States have not called into question the transaction values in question cannot, in itself, prevent the customs authority of a Member State from assessing the plausibility of the transaction values relied on by the importer. In such

> a case, that authority retains the possibility of excluding the customs values declared on that trader's other imports into other Member States, albeit on condition that it must set out the grounds for that exclusion in accordance with Article 6(3) of the Customs Code by reference to factors affecting the plausibility of the transaction values in question.

Furthermore, the Court addressed an issue concerning the obligation to reference customs databases kept by other MS or by the relevant EU services.

The question may be summarised as follows: are national customs authorities obliged to request data collected by other Member States, or data collected and processed by services of the EU (DG TaxUD; OLAF; EuroSTAT)?

The Court's response was negative. There is no obligation on national customs authorities to request data collected by other Member States, or data collected and processed by services of the EU (DG TaxUD; OLAF; EuroSTAT), on imports by the same operator.

This is because such data would be of no use in the context of the comparative methods. Moreover, an obligation to request data from other MS and from the EU could be onerous and could delay national customs operations, e.g. the application of customs assessments and duties.

Such an obligation, therefore, would be out of keeping with the imperative to safeguard the EU's financial interest.

Although not mandatory, the national customs authorities, when completing their investigations and collecting complete information on imports that are subject to adjustment, can refer to EU databases, or request other MS for national data.

European databases that contain confidential information are aimed, in principle, to facilitate the detection (using statistical methods) of fraudulent schemes or instances of commercial fraud and, consequently, they might not be used as a basis for the fixing of (higher) customs values when recovering unpaid duties.

In any case, the CJEU also stated that the national customs authorities can access additional information from these databases for the adjustment of customs value, provided that such information is

brought to the attention of the operator concerned, pursuant to Article 6(3) of the Customs Code.

The Court affirmed:

> 55 Even if it could prove useful for determining customs value, confidential information from a database which seeks, by means of statistical exploration methods, to detect commercial models capable of constituting instances of fraud cannot form part of the statement of reasons required in Article 6(3) of the Customs Code. Consequently, the database from which such information derives cannot be regarded as being available to the customs authorities in order to determine the customs value, within the meaning of Article 30(2)(a) and (b) of the Customs Code.
>
> 56 That said, the considerations set out in paragraphs 42 to 55 above do not prevent a Member State's customs authority, having regard to the circumstances of each case and to its obligation to exercise due care, from sending appropriate requests for further information to the customs authorities of other Member States or to the EU services and institutions, which it needs in order to determine the customs value (see, by analogy, judgment of 9 November 2017, LS Customs Services, C-46/16, EU:C:2017:839, paragraph 55), provided that they can be brought to the attention of the operator concerned pursuant to Article 6(3) of the Customs Code.

Lastly, the Court addressed the issue of the 90-day deadline for detecting comparable transactions with a view to determining the customs value.

The issue may be summarised as follows: does the customs code permit the customs value to be determined by reference to other transactions of the same operator, within a 90-day deadline (45 days before, 45 days after the import to be adjusted)?

The Court answered in the affirmative, since the comparative methods under the customs code require the customs authorities to consider the transaction value of other goods exported 'at or about the same time'.

The Court judged the 90-day period (45 days before, 45 days after the import) to be a reasonable "observation period", stating as follows:

> 70 In particular, the requirement to take into account the transaction value of goods exported 'at or about the same time' as the goods to be valued is intended to ensure that transactions taking place at a sufficiently close date to the date of export are taken into account, so as to avoid the risk of a substantial change in commercial practices and market conditions affecting the prices of the goods to be valued.
> 71 Accordingly, a customs authority may, in principle, take account only of transaction values of identical or similar goods sold for export to the European Union for a period fixed by the European Union at 90 days, including 45 days before and 45 days after customs clearance. That period appears to be sufficiently close to the date of export that the risk of a substantial change in commercial practices and market conditions affecting the prices of the goods to be valued is avoided. Therefore, if that authority concludes that the export transactions of goods which are identical or similar to the goods being valued over that period enable it to determine the customs value of those goods in accordance with Article 30(2)(a) and (b) of the Customs Code, it cannot, in principle, be required to extend its enquiry to include exports of identical or similar goods made outside that period.
> 72 In the absence of exports of goods which are identical or similar during that 90-day period, it is for the customs authority to examine whether such exports have been made over a longer period, but not too far removed from the date of export of the goods being valued, provided that, during that longer period, the commercial practices and market conditions affecting the prices of the goods being valued have remained substantially the same. It is only if the customs authority concludes, subject to review by the national Court, that such exports do not exist, that it may use, sequentially, the methods for determining customs value which are set out in Article 30(2)(c) and (d) of the Customs Code or, failing that, in Article 31 thereof.

8. *De facto control between the parties to the transaction, and reasonable flexibility in adjusting the customs value. Baltic Master, C-599/20*

In the Baltic Master case, the Lithuanian customs authority adjusted the customs value of goods imported from Malaysia. The

transaction occurred between two parties that were formally unrelated, but certain circumstances of the sale pointed to *de facto* control by the foreign (non-EU) company over the EU importing company.

Therefore, the first question for the Court was whether the parties to the transaction could be considered as related parties for the purposes of the customs valuation (in this case, as is well known, the competent authority is fully entitled to reject the transaction value method if reasonable doubts exist as to whether the relationship influenced the price).

The Court stated that *de facto* control is also relevant for customs purposes, but this cannot be inferred from relationships of mutual trust between the parties to the transactions.

Rather,

> 39 … it follows from the interpretative note referred to in paragraph 37 of the present judgment that one person should be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

The second question concerned the compatibility with the UCC of customs value adjustments based on information contained in national database.

The Lithuanian customs authority adjusted the customs value by reference to the customs value of certain goods that were not exactly "similar" within the meaning of Article 141 UCC, but were sold by the same seller (Malaysia operator) to other Lithuanian importers.

The Court stated that the specific circumstances of the sale should be considered, such as:

- Whether the undertaking provided or did not provide all the necessary documents.
- Whether the customs authorities exercised due care in adjusting the value, as required.
- Whether reasonable flexibility was exercised in relation to the customs valuation methods applied.

Given these circumstances, the Court ruled that the data contained in the national database may be considered to be data available in the EU. This is the case even if the data refers to a different import transaction by the same seller, or to goods of the same TARIC heading (not considerable similar to the ones of the adjusted transaction). Therefore, data contained in the national database can be used as a basis when determining or adjusting the customs value.

Moreover, the Court recalled that when applying the various customs valuation methods i.e. the so-called secondary methods, the interpretative notes to the Customs code permit reasonable flexibility.

> 52 … it is apparent from point 2 of the interpretative note, referred to in paragraph 48 above, that the valuation methods to be used under Article 31 of that code should be those defined in Articles 29 and 30(2) thereof; that point of the note states that those methods must be applied with reasonable flexibility, in particular as regards the assessment of the term 'similar' goods.

Therefore, the Court concluded:

> 54 … taking into account, first of all, the need to establish a customs value in the event that an undertaking does not provide sufficiently accurate or reliable information concerning the customs value of the goods concerned, and subsequently, the due care which customs authorities must exercise when applying each of the successive methods of determining the customs value and, lastly, the 'reasonable flexibility' with which those methods must be applied, it should be accepted that the data contained in a national database relating to goods ascribed to the same TARIC code and originating from the same seller as the goods concerned, constitute 'data available in the [European Union]', within the meaning of Article 31(1) of the Community Customs Code, which may be used as a basis for the purposes of determining the customs value of the goods concerned.

The Court went even further, affirming that this finding was consistent with EU international customs agreements.

The CJEU ruled that:

> 55 Reference to such data is a means of determining a customs value which is both 'reasonable' within the meaning of Article 31(1) and consistent with the principles and general provisions of the international agreements and the provisions referred to in Article 31(1).

9. *Admissibility of statistical methods when recovering own resources (customs duties) lost to the EU Budget. Commission vs UK C-213/19*

The case Commission v. UK is a turning point in the strategy used against customs undervaluations that threaten to undermine the financial interests of the European Union.

As part of its strategy to combat fraud in the context of customs undervaluations, OLAF, in collaboration with the JRC, developed a mathematical statistical model to identify statistical average values of imported goods. These methods enabled the identification of systemic customs frauds involving the undervaluation of imported goods.

The application of this mathematical statistical model has revealed the occurrence of very significant customs frauds in the UK, based upon the undervaluation of imports. Furthermore, the UK has failed to organise an effective system of customs controls and, in turn, it has promoted a system whereby certain fraudulent importers of textile products were facilitated to avoid paying customs duties.

As a result, OLAF drafted a report and issued a financial recommendation to the UK. This led to the European Commission bringing proceedings against the UK to recover these losses.

OLAF based its conclusion on the application of a statistical model, known as the OLAF-JRC method. Note that this statistical model was used not only to identify situations of potential undervaluation relating to specific imports, and thus was used as a risk analysis tool, but also as a tool to calculate the financial impact of the losses on own resources.

The Court of Justice considered that the OLAF-JRC method was valid, and was correctly applied in the case, both at the risk analysis stage, i.e. to identify potential tax evasion, and also at the customs value adjustment stage.

Essentially, the Court rejected the UK's arguments raised to cast doubt on the legitimate use of the OLAF-JRC statistical model for adjusting the customs value of the suspected transactions, and consequently endorsed the recovery of the unpaid duties lost to the EU budget.

More specifically,

> 416 Since the goods concerned could no longer be recalled for the purposes of physical controls and sufficient data as to their true value was not requested from the traders concerned, nor, therefore, provided, it is now no longer possible to determine, in respect of each customs declaration at issue, the customs value of the relevant products from China by applying one of the methods prescribed by Articles 70 and 74 of the Union Customs Code, such as the fall-back method in Article 74(3) of that code, which consists in determining the customs value on the basis of 'data available' in accordance with the conditions laid down in Article 144 of Implementing Regulation II.
>
> 417 In such circumstances, the United Kingdom, supported by the intervening Member States, cannot criticise the Commission for having applied the OLAF-JRC method for the purposes of calculating the losses of customs duties and, therefore, of traditional own resources resulting from the lack of adequate controls on the relevant imports, a method that is by nature essentially statistical and is not based on one of the sequential methods prescribed in Articles 70 and 74 of the Union Customs Code for determining, in respect of each customs declaration concerned, the customs value of the goods concerned.

The CJEU confirmed the validity and correctness of OLAF's operations and stated that otherwise, faced with large-scale frauds, OLAF would be prevented from properly carrying out its work of verifying and adjusting the value of each customs declaration.

In these circumstances, the statistical method applied by OLAF was the only reasonable method that could be used to determine the

amount of duties that remained uncollected from the UK and, consequently, lost to the EU budget.

Note, too, that the UK proposed an alternative method for determining the amount of uncollected customs duties, and it differed from the OLAF method essentially in two respects:

- The average prices were determined by reference to data related to overall EU imports (i.e. imports occurring in all EU countries), but weighted by reference to the quantity imported into the UK;
- The "revaluation" of the customs value involved adjusting the undeclared customs value to an "acceptable level" and not to the Cleaned Average Price (or fair price), nor to the Lowest Acceptable Price (which is 50% of the CAP), as the OLAF-JRC method.

However, the Court upheld the correctness of the OLAF method.

Note that the Court clearly stated that the CJEU is not required, in the context of recovery procedures, to choose one of the statistical methods proposed by the parties. Indeed, the Court's role was simply to evaluate the plausibility of, and the absence of evident errors in, the method actually adopted by the Commission.

The CJEU affirmed that

> 451 … the Court, therefore, is not required to choose between the different methodological approaches proposed by the parties, as the United Kingdom appears to suggest in its defence, but only to assess the OLAF-JRC method relied on by the Commission in support of the present action by examining the various criticisms of that method expressed by the United Kingdom, supported by the intervening Member States.
>
> 452 It should be stated, in this regard, that the Court's examination of the OLAF-JRC method in the context of the present infringement proceedings must essentially aim… to verify that this method was justified in the light of the particular circumstances of the case and that it was sufficiently precise and reliable in that, in particular, it was based on criteria that are neither arbitrary nor biased and on an objective and coherent analysis of all the relevant data

> available, and accordingly does not lead to a clear overestimate of the amount of those losses.

The Court went further by affirming that:

> 442 In that regard, while the OLAF-JRC method is indeed an essentially statistical method of estimating the amounts of own resources losses, which is not intended to determine the customs value of the goods concerned in accordance with Articles 70 and 74 of the Union Customs Code, having regard to each customs declaration concerned, the Commission cannot be criticised for having used such a statistical method for the purpose of calculating the amounts of own resources losses in the circumstances of the case.
> 443 It is common ground that the relevant imports were made on a large scale and that the goods concerned were released for free circulation and cannot now be recalled for checks to establish their true value. Furthermore, the United Kingdom failed, contrary to Article 325(1) TFEU and to applicable EU customs legislation, to adopt necessary measures, such as physical controls, requests for information or documents or the systematic collection of samples. Accordingly, in the absence of sufficient data in relation to the quality of the goods already released for free circulation, it is now no longer possible, owing to those failures to act, to determine the value of those goods on the basis of one of the valuation methods provided for in Articles 70 and 74 of the Union Customs Code; therefore only a statistical method can be used to estimate the value of those goods.

Furthermore, the Court recalled that in the event of large-scale customs frauds that made it almost impossible to determine, by inspections or other direct investigations, the correct amount of unpaid duties linked to each import queried, the Commission is entitled to act by applying indirect and inductive methods to protect the EU financial interest. A similar method, based upon the average weight of imports, was already deemed appropriate in similar circumstances.

> 446 In a case where checks proved impossible due to the absence of the goods concerned, and where this was the inevitable consequence of the failure of the customs

> authorities to carry out checks to verify the actual value of those goods, leading to the systematic acceptance by those authorities of the customs values declared, despite knowing that the goods were, on average, undervalued, the Court held that, in such circumstances, it was not inappropriate to quantify the amount of own resources losses resulting from such a practice by reference to data on the difference between the declared average standard weight of similar goods imported in a subsequent period and their average weight established during controls which, because of their extent, could be considered relevant (see, to that effect, judgment of 17 March 2011, Commission v Portugal, C-23/10, not published, EU:C:2011:160, paragraphs 54, 63, 65 and 66).

10. *Conclusion*

The CJEU case law highlight that a number of settled points of law related to customs adjustment and the statistical value method.

With regard to the comparative method in the case of identical and similar products,

1. National authorities are permitted to access national databases and, in detail:
   a) Records contained in national databases for the same operator, and inserted by the applicant for customs clearance purposes, cannot be discarded if the customs authority has not already questioned them.
   b) Goods which are not exactly similar, but which fall within the same customs tariff heading and were produced by the same seller and imported in the same period, may also be taken into account in certain circumstances.
2. National customs authorities are not obliged to reference values contained in European or other Member State databases.

With regard to statistical value:

1. the statistical value method can clearly be used for risk analysis purposes;

2. in case of large-scale customs frauds in relation to which national customs controls are unduly lenient, the European Commission is not precluded from deploying a statistical value when adjusting undervalued transactions and, consequently, recovering from the MS unpaid customs duties attributable to the EU Budget.

Certain points remain not fully settled.

As one can see, the Court is clearly inclined, in certain circumstances, to permit the use of the statistical value method enabling the European Commission to adjust declared customs values, in order to recover from Member States traditional own resources attributable to the EU budget. However, it is not entirely clear whether and under what conditions, in the context of the so-called fall-back method, national customs authorities could use the statistical value method in order to adjust customs values declared by importers.