

in line with Commentary 23.1 of the WCO TCCV, that TP documentation should be used to analyse the sale's conditions. The ICC goes further than Commentary 23.1, suggesting that:

businesses that establish prices between related parties in accordance with the arms-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 appraisal, and consequently that the prices establish the basis for customs value. (ICC, 2015, p. 2)

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

The sixth recommendation indicates that if the customs administration requires extra information beyond that included in TP documentation, those data requirements should be explicitly stated and announced in advance to be incorporated into TP documentation to serve both functions.

Concerning the impact of TP adjustments on customs values, one of the ICC's key suggestions is that customs authorities should recognise post-transaction adjustments made 'as a result of a voluntary compensating adjustment – as agreed upon by the two related parties' (ICC, 2015, p. 2) or because of a tax audit. The most important part of this idea is allowing post-transaction revisions without a provisional valuation method or fines for valuation adjustments. The importer should instead submit a single recapitulative return referencing all original customs declarations, per the fourth recommendation.

In the event of post-transaction TP adjustment, the third proposal offers allowing the importer to select between two procedures to review the customs value. Importers should be able to choose between applying the weighted average customs duty rate method, which divides the total amount of customs duties for the year by the total customs value for the same year, and the TP adjustment method to individual transactions.

3.1. The WCO Guide

The *WCO Guide to Customs Valuation and Transfer Pricing* was released in June 2015 and updated in September 2018 (WCO, 2018).¹⁰ The Guide does not provide a definitive approach to this issue but it 'provides technical background and offers possible solutions regarding the way forward, and shares ideas and national practices, including the trade view' (WCO, 2018, p. 4).

¹⁰ 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' (WCO, 2018, p. 4).

In most cases, the ‘adjusted price’ will be closer to the ‘uninfluenced’ customs valuation price. Consequently ‘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’ (WCO, 2018, p. 68).

In this regard, a helpful principle can be found in Advisory Opinion 4.1. Price review clauses provide a beneficial principle regarding:

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. (WCO, 1981)

After a brief description of the TCCV and ICC’s earlier work, the handbook recommends the use of TP information to assess the ‘circumstances surrounding the sale’ and provides more guidance. First, the WCO adds that while customs authorities make decisions based on the ‘totality of the evidence,’ ‘in certain situations a judgment may be based primarily on transfer pricing data’ (WCO, 2018, p. 63). Paragraph 5.2 of the guidance analyses TP data usefulness in full (in particular, single product vs product range and the date range). Finally, the WCO encourages customs officials to let business operators obtain an advance ruling to determine if buyer-seller relationship affects price. These judgments could also be based on a TP analysis or an Advance Pricing Agreement (APA).

Regarding TP 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 (WCO, 2018, p. 69).¹¹ Since the WCO Guide is not legally binding, national customs authorities (NCA) must decide how to review duties after a TP adjustment. Generally, a TP policy should be in place before the importation or clearance of the goods to identify the criteria (or ‘formula’) used to determine the final transfer price.

¹¹ ‘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’.

4. The EU perspective

Currently, apart from the ECJ *Hamamatsu Case* (see below), neither the UCC nor guidance documents mention the relationship between customs valuation and TP.¹²

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 TP methods because TP regulation is part of the corporate income tax legislation, which is within the EU members 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 TP 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 ECJ (i.e. the legally binding interpretation of the UCC). Under the current customs valuation framework, the first case referred to the ECJ on this matter was the *Hamamatsu Case*, as explained below.

4.1. The ECJ *Hamamatsu Case*

Hamamatsu Photonics Deutschland GmbH (Hamamatsu) 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 the operating margin, 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 several consignments that may include diverse types of goods that attract different import duty rates.

¹² There are some dated cases in this regard. See ECJ 24 April 1980, C-65/79 (*Procureur de la République v 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 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 Marsilla (2011).

The German Finance Court (Finanzgericht, Munich) referred two questions to the ECJ. First, it was asked if Article 28 et seq. 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 TP 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 must 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. (ECJ, *Case C-529/16 (Hamamatsu)*, *ECLI:EU:C:2017:984*, 2017, p. 33)

Therefore, in 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’ (ECJ, *Case C-529/16 (Hamamatsu)*, *ECLI:EU:C:2017:984*, 2017, p. 34).

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 (Friedhoff & Schippers, 2019, p. 26) First, the decision could be read considering 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’ (ECJ, *Case C-529/16 (Hamamatsu)*, *ECLI:EU:C:2017:984*, 2017, p. 23).

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 TP 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 (Rovetta et al., 2018, p. 187). Moreover, not considering any adjustment could also lead to abuse, given that the parties could set the price lower than the actual economic value.

Finally, this interpretation seems to be contradictory 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 (ECJ, *Case C-173/15 (GE Healthcare)*, *ECLI:EU:C:2017:195*, 2017). The final and last reading of the judgment focuses on the facts of the case at hand. More precisely, three relevant factors could lead to the argument that the ruling should only be interpreted in identical cases.

First, the Court explicitly refers to the Customs Code 'in the version in force' (which was the CCC and not the UCC, (ECJ, *Case C-529/16 (Hamamatsu)*, *ECLI:EU:C:2017:984*, 2017, p. 33)) 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. 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 TP for customs value purposes.

After the judgment of the ECJ, the Munich Finance Court, on 15 November 2018, rejected Hamamatsu's lawsuit as unfounded and the company appealed against the decision before the German Federal Fiscal Court.

On 17 May 2022,¹³ the Federal Fiscal Court confirmed the decision of the court in Munich and rejected Hamamatsu's claim for reimbursement. The Federal Fiscal Court did not consider a later transfer price adjustment and limited the determination of the customs value to the evaluation of the goods during the year using the subordinate methods in accordance with Art. 74 UCC, in which it only depends on the value of the goods at the time of customs declaration. According to the judges, the subsequent transfer price adjustment is not considered. From a practical point of view, this evaluation will often lead to the use of the fallback method according to Art. 74(3) UCC.

However, the judges pointed out that a simplification according to Art. 166 UCC could possibly be considered. The judgment of the German Federal Fiscal Court thus contributes new facets to the discussion about the relationship between customs value and transfer prices but does not conclusively clarify the issue.

5. Selected administrative practices of the NCA before and after the *Hamamatsu Case*

While there are certain problems in bridging the gap between TP 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 TP.

When exploring the alignment of customs values and transfer prices for administrative purposes, one should consider the reciprocal influence of the two, that is, transfer price to determine the customs value, and vice versa. Companies or the tax authority might use the customs value as a baseline for determining the TP, which is relevant for corporate income tax purposes.¹⁴

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

¹³ The official publication of the judgment (reasons for the judgment) took place at the end of September 2022.

¹⁴ 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.'

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 TP 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, TP rules are national in nature and tend to comply with the international standard endorsed at the 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 1980s (ECJ, Case C-65/79 (Chatain), ECLI:EU:C:1980:108, 1980), explicitly ruled out the possibility of using customs value for reasons other than the application of customs law, assuming the autonomy of customs values.¹⁵

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 advantageous 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 year-end, the benchmark studies resulting in the initial transfer price are typically already completed before the time of import. Therefore, 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 this gives rise to the infamous question what should be done with issue of retroactive transfer price 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 TP. 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 are 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 TP 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

¹⁵ 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.

acknowledged that in recent times, the EC EU bodies are intensifying the audits on NCA, which in turn are under increasing pressure to carry out detailed and accurate controls on customs evaluations.¹⁶

Whatever the reasons are, we focus on the following, assuming that TP rules have a certain precedence, and we focus on the scenario of customs value adjustments due to a different TP value determined for the specific transactions. As a result, we examined 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 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 TP 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 TP adjustments on determining the final customs values, focusing on the most common scenario in which a TP adjustment – made by the revenue authority following an audit; or by the taxpayer in applying their 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 TP and customs value for transactions involving related parties.

5.1. Administrative practice in Spain

5.1.1. The Spanish customs authority

Customs is a body within the framework of the Spanish Tax Administration Agency (Agencia Estatal de Administración Tributaria, AEAT). The functions in the Customs and Excise Area are provided 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 Spanish Customs Authority, aware of the problem, issued a resolution (Resolution 25/8/2017)¹⁷ and included new instructions¹⁷ for the Single Administrative Document (SAD, or DUA in Spanish), providing new rules regarding the declaration of the customs value in transactions between related

¹⁶ See, for example, ECJ 14 June 2022, C-308/14 (*Commission v UK*), ECLI:EU:C:2016:436.

¹⁷ Published in the Spanish Gazette on 1 September 2019. More information is available at <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*. In Explanatory Note 1/2022 (INSP NI 001/2022), the Tax Administration reminds the reader that use of the simplified declaration is subject to prior authorisation.

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 (after its amendment, the reference is now to Article 146.3b DA). 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’ (Spanish Department of Customs and Excise, 2017, p. 86330).

5.1.3. After *Hamamatsu*

Although the *Hamamatsu Case* is frequently mentioned in some of the resolutions of the Spanish Central Administrative Economic Tribunal,¹⁸ it is never part of the *ratio decidendi*. We must state that there has been no change after the judgment of case C-529/16, other than in the SAD instructions, and the Spanish customs authority has not issued any explanatory note on the changes derived from the *Hamamatsu Case*.

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 determination of the final value, as opposed to a consignment-by-consignment approach.

5.2. The Italian case

5.2.1. The Italian customs authority

The Italian legal system is characterised by two (mostly) autonomous agencies: the Revenue Agency (Agenzia delle Entrate), which has a general jurisdiction regarding direct and indirect taxes, and the Custom and Monopolies Agency (Agenzia delle Dogane e dei Monopoli, ADM), 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’ (ADM, Articles of Association, Art. 2; on this see Armella, 2017, p. 76; Bellante, 2020, p. 206; Vismara, 2018, p. 67).²⁰

¹⁸ The Central Administrative Economic Tribunal, despite its name, is not a court of justice; it is an administrative body that decides tax appeals.

¹⁹ 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.

²⁰ Articles of Association of the Customs Agency adopted by the Management Committee.

5.2.2. *Before Hamamatsu*

Before the Hamamatsu judgment, the ADM published two documents aiming to align customs value with TP (Circular 16/D/2015 and Circular 5/D/2017).²¹

The ADM also outlines two possible solutions that aim to reconcile customs values and TP values: the so-called ‘Incomplete declaration’ laid down by Art. 76, let. (a) of the CCC (now under the name of ‘Simplified declaration’ under Article 166 of the UCC), and the flat-rate value adjustment procedure, originally laid down by Art. 178, para. 4 of Regulation 1993/2454 (today this is Art. 73 of the UCC) (on this, see Saponaro, 2020, p. 597).

However, the simplified declaration procedure is currently not practicable due to a lack of suitable channels (i.e. IT problems).²² Nonetheless, as stated by the Italian Supreme Court, decision no. 7715/2013 and no 7716/2013, in a case regarding TP 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. (Italian Supreme Court, decision no. 7715/2013, para. 4.3; see also Fabio, 2022, p. 1049)

Therefore, any correction and adjustment resulting from a prior TP agreement must be excluded.²³

5.2.3. *After Hamamatsu*

Although the *Hamamatsu Case* seems to contradict the interpretative position adopted by the ADM, it has not released any statement or official document taking these changes into account. Therefore, the situation remains unchanged.

5.3. The Dutch Case

Transfer pricing is a matter that is dealt with by the tax authorities, whereas customs valuation is a matter that belongs to the customs authorities. There are no regular meetings between the TP 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

²¹ Published on 6 November 2015 and 21 April 2017, respectively.

²² 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.

²³ 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.

between those teams. The valuation specialty team has, however, a member with a TP background and both teams are allowed to exchange data (on request).

In EU and Dutch customs legislation, it is not stipulated how TP and customs valuation (rules) relate to each other. There have been two, unpublished national court cases about the impact a transfer price adjustment has on determining the customs value of imported goods.²⁴ In one of the cases 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 v René Chatain* (ECJ, Case C-65/79 (Chatain), ECLI:EU:C:1980:108, 1980, para. 8) of the ECJ that the refund request following a downward transfer price adjustment was rightfully rejected by the customs authorities.

In the Netherlands, the *Handboek Douane* (*Handbook on Customs Matters*) provides guidance on how customs officers should interpret and enforce the UCC. 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. 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 presented case, also be used for determining the customs values. Additionally, practical arrangements can be made about how a TP adjustment can be considered for the purpose of determining the final customs values. Regarding the latter, the customs authorities allow importers to file normal import declarations and declare the goods using the initial transfer price as customs value. A reconciliation sheet should subsequently be submitted after the transfer price adjustments have taken place. If these corrections result in an increase 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. Simplified declarations and Article 73 UCC are not encouraged. This view/approach has not changed since the *Hamamatsu Case*, as Dutch customs authorities take the view that the *Hamamatsu Case* should be interpreted narrowly, meaning that it should only be applied in identical cases.

5.4. The German case

5.4.1. German authorities responsible for TP and customs valuation

In Germany, the customs administration and tax administration are two separate and independent authorities. The tax administration is responsible for assessing the admissibility of TP adjustments. The German customs

²⁴ *Tariefcommissie* 25 November 1997, Nos. 88/95 until 90/95, 118/95 until 122/95, 131/95 until 155/95 and 10/96 (unpublished, 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 (unpublished).

administration is responsible for all aspects of customs law. There is a Federal Customs Value Office that 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. However, there is no joint assessment of the subject by the customs and tax authorities.

5.4.2. Before Hamamatsu

In Germany, there are no additional statutory regulations on dealing with transfer prices in terms of customs value law. Except for the *Hamamatsu Case*, German case law has also not made any significant judgments on this subject. The German customs administration has issued an internal administrative regulation on the customs value, in which the submission of advance pricing agreements is addressed as a means of verification.²⁵ In the case of subsequent price adjustments, the German customs administration takes a restrictive approach. According to this, customs duties will be levied in the event of subsequent price increases due to transfer price adjustments, but subsequent reductions will not be reimbursed unless the subsequent loss is due to the product or at least the tariff. 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. Due to the unclear wording of the ECJ ruling, both the German customs administration and business-friendly literature opinions felt their views are valid. The German customs administration is therefore adhering to the previous administrative practice after the Hamamatsu decision. Even after the final decision of the Federal Fiscal Court, the customs administration has so far adhered to the existing practice. 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 TP method used by the companies.

6. General appreciation of the national practices

The picture appears to be quite clear based on the above 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 several 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 TP, 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 inherent inconsistency of two different transactions evaluation methods. As we previously stated, the EU law lacks a clear norm

25 See Administrative regulation of 15.09.2021, E-VSF Z 5101 (para. 36).

establishing links between the two values, and as seen from the reports above, none of the EU member states examined have national TP 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, 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 TP purposes and vice versa. So far, no EU member state's 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 the countries considered, there are two separate authorities in charge of income tax (and consequently, TP) and customs duties.

It 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 TP documentation is seen as a useful instrument, acknowledged by the 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.²⁶ In three out

²⁶ The Spanish position is somewhat peculiar. The Supreme Court issued the Coca-Cola judgments (see Marsilla, 2011), affirming a logical need for reconciliation of customs value and TP. Nevertheless, parliament reacted by affirming the separation between customs value and TP and stating in the national law the prohibition to use TP 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 weird 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 TP documentation as a viable documentation to infer the customs value of the import goods in transactions between related parties.

of the four countries examined, the customs administrations expressly allow retroactive adjustments of the declared 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, that is when greater import duties would apply), and this asymmetry was most likely the rationale for the preliminary ruling request to the ECJ. The pragmatic Dutch approach of allowing ex-post adjustments of values (either upwards or downwards) based on a reconciliation option deserves special emphasis. Nonetheless, it appears that this practice lacks a strong, clear and precise legal basis at the 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 the 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, the *Hamamatsu Case* does not appear to have had significant impact on national practices relating to the interplay between customs value and TP. 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 customs value 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 the 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 TP and customs valuation rules will be accomplished, at least not in the near future. This would require 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 TP 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 TP adjustment. Importers have several 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 an authorisation for submitting customs declarations based on particular criteria (Art. 73 UCC). Some NCA, as shown above, already permit the use of these two approaches. Each of these 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 TP.

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 TP 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 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 NCA 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 a general nature (referred to as 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 (Commission Del. Reg. 2020/877)²⁷ clarified the distinction between three types of supplementary declaration: a supplementary declaration of 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 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 Delegated Act (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 NCA 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 TP 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 the 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, para. 2 UCC), allowing the submission of a simplified and supplementary declaration as well as providing the related documentation, within the time span of two years from the release of the imported goods (Art. 146 UCC DA, para. 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* if these amounts are not quantifiable at the time the customs declaration is filled out.

²⁷ The Delegated Regulation has amended – inter alia – Art. 146 and 147 of the Delegate Regulation.

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 is of great interest and is 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 the 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 unclear if the procedure may include all the elements of 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 undoubtedly 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 same 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 TP documentation, which is typically drafted and prepared by international company groups, is already widely accepted by customs authorities – even though 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 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 TP is assessed on an annual basis as profits of the overall group are allocated to the companies within the group according to the results achieved over a period (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 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 are 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 TP 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 – that is, 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.

Finally, 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 authorisation. 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 stated, 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 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 TP 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 it also applies to non-EU importers. However, there is still a disconnect between customs valuation, which considers the value of imported goods, and TP, 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. Conclusion

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 considerations above.

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 in part) harmonisation between customs valuation and transfer price. These are, however, methods, that 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)²⁸, 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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²⁸ Like 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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