SEMINARIO GIURIDICO
DELLA UNIVERSITÀ DI BOLOGNA
CCCXXVI

ASPECTS OF CUSTOMS CONTROL IN SELECTED EU MEMBER STATES

edited by
GIANGIACOMO D'ANGELO

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Foreword

I am particularly pleased with the presentation of this volume on aspects of customs control in European Union countries in the series of publications by the Department of Legal Studies of the University of Bologna.

The Customs Union is indeed an essential element for the proper functioning of the internal market and of the European integration process as a whole. The benefits it has provided to the development of the EU cannot be underestimated.

It is important to note that significant contributions to the European Union budget come from the application of customs duties. Also importantly, at a time when the European Union is facing exceptional financial challenges and unprecedented threats (e.g. rule-of-law backsliding, the COVID-19 pandemic, and war in Ukraine), the level of protection for both its budget and financing interests has become a priority.

In light of the above, the harmonization of customs controls, which are still primarily entrusted to individual Member States, represents an extremely sensitive and timely issue. In this regard, the research funded by the European Commission and the Department under the ECCE program – European Common Customs Evaluation – provides a concrete and valuable contribution to the general discussion of the topic.

This book, edited by Giangiacomo D'Angelo, illustrates the tangible results of the ECCE program's activities. The volume col-

lects the contributions made by an authentic pan-European research group, including scholars from prestigious European universities who share a European passion for legal studies. This is a work which will stimulate considerable discussion, not only in scholarly circles but also among EU and member state officials, as well as other practitioners, who will benefit from the legal analyses it contains.

No doubt, customs law issues will continue to play a central role in the future development of the European Union, in order to better define its financial framework and, more generally, its role in an ever-changing international context.

For this reason, the Department of Legal Studies, within the framework of the Jean Monnet Action, will continue to work in the field of customs law, following the path laid out by the research whose results we are seeing today. In particular, from the academic year 2023/24 a Jean Monnet Chair of European Union Customs Law – EUCL will be officially established in the Ravenna Campus to further develop the legal studies and research on the evolution of EU customs law. We owe a debt of gratitude to the Chair holder, Giangiacomo D'Angelo, for all his hard work in achieving this result.

Today, we are happy to mark the end of an intense research journey and hope that new research activities will lead to equally fruitful results in the years to come.

Bologna, July 15, 2023

Federico Casolari
Professor of European Union Law
Deputy Head of the Department of Legal Studies
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Presentation

The customs control on the valuation of goods is at the centre of the debate among European institutions, practitioners and scholars. There are several reasons that explain the considerable attention being paid to the subject within the European Union.

The current European customs system is based upon the application of ad valorem customs duties, meaning that the customs value of goods generally represents the basis for the application of the duties on import goods.

Therefore, the smooth and regular functioning of the EU Customs Union is dependent on the clarity and consistency of the rules on customs valuation. It is apparent that the customs valuation of the goods entering the EU must be as clear and as standardised as possible throughout the EU to promote legitimate trade and allow healthy competition between operators.

Furthermore, customs duties represent a traditional own source for the EU budget. The revenue from customs duties are estimated to be about 10% of the total revenues of the EU budget. Shortfalls in duty collection can therefore affect the financial interests of the European Union.

Lack of certainty and uniformity in customs evaluation represents both a distortion of the uniform application of the single customs tariff, and a threat to the finances of the European Union.

This is particularly true at a time when the EU is increasingly engaged in efforts to strengthen its overall competitiveness and financially support member states in their economic recovery.

Legal regulations regarding valuation are standardised at European level, but their implementation is mainly entrusted to national customs authorities.

Controls on customs valuation are the shared responsibility of European bodies and national authorities. While EU bodies are in charge of monitoring the proper functioning of the EU Customs Union, the day-to-day direct controls on imports are carried out by national customs authorities.

Consequently, the best method to study and propose a uniform application of the European customs value was to carry out an essentially comparative study, i.e. to make a comparative analysis of how the customs authorities of some European states perform the customs valuation, and the consequent inspections carried out on imported goods.

We chose to be realistic, focusing on the actual implementation of the customs valuation provisions by the customs authorities in the Member States.

Despite the fact that controls carried out by national authorities have to comply with European law, in practice they are modelled according to the administrative regulations of each Member State.

We therefore chose an 'on site' approach, and conducted our research in close contact with the national customs authorities.

A questionnaire was drawn up and submitted to the customs authorities. National reporters were also given the task of preparing a report by conducting interviews with the national authorities involved.

Furthermore, the customs authorities actively participated in the meetings organised at the University of Valencia, the Erasmus University Rotterdam, the University of Munster and the University of Bologna. These meetings made it possible to focus on the main issues of the research, and direct discussion with the operators proved particularly useful.

At present, there is much discussion about the role of statistical values in customs valuation. There have been some very important rulings by the ECJ in this field, which have attracted great interest among operators and the general public. For this reason, we made a case law review in which the main and most recent rulings of the Court of Justice on customs valuation are reported. The conclusions are not definitive, but there are some fixed points that can be helpful for operators and control authorities.

A parallel issue, related to customs valuation, is its relationship to valuations of imported goods for other taxes, in particular, the arm's length valuation for income taxes (transfer pricing).

This topic has long been debated in the international trade literature and within international discussion forums. There are difficulties in achieving regulatory alignment, particularly in the European Union where taxation is multilevel. However, since the administrative management of customs and direct taxation is centralised in national customs and tax authorities, and these are often closely related, an appropriate solution for alignment would be to introduce administrative regimes.

Several options have already been implemented by the customs and tax authorities of some countries, which, in the case of imports between related parties, strive to achieve alignment for customs and direct taxation in the valuation of goods.

We therefore prepared a dedicated paper in which we also outlined some solutions, at an administrative level, which could achieve a realignment of customs value with respect to transfer pricing. These are based on already existing European provisions and could therefore be endorsed at the European level, especially by the European Commission in guidance documents. In this way, the EU would take a further step towards harmonising customs valuation and the EU Customs Union would be in line with the current trends adopted in large customs areas that have already introduced realignment programmes at an administrative level.

Lastly, with a view to a possible further enlargement of the Customs Union, we also focused on the problems connected with enlargement. We focused on Balkan countries, which are aiming to be-

come integrated into the European Union, and have signed treaties for the establishment of free trade zones with the EU.

The last essay in this volume addresses the theoretical and practical issues related to the potential integration of the Balkan countries, with particular attention to the case of Albania, highlighting the opportunities, but also the challenges that third countries face in integrating within the European Union.

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GENERAL REPORT

*Giangiacomo D'Angelo**

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

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

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

* Associate Professor of Tax Law at University of Bologna.

1. *Structure of the customs authority*

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

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

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

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

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

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

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

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

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

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

2. *Risk analysis*

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Undervaluation as a means of risk analysis*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. *Units specialised in customs valuation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. *Right to be heard*

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

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

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

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

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

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

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

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

9. *Sanctions*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASPECTS OF CUSTOMS CONTROLS PERFORMED BY THE ITALIAN CUSTOMS AUTHORITY

*Federico Tarini**

1. *Introduction*

The purpose of this paper is to give a comprehensive overview of how the Italian customs authority handles customs regulations, particularly in the area of fraud detection and undervaluation.

* The author is a research fellow at the University of Bologna and contract professor in customs law. The author wishes to thank Angelo Infante of the Customs and Monopolies Agency for his valuable cooperation. Any errors and omissions remain solely with the author.

The paper will focus on the current practice of the Italian customs authority (law in action), rather than on the provisions of European and national legislation, in order to offer an accurate understanding of how such controls function.

This report is the result of a series of interviews with representatives of the Italian customs authority, carried out based on a questionnaire developed as part of the project, and on an analysis of official administrative documents.

2. *Place of the customs authorities in the public domain*

2.1. *The structure of the customs authority*

In Italy, activities pertaining to customs control are handled[1] by the Customs and Monopolies Agency (Agenzia delle Dogane e dei Monopoli, or ADM)[2], an administrative authority[3] entrusted with tasks assigned by law in the field of customs, movement of goods, excise duties, monopolies and gambling.

The agency's employees[4] assume the role of tax and judicial police officers in the performance of their duties, in all areas of competence.

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[1] The ADM, in the performance of its functions, may operate with other Italian Authorities or Police Forces (such as the Financial police or Guardia di Finanza).

[2] Law Decree 95/2012 has united the Customs Agency and the Autonomous Administration of State Monopolies.

[3] As with any other public agency, the Customs Agency must act in conformity with the Constitution's general provisions and with any other applicable rules governing the administration of public affairs. Article 97 of the Constitution sets out the norms of impartiality and good performance of the public administration. Law 241 of 1990 lays out the broad principles governing processes, time restrictions, invalidity of acts, and liability.

[4] As civil workers, all customs officials are recruited through open competitions alone. Participation in these competitions, which requires specific qualifications (diploma or degree), involves the completion of a pre-selection examination, a written examination, and an oral interview.

The Agency[5] is divided[6] into senior management departments (at central, regional or interregional levels) on the one hand, which are responsible for planning, steering, coordination, and control, and local offices on the other, which are responsible for the assessment, collection and control of duties, excise duties and all the other activities regarding monopolies[7].

The organisational framework is completed by the chemical laboratories, local structures that have an analytical role related to the classification of goods[8].

Customs officials are required to act in compliance with applicable legal provisions, and the agency's statutes and administrative regulations, which define the internal articulation of the senior and the local structures.

Under the ADM Statute, the Agency has four broad objectives: 1. Support and development of economic growth; 2. Protection of Italy's and Europe's financial interests; 3. Protection of the legal status of the Italian state; 4. Protection of the health and safety of citizens[9].

The relevant ADM functions that fall within the scope of this paper are detailed below.

Customs-related services and taxes: ADM is in charge of assessing and collecting state taxes and other European Union resources.

Supervision and Anti-Fraud: the Agency safeguards the financial interests of the EU and Italy by combating tax fraud; the ADM also plays a critical role in safeguarding persons' health and safety.

In particular, through its anti-fraud operations, the Agency conducts checks and controls on goods entering the European Union in order to combat criminality such as illegal trafficking in counterfeit goods, weapons and components of weapons, drugs, waste,

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[5] The current form of the ADM is provided for by Article 57 of Legislative Decree 300/1999.

[6] The current structure of the Agency can be seen here: https://www.adm.gov.it/portale/l-organigramma.

[7] Tobacco and similar products and gambling.

[8] The Chemical laboratories are also responsible for the control of energy products, alcohol, and illicit drugs.

[9] The current version of the Statute can be found on the ADM website: https://www.adm.gov.it/portale/statuto-e-regolamento.

non-compliant food, items of artistic heritage, and is involved in enforcement on general product safety, etc.

The ADM works in surveillance, suppression, and awareness-raising activities to combat the counterfeiting of products and services.

The ADM manages assets that are seized as a result of violations in the Excise, Customs, and State Monopolies departments, or assets that are entrusted by other Administrations or the Judicial Authorities.

The ADM manages chemical laboratories to support surveillance and anti-fraud efforts in the Excise, Customs, and Monopolies departments.

It collaborates with European and international organisations, as well as comparable administrations in the EU and third countries.

It supervises the activities of European initiatives and participates in transnational administrative twinning and cooperation and assistance projects.

Its officials routinely participate in international activities, including at a number of Italian embassies (ADM attaché).

2.2. *The relationship between the ADM and the executive power*

All of Italy's key fiscal authorities are "Fiscal Agencies", public bodies with legal personality and regulatory, administrative, organisational, accounting, and financial autonomy and with their own independent assets[10].

The Ministry of Finance retains a significant supervisory role, which is mostly implemented by two key administrative documents: the "Guidance Act setting out the key fiscal policies" and the ADM-Ministry of Economy and Finance (in short, MEF) convention.

[10] The ADM's current organisation, which is the primary concern of this paper, is effectively underpinned by the so-called "Blue Book", a public document updated each year that describes the current structure of the ADM and the most relevant statistical information (e.g. the total value of imports, the top five importing and exporting countries). In the first page of the 2020 edition (and all the previous editions), the Blue Book, in line with Article 61 and 63 of Legislative Decree 300/1999, defines the ADM as a public body with legal personality and regulatory, administrative, asset, organisational, accounting and financial autonomy in the fields of Customs, Excise (Energy and Alcohol, Tobacco), Gambling and Anti-Fraud.

The first is an annual economic and financial planning document, issued directly by the Ministry, and is valid for three years. It incorporates tax policy development objectives and other tax management objectives to which all tax authorities must conform.

The second is a negotiated agreement between the MEF and the Director of the Agency, which is renewed annually for a period of three years and is based on the objectives set forth in the policy deed.

Attached to the agreement is a document referred to as the "Agency Plan", which refers to the techniques for verifying management outcomes and the financial resources allocated to the Agency. This document is especially pertinent in the context of this agreement.

In this document, the Agency's result targets (distributed into "macro missions") are set out (in a three-year forecast).

The convention also defines the manner in which the ministry supervises the Agency.

However, these supervisory powers do not negate the autonomy of the Agency, which remains exclusively vested with supervisory powers in all matters attributed by law to the ADM.

This independence of the ADM is also indicated by its authority to establish companies[11].

Note, in this context, that a recent law decree[12] has allowed for the possibility of setting up a special "in-house company" with the Customs and Monopolies Agency as sole shareholder, for product quality certification services.

In order to comply with this legislative provision, the ADM founded the company Qualitalia S.p.A, an "in-house company" that provides[13] business operators with goods quality certification[14], issued by the Agency's chemical laboratories.

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[11] Article 59, para. 5 of Legislative Decree 300/1999.

[12] Law Decree 104/2020, also known as the "August Decree".

[13] This service is only provided on request and at market prices.

[14] The objective of this certification is to guarantee the use of a quality seal, if the product analysed meets the required standards (absence of harmful elements and certified origin), which is affixed to the product packaging, subject to the payment of a royalty to the Customs Agency for the use of the seal, and as long as the checks provided for by the Agency in the technical-scientific protocols guarantee that quality standards are maintained.

The company ADM Res S.p.A. was set up for the recovery and disposal of all products abandoned in customs areas, and for the recovery and disposal of all drifting, beached, or sunk migrant vessels.

In addition to the aforementioned cooperation between the ADM and the MEF, the Agency also maintains close ties with other Ministries[15].

2.3. *The relationship between the ADM and the legislative and judicial powers*

The Agency lacks direct competence in legislative matters.

Only Parliament (and, in some cases, the Government) has authority to exercise legislative power.

[15] First, the ADM collaborates with the Ministry of Foreign Affairs and International Cooperation (in Italian: Ministero degli Affari Esteri e della Cooperazione Internazionale, or "MAECI") for the promotion of exports and the protection of "Made in Italy" and other authorisations. The ADM is also a participant in the "Pact for Export" and works with MAECI within the scope of the authorisation Unit of Armament Materials (UAMA). The Agency also works closely with the Ministry of Sustainable Infrastructure and Mobility (in Italian, Ministero delle Infrastrutture e della Mobilità Sostenibili, abbreviated "MIT"). Activities requiring collaboration include port and interport logistics, close cooperation with the Coastguard in customs clearance at sea and fisheries supervision via the interoperability between the Single Customs Office of Controls of ADM (SUDoCo) and the European maritime single interface system (EMSWe), and collaboration with the Port System Authorities in matters of competence via the "Ports Agency Authority" (TAAP). The ADM also collaborates with the State Police, which is subordinate to the Ministry of Internal Affairs (in Italian, Ministero dell'Interno), in the fight against organised crime and unlawful trafficking of items such as drugs, waste, and medications. In the realm of public health, the Agency closely cooperates with the Ministry of Health (in Italian, Ministero della Salute), which assigns the ADM a supervisory role over cigarettes, alcohol, and gambling (activity carried out mainly by the chemical laboratories). In this context, the Agency, via ADM's Single Customs Office of Controls (SUDoCo), collaborates with the Offices of Maritime, Air and Border Health (USMAF), Phytosanitary and Border Control Posts (PCF) to improve the health and hygiene supervision of commodities at frontiers. The Agency also interacts with the Ministry of Defence (in Italian, Ministero della Difesa) in order to improve handling procedures of weapons materials and other dangerous goods. Lastly, the ADM cooperates with the Ministry of Ecological Transition (in Italian, Ministero della Transazione Ecologica or, in short, MITE) for the authorisation of strategic facilities in the mineral oil industry and for the authorisation of sale of natural gas and electricity to end users. This collaboration also facilitates the monitoring of import-export of energy products and fossil fuel sources, as well as the management of required stockpiles.

However, as mentioned above, the Agency has general regulatory autonomy[16].

Moreover, in line with applicable legislation, the Agency enacts and makes acts and decisions to regulate the technical and operational elements of all matters under its jurisdiction.

In terms of the ADM's interaction with the judicial power, it is worth noting that every customs official is classified as a "judicial police officer"[17] in all matters within its competence.

This status enables customs officials to conduct a substantial portion of criminal investigations into customs, excise duties and monopolies law violations, such as the collecting of documents and information and, if required, arrests[18].

The interaction between the ADM and Italian prosecutors' offices is another aspect of the customs agency's engagement with the judicial power.

The investigation of crimes leads to daily interaction, with a view to the filing of criminal reports, and obtaining of delegations from the public prosecutor's office to conduct investigations, and also the examination of illegal acts in customs matters, all of which are facilitated by the Agency's various departments.

To round off this section of the analysis, it is worth mentioning that the ADM and the national anti-mafia and anti-terrorism prosecutor's office (in Italian: Direzione nazionale antimafia e terrorismo, abbreviated "DNAA")[19] have had an agreement in place since 2009

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[16] Article 61, paragraph 2 of the Legislative Decree 300/1999.

[17] This status is granted only to officials of the Customs and Monopolies Agency and not to officials of other tax agencies.

[18] Customs officials exercise these functions of Judicial and Tax Police pursuant to Articles 57, para. III of the Code of Criminal Procedure, Article 324 and 325 of Presidential Decree 43/1973 (TULD), Article 30 and 31 of Law 4/1929, Article 32 of Legislative Decree 331/1993 conv. into Law 427/1993 and Articles 18, 19 and 58 of Legislative Decree 504/1995 ("Consolidated Law on Excise Duties"). During institutional checks (shipments, passengers, baggage, company checks, etc.), customs officers (as officers of the Judicial Police) act in accordance with Article 347 ("obligation to report the crime") of the Code of Criminal Procedure, being able to carry out, including on their own initiative, investigative acts, such as for example seizures and urgent investigations. By the Decree Law no. 23 of 8 April 2020, the functions of the judicial police were extended to personnel attached to the Monopolies.

[19] The DNAA is comprised of one National Anti-Mafia Prosecutor and twenty Deputy National Anti-Mafia Prosecutors. It is responsible for coordinating or-

that allows for the exchange of information on money laundering[20], terrorism, and combating of organised crime in international trade.

On the European front, the ADM partners with EPPO, the independent EU prosecutor's office charged with investigating and prosecuting crimes that affect the EU's financial interests, such as smuggling and transnational VAT fraud. EPPO requests assistance from ADM in the investigative actions that are required to combat organised criminality.

3. *Risk analysis, customs controls and tools*

3.1. *Risk analysis*

Italian customs controls are based on risk analysis to evaluate and identify risks and create the requisite countermeasures to deal with customs law violations.

Risk analysis is based on the so-called "customs control circuit", which was implemented in 1999 and is based on certain specified risk profiles and also on the elements listed in the customs declaration[21].

The management of risk profiles is performed by analysing the information and data gathered during the customs clearance assessment and control, and also the reports originating from operational offices, other Agency departments, or from national, EU, or international authorities.

Using ADM's databases, an analysis is also carried out of trade flows and related deviation indexes.

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ganised crime investigations carried out by the individual anti-mafia district directorates (DDAs). The primary objective of this coordination is to ensure that all applicable offices receive relevant information and to link various DDAs together, if facts or circumstances arise that are of relevance to two or more of them.

[20] The Italian Public Prosecutor's Office has received many reports of customs and currency declarations of businesses and individuals who are suspected of illicit trafficking of goods declared for import in Italy – and in the EU – with under-invoicing of taxable values, in the context of criminal association and money-laundering.

[21] Customs Agency Circular No. 74/D, 18 December 2003.

Importantly, Risk analysis in Italy not only determines the risk profile, but also correlates it with the type of control that must be implemented.

Consequently, each risk profile (often called a "channel") indicates the most suitable control. One of five possible "channels" can result from this investigation.

First, analysis may result in an automatic control (green channel).

The outcome by which goods should not be checked at the time of customs clearance is obtained through an entirely automated process, carried out *ex-ante*, by comparing the objective and subjective data present in the customs declaration with risk data available to the Agency.

Second, the analysis may lead to a documentary control (yellow channel), where the customs office examines the declaration and its associated documents.

This check is performed by the local office which verifies the completeness of the documents presented and the correspondence between the declaration made in the customs declaration and the content of the documents.

Third, the risk assessment may result in a scanner control (orange channel).

This type of control (implemented since 2002) enables the Agency to control the mode of transportation using a wide range of scanning tools.

Some local customs offices have X-ray scanning technology for shipments.

Scanner control ('controllo scanner' or CS) is advantageous in that it enables information on the shipment's contents to be immediately received without the need to physically open and inspect the shipment.

This type of control is particularly useful in searching for unlawfully concealed cargoes, such as drugs, firearms, etc.

Lastly, a physical control (red channel) permits the customs office to physically control the goods.

Customs officials conduct a partial or complete inspection of the shipment to compare the declared contents with what the importer/exporter actually presents.

In the case of physical control ('visita merci' or VM) selection, documentary checks are conducted and, if necessary, chemical laboratory analysis of samples are carried out.

The customs assessment will occur if the customs authorities conduct a documentary control of the declaration or carry out a scanning procedure or a physical examination of the items; otherwise, the debt will be collected in the event of a green channel.

Note that customs officers performing a control are entitled, under specific circumstances, to raise the control to a higher level (i.e. from automated or documentary to physical).

In addition, an important new control channel was introduced in 2012 – the "Blue channel" – which identifies certain *ex post* controls of customs declarations already made.

The selection of channels should be based on a set of parameters that can take into account the likelihood of fraud.

These factors can be separated into objective and subjective categories.

Objective factors are the elements that characterise the consignment from an objective standpoint, such as the means of transport, route followed, type of goods, and the tariff heading (the relevance of this factor is quite obvious, for example, in the case of antidumping duties, where a misclassification of the goods may result in duty avoidance), etc.

These factors are not set in stone and should be revised based on the applicable regulatory framework and shipment-specific factual circumstances.

Subjective factors are all aspects that pertain to the declarant, such as the presence or absence of AEO qualification, the declared activity, previous infringements of customs regulations, etc.

Customs officials can access multiple databases and exchange information with other Italian customs administrations in order to obtain this information.

Another important aspect in risk analysis is the use of information and data provided by OLAF, which are collected in a document called InfAM when an investigation is initiated.

This document contains all relevant information on the suspect party who occasioned the procedure and provides Member States

with pertinent data on the degree of surveillance required. In this instance, as OLAF accentuates the fraud risk, the ADM modifies the component to be considered in the risk assessment.

Then, after obtaining the results of investigations undertaken by national customs authorities, OLAF may elect to conduct an on-site control, which concludes when the investigation's final report is drafted[22]. Then the Customs Agency will seek to recover any higher duties recoverable and impose penalties as appropriate.

Customs Officers responsible for conducting controls also make use of the Common Customs Risk Management System (CRMS), a virtually real-time mechanism enabling all EU Customs authorities to directly exchange[23] risk-related data.

This tool, essentially, facilitates rapid and effective interventions at the EU's external frontier and within its borders.

In terms of databases, the ADM makes use of both EU and national databases.

If the declaration selected for control, based on the aforementioned factors, does not suggest that a customs law violation has taken place, the risk factor will be reduced. As a result, the business operator will be selected for fewer inspections.

The reasoning behind such "reduced controls" is that the risk analysis system must strike a balance between two opposing factors: one, the need to combat fraud and customs law violations and two, the need to ensure that customs rules do not impede the business operator's normal commercial operations or overburden the customs office.

All of the aforementioned activities occur at the national level.

Due to their proximity to the business operator, however, local offices are able to undertake their own risk assessments.

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[22] A video explanation of how this control works can be found on the website of the ADM: https://www.adm.gov.it/portale/inf-am-casi-investigativi-olaf.

[23] By means of a "Risk Information Form (RIF)".

Statistical Data[24]
As of 31 December 2020, there were 13,139 active risk profiles, of which 7,002 were newly formed. Based on analyses and assessments carried out in 2020, 9,280 risk profiles were cancelled, expired or modified. As the Customs and Monopolies Agency indicated, the improvement of risk profiles was made possible by the analysis and evaluation of several factors, including: • discrepancies identified during the inspection at the time of customs clearance; • risk information communicated by local offices (irregularity forms inserted into the ADM anti-fraud systems, risk reports from local structures and reports from negative control subjects); • risk warnings from the services of the European Commission, OLAF and other Member States (RIF and INF AM).

4. *Customs controls*

The type of customs controls carried out is directly related to the "channel" determined by the risk assessment.

The most common channel is certainly the green channel, also known as 'automatic control'. This type of control is not only a formal but also a substantive control, as the information system (known as 'Automazione Integrata Dogane Accise' or its acronym AIDA)[25] now automatically controls the data on the declaration.

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[24] All this information can be found in the so-called Libro Blu (Blue Book) - Relazione, 2020 ed., 143-144. This document can be found at the following link: https://www.adm.gov.it/portale/libro-blu-2020.

[25] As part of the process of reengineering the AIDA 2.0 information system, and with reference to customs declarations submitted in the ordinary procedure, the Customs Agency has updated the national import system by implementing the EU-CDM (European Union Customs Data Model) data model with effect from 9 June 2022. The Customs Agency gave clarifications regarding the reengineering of the import customs clearance computer system in circular letter no. 22 / D of 6 June 2022. In particular, for declarations pertaining to the procedure for entry into free circulation and special procedures other than transit, the computer system references the information requested in Annex D of the RD pertaining to the data of customs declarations and Annex C of the RE pertaining to the codes and formats to be used. The circular letters no.15 of 3 May 2022, no. 26 of 30 June 2021 and no. 18 of 7 May 2021 from ADM provide specific procedural instructions pertaining to the H7- Super - Reduced Data Set route for the customs clearance of products of moderate value.

The system also verifies that the codes of the documents accompanying the declaration are included in box No. 44 of the DAU (or any other relevant box in the future) (e.g. invoice, declaration of value, certificate of origin, transport documents, etc.).

If those codes are missing, the system automatically rejects the declaration.

It is also essential to note that the inclusion of the declaration in the green channel does not preclude the implementation of additional controls.

In this case, however, subsequent controls must be classified as assessment reviews ('controlli a posteriori').

Documentary controls, which are associated with the yellow channel, are the second type of controls that the customs office can announce ('controllo documentale', CD).

In this instance, customs officials examine the declarations and any other pertinent documents which the business operator may be directly asked to provide (if not already in their possession).

Since all (or the vast majority of) documents are now submitted electronically, when the system selects a CD or a VM, the business operator can upload a so-called electronic dossier which combines the declaration with files of all the documents.

However, the upload of the electronic dossier does not prevent the customs official from requesting additional information and/or documents via the electronic system, which will be added to the electronic dossier.

The CD could be switched into a higher level of control if, after analysing the document provided by the business operator, the customs official deems it necessary to inspect the goods or implement a scanner control.

Controls associated with the orange channel, or scanner control ('controllo scanner', abbreviated to CS), allow customs to scan the vehicle used to transport the goods.

Through a combination of colours of varying intensity and tone, the scanner technology detects the outlines of objects inside the containers, facilitating the identification of any concealed or undeclared goods.

In Italy, the Italian Customs Agency has implemented the 'Matrix' system (Monitoring Activities Targeting Risk Intelligence X-Ray),

which enables images captured by scanners located at the various national sites to be collected and compared in order to facilitate the work of control officials, who must interpret the scan results in order to identify any inconsistencies in the loads.

If the scanner results raise suspicions of an anomaly, a more thorough physical examination of the container's contents may be conducted.

The red channel, also known as "goods visit" ('Visita Merce' or VM for short), is the most stringent form of control, which can be total or partial.

This type of control can be integrated with chemical analysis: a customs agent will collect a sample of the goods and send it to one of the ADM's chemical laboratories.

The final and most recent channel is the blue channel, also called assessment review ('revisione di accertamento' or RA), which selects the declaration that must be submitted to the *a posteriori* control.

This is not the only method for selecting the declaration for an assessment review.

In addition to reviews that are requested by a party, an official review could be selected based on traditional criteria (non-automatic risk analysis).

The risk profile is consulted by the officer when a particular type of control is selected for a customs declaration.

The customs official is therefore informed of the reason why the customs declaration it has been selected and where he should place his focus. This does not preclude an extension of the control to other aspects of the declaration, but the primary risk factor requires a careful analysis.

On the other hand, the business operator does not know why the declaration has been selected.

In relation to customs restrictions, the SUDOCO Portal is worthy of note.

It provides a single interface (single entry point) to business operators and other authorities participating in the customs clearance and commodities control procedure, so that data is transmitted only once.

SUDOCO, which at the time of writing also enables the coordination of controls (one stop shop) by allowing administrations / bodies /

State bodies operating in the customs process of entry and exit of goods into / from Union customs territory, to send and manage requests for control inspections so that these may occur at the same time and in the same place.

Last but not least, it facilitates monitoring of the life cycle of the customs process by tracking the items' documentation and physical whereabouts in real time.

In addition to checks at the time of customs clearance, the Customs and Monopolies Agency also carries out post-clearance customs checks ('controlli a posteriori').

As specified in the Libro Blu 2020, the positivity rate of ex post checks in 2020 was 42.30%.

Post-release controls are carried out on declarations for goods that have been released to the party to whom the assessment applies[26].

Statistical Data
According to the "Libro Blu 2020", documentary controls on imports increased by 56.09% between 2018 and 2020. The 2018-2020 period also saw a significant increase in the number of goods inspections (VM) (+227,687 inspections). Regarding the distribution of import controls across the various product categories, controls related to the fashion industry clearly predominate, accounting for 48.99% of all controls. Furthermore, import controls on "Electrical material and electronic devices" accounted for 11.97% of all controls, while import controls on "Common metals and their works" accounted for 6.15%, and "Plastics and derivatives" accounted for 6.05%. The fashion industry encompasses textiles, footwear and apparel accessories. Regulation levels have significantly increased in order to better protect the financial interests of the European Union and its member states, and also to safeguard an economic sector of crucial importance for Italy. Documentary export controls (CD) increased by 52.88% at national level for the period 2018-2020. Goods inspections (VMs) on exports fell by 18.84%. In contrast, export controls carried out through scanners (CS) increased (+28.39%) in between 2018 and 2020. The regulations imposed on fashion-related items are spread fairly equally between exports and imports (28.32% of the total checks carried out).

[26] Article 48 of the CDU and Article 11 of Legislative Decree n. 374/90.

5. *Adjustments to the customs values*

5.1. *Types of controls*

Before discussing how customs value controls work in Italy, an important distinction should be drawn between controls which the customs authorities carry out at the time goods are presented to customs ('controlli in linea'), on the one hand, and ex-post controls ('controlli a posteriori') on the other.

5.2. *Controls at the time of presentation of goods*

The ADM has always deployed countermeasures in response to undervaluation. Annual ADM planning has normally included controls on undervaluation.

If the declared value of goods is abnormally lower than the value usually applied for similar goods (supported by statistical data as necessary) corresponding to the net weight, the declaration must be selected for CD or for VM controls.

However, the mere fact that the declared value of the goods is, at first glance, abnormally low will not automatically correct the declared value and result in the imposition of unpaid duties on the business operator.

Various factors play a crucial role in the detection of undervaluation.

Among the relevant factors are the national and European databases.

THESEUS, a statistical tool used primarily for anti-fraud purposes, is a key database used by the ADM in its customs value controls[27].

The weight of the goods is another contributory factor in adjusting the "abnormality" of the value to the actual situation and, indeed, the declared weight can be different from the actual weight after a customs control has been carried out.

[27] An overview of THESEUS can be found on the Joint research centre website: https://theseus.jrc.ec.europa.eu/.

In the textile industry, it is also essential to consider the specific circumstances surrounding the trade transaction, most notably the "seasonal" value of the merchandise. The value of fashion products, especially if they are high-end, can fluctuate dramatically from year to year; therefore, customs officials must also consider the peculiarities of the relevant industry sector. However, if a discount is applied, proper documentation is required.

In conclusion, the transaction value must be examined and evaluated based on an analysis of the actual case.

Nonetheless, if the undervaluation persists after all these "corrections", then further action is required.

Note that if the same operator has already been subject to multiple controls on the same type of import and fraud has never been detected, such previous controls must clearly be taken into account.

This is consistent with the ultimate aim of the UCC, which is to achieve a balance between efficient customs controls and fluid trade flows. If a business operator were required to repeatedly produce the same documents for the same transaction, then internal market flows would be significantly impeded.

If the system does not yet contain relevant information, the ADM could then ascertain whether an undervaluation occurred by asking the business operator to produce documentation and provide all pertinent details.

In fact, in the absence of previous checks or if no justifications for the difference in value are forthcoming, then Article 140 of the IA must be invoked, which allows documentation to be requested from the business operator if it can assist in ascertaining the transaction value[28].

The Customs Agency has the authority to require information on the valuation of products (e.g. contracts, payments, financial arrangements, cost of transport and insurance, expenses of deposits, and so on), and officers commonly enforce this on a daily basis.

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[28] For example, bank documentation, purchase contracts, orders, details on any production costs, documentation certifying the value of freight and insurance, export declaration for the introduction of goods into the EU customs territory accompanied by an invoice, certification from the chamber of commerce where the exporter is based, catalogues and price lists, resale invoices, etc.).

If information requests are not complied with, the Customs Agency will levy a monetary penalty (an "administrative" fine, which ranges from a minimum of EUR 5,000 to a maximum of EUR 10,000)[29]; if the information provided is false, the business operator may incur criminal liability.

Customs officers may also request data and information from credit institutions, entities involved in financial and credit intermediation activities, and insurance companies if such data and information may assist in reconstructing the origin, destination, and consistency of financial flows linked or linkable to flows of goods subject to undervaluation. This is another important tool for verifying undervaluation[30].

If, based on the analysis of this documentation (sale contracts, transport contracts, license agreements, product characteristics, etc.), the ADM is convinced that the value is correct (or, more precisely, that it represents the "actual value" of the imported goods), then the value will be accepted.

Note that, during this phase, the goods can be immediately released before the results of the customs analysis are forthcoming, but a guarantee must be provided.

In contrast, if the ADM is not persuaded that the declared value represents the actual value, the Agency, like any other national customs authority, will value the goods using the first of the secondary methods listed in Article 74 of the UCC that is applicable to the case at hand. No data exists on the most-used secondary method.

However, a crucial clarification needs to be made regarding the applicability of the statistical value and of the other values resulting from the use of databases.

Although the values shown in the databases, including the so-called statistical value, are undoubtedly useful for risk analysis, their utility in the re-determination of the customs value phase is disputed.

The required consistency between the actual value and the declared customs value forbids the customs authority from re-deter-

[29] Article 35, paragraph 35 of Law Decree No. 223/2006.
[30] Article 9 of Law Decree No. 16/2012.

mining the latter value solely on the basis of data stored in databases; rather, priority must be given to the criteria outlined in Articles 70 and 74 of the Customs Code[31].

In other words, the values derived from both national and European databases cannot, automatically and autonomously, lay the foundation for customs value adjustment.

Therefore, database (and statistical) values should be applied only within the framework of the so-called fall-back method, provided that no other factors are present which could impair its reliability[32].

The reasons why the statistical/database value can be used only under those conditions are twofold.

On the one hand, the customs authority cannot use the fall-back method if one of the hierarchically superior criteria specified in Art. 74, UCC is available.

On the other hand, only customs authorities have access to Databases, therefore economic operators cannot know the logical reasoning employed during the assessment phase, which represents a significant limitation of the right of defence.

5.3. *Ex-post controls*

The problems associated with undervaluation also reappear in connection with ex-post controls.

In addition to the powers referred to above, the ADM is also authorised to conduct an audit with access ('revisione con accesso'), enabling customs officials to enter the business operator's headquarters and, if the goods are still present, to conduct a physical inspection thereof.

Another important tool is the so-called post clearance audit (PCA), which is a general control measure (rather than a control focused on a single customs declaration) that allows for a 360-degree

[31] Cass. 11 June 2020, n. 11215; Cass. 26 November 2019, n. 30761; Cass. 25 January 2019, n. 2214 and CTP Genova, 31 May 2017, n. 833; CTP Napoli, 7 July 2009, n. 694; CTP Napoli, 28 November 2008, n. 408.

[32] Cass. 3 December 2019, n. 31464 and CTR Liguria, 15 June 2022, n. 552.

examination of and information-gathering on the business operator's organisational, administrative and internal procedures, whose aim is primarily to assist the company to better comply with customs procedures.

Business operators are selected for PCAs based on a regional-level risk analysis that is not performed automatically.

6. *Links with other national tax departments*

The Italian legal system has two distinct, independent fiscal Agencies: the Revenue Agency, which has general jurisdiction over direct and indirect taxes (income taxes, revenue taxes, VAT, etc.), and the Customs Agency, which is responsible for customs duties, excises, and monopolies.

A limited authority to impose taxes is also delegated to local municipalities, which are charged with levying and assessing certain local taxes, such as the local municipal tax.

Nonetheless, as already stated, both fiscal agencies are independent public bodies.

In certain instances, however, the close relationship between customs law and revenue taxes has highlighted the need to coordinate (at least broadly) the agencies' activities.

This is particularly the case with the interaction between transfer pricing and customs valuation.

6.1. *The interplay between transfer pricing and customs valuation*

Following a Joint Working Group with the Central Assessment Directorate of the Revenue Agency, the ADM published two documents with a view to adapting the previous guidelines content in light of the entry into force of the UCC[33].

In particular, the first of those documents stated that the traditional OECD methods for determining the intra-group transfer price

[33] On 6 November 2015, Circular 16/D aimed at the alignment of customs value with transfer pricing, followed, on 21 April 2017, by Circular 5/D.

may, under certain conditions, be accepted by customs when determining the customs value.

Since this is not the primary focus of this paper, suffice it to note that in those documents, the Customs Agency – after determining how the TP could affect customs valuation – identifies two possible solutions to reconcile direct taxation and customs duties.

The first method is the so-called Incomplete declaration (now known as 'Simplified declaration' – Article 166 of the UCC; Articles 145 ff. of Reg. 2446/2015; Articles 223-225 of Reg. 2447/2015), which permits the customs authorities (following authorisation from the Director of the competent customs office) to accept a simplified declaration that omits certain mandatory elements and documents, allowing them to be added at a later stage.

In Italy this authorisation is issued (following the provision of a guarantee) by the director of the local customs office responsible for the area.

As an alternative to the incomplete declaration, applicable only in the case of imports, the operator, aware of the potential impact of non-determinable elements on the transfer price, may request an authorisation to identify an amount defined ex-ante.

The legal basis of this authorisation is contained in Article 73 UCC which, under certain conditions, permits the use of a flat rate for the elements that are to be added or deducted from the price paid or to be paid (Articles 71 and 72 UCC) and even the full transaction value.

It is notable that the first method has not yet been implemented, even though the aforementioned document allows the incomplete declaration procedure to be deployed in order to reconcile customs value and transfer pricing rules.

In fact, the Article 73 authorisation is already suitable to achieve this objective.

Moreover, the procedure pursuant to Article 166 UCC could incur larger expenses than the Article 73 authorisation, for the operator as well as the customs authority, since it requires that every customs declaration be kept 'open' in order for the taxable amount to be accurately determined.

The ADM documents established the procedure to be followed for the issuance of the Article 73 authorisation: the request is pre-

sented via the CDS (customs decision system); after acceptance, the local office carries out certain checks on compliance, accounting records, etc.

The local office then transmits a report to the ADM's central structure, for the final decision.

If the operator is already an AEO, the procedure is significantly streamlined and expedited as it takes into account investigations already conducted to have the AEO issued.

6.2. *Connection with OLAF and International Agreements*

The ADM maintains an active collaboration with OLAF[34].

In general, the ADM responds promptly to investigation requests formulated by OLAF and provides a thorough analysis of the report's conclusions. These documents are crucial not only for combating possible abuse in the specific case that is subject to OLAF controls, but also for providing a broader perspective on which types of import present a higher risk profile.

As mentioned, there is also a special focus on the management and analysis of the RIF (Risk Information Form) used for the exchange of information between Member States and the European Commission, both in the context of the security risk management system and in relation to the outcomes of customs controls.

The prompt sharing of data on at-risk shipments and the transfer of risk information provided by the Commission or other Member States to the CDC result in excellent outcomes.

This ongoing collaboration is also present in dealings with third countries conducted under a special international agreement.

For instance, one of the most important types of international agreement in this context are the agreements concerning certificates of origin.

[34] OLAF is an independent organisation within the European Commission that investigates acts including fraudulent acts that adversely impact the EU budget. OLAF has initiated investigations and frequently requested ADM's assistance in conducting these probes.

Under these agreements, the ADM can – in cases of reasonable doubt or on a random basis – request a third country customs administration if a certificate was correctly issued and is authentic.

Most third countries requested, responded promptly.

Finally, another important factor to be taken into account are the periodic visits that the Agency receives from EU Court of Auditors and DG Budget. Such visits may include an examination of whether OLAF directions have been complied with in good time.

7. *Customs valuation rulings*

Currently, in compliance with EU legislation, rulings (or to be more precise, binding information rulings) are only permitted in respect of origin and tariff heading.

However, one form of ruling that can in theory be classified as a 'customs valuation ruling' is the authorisation permitting an operator to receive, prior to importation, qualified information on the value of the imported goods, widely used to reconcile customs valuation and transfer pricing rules (dealt with above).

One should also note that the general mechanism designed by the Italian legal system to provide the taxpayer with legally binding information (the taxpayer request or, in Italian, 'interpello del contribuente')[35] , cannot be used in the context of customs valuation.

On the one hand, the taxpayer request aims to secure a binding interpretation of or associated with a regulatory provision.

Therefore, predominantly factual questions such as, specifically, the determination of the value of goods, fall outside the scope of this mechanism.

On the other hand, the supremacy of European law over national law means that a national mechanism cannot be used in an area that is already covered by European law.

[35] Article 11 of Law No. 212/2000.

Consequently, the Italian legal system currently contains no generalised instrument or mechanism that can be used to obtain binding information on customs value.

8. *Right to be heard*

The right to be heard is explicitly protected by national law as well as by applicable provisions of European law.

However, in order to fully comprehend the ways in which the economic operator is permitted to '*express his or her point of view*', an important distinction must be made.

On the one hand, there is the so-called initial control phase, which happens immediately following the risk assessment and during which the customs official performs the necessary controls.

The right to be heard is inherent during this first phase, as controls (both documentary and physical) are normally carried out with the involvement of the importer / exporter or its representative.

As a result, the economic operator can always be able to express his point of view[36].

On the other hand, the second phase extends from the end of the control phase to the notification of any reassessment of the customs duties.

It is in this phase that art. 22 of the UCC, as well as the relevant national legislation, essential during this phase.

In practise, the procedure is still formal in nature, as the operator may only offer its observations as a formal written communication within 30 days after the report's delivery or receipt.

If the business operator decides to provide his or her observations in accordance with the correct procedure, the Customs Agen-

[36] Note, in this regard, that if the business operator wishes to challenge the result of the customs control while the latter is ongoing, it can have recourse to the special customs dispute settlement procedure known as the 'controversia doganale', which allows the importer to express its point of view to customs. On this matter, see Articles 63 ff. of the Consolidated Text of Customs Laws (in Italian: "Testo unico della legge dognale" or, in short, TULD).

cy must say clearly in the final assessment why the operator's observations are insufficient to validate the correctness of its activities.

Finally, it should be pointed out that the relevant Italian legislation[37], in turn, refers to the Statute of Taxpayers' Rights, which recognises the principle of loyal cooperation between the taxpayer and the competent tax authorities[38].

Thus, in order to coordinate the two legal provisions, Article 12, paragraph 7 of the Statute specifies that only Article 11 must be applied in matters of customs control.

As a result, while the Statute defines a broad principle of loyal collaboration, only customs law specifies how this desirable standard is to be applied in customs proceedings.

9. *Sanction and penalty system*

Italian law provides for unique administrative and punitive rules that apply solely to customs matters and are distinct from the tax sanctions envisaged for VAT and national taxes. However, one should keep in mind that another consequence flows from an infringement of customs law, which may be considered as a form of 'indirect' sanction.

More specifically, any unlawful activity – regardless of the penalty regime that applies – entails the automatic forfeiture of the customs facilitative regimes and simplifications enjoyed by the importer including, first and foremost, AEO authorisation.

One should also highlight the role played by customs officials as judicial police officers (as mentioned above), which comes into play where offences are committed that fall within the scope of criminal law.

In such cases, customs officials are obliged to notify the public prosecutor's office of the offence. The public prosecutor's office will then decide whether or not to initiate criminal proceedings.

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[37] Paragraph 4-bis of Article 11, Legislative Decree No. 374/1990, introduced by Article 92, paragraph 2 of Law Decree No. 1/2012, as amended by Law No. 27/2012.

[38] Article 12 of Law No. 212/2000.

Another issue of great relevance is the determination of the limitation period, amended by the 2018 European law[39].

Specifically, this law sets a seven-year time limit for notifying the taxpayer of a customs debt, in the case of a criminal offence.

Moreover, unlike in the past, the extension of the limitation period for notifying a customs debt from three to seven years for criminal offences is not conditional on the submission of the 'notitia criminis' within three years of the date on which the debt was incurred[40].

One final aspect requiring clarification concerns the relationship between administrative and criminal proceedings.

In general, the 'ne bis in idem' principle limits the possibility of a defendant being prosecuted more than once in respect of the same offence, acts or facts.

Therefore, an administrative penalty cannot be imposed in criminal proceedings (for the same facts or acts and against the same person).

For example, if an economic operator is prosecuted for a smuggling offence, he cannot concurrently be required to pay the administrative fine provided for in Article 303, TULD.

However, a situation should also be avoided whereby, after criminal proceedings have ended in a non-guilty or dismissal ruling, an administrative penalty is no longer applicable due to the expiry of the limitation period for the customs debt.

Therefore the Customs Authority, pursuant to Article 6 of Regulation (EC) No. 2988/95 on sanctions related to EU own resources levies, has considered that in the event of criminal proceedings, the application of an administrative penalty in respect of the same facts (and the same person) may be suspended and resumed 'when the criminal proceedings are concluded'.

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[39] Art. 12 of Law No. 37 of 3 May 2019, on 'Provisions for the fulfilment of the obligations arising from Italy's membership of the European Union' (also known as 'European Law 2018') which modified article 84, paragraph 2, TULD.

[40] Before the amendments made by the 2018 European law, the Italian Supreme Court (among others, see Italian Supreme Court, Judgment No. 7973 of 21 March 2019) emphasised that the extension of the limitation period (previously set at five years) was only possible if the notice of offence ('notitia criminis') was communicated within the ordinary three-year limitation period. This interpretative position is still applicable to customs debts arising before 1 May 2016.

The Italian customs authority's position, here, appears to be in line with the Proposal for a Directive on infringements and sanctions[41].

In particular, the fourteenth recital of the Proposal states that "Administrative proceedings for customs infringements should be suspended where criminal proceedings have been instituted against the same person in connection with the same facts. Any continuance of the administrative proceedings after the criminal proceedings have concluded should strictly observe the 'ne bis in idem' principle".

However, the wording of the subsequent Article 14 of the Proposal, which deals precisely with this suspension, is unclear as to the meaning of 'disposal' of criminal proceedings.

9.1. *Administrative sanctions*

Administrative sanctions[42] provide for the imposition of a fine.

The offense covered and sanctioned by Article 303 of the TULD is the most commonly committed offense, especially in the context of undervaluation. Under this provision, if the information contained in the declarant's declarations (including those concerning the value of the goods) fail to match the assessment, the declarant will be punished by an administrative sanction ranging from EUR 103 to EUR 516 unless the inaccurate indication of value has led to the border duties being redetermined.

In the latter case, if the act in question does not constitute a more serious offense, the administrative penalty applied will be based on the amount of the customs duty if the total border duties determined by the assessment are higher than those determined based on the declaration, and the difference in duties exceeds 5%[43].

For example, if the higher duties exceed EUR 2,000 and are less than EUR 3,999.99, the administrative fine ranges from EUR

[41] Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM/2013/0884 final.

[42] Articles 302 to 321 of the TULD.

[43] This provision has been sometimes criticised because of the supposed disproportionality between the violation and fine.

15,000 to EUR 30,000. If the higher duties are equal to or greater than EUR 4,000, the administrative fine ranges from EUR 30,000 to ten times the amount of the duties evaded.

The Customs Agency has stated that where a customs declaration contains several "heterogeneous or homogeneous consignments of goods", the penalties provided by the rule would refer to each "single" consignment contained therein[44].

The TULD also provides for specific sanctions applicable in other cases[45].

9.2. *Criminal sanctions*

Although the same piece of legislation provides for both administrative and criminal penalties[46], the process for enforcing them is distinct.

In reality, whereas administrative fines are imposed by the customs authority and challenged in Revenue Tribunals, criminal penalties are imposed by the judicial authorities and challenged in criminal courts.

The TULD also specifies the cases in which an importer's actions can give rise to criminal liability[47].

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[44] Note No. 16407 of 9 February 2015.

[45] For example, for differences between packages loaded on a ship or on an airplane and those indicated in the manifest (Article 302), differences found in deposits (Article 308) or in temporary storage warehouses (Article 309), irregularities found in the context of certain special procedures (Articles 310-315), omission or delay in submitting the customs declaration (Article 308), etc.

[46] Both are outlined in the TULD.

[47] Article 282 to Article 301-bis, TULD. In particular, Articles 282-291 specifically sanction the irregular introduction and movement of non-EU goods without customs formalities across land borders (Article 282), lake border (Article 283), by sea (Article 284), by air (Article 285), etc. or in other places (for example, Article 288 for customs warehouses). Article 292 generally sanctions (apart from the cases provided for in the previous Articles) anyone who avoids the payment of fees due for specific goods. This is labelled as 'simple smuggling', so called because the smuggling is committed without one of the aggravating circumstances provided for in Article 295. Aggravated smuggling (Article 295) occurs, for example, where the act is committed concurrently with a crime against the public trust, such as the crime of forgery in a public document, or a crime against the public administration or if the smuggling is committed in association with others.

The criminal implications of infringing customs law has recently been the focus of several important regulatory provisions.

First, the so-called decriminalisation decree[48] has converted the majority of customs offenses punishable by a fine ('multa' or 'ammenda') into administrative offenses, with the exception of certain types of criminal conduct, such as the offense of aggravated smuggling.

The penalties that may be imposed as a result of such decriminalisation have been dramatically reduced: from a punishment ranging from two to ten times the amount of border duties that were avoided, to an administrative fine of between EUR 5,000 and EUR 50,000.

A revision of the 2016 legislation[49] transposed Directive (EU) 2017/1371 into the Italian legal system and reintroduced the criminal offence of non-aggravated smuggling (or "simple smuggling").

In particular, under current law, if the behaviour — even if intentional — leads to a loss of customs duties totalling less than EUR 10,000, only the administrative fine will be imposed (ranging from two to ten times the amount of the duties evaded, but no less than EUR 5,000 and not more than EUR 50,000).

On the other hand, a criminal penalty will be imposed if the total amount of border duties reaches EUR 10,000.

In this case, if the higher duties fall between EUR 10,000 and EUR 50,000, the behaviour is classified as simple smuggling, but a criminal sanction (fine) is applied.

If the evaded duties exceed EUR 50,000, the behaviour will be classified as aggravated smuggling and the sanction will consist of a fine and imprisonment up to 3 years.

Finally, if the duties evaded exceed EUR 100,000, imprisonment from 3 to 5 years is added to the fine.

With regard to the relationship between customs smuggling and administrative offenses, the first differs from the second primarily in that fraudolent intent is required. For there to be smuggling, it is not enough for there to be a simple difference between the elements as declared by the operator and the elements as ascertained by cus-

[48] Legislative Decree No. 8/2016.
[49] Legislative Decree No. 76/2020.

toms. There must also be a fraud in relation to the goods, whose purpose is to avoid the payment of customs duties[50].

9.3. *Procedures to prevent tax litigation*

Italian law gives business operators a range of tools to resolve disputes with the customs administration.

Such "procedures to prevent tax litigation" facilitate dialogue between taxpayers and customs officials in order to avoid court proceedings but, as stated by the Court of Justice, these mechanisms are optional, and the business operator can go directly to court.

The sole exception is the Complaint ('reclamo'), which is obligatory in tax issues (including customs disputes) for amounts less than EUR 50,000[51]. The commencement of proceedings before the court (Revenue Tribunal) is preceded by an application for a "self-protective review" requested by a taxpayer appeal, in disputes for amounts not exceeding EUR 50,000.00 (the amount is determined based on taxes, not penalties and interest)[52].

The customs administration can also invalidate or annul unlawful or unjustifiable activities using "protective" procedures ('autotutela'), which can be employed upon request by a party or by the Office.

The importer can also, in general, remedy an error made even after customs procedures have already begun, and benefit from a significant discount on the applicable customs penalty, which is usually onerous or excessive[53].

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[50] Circular 39 / D of 2005 of the Customs Agency.

[51] Originally, the procedure was applicable only to disputes that did not exceed EUR 20,000. However, the maximum amount was raised to EUR 50,000 by Article 10 of Law Decree 50/2017.

[52] Article 17-bis of Legislative Decree No. 546/1992 states, "The appeal also creates the consequences of a complaint and may comprise a mediation proposal with redetermination of the claim", for issues over the threshold (paragraph 1). The purpose of submitting a complaint is to persuade the tax authorities to evaluate the claim in light of the taxpayer's point of view so they can accept it, if deemed appropriate.

[53] In the case of non-challenge of challenged actions and implementation of punishments (Articles 16 and 17 of Legislative Decree no. 472/1997), "voluntary disclosure/correction" (Article 13) and "facilitated definition" are applied.

Lastly, if a taxpayer's request for a review declaration results in increased customs taxes being applied, fines and interest are not imposed provided that the request is filed within 90 days of the definitive assessment[54].

9.4. *Administrative proceedings*

If, as a result of the assessment, a discrepancy emerges with respect to one or more of the elements required in order to determine customs duties, Customs will notify the declarant by means of a "report of findings".

If the declarant disagrees with the ADM's findings he may request, within 30 days of the signing of the minutes[55], the initiation of a customs dispute settlement procedure ('controversia doganale')[56].

This is the only form of administrative procedure in force in Italy that allows an appeal to be lodged before a higher level within the administrative hierarchy. The dispute, initiated at the business operator's request, is entrusted to the Regional Director.

The local office transmits the application, together with the minutes, any reports and/or documentation, within the following 10 days to the Regional Director, who decides on the dispute within four months[57], by a reasoned decision.

Unless the Regional Director provides the taxpayer with full reasons, the matter may then still be referred to the competent Revenue Tribunals[58].

Note that the initiation of the customs dispute settlement procedure has the effect of suspending the assessment, pending the decision of the Regional Director.

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[54] Article 20, Legislative Decree No. 449/1997.

[55] A customs dispute is not subject to a posteriori controls.

[56] Article 65, TULD.

[57] Article 68, para. 1, TULD.

[58] Customs Agency Circular No. 26/D of 04/04/2002 and Customs Agency Circular No. 41/D of 17/06/2002. See also Italian Supreme Court, Judgment No. 13890 of 28/05/2008, which states that the customs dispute settlement procedure is a type of administrative appeal available when the assessment is not yet final and does not affect the assessment notice.

Pending that decision, the importer's goods may be held at Customs as security for any increased duties that may be payable at the outcome of the procedure, or, if Customs considers it appropriate, the goods may be released immediately subject to a suitable guarantee being provided.

9.5. *Judicial proceedings*

An appeal to the Revenue Tribunal is, without doubt, the most widely used procedure available within the Italian legal system when defending oneself in customs disputes involving customs duties.

Specifically, the business operator is entitled to lodge an appeal both in order to challenge duties imposed (and possible penalties) and also for other matters entrusted by law to the competence of the customs authorities.

In tax matters, Italian law provides for two levels of jurisdiction, the lower level before the provincial and regional revenue tribunals (now Courts of Tax Justice), and the higher level before the Italian Supreme Court of Cassation in its judicial review function.

The assessment can be challenged before the competent provincial revenue tribunal within 60 days from notification. However, after the grace period of ten days for payment has elapsed, the proceedings are entered in the register unless a special application for suspension is made.

Suspension may be requested from the customs authority by the deadlines and in the manner provided for in Article 45(5) UCC or, alternatively, directly from the revenue tribunal[59].

In both cases, however, suspension of enforcement is subject to the provision of a guarantee.

Note, here, that under Article 98, paragraph 1, UCC, the guarantee cannot be released until the customs debt or the obligation to pay other charges has been extinguished or cannot arise.

[59] Article 47, Legislative Decree 546/1992.

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ASPECTS OF CUSTOMS CONTROLS PERFORMED BY THE DUTCH CUSTOMS AUTHORITIES

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1. *Introduction, methodology and structure*

This report discusses the customs controls enforced by the Dutch Customs Authorities, with a specific focus on how these controls are used to prevent undervaluation of imported goods.

The main focus of this report is on how the controls foreseen in the EU and national (customs) legislative framework work out in practice ('law in action') rather than a discussion on how the controls are regulated in the legislation ('law in the books'). For that purpose, interviews have been conducted with three customs officers of the Dutch Customs Authorities, using a structured questionnaire[1].

2. *Place of the customs authorities in the public domain*

2.1. *Structure of the Ministry of Finance*

The Ministry of Finance Organisation Decree 2020 regulates how the Ministry of Finance is structured[2]. Politically speaking, the Ministry of Finance is led by the Minister of Finance, the State Secretary of Taxation and Tax Authority and the State Secretary of Surcharges and Customs. The Ministry of Finance executive board is in charge of administration at the ministry. The Ministry of Finance can be distributed over several organisational units. From a customs perspective, the Directorate General of Fiscal Affairs – the Department on Consumption Tax, Customs and International Affairs (legislative power) and the Directorate General of Customs (executive power) – is of interest.

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[1] I wish to express my gratitude and appreciation to the three customs officers who agreed to be interviewed by me, and to Berend Stadhouders for his research assistance. Any and all errors or omissions are mine alone.

[2] The Ministry of Finance Organisation Decree 2020 is based on Article 10:3 of the General Administrative Law Act and Article 3, para. 2, of the Coordination Decree on the organisational, conduct of business and information systems of the national government.

The Directorate General of Fiscal Affairs is responsible for the design of policy and new legislative proposals. It also participates in strengthening external relationships with e.g. the European Union, the Organisation for Economic Cooperation and Development (OECD) and the World Customs Organisation (WCO). Customs policy makers within the Directorate General of Fiscal Affairs belong to the Department on Consumption Tax, Customs and International Affairs. The Directorate General of Customs is an autonomous body mandated to enforce customs legislation and is in particular responsible for monitoring cross-border EU movements of goods, levying and collecting import duties and taxes, and enforcing legislation and regulations in the fields of security, safety, health, the economy and environmental protection. The Director General of the Directorate General of Customs is a member of the Ministry of Finance executive board. Formally-speaking, the Directorate General of Fiscal Affairs is the organisational division that assigns the execution of customs legislation to the Director General of Customs. Next to this assignment, the Director General of Customs is assigned by eight other Ministries to implement cross-border enforcement tasks. A formal consultation arrangement exists between the Department on Consumption Tax, Customs and International Affairs and the Directorate General of Customs. They have monthly meetings and, in addition, representatives of the Department and of the Directorate General of Customs work alongside at meetings of the EU Council Working Parties, of the EU Commission Customs Expert Groups and other similar institutions. No formal consultation arrangement exists between the legislative and executive powers on the one hand, and the judicial power on the other hand.

2.2. *Customs offices*

The competent customs offices, within the meaning of Article 159 UCC, are located at the places indicated in Annex 1 of the General Customs Regulation ('Algemene douaneregeling'). The national office is located in Rotterdam. Part of the national office consists of so-called speciality teams. These include a Valuation specialty team (see section 5.1.).

2.3. *Customs officers*

Customs officers working for the Dutch Customs Authorities are obliged to comply with rules of conduct applicable to civil servants. A civil servant must take an oath or pledge that he or she will comply with those rules[3]. By taking an oath or pledge, the civil servant swears, among other things, to comply with legislation in the Netherlands, to perform his/her duties conscientiously and accurately, and to keep confidential any information acquired by reason of his/her position. The civil servant is also obliged to act in a manner that befits a good civil servant, to act with care, integrity and trustworthiness and to avoid any act that would harm his/her position. Further details on how civil servants act with integrity are laid down in the Integrity Code of Conduct of the Dutch Government ('Gedragscode Integriteit Rijk')[4]. Since 1 January 2020, the employment relationships of customs officers have been normalised, meaning that such officers have the same rights and protections as private sector employees[5]. This is also the case for customs officers with the right to carry a gun, while the situation is different for civil servants who work for the police and defence forces, for example. Such civil servants will still have a traditional unilateral appointment as civil servant, as in those circumstances public authority outweighs the need to establish a more equal employment relationship.

2.4. *Relationship between customs authorities and market operators*

The relationship between the customs authorities as governmental bodies and market operators is regulated by the legal regime of the Union Customs Code, the General Administrative Law Act ('Algemene wet bestuursrecht'), the General Tax Act ('Algemene

[3] Article 7 of the Law on Civil Servants.

[4] Gedragscode Integriteit Rijk, Staatscourant 2019 nr. 71141.

[5] This means, among other things, that civil servants become eligible for resignation remuneration, employment conditions are laid down in collective agreements relevant to the employment relationship, and labour disputes follow a different judicial procedure.

wet rijksbelastingen') and the General Customs Act ('Algemene douanewet'). In enacting these provisions, the customs authorities also need to take into account EU general legal principles and the Charter of Fundamental Rights of the European Union. National legal principles carry less weight, as various court rulings have held that EU general legal principles take precedence over national legal principles[6].

3. *Risk analysis, customs controls and tools*

3.1. *Pushing boundaries: the enforcement strategy of Dutch Customs*[7]

The pushing boundaries vision of the Dutch Customs Authorities lays down the enforcement strategy which they have developed. This strategy is based on the assumption that all international good flows will be placed under supervision, international and national legislation requires to be enforced and, at the same time, logistic delays and administrative red tape need to be reduced to the bare minimum. Against that background, the Dutch Customs Authorities distinguish three types of flows when selecting which kind of controls to enforce:

1. Trusted Traders ('green lane').
2. Trusted trade lanes ('yellow lane').
3. Other traders ('blue lane').

The selection is made by using data analytics, by harmonising reciprocal expectations and by integrating probabilities and possi-

[6] With regard to e.g. the principle of legitimate expectations, see the Dutch Supreme Court judgment of 8 June 2012, ECLI:NL:HR:2012:BW7710.

[7] For a more detailed description of Pushing Boundaries, see: F. Heijmann, Y-H Tan, B. Rukanova, A. Veenstra, The changing role of Customs: Customs aligning with supply chain and information management, *WCJ*, 14(2), 2020, 131-142. For some elaborations of a future outlook on how customs controls could be enforced (which do not necessarily represent the view and opinions expressed by the Dutch Customs Authorities), see: F. Heijmann, J. Peters, Customs – Inside Anywhere, Insights Everywhere, Rotterdam, 2022.

bilities. Data analytics is carried out on combined data and information embedded in all documents issued by the stakeholders involved in international trade flows (e.g. exporters, warehousers, shipping lines, forwarders, importers). This information provides details on what goods are shipped to the Netherlands and on the role and status of the stakeholders involved. This first step already distinguishes trusted traders ('green lane') from other traders. A trusted trader is a market operator that holds the Authorised Economic Operator authorisation and has successfully proven the actual working of the internal control mechanism during an audit performed three years after the issue date of the authorisation. As a reward for being a trusted trader and for providing access to its data, trusted traders benefit from e.g. inspections that avoid disruptions to their logistical processes, and they are subject to less intensive administrative and documentary checks. These benefits are also enjoyed by actors on a trusted trade lane ('yellow lane'). Trusted trade lane actors comply with the rules set out by the 'chain director', and avail of certification methods, information exchange with customs authorities and procedures that safeguard these rules and the exchange of information. However, trusted trade lanes have not yet become common practise due to a lack of physical security measures in the global supply chain and due to a limited exchange of source data. Other traders ('blue lane') who are unfamiliar to the Dutch Customs Authorities are subject to traditional measures such as physical inspections and interventions. Such inspections and interventions have been evolved to include innovative measures such as e.g. fast rail scanners, which allow trains to travel at a speed of 60 km/h while being scanned.

Next to this overarching enforcement strategy, the Dutch Customs Authorities also regularly publishes enforcement reports informing traders of the areas in which the authorities are implementing increased controls. An example of an enforcement report is the Dutch Customs Authorities communication of 27 July 2021, informing importers that, among other things, the customs authorities would pay greater attention to the customs value of textiles and shoes in import declarations. The Dutch Customs Authorities do not share information about risk profiles but, on-

ly occasionally, information about increased controls on particulars of the import declaration. When selecting methods for the enforcement strategy, customs valuation is typically an element that receives more attention, especially because of the increased e-commerce flows.

The Dutch Customs Authorities enforce controls that are commensurate with the risks identified. That means, for instance, that doubts about whether an accurate customs value has been declared will be followed up by documentary and administrative checks, whereas physical controls are more appropriate if the identified risks suggest that illegal products are among the imported goods.

3.2. *Risk analysis – methodology*

3.2.1. *Introduction*

Risk analyses are mainly conducted by the national tactical centre of the Dutch Customs Authorities (Douane Landelijk Tactisch Centrum, DLTC) in close cooperation with other institutions and departments in the Netherlands, as in the case of various ministries and customs authorities from other countries. Risk rules are applied in different stages. On the one hand they are applied on accepted declarations, while on the other hand they are enforced on individual companies. Both take into account the specific requirements for managing customs risks as set out in the Financial Risk Criteria and Standards Implementing Decision, although this was already done before the decision was published, with the difference now being that the administrative and reporting obligations are being complied with. This means, among other things, that all fifteen risk indicators that should cover nine risk areas (e.g. undervaluation, incorrect classification) are part of the risk analysis conducted by the Dutch Customs Authorities, and information is shared about newly identified risks with the connected customs authorities via the online Risk Identification Form (RIF).

3.2.2. *Methodology vs enforcement strategy*

As set out under section 3.1, however, the Dutch Customs Authorities have designed the enforcement strategy in an innovative and efficient way, making a selection between the different type of flows. The performed risk analysis in the Netherlands aims at a focus on efficiency and increased effectiveness. Classified risk profiles have been designed to effectively mobilise the resources of the enforcement department of Dutch Customs. This means that market operators who match the risk profiles are subject to a heavier control regime. Mathematical sample checking is used to validate the risk profiles and for conducting risk analysis, also by randomly selecting samples from the population that is not subject to the identified risk profiles. The Dutch Customs Authorities utilise data analytics with dashboards, refreshed on a monthly basis, in order to view deviations in trade patterns and population. Such deviations may lead to adjustments to the risk profiles that the Dutch Customs Authorities are using to detect undervaluation, among other risk areas.

3.2.3. *Checks on particularities in import declarations*

Another methodology used by the Dutch Customs Authorities is to carry out controls on data included in the import declaration itself. The Dutch Customs Authorities deploy 'business rules', to be applied upon acceptance of all electronic messages and declarations submitted to customs. A business rule checks, for instance, whether an unlikely customs value has been inserted, or whether the submitter of an inward processing relief declaration holds the required license. Whenever a risk criterion is suitable for conversion into a business rule, it will be programmed for automatic control purposes. In contrast to a risk rule output, which leads to a selection for follow up by a customs officer, a business rule hit leads to the rejection of a declaration. In other words the system will, for instance, automatically block the submission of an import declaration if the declarant has not filled in particulars thereof (e.g. Incoterm, transaction code, customs value). One benefit of this unique method is that

multiple risk and formal criteria associated with the submission of import declarations are checked when the declarations are entered into the customs system. If crucial information is not included in the declaration, the imported goods are blocked as a result of the declaration being refused. Therefore, the Dutch Customs Authorities carry out 100% controls on the control elements that are checked by business rules.

3.2.4. *Post-clearance audits*

The Dutch Customs Authorities also perform post-clearance audits. These audits are initiated on the basis of Article 48 UCC and can take the form of information requests, requests for documentation, interviews and on-site visits. Post-clearance audits may concern the market operator's entire customs position. They may also focus, for example, on all or some of the market operator's customs licenses, or on the determination of and processes for including particulars such as the origin, classification or customs value of imported goods in the customs declaration. The length of post-clearance audits depends on the size and complexity of the market operator's customs formalities. It may vary between a one-day site visit followed by an end report, and multiple site visits over a longer period (even exceeding a year) followed by an end report.

3.2.5. *Type of audits in numbers*

As a result of the total layered enforcement strategy of the Dutch Customs, the statistical figures for physical and document checks included in the table below do not give a complete overview of all enforcement activities undertaken by the Dutch Customs Authorities. As explained in section 3.2.3, business rules are used for checking many risk and formal criteria. Therefore, certain particulars of the import declarations are subject to a 100% control mechanism enforced by the Dutch Customs Authorities. Next to these customs controls, the Dutch Customs Authorities also assess mar-

ket operators before they start operating, which leads to a higher level of compliance at the start of their operations. These types of (post-clearance) controls, too, are not reflected in the below table. Lastly, post-clearance controls performed at market operator level may include documentary checks. These checks, too, have not been taken into account in the statistics below.

Taking this into account, in 2021 approximately 0.3% of goods were inspected physically and 1% of documents were checked. Key figures for surveillance and controls over the period 2019-2021 are to be found in table 3.1. During this period, more than 320 (2019), 378 (2020) and 698 (2021) million declaration lines in import, export, admission, exit and transit declarations were processed by the Dutch Customs Authorities.

Subject	2019	2020	2021
Controls on import and excise declarations	419,566	485,206	571,579
Hours devoted to the supervision of the external border	410,224	464,339	524,180
Passenger baggage	267,370	80,915	222,540
Mobile supervision (internal and external borders)	16,570	15,103	17,571
Administrative controls (audits)	2,241	2,613	1,920
Scans (fixed scans)	91,041	105,118	127,943
Other controls	140,508	154,920	173,185

Table 3.1. Key figures surveillance and controls[8].

The Dutch Customs Authorities do not make use of contextual analyses of import declarations in the declarations process, meaning that declared values on import declarations are automatically compared to recently declared values for identical or similar goods that have been imported. The Dutch Customs Authorities are investing in contextual analyses, however. Nevertheless, they are being applied in post-clearance audits by EDP-auditors who participated, to

[8] https://magazines.rijksoverheid.nl/douane/jaaroverzichtdouane/2022/01/kerncijfers (checked on 6 July 2022).

that end, in Profile with (academic) research partners, customs authorities from other (EU) Member States and corporates[9]. Although it does not yet involve real-time data monitoring or analyses of future values due to the lack of technical capabilities, the project's end-game is to accelerate the uptake of state-of-the-art data analytics and incorporation of new data sources for a more effective and efficient European customs risk management.

3.3. *Risk analysis – risk indicators and profiles*

If the customs authorities have doubts about the accuracy of declared values, they will first put questions to the market operator and further verify the transactions based on the information provided. The requested information may take the form of e.g. sales agreements, purchase invoices for the goods, transport invoices, international bills of lading, sales invoices for the goods at the first level of trade, delivery notes, confirmations of receipt of deliveries, reference calculations for the formation of the selling price based on the acquisition price and extracts from import and sales accounts, purchase and sales ledgers. In determining whether the correct price elements have been taken into account, the Dutch Customs Authorities may also request to see e.g. royalty and/or distribution agreements, as well as documentation related to assists. In a series of sales situations and especially in back-to-back order situations, the Dutch Customs Authorities typically also request a description of the ordering process, besides sample documentation of the purchase orders and invoices.

Meetings may be scheduled between the audited market operator and the Dutch Customs Authorities to allow both parties to present their views, clarify their position and provide further explanations with regard to the information provided. If doubts remain, a (formal) letter is sent to the market operator seeking further information in order to remove doubts. Only if doubts still remain, the Dutch Customs Authorities provide the market operator with a

[9] https://cordis.europa.eu/project/id/786748 (checked on 23 July 2022).

so-called Sopropé letter indicating their intention to reassess the import duties (see also part 7) following, in most cases, a correction made to the customs value. Suspicion of undervaluation might be a reason to reassess import duties. Also after the transmission of the Sopropé letter, the market operator is given the opportunity to present its views.

3.4. *Risk analysis – statistical database*

The Dutch Customs Authorities do not make use of statistical information included in a national database. The main reason for this is that statistical information does not, typically, provide the full context of a particular import transaction, although it typically includes averages that take account of quality differences. Take for example the apparel industry where quality and volumes typically have a significant effect on the prices of the imported apparel products. This context is typically not in the data set and will only become known if additional information is sought by the customs authorities.

The Dutch Customs Authorities do make use of the European Fair Price list, a price reference list published by OLAF. This tool is mainly used to detect undervaluation. This list is translated into risk profiles, implying that all declarations are matched to this list and selected once a declared value is lower than the values included in the list. However, this is only an indicator for further control. Declared values which are lower than the statistical values are not by default disputed as, again, the Dutch Customs Authorities risk analysis takes account of the full context of a particular import transaction. The statistical values are also used to determine the guarantee amounts for goods that are released but subject to further audits of the Dutch Customs Authorities. In principle, statistical values are not used to determine the customs values of goods whose declared values have been disputed, unless the customs value is established with reasonable means using the fall-back methods (Article 144(2) UCC IA), and no other data sources are available to value the imported goods. But this is only in exceptional situations like those

that have arisen, for example, in certain recent rulings of the Court of First Instance Noord-Holland[10]. In these rulings, the transaction value method was rejected. Under the fall-back method, the customs authorities used statistical data from the European Fair Price list to determine customs values. The defendant did not directly challenge the use of the European Fair Price list as such, but argued that the prices in this list were too high. The court eventually ruled that, in this case, the customs authorities are entitled to use the prices included in the European Fair Price list. By doing so, they must, however, take into account the quality of the imported apparel products. As the imported goods were of poor quality, there ought to have been amendments to the average prices for determining the declared customs values by the customs authorities. The court concluded that the customs authorities should perform a recalculation.

3.5. *Risk analysis – other price elements*

Undervaluation of goods can also relate to that part of the appraisal of the imported goods that is not expressed in terms of the sales price, but has to do with the dutiable price elements enumerated in Article 71 UCC that have not been taken (fully) into account in determining the transaction value of the imported goods. Also for these other price elements such as royalty payments, assists and commissions, the European Fair Price list is regularly used by the Dutch Customs Authorities in post-clearance controls. This list also enables customs authorities to detect undervaluation, because in principle this list should also take into account the price elements mentioned in Article 71 UCC. Also, (industry) experience, the risk profiles and the appropriate controls that are being used and enforced by the Dutch Customs Authorities are part of the risk analysis to detect undervaluation that has to do with not taking into ac-

[10] See for example: Court of First Instance Noord-Holland 6 July 2022, ECLI:NL:RBNHO:2022:6038, Court of First Instance Noord-Holland 6 July 2022, ECLI:NL:RBNHO:2022:6039, Court of First Instance Noord-Holland 6 July 2022, ECLI:NL:RBNHO:2022:6034, Court of First Instance Noord-Holland 6 July 2022, ECLI:NL:RBNHO:2022:6037.

count relevant price elements. The following is an example of how industry expertise can assist in performing a post-clearance audit of undervaluation: a post-clearance audit related to the imports of a market operator in the apparel industry. Based on industry expertise, the Dutch Customs Authorities would likely focus their audit on price elements such as royalties, assists and commissions which are common price elements in this industry. Such controls focus not only on whether these price elements have been taken into account and, if not, should have been included; the audit may also focus on whether an appropriate remuneration for these price elements has been taken into consideration. Benchmark studies performed for transfer pricing purposes are often requested by the Dutch Customs Authorities for making such an assessment. These studies generally show what a payment e.g. a royalty would be, if it were paid to a third-party.

4. *Adjustments to the customs values*

4.1. *Reasons for doubting the declared customs value*

As mentioned, the Dutch Customs Authorities can perform an assessment before the market operator starts its customs operations, in order to ensure that the business processes to prevent undervaluation are in place (see section 3.2.5.). Nevertheless, the customs authorities may still have doubts about the accuracy of customs values at the time they are declared. The customs authorities can adjust the customs value declared by the market operator, if they have doubts about the accuracy of the declared customs value following the procedure as set out in section 3.

There are various reasons for doubts to arise. The following is a non-exhaustive list of various reasons why the customs authorities may consider that the customs value should be adjusted:

- The customs authorities have doubts as to whether the person that is indicated as the purchaser for a particular import

transaction can be regarded as such from a customs valuation perspective, as the purchaser assumes no financial risk over the goods at any point in time.
- The customs authorities doubt whether the market operator has objective and quantifiable data available in its records.
- The amounts of the price elements cannot be determined at the time of import.
- It cannot be established that a sale occurred because information is lacking and is not provided by the market operator. This occurs more frequently in case of e-commerce transactions where the non-EU-resident supplier cannot be contacted.
- The goods arrive without accompanying documents that can be used to determine customs value.

One should also emphasise, here, that the adjustments are only made after the customs authorities have analysed the total context of the transaction, which includes giving the market operator an opportunity to presents its views (see also section 7). Only if doubts remain after the market operator has presented its views, can the customs authorities reject the transaction value method in favour of an alternative valuation method (see section 4.3.). By analysing the total context of a particular transaction, this also means that, even if the declared values are lower than other transactions for similar goods (which may or may not be substantiated by statistical values), the transaction value method will not automatically be rejected, as a specific protocol is not automatically triggered. In this case, too, the full context of the audited transaction will be analysed to determine whether or not a valid reason exists for having indicated a price lower than the declared values of identical or similar goods, to assess the imported goods.

4.2. *Resolution of doubts expressed by the customs authorities*

In the EURO.2004 Hungary case (ECJ C-291/15), the European Court of Justice ruled that the transaction value method can be rejected, even if the commercial invoice corresponds with the

importer's accounting records and proofs of payment and with the bank certificate produced. That raises the question of what documentation will suffice to prove to the Dutch Customs Authorities that the declared values are accurate. Although it depends on the case at hand, typically an invoice, proof of payment and access to the financial administration is sufficient to remove any doubts the customs authorities may raise.

4.3. *Rejecting the transaction value method*

As said, the customs authorities have the legal right to reject the transaction value if they still have doubts about the accuracy of the declared values after giving the market operator the opportunity to present its views. This is not an easy step to take. If an import hits the risk profile, this will not be sufficient to reject the transaction value as the full context must be explored. If the totality of information available to the customs authorities still does not resolve their doubts as to the accuracy of the declared values, they will reject the declared transaction value. The market operator will be given the reasons for the rejection of the transaction value, and informed of what basis is used to determine the substituted customs value.

If the transaction value method is rejected, the customs authorities apply the alternative valuation methods in strict sequence, i.e. they evaluate their applicability in the following order:

- Transaction value of identical goods.
- Transaction value of similar goods.
- Deductive value method.
- Computed value method.
- Fall-back method.

In practice, identical or similar goods cannot always be identified by the Dutch Customs Authorities. Hence they apply one of the other alternative valuation methods. The deductive value method appears to be the alternative valuation method most used by the customs authorities in cases where the transaction value method is rejected, especially where goods are sold in the customs territory of the Union without being subject to further working or processing af-

ter import. The computed value is only used for manufacturers and usually only applied as an alternative valuation method if the goods are sold between two related parties, as a foreign manufacturer related to an EU importer is more inclined to provide the necessary information voluntarily compared to a non-related manufacturer outside of the EU. This is the case, moreover, because the customs authorities may not require or compel any person not established in the customs territory of the Union to produce for examination, or to allow access to any account or other record for the purposes of determining the customs value under the computed value method. After the deducted value method, therefore, the fall-back method is more often used as an alternative valuation method.

5. *Connection and cooperation with other tax(es) departments and with OLAF*

5.1. *Connection and cooperation with other tax(es) departments*

For related-party transactions, customs valuation rules specify that the price paid or payable should not be influenced by the relationship between the seller and buyer, whereas for corporate income tax purposes, transfer prices between related parties should be set in accordance with the arm's length principle. It is in the interest of both customs authorities and tax authorities that related-party transactions are valued on the basis of the parties not being related. The WCO therefore recommended, in its report entitled Guide to Customs Valuation and Transfer Pricing (2015, updated in 2018), closer collaboration between customs and tax authorities and mutual awareness-raising sessions. In the Netherlands, the closer collaboration is possible because the Valuation specialty team of the Dutch Customs Authorities ('Landelijk Waarde Team') has members with a corporate income tax/accountancy background, and the tax authorities include tax officers with an expertise in customs valuation rules. For the Oil & Gas sector specifically, there are even combined

teams with both customs and transfer pricing specialists. Apart from these combined teams, there are no mutual awareness-raising trainings/seminars being organised, nor is there any automatic sharing of information of market operators/tax payers (e.g. local file, master file, APA, customs valuation rulings (if any), audit files) between customs and tax authorities. This information is, however, shared on request.

In the view of the Dutch Customs Authorities, transfer pricing adjustments for imported goods transactions need to be taken into account when setting the final customs values of imported goods. Market operators, however, need to report such transfer pricing adjustments themselves as the tax authorities do not automatically exchange information on transfer pricing adjustments with the customs authorities, and neither do the customs authorities exchange any information on customs value adjustments with the tax authorities. Unless the market operator voluntary discloses the transfer pricing adjustments, the customs authorities will only find out about these if there is a post-clearance audit. The Dutch Customs Authorities' view on the impact of transfer pricing adjustments on determining the (final) customs values of imported goods has not changed following the Hamamatsu case, although in identical cases they will handle a request in line with the Court's decision. A broader application of the Court's decision, however, would potentially lead to a departure from the transaction value method in any case in which a transfer pricing adjustment is made, a position that is not favoured by the Dutch Customs Authorities.

Although the Dutch Customs Authorities are in favour of market operators taking into account transfer pricing adjustments in the final determination of their customs values, they do expect market operators to request a pre-clearance working arrangement in order to calculate it (for the process of obtaining a working arrangement, see section 6.2.). This working arrangement can take the form of a simplified declaration pursuant to Article 166 UCC, making it possible for a market operator to declare provisional values and later make them final in a supplementary declaration after the transfer pricing adjustments have taken place. This option is not common and is not the customs authorities' preference, as it creates a genuine adminis-

trative burden for both the customs authorities and market operators and is generally also not possible due to system restraints. Another alternative is to make arrangements under Article 73 UCC, allowing market operators to take into account a fixed amount which is revised prospectively each year. This, however, is, according the Dutch Customs, usually not an option if the market operator is not established in the customs territory of the EU. Therefore for these and for certain other market operators, they also accept that market operators file normal declarations and also file a reconciliation sheet on a periodic basis (e.g. quarterly or annually). The reconciliation sheet should contain details on line items concerning e.g. imports made, values declared, and duty rates imposed. This sheet should also show the duty impact of the transfer pricing adjustments, whereby the position typically taken is that the transfer pricing is spread equally over the declared customs values. Depending on whether the transfer pricing adjustments result in a downward or upward movement of the intercompany price, the market operator is eligible for a partial refund of import duties, or additional import duties become payable.

5.2. *Connection and cooperation with OLAF*[11]

While the customs authorities engage the tax authorities only on an occasional basis, proactive cooperation exists between the Dutch Customs Authorities and OLAF. The cooperation is based on the following legal instruments:

- Mutual administrative assistance in customs matters[12].
- Checks and inspections on behalf of the European Commission in the Netherlands[13].

[11] See for a more extensive description of the cooperation between the Dutch Customs Authorities and OLAF: https://www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HDU/samenwerking_met_olaf.html.

[12] Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, *OJ* L. 82, 22.3.1997, 1-16.

[13] Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in

- Communication of irregularities[14].
- Bilateral treaties[15].
- Mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation[16].
- International criminal cooperation[17].

The Customs Information Centre (Douane Informatie Centrum, DIC) plays an important role in the cooperation. DIC functions as a central information point to exchange information between customs offices and performs operational tasks related to mutual assistance in customs and excises matters. Operationally, DIC also functions as a central point of contact between the Dutch Customs Authorities and OLAF. The communication takes the form not only of exchange of written information or of notifications about irregularities/fraud (Assistance Mutuelle (AM) notifications) that OLAF shares with all Member States; DIC facilitates all forms of operative communication between OLAF and the Dutch Customs Authorities, such as

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order to protect the European Communities' financial interests against fraud and other irregularities, *OJ* L. 292, 15.11.1996, 2-5.

[14] Regulation (EU) No. 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No. 352/78, (EC) No. 165/94, (EC) No. 2799/98, (EC) No. 814/2000, (EC) No. 1290/2005 and (EC) No. 485/2008, *OJ* L. 347, 20.12.2013, 549-607, Council Regulation (EU, Euratom) No. 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (Recast), *OJ* L. 168, 7.6.2014, 39-52 and Regulation (EU) No. 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No. 352/78, (EC) No. 165/94, (EC) No. 2799/98, (EC) No. 814/2000, (EC) No. 1290/2005 and (EC) No. 485/2008, *OJ* L. 347, 20.12.2013, 549-607.

[15] The European Union has signed customs cooperation and mutual administrative assistance agreements (Korea, Canada, Hong Kong, US, India, China and Japan). The European Union also has Partnership and Co-operation Agreements with a number of countries, including Russia and Ukraine, which cover customs co-operation and include a protocol on mutual administrative assistance.

[16] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, *OJ* L. 64, 11.3.2011, 1-12.

[17] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000).

exchange of information, alignment and progress meetings on AM notifications and participation in Union missions, controls and verifications on behalf of the European Commission in the Netherlands.

6. *Relationship with the customs authorities*

6.1. *Customs valuation rulings*

The Dutch Customs Authorities have a Valuation specialty team (Landelijk Waarde Team). This team consists of subject-matter experts on customs valuation who act as sparring partner within the Dutch Customs Authorities itself, take part in meetings of the Commission Customs Expert Group, Valuation section and WCO Technical Committee on Customs Valuation, and can be consulted by market operators. Consultation, here, means that a market operator (or an advisor on its behalf) may reach out to obtain clarity on how customs valuation rules in a particular case should be interpreted. In order to receive a response to a customs valuation related question, it is essential that facts and circumstances be clearly outlined, and that relevant documentation is provided, ideally together with the arguments supporting a particular customs valuation treatment. If voluntary disclosures are related to the underreporting of customs values, then the Valuation specialty team will normally handle the request. In practice, it often happens that a market operator submits a voluntary disclosure and a request for a customs valuation ruling at the same time. Since 2017, the Valuation specialty team has no longer had responsibility for the issuance of so-called article 73 licenses. This is now done by the Company Contact Point ('Bedrijven Contactpunt') of Dutch Customs or the client manager of the Dutch Customs assigned to an individual market operator. Valuation specialty team can still be involved if further investigation or assessment is required before a license is issued.

Market operators can obtain a working arrangement ('ruling') from the Valuation specialty team which grants them legal certainty.

For obtaining such a working arrangement, market operators need to file a ruling request with the Valuation specialty team. This request usually takes the form of a letter or e-mail and should outline the relevant facts and circumstances of the particular import flow, the relevant customs valuation provisions and the line of reasoning supporting the applicable customs valuation treatment and the request. The market operator should include in the attachment any relevant commercial documentation (e.g. invoices, contracts, royalty agreements, shipping documents) that may be relevant for determining the customs valuation position. Subsequently, the Valuation specialty team will issue a ruling in writing to the applicant and/or its advisor. The customs valuation ruling is a decision by the customs authorities applicable to the individual case and addressed to an individual economic operator, and it will therefore only be made available to the customs authorities and the individual economic operator. The reference number of the ruling should be included in the import declarations that relate to the import transaction for which the ruling has been requested.

The processing time for obtaining a customs valuation ruling is not laid down in legislation or guidance. In practice it depends on the complexity of the transactions in scope, the availability of relevant underlying documents and whether any meetings between the applicant and the customs authorities are necessary before issuing the ruling. For an extended customs ruling, it takes at least three months to come to a ruling if all documents can be made available at the time of the application and there are no questions from the customs authorities. Usually, however, it takes from six to twelve months if the Valuation specialty team requests additional information and meetings are necessary to clarify the facts and circumstances.

A customs valuation ruling can only be obtained for existing import transactions or import transactions that are about to commence. The Valuation specialty team will, in principle, not issue a ruling for an exact amount, but instead give its view on how the customs valuation rules should be interpreted in particular cases. For example, the customs valuation ruling can clarify which sale in the supply chain should be regarded as the relevant sale for export,

whether a royalty payment should be added to the customs value or whether a transfer pricing adjustment should be taken into consideration. It also provides for pragmatic arrangements about how to account for retroactive transfer pricing adjustments (see part 5). Although a customs valuation ruling can provide legal certainty as to whether transfer pricing documentation can be used to demonstrate that intercompany import prices have not been influenced and can also be used to make arrangements for how to account for transfer pricing adjustments, the customs and tax authorities in the Netherlands do not officially facilitate a request for a combined Advance Pricing Agreement and customs valuation ruling. Although the authorities would not necessarily be averse to cooperating with a market operator that prefers to obtain a combined ruling, it is far from common in the Netherlands to apply for a combined ruling, and legislation or guidance such as we see for instance in South Korea is lacking.

6.2. *Trusted party schemes*

The Authorised Economic Operator programme is developed as a trusted trader scheme. At the time of introduction of AEO pilots in 2008, the Dutch Customs Authorities put significant efforts into promoting the programme to traders. The active promotion of the AEO programme continued until 2015, but is now no longer a priority of the Dutch Customs Authorities in view of the fact that valuable facilities are still absent in the EU's customs legal framework, also after the UCC entered into force. Only where legally required, Dutch Customs Authorities require market operators to obtain an AEO license. In practice, some traders even conduct a cost-benefit analysis as to whether or not they should keep their AEO license as the benefits do not always outweigh the costs. Besides the AEO programme, the Tax Authorities developed a scheme called horizontal monitoring. This trusted party scheme is designed as a new methodology of supervision. It offers taxpayers, their advisers and the tax authorities the opportunity to make agreements in advance about work processes and tax issues on the

basis of transparency and mutual trust. However, this scheme is developed for interaction between tax payers and tax authorities, and as such covers only national taxes and does not extend to customs matters. Although the authorities could conceivably leverage from the combination of market operators who have AEO authorisation and also utilise horizontal monitoring, this is not really happening in practice.

There is also no official voluntary disclosure programme. That being said, market operators can voluntarily disclose to the customs authorities any mistakes that they have made and they are expected to do so, especially if they are authorised economic operators. If a voluntary disclosure is made, typically no or limited penalties are imposed on the market operator, although interest will be charged in case additional import duties become payable (for a more detailed discussion on sanctions, see section 8). Should the voluntary disclosure lead to a partial refund of overpaid import duties, an official refund request needs be made in accordance with the conditions laid down in Articles 116-120 UCC. The legal basis for voluntary disclosures that result in an additional payment is less clear. It could be argued that this is based on Article 173 UCC, but in reality customs declarations are not amended retroactively following a voluntary disclosure submitted by a market operator. In the view of the Dutch Customs Authorities, there is no legal obligation to amend the initial declarations based on post clearance activity performed by the Dutch Customs Authorities; the customs authorities merely have to follow up on their findings. If the voluntary disclosure concerns an undervaluation of the imported goods, the disclosure is communicated by e-mail or letter to the customs authorities. Usually the Valuation specialty team will deal with the request if the market operator is requesting a customs valuation ruling at the same time (see section 6.1.).

In addition, large multinational companies may have periodic meetings with the Dutch Valuation Specialty team to discuss their customs valuation position and to align on how to determine the customs value for their imported goods. These meetings provide the market operator with clarity on the position and reliability of their customs valuation policy, while at the same time enabling the mar-

ket operator to avoid retroactive assessments. At the same time they benefit the customs authorities as well, as they safeguard the (correct) contribution to own resources.

7. *Right to be heard and appeal/court procedures*

7.1. *Right to be heard*

The right to be heard is firmly anchored in the legal provisions of the Union Customs Code, and the Dutch Customs Authorities adhere to this legal principle, as will be explained in this section (see also part 3 and in particular 3.4.). In practice, customs debtors are actively informed by the Dutch Customs Authorities if the latter have doubts about the accuracy of declared customs values. These doubts are typically based not only on statistical values, as explained in section 4, but on a combination of factors included in the risk analysis carried out. The reasons for the doubts are communicated to the declarant and before additional customs duties are reassessed, and the declarant is given the opportunity to respond and provide information to back up the declared customs values. Depending on the customs authorities' doubts expressed, the declarant's responses may take the form of underlying documents (e.g. invoices, transport documents, accounting ledgers, bank statements) which are sent (as a copy) by ordinary post or by e-mail to the customs authorities. In some cases, a meeting is scheduled between the Dutch Customs Authorities and the declarant (and its advisor) to discuss the customs authorities' doubts. Only if the declarant is unable to furnish supporting documentation and the customs authorities have adequate grounds to argue that the alternative valuation methods cannot be used to determine the customs value, they will use a statistical value as a basis to determine the customs value of the imported goods under the fallback method.

7.2. *Sopropé-letter: intention to take a negative decision*

The arguments and supporting documents presented may eliminate the Dutch Customs Authorities' doubts, otherwise they may commence a reassessment procedure. This procedure is initiated by sending a so-called Sopropé-letter informing the declarant of the intention to reassess import duties, and it includes information on how the reassessed duties are determined. The customs authorities must communicate the grounds for their intended decision to the declarant, who must be given the opportunity to express his or her point of view within a time period prescribed from the date on which he or she receives, or is deemed to have received, that communication pursuant to Article 22(6) UCC.

7.3. *Administrative appeal procedure*

If after presenting arguments and supporting documents, the Dutch Customs Authorities still have doubts about the accuracy of the declared values, they enforce the post-clearance recovery procedure by issuing a payment notification. After receiving the notification, the customs debtor can appeal against the customs authorities' decision. The customs debtor must lodge the appeal with the customs authorities within six weeks of notification of the decision. This appeal must include the name and address of the party submitting the appeal, the date of submission of the letter, a description of the decision the appeal is lodged against and the grounds of the appeal. In practice, market operators typically submit a pro-forma appeal first without including the grounds, and include a request to submit the grounds at a later date. The Dutch Customs Authorities accept this in most cases. The appeal against the decision initiates the administrative appeal, which is the first phase of an appeal procedure. An appeal specialty team (Team bezwaar en beroep) will handle the administrative appeal. Customs officers working for this team are never involved in decisions that customs debtors appeal against, as this will avoid any bias on the part of the customs authorities in the administrative appeal phase.

If they intend to reject the customs debtor's objections, they inform the latter of the reasons for doing so. The applicant then has the opportunity to express its views in writing and/or during a hearing. At a hearing, the applicant can also request to examine the customs authorities' files. In practice, the appeal specialty team may also seek additional information and grant the applicant time to gather this information, and it may take considerable time for the administrative appeal phase to conclude. In 2021 alone, 3,822 administrative appeals on customs matters were dealt with by the Dutch Customs Authorities, of which 87.6% were dealt with within the prescribed legal deadlines[18].

7.4. *Court proceedings*

If the appeal specialty team rejects the applicant's objections, the latter may file an objection on appeal within six weeks to initiate court proceedings at the first court of appeal at the Court of North-Holland, Haarlem. This court has a chamber specialised in customs matters. Appeals against decisions of the Court of North-Holland are dealt with by the High Court in Amsterdam that also has a chamber consisting of judges with customs expertise. Against a decision of the High Court, an interested party can file an appeal in cassation to the Supreme Court. The Supreme Court is the highest court in the Netherland for customs related proceedings, and in cassation proceedings it scrutinises the quality of contested judgments handed down by the courts of appeal in relation to the application of law as well as the supporting legal reasoning[19]. Lower courts may also refer preliminary questions to the Supreme Court. The High Court in Amsterdam can also be bypassed if the parties so agree, after the judgement of the first court of appeal is handed down. This only happens if the interested parties are not in dispute about the facts.

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[18] https://magazines.rijksoverheid.nl/douane/jaaroverzichtdouane/2022/01/kerncijfers (checked on 6 July 2022).

[19] https://www.hogeraad.nl/english/cassation-the-main/.

In 2020[20], the Court of First Instance delivered judgments in 48 cases on customs matters. In five cases, that court ruled in favour of the plaintiff and in four cases it ruled partially in favour of the plaintiff. In that same year, the High Court delivered judgments in 15 customs cases. In six cases the High Court ruled in favour of the plaintiff and in four cases it ruled partially in favour of the plaintiff.

7.5. *Requests for a preliminary ruling*

The Court of First Instance, the High Court and the Supreme Court are all entitled to request the annulment of EU legal acts or a preliminary ruling[21]. In practice only the Dutch Supreme Court submits requests to the European Court of Justice, by an unwritten rule. The exception to this unwritten rule applies to classification and antidumping proceedings. Lower courts also tend to submit requests for those matters. The table below gives an overview of ECJ rulings published over the last five years in customs matters and initiated by Dutch courts.

Year	Decisions of the European Court of Justice	Subject	Referring Dutch Court
2021	ECJ 3 June 2021, C-39/20, Jumbocarry Trading	Application of statute of limitation	Supreme Court
2020	ECJ 11 March 2020, C-192/19 (Rensen Shipbuilding)	Classification of ship hulls	High Court Amsterdam
2020	ECJ 11 March 2020, C-160/18 (X B.V. vs Staatssecretaris van Financiën)	CIF import price	Supreme Court
2020	ECJ 8 October 2020, C-330/19 (Exter)	Interpretation of taxable bases	Supreme Court

[20] Numbers of more recent years are not yet available due to a change in systems.

[21] Articles 264 and 267 of the Treaty on the Functioning of the European Union.

Year	Decisions of the European Court of Justice	Subject	Referring Dutch Court
2019	ECJ 19 September 2019, C-251/18 (TraceSport)	Request for annulment of Implementing Reg. 501/2013	Court of First Instance North-Holland
2019	ECJ 10 July 2019, C-249/18 (CEVA Freight Holland)	Revision customs value in the customs declaration	Supreme Court
2019	ECJ 3 July 2019, C-644/17 (Eurobolt)	Request for annulment of Implementing Reg. 723/2011	Supreme Court
2019	ECJ 11 April 2019, C-288/18 (X)	Classification of monitors	Supreme Court
2018	ECJ 13 September 2018, C-372/17 (Vision Research)	Classification of high-speed camera	Court of First Instance North-Holland
2017	ECJ 16 February 2017, C-145/16 (Aramex)	Request for annulment of Implementing Reg. 301/2012	High Court Amsterdam

Table 7.1. ECJ cases in customs matters initiated by Dutch Courts.

8. *Sanctions and penalties*

8.1. *Customs sanctions in Dutch legislation*

For years, plans have been in the making to harmonise customs sanctions in the European Union, but to date without success. Article 42 of the Union Customs Code does, however, include parameters for imposing penalties on market operators who fail to comply with customs legislation. The penalties that Member States must include in their national customs legislation should be effective, proportionate and dissuasive. They can take the form of either:

- a monetary charge by the customs authorities including, where appropriate, a settlement applied in lieu of a criminal penalty; *or*
- the revocation, suspension or amendment of any authorisation held by the person concerned.

In the Netherlands, customs sanctions are laid down in the General Customs Act that makes a distinction between administrative penalties (chapter 9) and criminal law provisions (chapter 10). Reporting too low a customs value is considered a criminal act pursuant to Article 10:5(1)(a) of the General Customs Act. This provision stipulates that any person who submits an inaccurate or incomplete customs declaration under the customs regulations, will be punishable by a maximum of six months' imprisonment or a monetary penalty in the third category (i.e. max. EUR 9,000 in 2022) and such violation is treated as an 'offense'. Deliberately submitting an inaccurate or incomplete customs declaration that results in undercharging duties imposed at import, will be punishable by a maximum of six years' imprisonment or a monetary penalty in the fifth category (i.e. max. EUR 90,000 in 2022), or no more than the undercharged duties imposed at import, whichever amount is higher[22]. If intent is present, the violation is treated as a 'criminal offence'. In practice, as outlined in section 8.3, most violations are punished by a penal order rather than being prosecuted by the public prosecutor.

8.2. *Extended period of five years by default, in case of underreporting*

As underreporting is considered a criminal act, an extended statute of limitation period of five years applies[23]. In practice the Dutch Customs Authorities exercise the right to extend the period to five years by default in these kinds of cases. Different rules applied under the Community Customs Code. Then, Article 7:7(2) of

[22] On purpose I used the term 'detention' for the violation without intent and the term 'imprisonment' for the violation in case of intent. Detention is a 'lighter' regime than imprisonment.

[23] Article 7:7 read in conjunction with 10:5(1) General Customs Act.

the General Customs Act permitted the Dutch Customs Authorities to extend the period to five years only in cases where market operators intentionally violated the customs provisions. According to the Dutch Supreme Court, market operators intentionally violate a customs provision if they are aware or should have been aware that their act or omission would result in circumvention of duties or where market operators accept the reasonable likelihood that their act or omission would result in the circumvention of duties[24]. With this ruling, the concept of 'conditional intent', a doctrine developed in the criminal law, was extended to customs cases. In another court case, the Supreme Court clarified that abuse of law does not result in 'conditional intent'[25].

Contrary to the Community Customs Code, the Union Customs Code prescribes that the statute of limitation should always be extended if the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings[26]. This, and the ECJ case *Snauwert*, led to the Dutch legislative amendment of Article 7:7(2) of the General Customs Act, which removed 'intent' as a condition for extending the statute of limitation. From that moment on, market operators need not have 'intentionally' violated customs rules in order for the period to be extended to five years. In practice, this means that the customs authorities extend the statute of limitation by default to five years, even where the market operator did not intend to violate applicable customs rules. In practice, therefore, the normal three-year statute of limitation period is practically obsolete in such cases. In the literature, scholars have debated whether this practice is in conformity with EU law[27]. Since then, too, this issue has been dealt with in the

[24] Dutch Supreme Court 12 September 2008, ECLI:NL:HR:2008:AZ6888, para. 3.3. and Dutch Supreme Court 2 October 2020, ECLI:NL:HR:2020:1544.

[25] Dutch Supreme Court 29 June 2018, ECLI:NL:HR:2018:1034.

[26] Compare the Articles 221(4) Community Customs Code and 103(2) Union Customs Code.

[27] F.E. Dekker, Wordt (strafrechtelijk) vervolgd? Een onderzoek naar de toepassing van de verlengde verjaringstermijn bij het innemen van een pleitbaar standpunt (verhandeling EFS Post-Master in EU Customs Law 2021) and G.J. van Slooten, De strafrechtelijk vervolgbare handeling in het douanerecht: "less is more" en zelfs teveel, *WFR*, 227, 2021.

decisions of lower courts which, until now, have ruled in favour of the customs authorities[28].

8.3. *Selection criteria for deciding between penalties or criminal prosecution*

As indicated above, the undervaluation of imported goods (intended or not) leads to criminal prosecution. This means, in essence, that criminal proceedings are initiated by the public prosecutor, or a penal tax order is issued by the Inspector of the board of national taxes (i.e. Penalty/Fraud Coordinator). In deciding whether or not to impose a penalty or instead to prosecute an offender, the Dutch Customs Authorities make use of the Protocol "notification and settlement of tax offences and offences related to customs and surcharges" ('Protocol aanmelding en afdoening van fiscale delicten en delicten op het gebied van douane en toeslagen'). This protocol reveals that, in principle, only cases involving a considerable societal impact will face criminal prosecution by the public prosecutor. Other cases will be settled by issuing a penal tax order. The following roadmap has been developed to help decide whether or not a particular case has a considerable societal impact:

- All cases in which a market operator intentionally violates the customs provisions, and the evaded customs duties amount to EUR 100,000, or cases where the evaded customs duties are less than EUR 100,000 but other aggravating circumstances of considerable impact have taken place[29], will be notified to the Penalty/Fraud Coordinator.
- The Penalty/Fraud Coordinator will subsequently review the cases and discuss these with the tax information and investigation service. The more serious cases where the evaded customs duties exceed EUR 100,000 or cases where the evaded customs duties are less than EUR 100,000 but oth-

[28] See for instance: Court of First Instance Noord-Holland 20 May 2021, ECLI:NL:RBNHO:2021:4292.

[29] Aggravating circumstances are for instance recidivism, high societal status of the offender and the confluence with other non-fiscal offenses.

er aggravating circumstances of consideration have taken place, will be selected and notified to the Public Prosecutions Department.

- The selected cases will be discussed during the so-called tripartite meeting between the public prosecutor, the Penalty/Fraud Coordinator and the tax information and investigation service. During this meeting a final decision is made as to whether the case will be further investigated by the tax information and investigation service with a view to bringing the case before a criminal court.

Besides this roadmap, cases in which a market operator evades customs duties that amount to EUR 10,000 (private person) or EUR 15,000 (company) must be reported by the customs officers handling the case to the Penalty/Fraud Coordinator, using the DFB 10 form. If the Penalty/Fraud Coordinator suspects that the customs duties may have been evaded intentionally, resulting in the evasion of duties up to the amounts of the aforementioned thresholds, the cases are notified to the selection consultation and then steps are taken similar to the ones indicated in the aforementioned roadmap.

In most cases, market operators accused of evading customs duties are not proceeded against by the public prosecutor based on the aforementioned roadmap. Accordingly, in these cases the Penalty/Fraud Coordinator will generally issue penal orders, although legally there is still the option to submit the case to the public prosecutor, based on the provisions of Article 11:3 General Customs Act read in conjunction with Article 80 General Administrative Law Act. Articles 10:5 General Customs Act read in conjunction with Article 76 General Administrative Law Act regulate penal orders in general. In determining the amount of the penalty, a significant role is played by the notion of culpability, involving a distinction between intent, gross negligence and other cases. As a rule of thumb, and as provided for by internal customs authorities guidelines, penalty amounts are reduced by the following percentages which take into account the type of culpability involved.

Culpability	Percentage/amount	Minimum amount of
Intent	50% of evaded customs duties	500 EUR
Gross fault	25% of evaded customs duties	500 EUR
Other cases	10% of evaded customs duties	250 EUR

Table 8.1. Percentage/amounts applicable for penal orders.

Sanctions are imposed for every case and not for a constellation of cases. The percentages are doubled in cases of e.g. recidivism. In case of periodically submitted customs declarations, it is possible to deviate therefrom. In such cases a penal order will, in principle, only be issued if the following three cumulative conditions are fulfilled:

- The correction for each declaration line is lower than EUR 25;
- The total correction of the periodically submitted customs declaration is lower than EUR 1.200 EUR; *and*
- The total correction is more than 0.5% of the customs debt of the periodical submitted declaration.

In case of a voluntary disclosure, a penal order will not be issued if the statute of limitation has expired or if the view on the classification of a particular good has changed. If a market operator discloses too low a customs value or an incorrect country of origin, the Penalty/Fraud Coordinator will further assess what the penalty order amount will be. The fact that the market operator has voluntarily disclosed the irregularities, will in those cases often lead to a lower penalty being imposed. Since the amount is tailored to the specific case at hand, there is no framework providing further guidance. If a company holds an AEO license and does not voluntarily disclose irregularities, this qualifies as a serious default and will be reported to the national AEO centre. This could lead to the penalty amounts being increased.

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ASPECTS OF CUSTOMS CONTROLS PERFORMED BY THE GERMAN CUSTOMS AUTHORITIES

*Benedikt Wemmer**

1. *Introduction*

This report discusses the customs controls enforced by the German Customs Authorities, with a specific focus on how these controls are used to prevent undervaluation of imported goods.

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The main focus of this report is on how the controls foreseen in the EU and the national (customs) legislative framework work out in practice ('law in action') rather than a discussion on how the controls are regulated in the legislation ('law in the books'). For this purpose, the German customs administration was asked specific questions in writing[1].

2. *Place of the customs authorities in the public domain*

The Federal Customs Administration is responsible for implementing customs law in Germany. Germany is a federal state[2]. The German administrative structure is thus a federal system, which allocates responsibilities partly to the individual federal states and partly to the federal government[3].

The customs administration in Germany is a federal authority. Accordingly, the individual federal states have no competence in the implementation of customs law.

Most tax authorities in Germany, on the other hand, are state authorities. The customs administration is therefore an independent authority and not subordinate to the general tax authorities.

National legislation in the area of customs law is also the responsibility of the federal government pursuant to Art. 73 (1) No. 5 of the German Constitution, insofar as the overriding European law leaves a regulatory area open in this respect[4]. The most important regulations on customs law at the national level are found in the German Fiscal Code, the Customs Administration Act and the Customs Ordinance.

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[1] All of the following statistical information and data, unless cited with a different source, were provided by the German customs administration upon request within the framework of the research project.

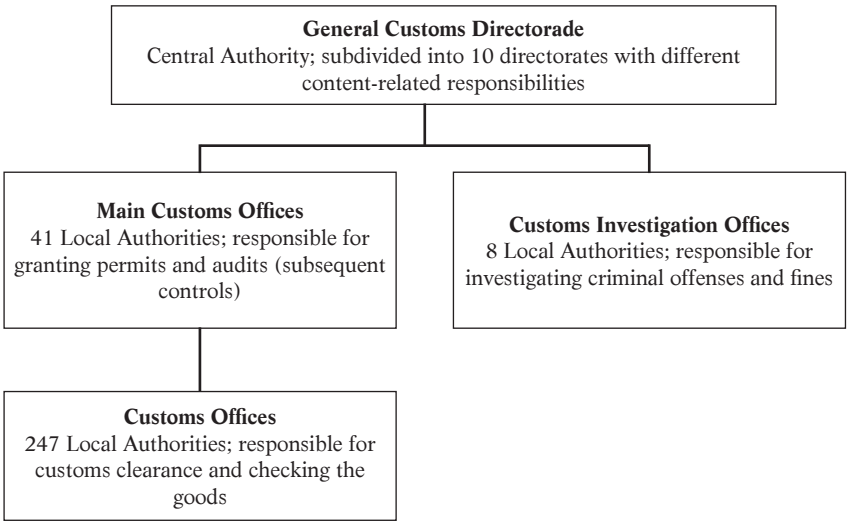
[2] See Art. 20 para. 1 of the German Constitution ("Grundgesetz (GG)").

[3] Cf. *Sachs* in Sachs, GG, Art. 20 Marg. 59-64.

[4] For example, in the area of sanctions law or administrative enforcement; see *Sachs* in Sachs, GG, Art. 73 Marg. 20-23 for detailed information on the constitutional requirement of Art. 73 para. 1 No. 5 of the German Constitution.

2.1. *Structure of the German customs administration*

The German customs administration is subject to the Federal Ministry of Finance in Berlin as the supreme authority[5]. The German Customs Administration comprises the General Customs Directorate as the supreme authority on the one hand and various local customs authorities on the other[6]. The German customs administration employs about 46,000 customs officers[7]. However, only about 25% of them[8] work in the field of customs law. This is due to the fact that the customs administration, as a federal authority with a nationwide structure, has taken on other non-customs tasks. For example, the German customs administration is also responsible for the collection and administration of motor vehicle tax, combating undeclared work or the enforcement of outstanding claims of the Federal Republic of Germany (federal bailiffs).



[5] Cf. *Wolffgang* in Wolffgang/Jatzke, UCC, Art. 5 Marg. 6.

[6] https://www.zoll.de/DE/Der-Zoll/Struktur-des-Zolls/struktur-des-zolls_node.html (15 August 2022).

[7] https://www.zoll.de/DE/Presse/Zolljahresstatistik_2021/_functions/faq_1_personal.html?nn=411222&faqCalledDoc=411222 (15 August 2022).

[8] Notice: This value is estimated. Exact numbers are not available because some areas of responsibility overlap.

2.1.1. *General Customs Directorate ("Generalzolldirektion – GZD")*

The General Customs Directorate is responsible for the operational management of the Customs Administration. It is divided into ten directorates – two central directorates and eight specialised directorates. The specialised directorates include the Customs Criminological Office, the Education and Science Centre and the Financial Intelligence Unit (FIU).

The specialised directorates responsible for customs law issues and the implementation of customs controls (including risk analysis) are presented below.

2.1.1.1. *Directorate V - General Customs Law*

Directorate V, based in Hamburg, is responsible for general customs law and exercises legal and technical supervision over the local authorities in this area. This also includes legal and technical supervision for the proper collection of import duties, for issues of customs valuation law and for the implementation of customs controls based on general customs law.

2.1.1.2. *Directorate VIII - Customs Criminological Office*

Directorate VIII of the General Customs Directorate with responsibility for the customs investigation service is a special feature. The Customs Criminological Office with its headquarters in Cologne, which existed as an independent intermediate authority within the customs administration until the establishment of the General Customs Directorate on 1 January 2016, is now managed as a functional unit within the General Customs Directorate, while retaining its legally standardised position within the network of federal German security authorities[9].

[9] See https://www.zoll.de/DE/Der-Zoll/Struktur-des-Zolls/Generalzolldirektion/Fachdirektionen/fachdirektionen_node.html;jsessionid=09523A88E1CFDE523870DE3AF63A70A1.internet402 (15 August 2022).

The Customs Criminological Office is the headquarters of the German Customs Investigation Service, whose main task is the prosecution and prevention of medium, serious and organised customs crime.

The Customs Criminological Office is also responsible for risk management and risk analysis in relation to customs controls during customs clearance.

2.1.2. *Local customs authorities*

The Customs Administration's operational tasks are performed at the local level by 41 main customs offices and 8 customs investigation offices[10]. As regional authorities, the main customs offices are responsible for the customs treatment of goods and for the authorisation and monitoring of customs-specific procedures. A total of 247 customs offices are subordinate to the main customs offices. In particular, the customs offices process customs declarations submitted and carry out the actual customs clearance. Apart from the customs offices at Germany's third-country borders (at the land border with Switzerland and at airports and seaports), there is also a comprehensive network of customs offices inland.

The eight customs investigation offices in Berlin, Dresden, Essen, Frankfurt am Main, Hamburg, Hanover, Munich and Stuttgart are also local authorities of the customs administration[11]. Among other things, they investigate criminal and administrative offences under customs law. This ensures a clear separation between customs audit procedures (with comprehensive cooperation obligations on the part of economic operators) and customs investigation procedures (with protective rights for the accused).

[10] See https://www.zoll.de/DE/Der-Zoll/Struktur-des-Zolls/Oertliche-Behoerden/oertliche_behoerden_node.html (15 August 2022).

[11] https://www.zoll.de/DE/Der-Zoll/Struktur-des-Zolls/Oertliche-Behoerden/oertliche_behoerden_node.html (15 August 2022).

2.1.3. *Other bodies involved in customs law*

In certain cases, German bodies other than the customs administration also perform customs-related tasks[12]. One example is the Chambers of Industry and Commerce ("Industrie- und Handelskammer – IHK"), which is responsible for issuing certificates of origin (non-preferential origin) according to Art. 1 (3) of the German Chamber of Industry and Commerce Act.

Apart from such exceptional cases, however, the implementation of customs law is the sole responsibility of the German customs administration.

2.2. *Customs control responsibilities*

Customs controls are predominantly carried out by the local customs authorities. Controls of goods within the framework of customs clearance are basically carried out at the 247 German customs offices. On the one hand, classical controls – such as the inspection of goods or a document check – are carried out by the customs offices during customs handling. On the other hand, there are also control units of the main customs offices that stop and control goods transports on land and at sea on their own initiative. In such cases, the first controls can also take place before the actual customs clearance.

As Art. 46 (2) UCC makes clear, customs controls, with the exception of random checks, are carried out on the basis of an electronic risk analysis[13]. This centrally conducted risk analysis of the flow of goods and of possible customs risks takes place in the General Customs Directorate[14]. Directorate VIII (Customs Criminological Office) is responsible for risk analysis and customs risk management. A special department for risk management in customs law has

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[12] *Wolffgang* in Wolffgang/Jatzke, UCC, Art. 5 Marg. 6; *Lux* in Dorsch, Zollrecht, Art. 5 Marg. 5.

[13] Cf. *Rathemacher* in Wolffgang/Jatzke, UCC, Art. 46 Marg. 68; *Felderhoff/K. Witte* in Witte/Wolffgang, Lehrbuch des Zollrechts der Europäischen Union, Marg. B2075.

[14] A definition of customs risks can be found in Art. 5 No. 7 UCC.

been set up here (Unit DVIII.A.3 - Risk Management)[15]. The findings of the electronic risk analysis are passed on to the regional main customs offices and customs offices and implemented locally. These are control proposals and recommendations only, as the Directorate VIII – unlike the Directorate V – has no direct right to issue binding instructions to the local customs authorities[16].

Subsequent inspections pursuant to Art. 48 UCC are carried out by specially trained auditors of the main customs offices. The basic rule for such an audit is that the auditor checks in favour of as well as against the taxpayer. Often, errors in the area of complex customs valuation are only discovered through subsequent checks during the audit[17]. This can, for example, be the addition of royalties according to Art. 71 (1)(c) UCC, the addition of provisions according to Art. 71 (1)(b) UCC or the determination of customs values by subordinate methods according to Art. 74 UCC.

2.3. *Special responsibilities in the area of customs value ("Bundesstelle Zollwert")*

With regard to customs value, special responsibilities are allocated in Germany. In principle, the division of work between the General Customs Directorate and the local customs offices (in particular the central customs offices and local customs offices) is as previously outlined.

Due to the complexity of customs valuation law and the importance of this for the correct levying of import duties, the Federal Customs Valuation Office ("Bundesstelle Zollwert") was created as a central information point to provide support on all questions relating to customs valuation law.

The Federal Customs Valuation Office was established in its current form on 1 February 2010 as part of the structural development in the Federal Finance Administration at the main customs of-

[15] Cf. on the historical development of this central risk analysis centre in Germany, *Wemmer* in Witte, UCC, Art. 46 Marg. 25-26.

[16] *Wemmer* in Witte, UCC, Art. 46 Marg. 31.

[17] Cf. *Pohl*, Prüfungsanordnung, 2018, pp. 25-26.

fice in Cologne. Despite the organisational connection to the local main customs office in Cologne, the central office is responsible for the whole of Germany.

Together with the General Customs Directorate (Directorate V), the Federal Customs Valuation Office is responsible for the uniform application of the regulations on customs valuation and participates in the determination and verification of the customs valuation[18]. The Federal Customs Valuation Office assumes all operational tasks. Currently, 10 customs officers work in this central office.

The Federal Customs Valuation Office provides legal opinions on the customs value of imported goods. In this context, it can be called on by customs authorities in all difficult and complex cases, in particular in the case of

- the demarcation between purchase and commission transactions
- indications of price influence due to connectedness
- the customs valuation of commissions
- the customs valuation of research and development costs
- the customs valuation of tool costs
- the customs valuation of royalties
- the customs valuation according to subordinate methods[19].

In doing so, it assists in particular with the determination of the specific criteria that may be used by importers pursuant to Art. 73 UCC.

In addition, it also provides assistance to customs offices (in writing and by telephone) and economic operators (by telephone only) on all other customs valuation issues. If necessary, it also supports the examination service, which carries out subsequent customs controls in accordance with Art. 48 UCC[20]. Furthermore, it conducts training events on customs valuation law for the Education and Science Centre of the Customs Administration (Directorate IX of the General Customs Directorate), thus ensuring adequate further training in customs valuation law.

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[18] Cf. German administrative instruction on customs value, para. 126.

[19] Cf. *Krueger* in Dorsch, Zollrecht, Art. 74 Marg. 42; see also German administrative instruction on customs value, para. 126

[20] Cf. *Pohl*, Prüfungsanordnung, 2018, 27.

The decisions of the Federal Customs Valuation Office are not binding on the requesting customs offices. The dutiful discretion of the responsible official continues to apply. Nevertheless, the decisions and legal assessments of the Federal Customs Valuation Office are generally followed by the respective customs offices.

In summary, the Federal Customs Valuation Office has a significant influence on the legal assessment of customs valuation issues in Germany; for example, by creating leaflets or contributing to binding service regulations (especially service regulations on customs value; E-VSF Z 5101). However, the implementation of strategic control measures or focus area controls is not the responsibility of the Federal Customs Value Office, but of the risk management department DVIII.A.3 of the Customs Criminological Office (General Customs Directorate).

3. *Risk analysis, customs controls and tools*

The legal requirements for customs controls in Germany are presented below. Then, the implementation of customs controls and the risk analysis used for this purpose will be discussed.

3.1. *Legal requirements for customs controls in Germany*

Customs controls constitute state action in the form of an interference with the rights of the respective economic operator or the person being controlled. Customs controls are sovereign interventions. Therefore, they may only be carried out by designated public service officials. According to Art. 64 (1) of the Federal Civil Service Act, customs officers are sworn in and bound by law[21]. This is also to ensure impartiality and fairness. For example, according to Art. 3 (1) of the German

[21] Customs officers have to take the following oath of service: "I swear to uphold the German constitution and all laws applicable in the Federal Republic of Germany and to conscientiously fulfil my official duties".

Constitution, all persons are to be treated equally before the law[22]. Unequal treatment of what is essentially the same and also equal treatment of what is essentially unequal is thus fundamentally prohibited[23].

As already standardised in European law, such interventions must also be proportionate under German law. This follows from the German constitution (principle of the rule of law)[24]. The principle of proportionality states that an intervention must be necessary, suitable and appropriate (i.e. not excessively burdensome, not unreasonable)[25]. If, for example, there is a milder but equally suitable means of carrying out a control, this must be chosen.

If a customs control contains a decision within the meaning of Art. 5 (39) UCC, the person concerned can lodge an appeal against it pursuant to Art. 44 (1) UCC[26]. Like German law, European customs law provides for a two-stage appeal procedure in Art. 44 (2) UCC[27]. Since the structure is subject to the EU member states, the general national tax law provisions pursuant to Art. 347 to 367 German Fiscal Code ("Abgabenordnung – AO") apply[28]. In the first step, an appeal against a decision under customs law can be lodged with the customs authority. Such appeals are decided by the competent main customs office in a special department[29]. Accordingly, the appeal will be processed by the same authorities that issued the decision, but never by the same person.

If the customs authority rejects this appeal, in a second step an action can be filed with the locally competent fiscal court (cf. Art. 40 (1) of the Fiscal Court Code ("Finanzgerichtsordnung – FGO") and Art. 100 (1) sentence 2 of the FGO)[30].

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[22] Cf. *Nussberger* in Sachs, GG, Art. 3 Marg. 69.

[23] Cf. *Jarass* in Jarass/Pieroth, GG, Art. 3 Marg. 10-12.

[24] See Art. 1 Para. 3, Art. 20 Para. 3 of the German Constitution; see also *Sachs* in Sachs, GG, Art. 20 Marg. 74-78.

[25] Cf. *Sachs* in Sachs, GG, Art. 20 Marg. 149-154; see also *ECJ*, 18.09.1986, 116/82, Collection of case law of the Court of Justice and the Court of First Instance 1986, 2519 (2544) Marg. 21.

[26] Cf. *Ruesken* in Dorsch, Zollrecht, 2020, Art. 44 Marg. 20.

[27] *Rathemacher* in Wolffgang/Jatzke, UCC, Art. 46 Marg. 47.

[28] Cf. *Ruesken* in Dorsch, Zollrecht, 2020, Art. 44 Marg. 20.

[29] The appeal is therefore not decided by a German court, but by a national customs authority.

[30] *Rathemacher* in Wolffgang/Jatzke, UCC, Art. 46 Marg. 48.

The deadline for filing an appeal is one month after notification of the decision. The deadline for filing a complaint with the responsible German tax court is one month after the announcement of a negative appeal-decision by the customs authorities.

However, such appeals against customs controls have no suspensive effect. Customs controls can therefore not be delayed. In justified cases, interim legal protection with an application for suspension of enforcement is available.

The fiscal courts are independent of the customs administration and are not subject to any duty to issue instructions. Decisions of the fiscal court can be legally reviewed by appeal to the Federal Finance Court. According to Art. 97 (1) of the German Constitution, all judges in Germany are independent and subject only to the law[31]. This includes both applicable national law and directly applicable EU law. Any influence by government or administration as well as coordination with authorities or ministries is inadmissible.

3.2. *Types of customs controls*

In principle, all the customs controls listed as examples in Art. 46 (1) UCC are conceivable in Germany[32].

- Inspection of goods
- Taking of samples and specimens
- Verification of the accuracy and completeness of the information provided in an application or notification and of the existence, authenticity, accuracy and validity of documents
- Audit of traders' accounts and other records
- Control of means of transport, luggage and other goods carried by or on persons

However, the German customs offices check the information in customs declarations mainly through document checks and inspections of goods. If necessary, documents submitted can also be checked or expert opinions on the classification of imported goods

[31] Cf. *Kment* in Jarass/Pieroth, GG, Art. 97 Marg. 2-11.
[32] Cf. *Rathemacher* in Wolffgang/Jatzke, UCC, Art. 46 Marg. 24.

can be requested. Such classification reports are prepared by the Education and Science Centre of the General Customs Directorate. This Directorate has employees with appropriate qualifications (e.g. engineers, biologists or chemists)[33].

The German customs administration does not have a percentage breakdown of document checks and inspections.

3.3. *Risk analysis*

Customs controls on the import of goods are carried out in Germany by the central customs offices and the local customs offices as well as by mobile control units.

The number of customs import declarations (standard customs declarations, simplified customs declarations and entries in the accounts) in 2019 to 2021 was as follows:

Year	Number of customs import declarations
2019	123,983,794
2020	120,254,866
2021	146,540,389

Data and statistics on the exact number of customs controls carried out are not available to the German customs administration. It is estimated that the control rate is less than 1%[34] of all declared import consignments. This includes all types of controls (both physical and purely digital).

The selection of customs controls to be carried out is based on risk hits of the central risk profiles and local risk notices, as well as on discretionary decisions of the clearance service (so-called random checks).

According to Art. 46 (2) of the UCC, customs controls – with the exception of random checks – are primarily carried out on the basis

[33] The Education and Science Centre is also responsible in Germany for the issuance of binding customs tariff information.

[34] Notice: This value is estimated. Exact numbers are not available because the German customs administration does not collect precise data. This seems realistic considering the number of available customs officers and the total volume of customs declarations in Germany.

of a risk analysis. The percentage cannot be precisely quantified. Customs offices are encouraged to implement the controls contained in the measures of the central risk profiles and local risk notices.

3.3.1. *Risk management department DVIII.A.3*

With the introduction of the General Customs Directorate on 1 January 2016, Unit DVIII.A.3 - Risk Management was created at the Customs Criminological Office. The unit is responsible for the implementation and further development of the common framework for risk management according to Art. 46 (3) UCC[35].

The Risk Management Unit itself prepares central risk notices which are passed on to the customs offices in Germany. It is also responsible for monitoring and coordinating local risk analysis. The local risk analysis is carried out at the local customs authorities and takes particular account of local risks.

If, for example, a customs declaration is rejected because basic information is missing, a local risk profile can be used to ensure that the new customs declaration is not processed without an examination.

Customs offices are required to implement both the control recommendations of the central risk profiles and those of the local risk notices.

Both the risk profiles and the way they are compiled are confidential. In order to ensure the functionality of the risk analysis, especially the avoidance of circumvention possibilities, a communication of the concrete reasons to individual economic operators is not provided for.

An economic operator therefore does not learn whether the control carried out is a mere spot check by the local authority or is based on a previously carried out risk analysis. Accordingly, there is no legal protection against a risk analysis taking place in the background, but only against the respective individual case decision.

The central risk analyses of the Customs Criminological Office focus on the following legal or thematic areas in terms of customs law:

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[35] Cf. *Wemmer* in Witte, UCC, Art. 46 Marg. 25.

- Registrations Post and Courier
- Anti-dumping duty/countervailing duty
- E-commerce, classification (without anti-dumping)
- Preferential origin
- Turnover tax/import turnover tax
- Customs value
- Customs tariff classification
- Additional duty USA

Other areas of law deal with various excise duties and non-fiscal topics such as prohibitions and restrictions or foreign trade law. The German Customs Administration does not collect statistics on the number of hits of risk profiles sorted by individual risk areas or their percentage weighting in relation to random checks.

3.3.2. *Risk analysis methods and tools*

The risk analysis goes through the phases of information collection, information processing or information condensation, evaluation, communication of identified risks (creation of risk profiles), and overall assessment of the risk profiles.

3.3.2.1. *Information collection*

The risk analysis is triggered by a detected irregularity in the form of a tip-off or based on a suspicion that a certain area could pose a potential risk under customs law. In this process, own research approaches are pursued and also external information from customs offices, other EU Member States, the EU Commission, OLAF etc. is processed.

3.3.2.2. *Information processing or condensation*

The incoming information is condensed with further data and information. Various national and European databases are queried. The risk analysis is mainly carried out on the basis of these database

queries, the results of which are processed and evaluated in spreadsheet form. In particular, retrograde searches in the search database ATLAS (a mirrored version of the German customs clearance system - ATLAS) provide information on possible customs law effects[36]. The most important risk factors are, on the one hand, conspicuous participants (especially declarants, consignees and consignors), and on the other hand, conspicuousness and statistical shifts in the area of customs value, code number and country of origin or consignment.

Technologies from the fields of artificial intelligence and blockchain have not been used so far. The processing is carried out manually by the respective customs officers of the risk management department DVIII.A.3 (specially trained data analysts). Currently, only "classical" statistical methods have been used. This includes some evaluations in tabular form using Microsoft Excel, analyses with Oracle Business Intelligence, or self-developed software applications.

3.3.2.3. *Evaluation*

After the information has been consolidated, the findings are evaluated and placed in relation to the potential danger (e.g. possible tax/import duties evasion, violation of foreign trade regulations or violation of prohibitions and restrictions). The burden on economic operators caused by controls is also taken into account. For example, the AEO status of an economic operator is included in the assessment. Therefore, the burden of customs controls is lower for AEOs. Nevertheless, an AEO can of course also be checked.

3.3.2.4. *Communication*

The findings are then communicated to the customs clearance offices at local level. Risk profiles are created for this purpose. These are transferred to the national customs clearance system ATLAS via an interface. If the data entered for a customs declaration matches the risk parameters, this risk profile is displayed to the customs officer at the

[36] *Wellen*, Risikomanagement 105 (107).

respective customs office[37]. So it doesn't matter where (locally) a customs declaration is made or which customs officials check the case.

In addition to the existing risk, a concrete recommendation for action (e.g. physical inspection of the goods) is also communicated.

Whether this recommendation is implemented is at the discretion of the respective customs officer who checks the consignment. However, this doesn't represent a divergence between law and practice, but rather a safeguarding of the requirement of proportionality (see Art. 46 (1) UCC)[38].

The control results at local level are also recorded in the ATLAS customs system. By means of a corresponding code, it can be communicated whether the risk indicated in the risk profile has been confirmed or not. It is also communicated whether a control was carried out at all, or whether the customs office refrained from a control in the context of its dutiful discretion remit in the individual case.

3.3.2.5. *Overall assessment of the risk profiles*

Risk profiles are subject to regular monitoring, at latest every six months, or at shorter intervals if necessary. In this process, the risk hits generated in the German customs clearance system ATLAS are statistically evaluated (total number of hits, breakdown of hits by declaration type, customs office, etc.) and assessed in terms of content to determine whether the suspected risk has been confirmed or not.

This evaluation decides whether an existing risk profile is extended, changed or discontinued[39].

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[37] *Wellen*, Risikomanagement, 105 (108).

[38] Art. 46 para. 1 UCC stipulates that only necessary controls are carried out. Accordingly, there needs to be a way to ignore an obviously irrelevant risk profile when a control is not required.

[39] *Wellen*, Risikomanagement, 105 (108).

3.3.3. *Spot checks at local level*

As shown, in addition to customs controls based on a previously conducted risk analysis, spot checks are also carried out by the local customs authorities.

These random checks serve as a corrective and ensure that an economic operator must expect to be checked for every goods transaction[40].

This also includes customs controls of customs value. The German customs administration does not yet collect statistics on the content of these spot checks.

3.3.4. *Special controls on customs value*

As shown, customs controls on customs valuation can be initiated both by a risk analysis and by a spot check.

There is no general differentiation between different types of goods. However, the focus is generally on high-risk goods, and they are treated accordingly. In other respects, risk management is based on the specific circumstances of the individual case, e.g. particularly conspicuous participants.

For certain areas (e.g. textiles), statistical values are determined on the basis of the clearances in the German clearance system ATLAS and used to support clearance.

A price per kilogram is often determined[41]. The use of such average values was also confirmed by German courts[42].

The German customs administration considers the use of guideline values to be a suitable instrument for filtering out particularly conspicuous customs value declarations and thus justifying initial doubts about a declared customs value.

These average values are used for parameter control of risk profiles and can also be used to support customs valuation decisions

[40] *Wemmer* in Witte, UCC, Art. 46 Marg. 22a.

[41] See Decision of the Duesseldorf Finance Court 4 September 2015 - 4 K 2365/14 Z EU.

[42] See e.g. Decisions of the Duesseldorf Finance Court of 14 November 2018 - 4 K 339/18 Z EU, of 10 July 2013 - 4 K 1701/12 Z and of 4 September 2015 - 4 K 2365/14 Z, EU.

according to a procedure laid down in detail in a guideline (textiles and footwear) or a leaflet (all other goods). As part of the customs value determination according to the fall-back method (Art. 74 (3) UCC), such values are used as a basis for estimates by the customs administration. For example, the Duesseldorf Finance Court determined that if no further information on the respective goods is available (for example based on internet research) an estimate by the customs authorities based on average prices is permissible[43].

However, these statistical values are not available to economic operators since the data is subject to tax secrecy[44].

In summary, one can say that such statistical values are primarily used as a risk indicator to combat undervaluation. As a last resort, however, these statistical values can also be used by the customs administration to determine the customs value.

4. *Connection with other tax(es) departments and OLAF*

As described above, only partial cooperation exists between tax and customs authorities in Germany due to the federal structure. In particular, the authorities inform one another about facts of interest to the other authority.

4.1. *Common valuation methods (direct taxes and customs value)*

When carrying out customs controls to verify the customs value, no valuation methods from other (direct) taxes are used. Rather, the customs administration works autonomously in these cases according to its own valuation standards based on the applicable customs law.

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[43] Decision of the Duesseldorf Finance Court of 14 November 2018 - 4 K 339/18 Z EU.

[44] The average prices result from all goods values declared in the past.

4.2. *Cooperation in the area of transfer pricing*

Closer cooperation between the tax and customs authorities called for by the WCO in the Guide to Customs Valuation and Transfer Pricing has to date been very limited in Germany.

4.2.1. *Joint awareness training*

So far, there are no joint training courses or seminars to raise mutual awareness between tax and customs authorities on the topic of transfer pricing and customs valuation. So far, no employees of the tax authorities have taken part in training events on customs valuation law organised by the Federal Customs Valuation Office at the Education and Science Centre of the Customs Administration.

4.2.2. *Information exchange*

The Federal Customs Valuation Office receives notification of concluded Advanced Pricing Agreements from the German Federal Central Tax Office[45].

The notification is made automatically. The Federal Customs Valuation Office does not know whether the Federal Central Tax Office informs the economic operator in such cases.

In addition, the Federal Central Tax Office notifies the Federal Customs Valuation Office once a year – also automatically – of data from the "LIFE" database. In this database, the Federal Central Tax Office records foreign companies that are subject to limited tax liability in Germany with regard to licensing income and have applied for a refund or exemption in order to avoid double taxation.

The Federal Customs Valuation Office does not receive any information about tax audits that have been carried out. Furthermore, it does not communicate any information on customs valuation decisions to the tax administration.

[45] This is a German central authority for tax issues, also responsible for international coordination and exchange with other authorities.

4.2.3. *Particular expertise in transfer pricing and customs value*

The Federal Customs Valuation Office has transfer pricing experts who are proficient in both transfer pricing and customs valuation.

4.2.4. *Relationship between customs value adjustments and transfer pricing rule*

Customs valuation adjustments are not related to transfer pricing rules. Notwithstanding this, customs valuation can provide supplementary assistance in determining arm's length prices[46].

The Federal Customs Valuation Office does not notify the tax authorities of customs valuation adjustments. Similarly, the tax authorities do not notify the Federal Customs Valuation Office of any transfer pricing adjustments.

Transfer pricing adjustments can lead to customs valuation adjustments if such adjustments become known to the customs administration. This depends on the type of adjustment (price increase or decrease by the seller), the product-related nature of the adjustment, the contractual arrangements that led to the adjustment and whether the adjustment relates to imported goods.

4.3. *Current implementation of the ECJ's Hamamatsu decision*

The ECJ ruling in the "Hamamatsu" case confirmed the German customs administration's administrative opinion on the customs valuation treatment of lump-sum (i.e. not product-related) subsequent transfer pricing adjustments in the form of credit notes. Such credits cannot lead to a refund of import duties.

The German customs administration therefore continues to assume that subsequent increases in customs value due to transfer pricing adjustments will be levied, but subsequent reductions will not be refunded, unless a product-related or at least duty

[46] See Section 4.7 of the administrative principles on transfer prices, published with the BMF decree of 14 July 2021 IV B 5 - S 1341/19/10017:001.

rate-related breakdown of the subsequent price adjustment is possible.

The Federal Fiscal Court – as the highest German financial court – recently decided the "Hamamatsu" case, finally[47]. The plaintiff's appeal was rejected as unfounded.

A subsequent reimbursement of paid import duties is therefore excluded in this specific case. The customs value of the goods declared during the year is determined using the fall-back method according to Art. 74 (3) UCC and does not provide for any subsequent adjustments.

Apart from the specific individual case, general principles can also be derived from this judgment.

According to this case law, the determination of customs value using the transaction value method (Art. 70 UCC) is fundamentally ruled out. Rather, subsequent price adjustments should not be taken into account and goods declared during the year should be valued using the subordinate methods in accordance with Article 74 UCC.

Accordingly, an APA would be irrelevant for the customs valuation.

In addition, the distinction between subsequent collection and reimbursement in the case of subsequent price adjustments (administrative practice of the German customs administration) would have to be omitted, since subsequent adjustments are not relevant according to this decision.

So far, however, the German customs administration has not commented or positioned itself on this decision. It is therefore unclear what conclusions of general importance are to be drawn from this judgment.

4.4. *Cooperation between national customs authorities/cooperation with OLAF*

The Customs Administration cooperates with other customs authorities as well as EU institutions on the basis of applicable law, such as Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission.

[47] Decision of the German Federal Fiscal Court of 17 May 2022, VII R 2/19 (The reasoning behind the judgment was not published until September 2022).

The German customs administration informs OLAF of transactions for which the conditions are met which are provided for in Art. 17 or Art. 18 of Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. In addition, cooperation with other Member States takes place in accordance with Title II of the above-mentioned Regulation (administrative assistance without a request, so-called spontaneous communications).

The exchange with OLAF and with other Member States usually takes place via the Commission's AFIS IT platform (Anti-Fraud Information System)[48]. According to the German customs administration, the exchange works without any problems. Best practices are also shared here.

Finally, risk-relevant information is also exchanged between the national customs risk management offices via the RIF database (Risk Information Form) (cf. Art. 46 (5) UCC)[49].

5. *Customs valuation rulings*

The Federal Customs Valuation Office provides customs valuation information (by telephone and in writing) to customs offices and also to economic operators (by telephone only).

Year	Art	Number of expert opinions
2018	Assistance with customs inspections	73
	Support in legal proceedings	7
	Support in appeal proceedings	19
	Support for subsequent collection, remission, reimbursement	3
	Other requests from customs offices	54

[48] Compare the exchange of risk-related information according to Art. 45 Para. 5 UCC *Wemmer* in Witte, UCC, Art. 46 Marg. 38.

[49] Cf. *Rathemacher* in Wolffgang/Jatzke, UCC, Art. 46 Marg. 72.

Year	Art	Number of expert opinions
2019	Assistance with customs inspections	99
	Support in legal proceedings	13
	Support in appeal proceedings	17
	Support with subsequent collection, remission, reimbursement	4
	Other requests from customs offices	55
2020	Assistance with customs inspections	99
	Support in legal proceedings	10
	Support in appeal proceedings	23
	Support with subsequent collection, remission, reimbursement	13
	Other requests from customs offices	64

In addition, the Federal Customs Valuation Office answered a large number of enquiries by e-mail or telephone (in 2018: 542; in 2019: 529 and in 2020: 527 telephone enquiries). The information provided by telephone also includes information provided to economic operators.

5.1. *Non-binding customs valuation decisions*

The information and legal opinions of the Federal Customs Valuation Office are not binding on the local customs authorities. Economic operators cannot legally rely on information provided by the Federal Customs Valuation Office by telephone. Customs valuation information provided by the Federal Customs Valuation Office always relates to the individual case and is not published.

5.2. *Collective decisions related to Transfer Pricing*

Due to the German federal administrative structure and the clear separation between customs and tax authorities, no combined APA/customs valuation ruling has been provided so far. The tax and

the customs valuations are carried out independently, within the respective remits.

5.3. *Decision support for difficult customs value constellations*

The General Customs Directorate (Directorate V), together with the Federal Customs Valuation Office, has prepared information sheets on difficult customs valuation law topics and published them as annexes to the Service Regulations on Customs Valuation Law in E-VSF Z 5101.

These include in particular the fact sheets Purchasing Commission (Annex 1), Sales Commission (Annex 2), Provisions (Annex 3) and Royalties (Annex 8). These fact sheets are intended to facilitate work with certain difficult topics of customs valuation law and to ensure a uniform procedure in Germany. They are operational working aids with clarifying case examples.

5.4. *Binding customs value information*

From the point of view of the Federal Customs Valuation Office and the General Customs Directorate, the preparation of a proposal for the introduction of binding customs valuation information at EU level is welcomed. A final German position will be worked out in the context of the upcoming discussions in the competent EU bodies.

6. *Adjustments to customs values*

Determining the correct customs value is one of the obligations of the declarant of a customs declaration. According to Art. 70 (1) UCC, the primary method for determining the customs value is the so-called transaction value method. This method is used in Germany for over 90% of all goods imports[50]. The transaction value method is based on

[50] Cf. *Vonderbank*, Zollwert, 2018, 35.

the price actually paid or payable for the imported goods[51]. This information is usually only available to the importer of the goods. Even unusually low prices are to be recognised under the transaction value method, provided they correspond to the economic circumstances and there is no fraudulent intent[52]. A low price alone does not give the customs administration the right to apply a different customs value.

However, a very low price compared to other goods may lead the customs administration to question the accuracy of the information in the customs declaration.

Reasonable doubts within the meaning of Art. 140 UCC-IA must be based on verifiable or comprehensible facts (e.g. indications from the risk analysis, manipulations on invoices or in the accounts, value appraisals and expert opinions, results based on requests for administrative and legal assistance, additional documents to the contrary, e.g. purchase contract, order documents, etc.)[53].

In particular, the average prices determined by the risk analysis are often used as a reference basis for this.

In the event of such reasonable doubts, the customs authority may require further evidence to confirm the declared price as part of the customs value control. A mere suspicion that the price is too low in light of all experience does not normally satisfy the requirements of Art. 140 UCC-IA. In the case of non-commercial imports, the customs authorities usually proceed generously[54].

Likewise, omitted or incorrect additions according to Art. 71 UCC and deductions according to Art. 72 UCC can lead to the customs authorities subsequently adjusting the customs value. Finally, there is also a need to adjust a customs valuation according to the subordinate methods pursuant to Art. 74 UCC in the event of incorrect calculations[55].

The German customs administration does not yet collect statistics on how often customs values are adjusted.

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[51] See *Lyons*, EU Customs Law, 319-320 for detailed information on the difference between normal price and the transaction value.

[52] The ECJ recently confirmed this in its judgment of 22 April 2021, C-75/20; "*Lifosa*", ECLI:EU:C:2021:320.

[53] Cf. German administrative instruction on customs value, para. 119.

[54] Cf. German administrative instruction on customs value, para. 119.

[55] Cf. See *Lyons*, EU Customs Law, 341-345 on the alternatives to the Transaction Price.

The following are the main reasons, in the view of the Federal Customs Valuation Office, for declared customs values being corrected by the customs authority:

- No or incorrect consideration of supplementary factors pursuant to Art. 71 UCC, in particular royalties, tooling and development costs, as well as transport costs.
- No or incorrect consideration of split-off purchase price components pursuant to Art. 70 (2) UCC, in particular analysis and quality control costs.
- Price influence due to interconnectedness or non-consideration of subsequent transfer pricing adjustments.
- Under-invoicing of imported goods.
- Incorrect determination of the customs value according to the subordinate methods, in particular for the import of prototypes, samples and repair goods.

The German customs authorities strictly adhere to the sequence criteria set out in the UCC when correcting customs values.

If it is not possible to apply the transaction value method (Art. 70 UCC), the customs value is determined in the order prescribed by Art. 74 (1) UCC.

The following subordinate methods are most frequently used:

1. conclusion method (Art. 74 (3) UCC);
2. calculated value method (Art. 74 (2) (d) UCC);
3. deductive method (Art. 74 (2) (c) UCC).

The German customs authorities were unable to provide further statistics.

7. *Right to be heard*

The right to be heard is a general legal principle for "good administration", which is also recognised in Union law (cf. Art. 41 (2) of the Charter of Fundamental Rights)[56]. It describes the right of every person to be heard before an adverse measure is taken against

[56] Cf. *Craig* in Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, Art. 41 Marg. 41.12-41.13.

him or her. According to Art. 22 (6) UCC, this principle also applies to all customs legislation.

Accordingly, the German customs administration generally grants the opportunity to comment on the facts of the case before an adverse measure is imposed. This is a comprehensive legal entitlement granted by the German customs administration.

Therefore, customs officers are required by various binding administrative instructions to grant the right to be heard. An example here is the administrative regulation "Reimbursement/Remission of Import Duties"- para. 134:

"The parties involved must first be given the opportunity to comment both in the context of processing the appeal and in the reimbursement procedure".

The right to be heard can also be granted in the context of customs controls.

If, for example, a customs control carried out gives rise to doubts about the correct amount of the customs value (suspicion of under-invoicing based on a significant deviation from average values), the economic operator can take the initiative and dispel existing doubts by submitting business documents before import duties are collected by the competent main customs office by means of a new decision. If the trader does not exercise the right to be heard, it is also possible to raise these arguments in subsequent opposition proceedings (legal remedy pursuant to Art. 44 UCC). The right to be heard is granted exclusively by the competent local customs authorities. Supporting agencies, such as the Federal Customs Valuation Office or the Risk management department (DVIII.A.3) of the General Customs Directorate, do not grant a legal hearing, as these agencies do not issue decisions directly to economic operators. The information, opinions, instructions of these offices only have an internal administrative effect.

The importer's explanations are taken into account before the respective customs valuation adjustment decision is taken. If, in the importer's opinion, this does not happen to an adequate extent, this can also be asserted in the appeal procedure pursuant to Art. 44 UCC. If the importer cannot or does not wish to submit further evidence confirming a very low customs value as economically correct, the customs

administration can use nationally determined average prices ex officio for the customs value adjustment. An estimate by the customs authorities is therefore always made on the basis of all available data.

As a rule, a legal hearing takes place in writing due to its complexity. Transmission can be by letter and also by digital transmission (e.g. by e-mail). In some cases, the right to be heard can also be realised in the context of a meeting; for example, during the final meeting of an audit pursuant to Art. 48 UCC[57].

8. *Sanction and penalty regime*

In the absence of European legislative competence in the area of sanctions for customs violations, the sanction and penalty regime is formulated under national law[58]. According to Art. 3 (3) German Fiscal Code ("Abgabenordnung – AO"), customs duties are equated with taxes in Germany. Accordingly, the provisions of German criminal tax law and the sanctions applicable to taxes apply also to customs offences. There is therefore no separate realm of customs criminal law. Rather, criminal tax law is transferred to the area of customs and applied mutatis mutandis.

8.1. *Criminal sanctions*

The relevant offences in the customs area are those listed in Art. 369 (1) AO[59].

- Customs evasion pursuant to Art. 370 AO.
- Violation of a prohibition pursuant to Art. 372 AO.
- Trade in tax-evaded goods pursuant to Art. 374 AO.

Any person who provides the customs authorities with incorrect or incomplete information about material facts or fails to inform

[57] Cf. *Pohl*, Prüfungsanordnung, 2018, 76-77.

[58] *Kuechenhoff* in Kuechenhoff/Schoenknecht, Lehrbuch Abgabenrecht für Zölle und Verbrauchsteuern, 2019, margin 1352.

[59] Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (311).

the authorities about material facts in breach of his or her duty and thereby reduces customs duties or obtains an unjustified financial advantage for himself or herself or another person is liable to prosecution for customs evasion under Art. 370 (1) AO. An attempted offence, too, is punishable.

The classic smuggling of goods therefore also falls under this penal provision[60].

The deliberate undervaluation of customs values with the aim of saving import duties is punishable under Art. 370 AO as customs evasion, with up to ten years in prison or a fine. The specific penalty depends on the circumstances of the individual case and the amount of import duties evaded. The German customs administration does not collect statistical data on the exact number of penalties imposed due to under-invoiced customs values.

Criminal liability under Art. 370 AO (customs evasion) also extends to foreign import duties (cf. Art. 370 (6) AO)[61]. The fact that in such cases it is not the German authorities but foreign authorities that have received incorrect or incomplete information or have been left in ignorance, in breach of their duty, is irrelevant according to German case law[62]. In addition to the other EU states, these regulations also apply to Iceland, Lichtenstein, Norway and Switzerland[63]. Thus, for example, under certain circumstances mentioned in the German law and while abiding by the rule against double punishment, an evasion of customs duties committed in France can also be punished as customs evasion in Germany. However, double punishment for the same offense is out of the question[64]. If a sanction were imposed in one of the countries mentioned, a sanction in Germany

[60] See *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (318) for detailed information on the special features of commercial, violent and group smuggling according to Art. 373 AO as an aggravated version of customs evasion.

[61] Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (317).

[62] This is what the German Federal Court of Justice decided. E.g. in the judgment of 21 February 2001, 5 StR 368/00 or in the judgment of 8 November 2000, 5 StR 440/00.

[63] Cf. *Kuechenhoff* in Kuechenhoff/Schoenknecht, Lehrbuch Abgabenrecht, 2019, Marg. 1494.

[64] Such an approach would be neither in accordance with the German constitution nor with the applicable EU law (cf. 'ne bis in idem' principle).

would be ruled out according to this regulation (subsidiary application).

Customs criminal law also includes the "violation of a prohibition" pursuant to Art. 372 (1) AO. According to this, anyone who imports, exports or transports goods contrary to a prohibition is liable to prosecution[65]. Accordingly, this is not primarily a matter of fiscal interests, but rather of security interests. The penalty is based on that of customs evasion under Art. 370 (1) and (2) AO.

A prosecution as a crime in Germany presupposes that there is a so-called initial suspicion. An initial suspicion exists if there are sufficient factual indications of a prosecutable criminal offense[66]. In this case, the customs authorities are obliged to investigate. Such investigations are no longer made by the main customs offices but by the customs investigation offices. Since these actual indications must also relate to subjective action (intent/negligence), it is often difficult to make a distinction here.

From a practical point of view, this can therefore lead to a certain "grey area" in which criminal prosecution is subject to interpretation on a case-by-case basis. However, as soon as there are clear indications of a possible criminal offence, the authority must act and begin an investigation. As soon as criminal proceedings have been initiated, the person involved is no longer obliged to cooperate. Accordingly, customs audits (Art. 48 UCC) would also be suspended if investigations with the same content were initiated.

Finally, the existence of a criminal offense also has an effect on the statutory limitation period for subsequent collection of import duties. According to Art. 103 (1) UCC, the usual limitation period for import duties is 3 years. If a crime has been committed, this period is extended to 10 years (see Art. 103 (2) UCC). The 10 years correspond to the statute of limitations in German criminal tax law. It is the responsibility of the customs authorities to determine whether a criminal offense has been committed. In this respect, neither the initiation of criminal proceedings nor a conviction is required[67].

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[65] Cf. *Kuechenhoff* in Kuechenhoff/Schoenknecht, Lehrbuch Abgabenrecht, 2019, Marg. 1548.

[66] Cf. Art. 152 (2) of the German Code of Criminal Procedure.

[67] Cf. *Alexander* in Witte, UCC, Art. 103 Marg. 9.

Due to the obligation to prosecute all crimes, an investigation is always initiated.

8.2. *Administrative offences*

The area of administrative offences is also regulated in Germany in the Fiscal Code (cf. Art. 377 ff. AO)[68]. If, for example, the perpetrator of a customs evasion offence lacks intent, the offence may be punished under the heading of reckless customs evasion (Art. 370 AO). Fines of up to EUR 50,000 are provided for.

If an undervaluation is not intentional but reckless, an administrative sanction is possible as this may be treated as an administrative offence pursuant to Art. 378 AO.

According to Art. 382 of the German Fiscal Code (AO), the endangerment of import and export duties is also sanctioned by a fine. It is therefore not necessary for import duties to have been reduced. A risk may exist, for example, in the case of offences in breach of regulations that apply to the placing of goods in a customs procedure[69]. Negligent action on the part of the offender is sufficient. However, the offence must be fully realised. In contrast to criminal offences, an attempt is not sufficient[70].

8.3. *Voluntary self-disclosure of misconduct under customs law*

According to Art. 371 AO, it is possible for persons to obtain immunity from prosecution who voluntarily notify the customs authorities of customs misconduct that constitutes customs evasion (Art. 370 AO)[71].

This creates an incentive to reverse illegality and to cooperate with the customs authorities (so-called bridge to legality). This regu-

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[68] Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (320).

[69] Cf. *Kuechenhoff* in Kuechenhoff/Schoenknecht, Lehrbuch Abgabenrecht, 2019, Marg. 1643.

[70] Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (320).

[71] Cf. *Kuechenhoff* in Witte, UCC, Art. 42 Marg. 22; Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (314).

lation also originates from German criminal tax law and also applies to criminal offenses under customs law.

Pursuant to Art. 378 (3) AO in conjunction with Art. 371 AO, this possibility also exists in respect of reckless customs evasion pursuant to Art. 378 AO. However, there is no provision for self-disclosure in the case of offences under Art. 372 AO ("violation of a prohibition")[72].

The German customs administration does not collect data on the annual number of such voluntary declarations exempting from sanctions.

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[72] Cf. *Lux/Moeller/Pickett/Retemeyer*, GTCJ 2018, 310 (315).

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ASPECTS OF CUSTOMS CONTROLS PERFORMED BY THE SPANISH CUSTOMS AUTHORITIES

*Jorge Juan Milla Ibáñez**

1. *Introduction and methodology*

This paper focuses on making an exhaustive analysis of the customs controls carried out by the Spanish customs authorities, with particular reference to the use of these controls to prevent the undervaluation of imported goods.

The main objective of this report is to demonstrate how the controls are actually carried out in Spain. In order to achieve this objective, we have carried out a series of interviews with customs officials from the Spanish Customs Authorities, through a structured questionnaire that was approved in advance.

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2. *Place of the customs authorities in the public domain*

The Tax Agency (*Agencia Estatal de Administración Tributaria*, AEAT) was created and effectively established on 1 January 1992[1].

It was set up as a public entity linked to the then Ministry of Economy and Finance through the former State Secretariat for Finance and Budget. As a public entity, it has its own legal regime different from that of the General State Administration, which, without prejudice to the essential principles that should govern all administrative actions, gives it a certain autonomy in terms of budget and personnel management.

The Tax Agency is entrusted with the effective application of the State tax system, as well as those resources belonging to other Spanish public administrations or the European Union whose management is entrusted to it by law or by agreement. Customs falls within the competencies of the Tax Agency. The name of this unit is 'Department of Customs and Excise' (*Departamento de Aduanas e Impuestos Especiales*), and it is the department dedicated to valuation issues in Spain.

The territorial organisation and the attribution of functions in the Customs and Excise Area underwent several changes in 2021[2]. The following stand out in particular:

1. With regard to authorisations, competence in this matter is attributed to the Department of Customs and Excise when another Member States have to intervene in the authorisation, while in other cases this competence is attributed to the territorial bodies.
2. There is a central body for promoting the investigative function based on the use of new technologies and to deal with complex frauds carried out through organisations, in-

[1] Article 103 of Law 31/1990, of 27 December, Budgets for 1991. The complete structure of the AEAT can be found at: https://www.agenciatributaria.es/static_files/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Presentacion/Organigrama/Organigrama_AEAT_es_es.pdf

[2] Resolution of 31 January 2021, of the Presidency of the Tax Agency, on the organisation and attributions of functions in the Customs and Excise Area (Spanish Gazette n. 13, 15 January 2021, pages 3826 to 3850).

cluding international ones. This is the National Customs and Excise Investigation Office that reports to the Department of Customs and Excise, which uses the potential of new technologies and efficiently organises international cooperation within the scope of the Union and with third countries, in matters of customs and taxes under the Department's jurisdiction. The creation of units specialised in investigation procedures is also promoted for the same purpose in the territorial sphere. The coordination of these units through the central body increases the efficiency of the investigative function.

3. The competencies in matters of a posteriori verification of customs declarations are assigned to a single person in charge, through a functional area in the Regional Customs and Excise Units.
4. Regarding the post-clearance control of certain tariff benefits granted to the importation of products from the Canary Islands and aids for the introduction of such products from the rest of the customs territory of the European Union, for reasons of efficiency, the post-clearance control, within the scope of the powers of the Customs and Excise Area, will be handled by the Regional Customs and Excise Unit of the Special Delegation of the State Tax Administration Agency of the Canary Islands, regardless of the tax domicile of the beneficiary.
5. In a gradual process of improving the control of customs declarations at the time of customs clearance, the decentralised offices of the Regional Units and Customs and Excise Tax Administrations are given authority at the national level to initially dispatch such declarations, when their control does not imply a modification of the data declared by the interested party.
6. The new organisational model provides that in each of the bodies made up by the Regional Unit, its decentralised headquarters and its Customs and Special Tax administrations, there may be Teams and Units, to which functions are attributed in relation to the phases of the administrative pro-

cedure, which are authorised to sign the related acts, except for the inspection procedure, to which the provisions of its specific regulations apply. The Teams, therefore, will be competent to initiate, where appropriate, the instruction and resolution of the procedures in relation to the matters entrusted to them, except in relation to the inspection function. The Units will be responsible for initiating, where appropriate, the investigation and formulating the corresponding resolution proposal. The Teams and Units will have the same powers in relation to sanctioning procedures that may arise from the administrative procedures with which they deal.

The Customs and Excise Units and Teams integrated into the Areas may carry out the following actions:

- The initiation, instruction and resolution of the authorisations falling within its competence.
- The reassessment or re-examination procedures established in the customs legislation that falls within its competence.
- Those of the procedures of annulment, revocation or suspension derived from the actions mentioned in the line above regarding customs matters.
- The initiation and instruction of sanctioning files that could derive from the actions entrusted to them.

Customs officials are State officials (civil servants) that have their own Statute that regulates their rights and obligations. In the performance of their functions, they must act, among other things, with impartiality and maintain the mandatory duty of confidentiality, but they do not have to take an oath.

As indicated above, the Department of Customs and Excise is part of an autonomous body, the AEAT, which reports to the Ministry of Finance[3]. However, there are no meetings between the legislator and customs officials (nor between the judiciary and customs officials), notwithstanding the fact that customs officials participate

[3] Currently, the official name of this ministry is the Ministry of Finance and Public Administration (Ministerio de Hacienda y Función Pública).

in the regulated processes of elaboration or modification of the legal framework.

An administrative review of the decisions taken by the customs authorities is made before lodging an appeal with a Court of Law, which consists of two types of claim: the Appeal for reconsideration against Customs and Excise acts (optional) in which the authority that issued the resolution will have the competency to deal with and resolve the appeal against the resolution, and Economic-administrative complaints against Customs and Excise acts (mandatory in order to subsequently take the case to court), where the Economic-Administrative Courts, which are independent from the Tax Agency, will review the decisions of the customs authority. We will review these two claims in section 7 (Right to be heard).

3. *Risk analysis, customs controls and tools*

The customs controls carried out by the Spanish customs authorities are based on risk analysis, following the risk criteria established by EC Decision C(2018)3293. However, in the interviews with the customs authorities, they do not disclose what the main risk factors are as this is considered "sensitive" information. However, we do know that this analysis is coordinated centrally (AEAT) and takes into account the guidelines set by the Union Customs Code, in particular article 46. What the customs authorities do confirm is that from the results obtained through the risk analysis procedures (e.g. an annual review of the effectiveness of the procedures), a follow-up is carried out in order to provide feedback to the system that allows it to constantly adapt to the reality of commerce.

Customs authorities do not specify the methodology used (e.g. sample checking, AI, blockchain technology) but point out that there is an internal IT department that provides support to the departments. Among other things, the IT department develops various tools to simplify the task of risk analysis based on various techniques for using information, ranging from the development of tools

for processing information to machine learning techniques. This department is called the Taxation IT Department (*Departamento de Informática Tributaria*). One of its main functions is the development, implementation and maintenance of information systems in the field of customs and excise duties, as well as collaborating with the European Union and the public and private sector. This department has a general subdirectorate called "Customs and Excise Applications" (*Subdirección General de Aplicaciones de aduanas e impuestos especiales*).

In the case of a specific inspection, the debtor is not informed about the risk analysis or the criteria that led to the inspection being carried out. Instead, the AEAT prepares an annual Tax Control Plan that is restricted, although it publishes the general criteria that it uses and an Annual Report to assess the results of the actions developed by the Tax Agency.

The general criteria published indicate the sectors of activity that the actions will focus on for that year[4]. This is done by the General Directorate of the Tax Agency, for the customs valuation of goods, in the Official Gazette at the beginning of every year. For example, in the 2022 guidelines, published on 26 January 2022[5], special reference is made to customs value, transfer pricing or risk analysis as follows:

- Controls will be carried out on customs declarations and their elements that have a direct impact on the settlement of taxes associated with introducing goods into the customs territory of the European Union, with special monitoring of declarations indicating unusually low customs values.
- In order to reinforce the actions to control the import and export of goods subject to additional controls, risk analysis techniques will be adopted, and physical inspections or scanners will be used to examine the goods.
- In the specific case of prior transfer pricing agreements, the most of them are managed centrally by specialised person-

[4] This form of communication is provided for in article 116 of the General Tax Law.

[5] This instruction can be found at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-1453.

nel, thereby facilitating greater consistency in the criteria applied, as well as improved administrative efficiency.

In terms of controls, the authorities confirm that random checks of the customs value of imported goods are carried out (as established by the Union Customs Code). As regards the types of control, we note that documentary and physical controls are carried out. As regards the latter, and depending on the type of irregularity being investigated, different measures can be adopted, both non-intrusive and intrusive, by unloading part or all of the goods, with the possibility of removing samples. This type of control can be extended to the address(s) of the person(s) involved in the importation. The system registers the type of control carried out, and statistics on the type of control can be extracted. The only statistics available are those included in the Annual Reports. For 2020 (the last annual report published), we find the following results of documentary customs controls and physical examinations of goods:

	IMPORT		**EXPORT**	
	Documentary	**Physical**	**Documentary**	**Physical**
PROTECTION (external health and animal health, phytosanitary measures)	16,044	2,373	183,784	351
CITES (Convention of International Trade in Endangered Species of Wild Flora and Fauna)	7	63	42,428	340
WASTE/OZONE (products that deplete or destroy the ozone layer)	2	74	12,726	80
CULTURAS ASSETS	0	0	5,351	629
QUALITY AND SAFETY OF THE PRODUCTS	8,998	199	0	0
SAFETY PROHIBITIONS/ EMBARGOES (restrictive measures on imports and exports)	10,634	14,063	212,241	468
PRECURSORS AND CHEMICAL PRODUCTS	20,077	104	45,173	134
TOTALS	**55,762**	**16,876**	**501,703**	**2,002**

Source: AEAT. 2020 Annual Report.

Furthermore, during 2020, 21,959 containers were scanned, for both imports and exports, to verify that the declared load coincided with the radiographic imaging of the goods inside the container, and to check for double bottoms or hidden compartments. X-ray checks have also continued to be put in place to detect the illegal trafficking of nuclear and radioactive materials, as well as contaminated goods.

The focus of customs controls (customs valuation, classification, country of origin, compliance with licensing procedures) will depend on the risk indicated (by risk analysis) for each shipment, classifying it according to the type of irregularity it is intended to deal with.

Regarding the customs value of imported goods, the type of control is adapted to the characteristics of the shipment in question and the level of risk that has been associated with it using statistical tools, which, as we have previously mentioned, are not accessible. In addition, the AEAT states that it uses a statistical tool for risk analysis to determine the guarantee amounts and/or to support value adjustment decisions, at the national level. As regards the possible guarantee, reasons must be provided to justify the amount set and should correspond to the final value that could arise from the result of the controls. For this reason, the guarantee amount must be based on criteria and data that can be communicated to the potential debtor and that meets the evaluation criteria established by the Union Customs Code.

When it comes to the valuation of certain items considered "hard to value", such as royalties and license rights, customs valuation is based on the main and secondary methods established by the European Union regulations. At the national level, there is a department specialised in value issues that deals with doubts about valuation. However its advice is only available internally. This is the Area of Control and Risk Analysis of Foreign Trade of the General Subdirectorate of Inspection and Investigation (*Área de Control y Análisis de riesgos de Comercio Exterior de la Subdirección General de Inspección e Investigación*).

Likewise, courses are held and notes are issued on issues that are particularly complex.

4. *Customs value adjustments*

In Spain, customs valuation is carried out in accordance with the methods established by the regulations. When the declared customs value does not comply with the valuation methods used, the declared value is adjusted. However, the customs authorities do not provide any information on the percentage of cases.

There are four customs channels or circuits:

- Green: not considered a risk for controls being carried out on the goods at the time the documentation is presented. It does not imply that it is correct as it may be subject to subsequent verification.
- Yellow: indicates that authorisation from another border control agency is missing or may be missing.
- Orange: the documents are reviewed. If an error or possible error is detected, a physical control is not necessarily carried out. If the documentation is sufficient, the settlement proposal can be made. If doubts arise when examining the documentation but not all the elements are available in order for a decision to be made, the goods will pass to the red channel.
- Red: the Customs Authority has decided to physically check the goods. There are several procedures for doing this:
    - Container emptying: the cargo is taken to a warehouse and completely emptied.
    - Scanning: the goods undergo inspection via a scanner to check the load without the need to open the container.
    - Sampling: the container is placed in a closed area; the inspector opens it and selects a sample (package) at random.

The clearance procedure will last, in general, 2-4 days unless the goods require special inspection, in which case processing could be delayed depending on the type of inspection required (between 8 and 15 days).

No specific information was provided for the purpose of this report on the percentage of controls and the average duration of dispatches, as this this is considered sensitive information by the Spanish customs authorities.

Common adjustments are due to not all the items making up the customs value being included. These are mainly:

- Transportation expenses.
- Royalties.
- Goods and services supplied by the importer.

Other reasons are related to the relationship between the price paid or payable and the existence of well-founded doubts regarding the customs value declared in terms of Art. 140 of the Commission implementation regulation.

The Spanish customs authorities strictly follow the sequence criteria established in the UCC and the hierarchical order established therein. There is no data available regarding the frequency of use of one method or another. The authorities state that the method used will depend on the specific case, the information available and the type of imported merchandise, especially for the purpose of being able to apply the value of identical or similar merchandise.

Spanish customs authorities, in line with what the CJEU ruled in case C-291/15, admit that they have "reasonable doubts" as to the accuracy of the declared customs value when the declaration of a customs value is significantly lower than the average. Although this is an important element that raises doubts regarding the veracity of the declared customs value, it may also be accompanied by other factors. There is no general answer regarding what constitutes sufficient evidence for the customs authorities not to have doubts about the veracity of the declared price as a transaction value and thus from deviating from the transaction value as a customs value. The evidence must be analysed on a case-by-case basis and cannot be assessed independently but as a whole, so that the assessment of all these elements must be taken into account to dispel or confirm doubts.

With regard to post-clearance control, there are six review procedures:

a) Data verification procedure for ENS, EXS, summary declarations and manifests.
b) Procedure for the verification of data relating to customs declarations: procedure used to verify with the declarant any discrepancy with declared information.

c) Limited verification procedure in respect of customs declarations: procedure used to perform a limited scope inspection.
d) Procedure for rectification of customs declarations.
e) Declaration procedure initiated by a customs declaration.
f) Inspection procedure.

Regarding these procedures, we should clarify that the method of determining the customs value could be altered with the limited verification procedure and with the inspection procedure. If the declaration procedure initiated by a customs declaration or the data verification procedure indicate that the valuation method has to be changed, this change must be implemented by initiating a limited verification procedure or an inspection procedure.

The customs value could be altered by any procedure (for example, by deciding to include an adjustment of value based on data recorded by Customs).

Finally, we should mention that in some cases there are joint inspections planned between the customs authority and other tax authorities. The relationship between taxes has always been a pending issue in Spain due to the difficulty of coordinating tax matters as disparate (in terms of objectives and purpose) as income tax and customs duties. Specifically, the expiration term of the post-clearance control is 3 years, and the limitation period of internal taxes (e.g. corporate tax) is 4 years. Regarding this matter, the Spanish Supreme Court had repeatedly pointed out the necessary coordination of the valuation of related party transactions in both areas, direct taxation and customs, as the only possible solution because both are based on the price of the specific transaction, which has to be at "arm's length". As a response to this case law, the actual wording of Article 18 of the Corporation Tax Law[6], which regulates related-party transactions, in section 14, provides that the market value for the purposes of Corporate Income Tax, Personal Income Tax or Non-residents Personal Income Tax, does not produce effects with respect to other taxes unless expressly provided otherwise. Vice ver-

[6] Regulation in force since 1 January 2015, by the repealing provision of Art. 1 of Law 27/2014 dated 27 November.

sa, the same occurs in the opposite direction with respect to Corporate Income Tax, Personal Income Tax or Non-residents Personal Income Tax; that is, the taxes are in watertight compartments with no reciprocal influence.

5. *Links with other tax departments and OLAF*

Carrying out customs checks on customs values does not establish a connection with the valuation methods used for other taxes (e.g. local files, master file, APA, audit files). Valuation methods for other taxes are only taken into account if they comply with the provisions of customs regulations.

In the Guide to Customs Valuation and Transfer Pricing, the WCO calls for a closer co-ordination between tax authorities and customs authorities. To achieve this, courses, conferences and seminars on mutual awareness between tax and customs authorities are held. This coordination is extremely easy in Spain given the internal organisation of the AEAT.

It is worth mentioning the way in which information is shared between the tax authorities and customs authorities. In fact, they have common databases that share all the information (local files). In addition, and as an exercise of transparency, all this information is incorporated into a verification file that is available to the debtor.

However, there are no transfer pricing specialists in the customs control/valuation team and vice versa. Although it is true that those responsible for customs valuation have a knowledge of transfer prices and vice versa, this cannot be enough.

If we consider the relationship between the customs value adjustment and the transfer pricing rules, which are generally endorsed by the OECD, and whether the reported customs valuation adjustment is shared with the transfer pricing department and vice versa, we find that, unlike customs valuation, the commonly accepted methods used for transfer pricing are not applied in hierarchical order, so the adjustments do not necessarily have to be the same. Taking this into account, efforts are being made to apply the same

principles for the purposes of determining the value of customs and the tax bases for direct taxation.

In the Hamamatsu case (C-529/16), the CJEU rules that it is not possible, in a normal declaration procedure, to make a posteriori positive or negative adjustment, because of the transfer pricing adjustments. It is clear that in these cases, the operator had to take advantage of a simplified declaration procedure currently provided for in articles 166 ff. of the UCC or the valuation agreement of Art. 73 UCC, and this is how it is interpreted by the customs authorities. In Spain, the declarant in related party transactions will be authorised to use the simplified declaration and then lodge a supplementary declaration within the time limits provided. 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". Thus, in essence, this procedure allows the filing of customs declarations with a provisional value that is subsequently revised once the transfer price adjustments have been defined and the resulting value is final.

Regarding relations between the Spanish customs authorities and OLAF, we must distinguish between cases in which additional information is needed and cases of cooperation. On the one hand, in those cases in which additional information is needed in order to determine the correct customs value, the cooperation of other customs authorities, or of the Commission through its competent bodies, can be requested. On the other hand, in terms of cooperation with OLAF, we highlight two types of cooperation, one related to specific imports in which additional information is needed, and joint operations in which the Member States and OLAF participate with the aim of intensifying controls and cooperation over periods of time.

We found an example of this kind of cooperation when the Spanish Tax Agency, in a joint operation with the *Guardia Civil*[7], Europol and OLAF, dismantled a major criminal organisation, organised on four levels, dedicated to the illicit trafficking of green-

[7] The *Guardia Civil* is one of the two national security forces, together with the National Police Corps (Policía Nacional). It is military in nature and performs, among other things, police functions, reporting to the Ministries of the Interior and Defence.

house refrigerant gases in Spain. 27 people were detained during this operation, including the network's ringleaders, and three were under investigation for alleged crimes, including money laundering, belonging to a criminal organisation, smuggling, and offences against the Treasury and Social Security, the environment, public health, and workers' rights.

Finally, in relation to the routine use of the information provided by the exporting country and the proactivity of the Spanish customs authorities in requesting the information, our sources are extremely sceptical. They point out that the information regarding the country of export can be used as long as it offers sufficient reliability, since the value declared for export in a third country does not have to be the true customs value of the merchandise. Depending on the third country, cooperation is not always productive.

6. *Relationship with the customs authorities*

6.1. *Customs valuation ruling*

In Spain, it is not possible to request a combined APA/customs valuation ruling, and the customs valuation ruling is not published. However, it is possible to obtain a customs valuation resolution, following the content specified in the UCC, which regulates the possibility of, and the procedure for, obtaining valuation agreements in certain cases. To this end, an operator can submit a non-binding query[8] to the General Directorate of Taxes (*Dirección General de Tributos* - DGT) regarding customs valuation.

[8] In the case of queries, its procedure is regulated in Royal Decree 1065/2007 of 27 July, which approves the General Regulations for the actions and procedures of tax management and inspection and the development of the common rules of tax application procedures. This Royal Decree can be found at: https://www.boe.es/buscar/act.php?id=BOE-A-2007-15984

The General Directorate of Taxes[9] will exercise the following powers:

- The analysis and design of the global public revenue policy, in relation to the tax system.
- The proposal, elaboration and interpretation of the regulations of the general tax regime and of the tax figures not expressly attributed to other bodies of the Ministry of Finance and Public Administration, as well as the performance of economic and legal studies necessary for the fulfilment of these tasks.
- The study of issues related to the collection and the economic effects of the different taxes, and the proposal of the corresponding fiscal policy measures, as well as the preparation of the fiscal benefits budget.
- The negotiation and application of agreements to avoid double taxation, those concerning the tax regulations contained in international treaties and the work related to the Organisation for Economic Cooperation and Development and the European Union in the tax field.
- The study and preparation of measures relating to international tax agreements and special tax agreements, in coordination with other Administrative bodies, and to support actions related to relations with the European Union and other international organisations of which Spain is a part.
- Carrying out the tasks required by the tax harmonisation policy in the European Union.

In addition, we should take into account that, at present, within the EU, work is being done on the possibility of issuing binding information as already exists for tariff classification or origin.

[9] According to Article 4 of Royal Decree 769/2017 of 28 July, which develops the basic organic structure of the Ministry of Finance and Public Administration and modifies Royal Decree 424/2016 of 11 November, which establishes the basic organisational structure of ministerial departments.

6.2. *Trusted party schemes*

Although there are no specific programmes in internal regulations for interaction with merchants other than authorised economic operators (AEO), there are various forums with operators that deal with various customs issues. In the same way, prior to the application of regulatory changes, informative sessions are organised with the sectors involved.

These AEO programmes are used to improve customs valuation compliance. For example, one of the issues to verify relates to the internal procedures for determining the customs value and the improvements that can be incorporated. Spain now has 1,070 of these Operators after having granted this certification to 58 new operators in 2020. The Tax Agency will check the information provided by the interested party in the Questionnaire that has to be submitted together with the application, to determine whether the necessary requirements for obtaining the authorisation are met, without prejudice to the procedures that could be initiated later based on the information obtained during the audit. This, however, cannot be considered an inspection by Customs, as it is a specific AEO audit procedure.

The verification actions performed during the course of 2020 (the last annual report published) to control authorisations and formal obligations, refunds, the finalisation of systems and review of documents carried out in management control of external trade during 2020 reached 634,170 (as a reference, the figure in 2019 was 704,799 actions).

7. *Right to be heard*

Based on the practical experience of the Spanish customs authorities and not on what the regulations say, we asked in which cases and at what moment the customs controls are carried out. Customs debtors – following Article 22.6 UCC – have the right to explain the divergence between the statistical indication and the value they declared. Our research confirms the strictest compliance with the article mentioned above. The Spanish customs

authorities, before adopting a decision that harms applicants, inform them of the grounds on which they intend to base their decision. The authorities have an obligation to answer. In case of inadmissibility of the alleged, such decision will always be motivated and must be agreed and notified to the petitioner within three months following the filing of the petition. Motivation is very important as the taxpayer must know the basis, circumstances or motives of the decision, which must be taken with the necessary amplitude for his/her due knowledge and subsequent defence. This is because the motivation of the administrative act is connected with the fundamental right to effective protection and the right of defence[10]. Communications are received electronically with total security and integrity, either by means of notification by electronic appearance (electronic access by the interested parties to the content of the corresponding administrative actions, provided that there is a record of such access), or by using the Single Enabled Electronic Address (*Dirección Electrónica Habilitada Única - DEHú*). This last type of notification will be compulsory for the persons and entities expressly referred to in Royal Decree 1363/2010 of 29 October, which regulates the cases of compulsory administrative notifications and communications by electronic means within the scope of the Tax Agency, which are basically companies and other entities.

The applicant can submit comments within the established period of 30 calendar days, which starts from the date on which he/she receives or is considered to have received, the communication. The procedure will end with the appropriate ruling, depending on whether the arguments presented have been accepted. The interested party will be notified of the ruling.

In relation to the administrative review of customs decisions, the UCC recognises the right to appeal of anyone who considers that a decision of the customs authorities regarding the application of customs regulations affects their rights, as long as it affects them directly and individually, making a generic reference to the regulations of the member states in Article 245.

[10] See Spanish Supreme Court Ruling of 12 May 1999 and 25 June 1999.

Consequently, the appeal procedures of the acts of settlement of customs debt in Spain are regulated in Title V of the General Tax Law[11] and Royal Decree 520/2005, which approves the General Regulation of Administrative Revision (RGR)[12]. These are:

- The Appeal for reconsideration against Customs and Excise acts *(recurso de reposición contra actos de Aduanas e Impuestos Especiales)*.
- Economic-administrative claim *(reclamación económico-administrativa)*.

The Appeal for reconsideration against Customs and Excise acts: the basis of this appeal is that the administrative body that issued the act has another opportunity to consider it, before submitting the dispute for external prosecution to the managing Administration and, where appropriate, to the judicial authorities.

The Economic-administrative claim procedure is divided into three main phases: initiation, processing and termination.

An appeal can be lodged against the economic-administrative resolution before appearing before a Court of Law (contentious-administrative appeal) within 3 months, by filing an extraordinary appeal for review against the final decisions of the tax administration and against the final resolutions of economic-administrative bodies in the event of any of the following circumstances:

- That essential documents for the decision on the matter appear subsequent to the act or resolution under appeal;
- That the resolution has been influenced by documents or testimonies declared false by a final court ruling, prior or subsequent to that resolution.
- That the act or resolution was issued as a result of prevarication, bribery, violence, fraudulent machination, or other

[11] The General Tax Law (Ley General Tributaria) can be accessed at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186.

[12] The Royal Decree 520/2005, which approves the General Regulation of Administrative Revision (Real Decreto 520/2005, de 13 de mayo, por el que se aprueba el Reglamento general de desarrollo de la Ley 58/2003, de 17 de diciembre, General Tributaria, en materia de revisión en vía administrativa) can be accessed at: https://www.boe.es/buscar/act.php?id=BOE-A-2005-8662.

punishable conduct and has been declared so by virtue of a final court ruling.

The deadline for the decision is:

- 6 months for abridged proceedings with single-person organisations (as defined by articles 245-248 of the General Tax Act).
- 1 year for single or first-instance proceedings (as defined by articles 235–240 of the General Tax Act).

The deadline for the ruling is six months in the case of abridged proceedings with single-person organisations (regulated by articles 245-248 of General Tax Act 58/2003 of 17 December), and one year in the case of single or first-instance proceedings (articles 235-240 of the General Tax Act) from the ordinary appeal to an intermediate appellate court (Article 241 of the General Tax Act) and from the extraordinary appeal for review (Article 244 of the General Tax Act).

8. *Sanction and penalty system*

8.1. *Sanctions and penalties*

The sanction and penalty system in Spain is regulated in the General Tax Law, the Spanish Penal Code[13], the Organic Law 12/1995 of 12 December on the Repression of Smuggling[14] and Law 11/2021 of 9 July on measures to prevent and combat tax fraud[15].

In the Spanish legal system, where there is no specific legislation for customs law except for smuggling[16], there are two levels of repressive measures:

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[13] The Spanish Penal Code (Organic Law 10/1995, of 23 November) can be reviewed at: https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444.

[14] The Organic Law 12/1995 of 12 December, on the Repression of Smuggling, can be reviewed at: https://www.boe.es/buscar/act.php?id=BOE-A-1995-26836.

[15] This Law can be found at: https://www.boe.es/buscar/act.php?id=BOE-A-2021-11473&p=20211012&tn=1#ad.

[16] Section 3 of the General Tax Law examines the specific system of – administrative – infringements and penalties, criminal offences and punishments, in customs law matters.

a) Administrative infringements: These are decided by the administration and are appealable to the administrative law courts. In terms of customs law, they normally take the form of monetary fines, while additional penalties of various types are also permitted.
b) Criminal offences: These are decided by the criminal courts and may include imprisonment as well as additional penalties such as monetary fines or other auxiliary punishments. When the administration suspects that a crime may have been committed, it is required to stop administrative processes and refer the case to the competent jurisdiction or to the Public Prosecutor.

In this report, 'infringement' is used to refer to administrative infractions and 'penalty' is used to refer to the legal consequences of those infractions. Criminal behaviour is referred to as a criminal offence and the legal sanction for it is known as a punishment. Criminal behaviour can only be determined to be such in a criminal court case.

Penalties in Spain are classified as mild, serious, or very serious. Each infringement is classified separately. In order to classify an infringement, several circumstances are taken into account, such as whether information was hidden from the Tax Administration or whether fraudulent means were used. The pecuniary penalties can be for the legally established fixed amount or proportional, between 50% and 150% of the base of the sanction, according to the graduation criteria indicated in the law. The main penalty will derive from failing to comply with the obligation to submit the declarations or documents necessary to carry out a settlement in a complete and correct manner. Since the entry into force (11 July 2021) of Law 11/2021 of 9 July on measures to prevent and combat tax fraud, the minimum amount of the penalty rises to EUR 600 for presenting a summary declaration provided from in Article 127 of the UCC that is incomplete, inaccurate or which contains false information. Infringements will not be considered smuggling, although they may constitute a criminal offence.

Illicit behaviours will be regarded as an administrative infringement or as a criminal offence depending on the value of the goods involved. A criminal offence is committed when the amount defraud-

ed exceeds EUR 120,000. In the case of criminal offences against the Treasury of the European Union, a criminal offence is committed when the amount exceeds EUR 50,000, although with very low sanctions[17]. Therefore, declaration errors or differences in criteria with the Public Treasury should not entail criminal liability, provided that there has been no concealment of economic information. In any case, it is always possible to carry out a voluntary regularisation, and hence avoid criminal liability, if this is done before the Administration has notified the taxpayer of the initiation of inspection actions or a complaint is filed by the Public Prosecutor's Office or the Attorney for the defrauded Administration. Article 208.1 of the General Tax Law provides that the administrative procedure for imposing a penalty must be dealt with separately from the procedure for determining a tax (customs) debt, except where the debtor waives the separate proceeding.

It is noteworthy that the law does not follow the standards for customs valuation, and that the amount of duties or taxes is not considered while valuing the items. Instead, Article 10 of Organic Law 6/2011 of 30 June, which modifies Organic Law 12/1995 of 12 December on the repression of smuggling (*Ley Orgánica 6/2011, de 30 de junio, por la que se modifica la Ley Orgánica 12/1995, de 12 de diciembre, de represión del contrabando*) outlines the precise methods for valuation for the purposes of crimes.

As regards penalties, tax offences will be punished with the following joint penalties:

- Penalty of imprisonment from one to five years.
- Fine of one to six times the amount defrauded.
- Accessory measures: loss of the possibility of obtaining subsidies or public aid and the right to enjoy tax or Social Security benefits or incentives for a period of three to six years.
- Penalties may be reduced in case of cooperation.

Regarding the statute of limitation in Spain, this is consistent with Article 103 (2) UCC. Indeed, Article 259 (3 (a) of the General

[17] Where the amount defrauded does not reach EUR 50,000 but is above EUR 4,000, the punishment will consist in three months to one year in prison or a pecuniary penalty of between 100% to 300% of the amount defrauded.

Tax Law establishes that the notification of a customs debt shall be extended in the case stated in Article 103 (1) UCC to a period of 5 or 10 years. The reason for this double extension is that the wording of Article 259 (3) (a) links the extension with the time provided for the prescription of the offence against the Treasury of the European Union, counted from the date of the debt, which will depend on the prison time of the punishment. And there are two situations. One, if the amount defrauded exceeds 50,000 euros, and the other, if the amount exceeds 600,000 euros. In the first case, the prescription for the crime will be 5 years and, in the second one, the prescription will be 10 years. Therefore, we must conclude that the current statute of limitation in Spain is 5 or 10 years, depending on the amount defrauded, according to Article 131 (1) read in conjunction with Articles 305 (1) (3), 305 (bis) (1) and 306 of the Spanish Penal Code.

8.2. *Special cases in relation to the settlement of customs debt in cases of crime against the Public Treasury (Art. 259 General Tax Law)*

When the Tax Administration notices signs of a crime against the Public Treasury, it will refer the case to the competent jurisdiction or to the Public Prosecutor and refrain from carrying out the settlement if any of the following occur:

- When, as a result of the investigation or verification, the amount of the settlement could not be determined precisely, or it would not have been possible to attribute it to a specific taxpayer.
- When the administrative settlement could be in any way detrimental to the investigation or verification of the fraud.

When the case is referred to the competent jurisdiction or to the Public Prosecutor, the term for the settlement and notification of the customs debt to the debtor will be governed by the following regulations:

- When the settlement of the customs debt is possible, it will be calculated from the date on which the debt originated and the debtor was notified in the period of 5 or ten years according to

the type of offence against the Treasury of the European Union.

- When the settlement of the customs debt is not possible or the settlement has to be adjusted to the amount established in the criminal proceedings, the term to calculate the settlement and notify the debtor will be three years. The amount will be computed from the moment in which the judicial authority initiates the case without secrecy for the parties in person or, as the case may be, from the moment in which the judicial resolution that puts an end to the criminal procedure reaches finality.

In the sense of the 'ne bis in idem' principle, in the event that a sanctioning procedure has been initiated by the Tax Agency, it will be understood to be concluded, in any case, at the moment it is referred to the competent jurisdiction or to the Public Prosecutor, without prejudice of the possibility of initiating a new sanctioning procedure, if applicable. In any case, the conviction of the judicial authority will prevent the imposition of an administrative fine for the same acts.

In cases in which no crime is finally detected, the tax administration will initiate, if appropriate, the administrative sanctioning procedure in accordance with the facts that the courts have considered proven.

To sum up, two aspects are important to clarify: first, administrative penalties often consist of monetary fines, although Spanish punishment for customs tax-related criminal offences typically includes a pecuniary penalty in addition to a jail sentence; and second, because the punishment for the criminal offence already includes a monetary component, administering a double punishment in this situation would be particularly unreasonable.

8.3. *Smuggling*

Whether the offence of smuggling is committed will depend on the specific case and the amount.

An offence of smuggling applies in the following cases:

1. Importing or exporting, as well as trading, possessing or circulating non-community legal trade goods without comply-

ing with the customs formalities by presenting them for customs clearance or accrediting their lawful importation, respectively.
2. Allocating goods in transit for consumption without having complied with community regulations on customs matters.
3. Importing or exporting, as well as trading, possessing or circulating stagnant goods (currently only tobacco products) or prohibited goods, as well as wild fauna and flora in danger of extinction, without complying with legal requirements.
4. Removing goods from Spanish territory that make up the Spanish Historical-Artistic Heritage without due authorisation.
5. Exporting weapons and defence material without proper authorisation.

As long as the following amounts are reached:

- In cases 1) and 2), when the value of the goods, merchandise, or effects is equal to or greater than EUR 150,000, either in a single action or even considered separately.
- In cases 3), 4) and 5), when the value of the goods, merchandise or effects is equal to or greater than EUR 50,000 (in the specific case of tobacco, when it is equal to or greater than EUR 15,000), either in a single action or even considered separately.

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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

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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.

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

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1. *Background*

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

* The paper contains the preliminary result of a legal research programme – ECCE European Common Customs Evaluation (https://site.unibo.it/ecce) – sponsored by the EU Commission, and is based on the proceedings of the seminar held in Valencia on 23 November 2021.

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

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

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

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

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

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

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

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

[2] Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, *OJ* L. 269, 10.10.2013, 1-101.

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

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

1.1. *Transfer Pricing*

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

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

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

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

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

1.3. *EU customs law*

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

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

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

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

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

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

[5] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, *OJ* L. 343, 29.12.2015, 558-893.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *The first step: TCCV Commentary 23.1*

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

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

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

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

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

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

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

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

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

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

[10]

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

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

3.1. *The ICC Policy Statement*

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

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

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

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

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

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

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

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

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

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

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

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

3.2. *The WCO Guide*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. *The EU perspective*

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

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

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

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

4.1. *The ECJ Hamamatsu case*

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

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

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

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

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

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

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

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

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

4.2. *The possible repercussions of the Hamamatsu case*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.1. *Spain Administrative Practice*

5.1.1. *The Spanish Customs authority*

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

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

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

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

5.1.2. *Before Hamamatsu*

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

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

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

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

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

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

5.1.3. *After Hamamatsu*

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

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

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

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

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

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

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

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

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

5.2. The Italian Case

5.2.1. *The Italian Customs authority*

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

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

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

5.2.2. *Before Hamamatsu*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2.2.4. *Corrections and adjustments*

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

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

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

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

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

5.2.3. *Practical issues*

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

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

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

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

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

5.2.4. *After Hamamatsu*

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

Therefore, the situation remains unchanged.

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

5.3. *The Dutch Case*

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

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

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

5.3.2. *Before Hamamatsu*

5.3.2.1. *Legislation*

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

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

5.3.2.2. *Jurisprudence*

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

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

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

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

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

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

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

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

5.3.3. *After Hamamatsu*

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

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

5.4. *The German Case*

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

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

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

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

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

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

5.4.2. *Before Hamamatsu*

5.4.2.1. *Legislation*

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

5.4.2.2. *Jurisprudence*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4.3. *After Hamamatsu*

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

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

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

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

6. *General appreciation of the national practices*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2. *Art. 73 authorisation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Customs duties will be levied retroactively if the pre-adjustment

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

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

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

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

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

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

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

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

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

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

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

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

8. *Conclusions*

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

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

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

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

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OPPORTUNITIES AND CHALLENGES OF HARMONISATION AND COORDINATION OF LEGAL RULES ON CUSTOMS CONTROLS WITH *ACQUIS COMMUNAUTAIRE*: THE CASE OF ALBANIA

*Rezarta Tahiraj**

1. *Introduction*

Efficiency and safety. These key words characterise the qualitative analysis of the customs system. They also apply, obviously, when carrying out a comparative analysis between multiple systems, for example the European system and the system of the Republic of

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Albania. As Albania is an EU candidate country, such a comparative analysis is a matter of priority in view of the results of the analysis in terms of the harmonisation between both customs systems from the very start.

Albania, whose goal is to become a Member State of the European Union, has made considerable efforts in recent years to bring about profound changes in every sector, and the customs system itself has not remained unaffected. Albania officially submitted its application for membership of the European Union on 24 April of 2009, but had to wait until 2014 to receive the status of candidate country[1]. From that date until 19 July of 2022, when EU accession negotiations began[2], Albania introduced and implemented important changes to its customs system. Changes that have, in turn, impacted on European Union rules. For example, in 2009 when Albania applied to become an EU Member State, the EU Regulation No. 450/2008 was currently in force[3] and it was subsequently replaced by the Regulation No. 952/2013[4] which establishes the Union Customs Code, which has an implementing Regulation No. 414 of 8 March 2021[5].

The ensuing image is that of a Europe that is evolving and of an Albania that is following closely in its wake in order to reflect its every changing advance. The part played by the customs system in

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[1] Council of the European Union 2014, "Council Conclusions on Albania, 24 June 2014", General Affairs Council Meeting, Luxembourg 24 June 2014.

[2] Council of the European Union, "Council Conclusions on the Enlargement, Stabilisation and Association Process – Albania and North Macedonia", document 7002/20 "ELARG 20 - COWEB 35", Brussels, 26 March 2020; Council of the European Union, "Intergovernmental conference at ministerial level on the accession of Albania in the European Union".

[3] Regulation (EC) No. 450/2008 of the European Parliament and European Council of 23 April 2008 laying down the Union Customs Code, Official Journal of European Union L. 145 date 4.6.2008, page 1.

[4] Regulation (EU) No. 952/2013 of the European Parliament and European Council of 9 October 2013 laying down the Union Customs Code, Official Journal of European Union L. 269/1 date 10.10.2013.

[5] Commission Implementing Regulation (EU) No. 2021/414 of 8 March 2021 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No. 952/2013 of the European Parliament and of the Council, Official Journal of European Union L. 81/37 date 9.3.2021.

this process of assimilation is clearly important, in view of the essential role of customs rules in safeguarding the people, environment, markets and the development of the economies of countries. It is therefore reductive and inappropriate to consider customs operations as being focussed exclusively on the fiscal aspect, however important that aspect is in terms of the allocation of economic resources to one's country. Customs, in fact, play a key role in defending borders and safeguarding internal security by combating terrorism, crime, fraud, etc. Uninterrupted supervision 24/7 by customs officials at airports, ports and border crossings also stops the illegal entry of persons and of hazardous or illegal goods. There are almost 92,000 customs workers in the entire European Union.

It is due to the commitment of customs officers that, in 2020 for instance, goods were prevented from entering the EU in 23,933 cases, which would have caused harm to human health in that they were produced in violation of the most basic health, veterinary and photo-sanitary safety regulations; and almost 27 million items were discovered and confiscated as being unsafe for their intended use, such as hazardous electrical and electronic equipment, contaminated food products, wood from protected trees etc.

The EU customs union is fundamental for the functioning of the European single market, where persons and goods are able to circulate freely once they have entered the Union. Thus, we can understand how important it is, also for Albania, for the Albanian customs system to become rapidly harmonised with the European Union customs system in the overall context of EU enlargement. It is, therefore, reasonably conceivable that in a few years Albania will be the new customs frontier of the European Union in the Western Balkans. And this is yet another reason to attempt to analyse and understand the improvements which the Albanian customs system has introduced, in order to be able to glimpse the efficiency and safety capabilities that it will be and must be able to guarantee, in the near future, in conformity with European standards.

2. *Integration of Albanian customs legislation with the* acquis communautaire

Albania, like the other 5 countries of the Western Balkans (Bosnia and Herzegovina, Kosovo, Republic of North Macedonia, Montenegro and Serbia), has signed and ratified a "Stabilisation and Association Agreement" (SAA) with the European Union which, among other things, establishes free trade zones with the European Union. In addition, these 6 Western Balkan countries and Moldova are part of the Central European Free Trade Agreement (CEFTA) which promotes trade within the region by eliminating regional trade tariffs and identifying and reducing non-tariff barriers to trade[6]. In April 2018, a new protocol facilitating trade entered into force and CEFTA Member States began negotiations on a new dispute resolution protocol[7].

In addition, Albania participates in two European Union programmes to enhance cooperation in tax and customs matters, respectively called "Fiscalis 2020"[8] and "Customs 2020"[9]. This cooperation includes not only the exchange of expertise, but also the development and operation of various trans-European IT systems. The participation of the tax and customs administrations of Albania and of other European enlargement countries in these programmes with their counterparts in the EU Member States helps them to improve their performance and to align their customs and fiscal procedures with those used in the European Union.

In relation to customs aspects, the Stabilisation and Association Agreement (SAA)[10] signed by Albania establishes that the Europe-

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[6] Agreement on Amendment of and Extension to the Central European Free Trade Agreement signed by the Republic of Albania, Republic of Moldova, Bosnia and Herzegovina, Republic of Montenegro, Republic of Bulgaria, Romania, Republic of Serbia, Republic of Croatia, Republic of Macedonia and Kosovo, https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/cefta/trt_cefta_3.pdf (accessed 5 Sept. 2022).

[7] Additional Protocol to the Agreement on Amendment of and Accession to the Central European Free Trade Agreement, CEFTA.

[8] Decision of the Council of Ministers of the Republic of Albania No. 777 date 19.11.2014.

[9] Customs 2020 Programme, Participation of Albanian Customs in DG TAXUD Programme Customs 2020.

[10] Implementing the CEFTA 2006 Agreement: Reaping the benefits of trade and investment integration in South East Europe, CEFTA Report.

an Union and the Republic of Albania undertake to progressively establish a bilateral free trade area over a period not exceeding ten years, and also establishes a process for the reduction and elimination of customs tariffs and rates on products coming from the European Union and from Albania. In particular, Article 18 of this agreement states that "the customs duties applicable to imports into the Community of products originating in Albania are abolished on the date of entry into force of this agreement" and that on the same date (2009) are also abolished "quantitative restrictions on imports into the Community and measures having equivalent effect in relation to products originating in Albania". Obviously, the Stabilisation and Association Agreement also provides for reciprocity of these conditions, and therefore duties on EU products imported into Albania are also abolished.

This first phase of the integration of Albanian customs regulations into the *acquis communautaire* was preceded by Albania's accession in 2007 to the Central European Free Trade Agreement (CEFTA) with the ratification of the respective agreement[11]. In fact, Albania's accession occurred alongside other Western Balkan States: Kosovo, Bosnia and Herzegovina, Montenegro and Serbia and, concurrently, Moldova. In the meantime, a number of countries that are now EU Member States have withdrawn from the pact and, currently, the agreement continues in force between the aforementioned 6 countries of the Western Balkans and Moldova. Note that withdrawal is necessitated due to – and as a positive consequence of – the accession of those countries to the EU, as a fully acceded country clearly no longer needs to remain in the CEFTA since the free trade area automatically extends to the entire EU territory. And indeed, the EU regarded the CEFTA as a crucible to test (by issuing indications by way of recommendation) the operation of free trade amongst aspiring EU membership countries, but also the operation of free trade between CEFTA member countries and the European Union, considering that all these CEFTA member countries

[11] Central European Free Trade Agreement, Krakow, 21 December 1992. For more see: https://www.cvce.eu/obj/central_european_free_trade_agreement_krakow_21_december_1992-en-0b71b87b-bdfd4a9c-a239-aa64cb337dcc.html (accessed 7 Sept. 2022).

also signed the Stabilisation and Association Agreement with the European Union.

An interesting detail of topical interest, here, is the possibility of extending membership rights also to Ukraine: this was discussed at a summit in Bucharest on 6 April of 2006, held with a view to drawing up a joint declaration on accession to the CEFTA by Moldova, Bosnia and Herzegovina, Kosovo, Serbia, Montenegro and Albania.

One should highlight that Albania's accession to the Agreement on Central European Free Trade (CEFTA) in 2007, as we will see later, will produce significant benefits as the statistics will show how Albanian exports to CEFTA countries are growing significantly and much faster than in the case of other States[12].

In the last decade, Albania's efforts to modernise its customs facilities and services have included deploying special mechanisms made available by the European Union such as e.g. the "Customs 2020" EU cooperation programme.

The Agreement between the Council of Ministers of the Republic of Albania and the European Union for participation in the "Customs 2020" programme, valid from 1 April 2014 to 31 March 2020, is ratified by the Law No. 184 of 12/24/2014[13]. The overall aim of the "Customs 2020" programme is to support the functioning and the modernisation of the customs union in order to strengthen the internal market through the cooperation of the participating countries, their Customs Authorities and their officials. Modernisation, according to the programme's aims, meant more specifically: to increase the exchange of information and data between national customs administrations in order to better detect the flow of hazardous and counterfeit goods; to support Customs Authorities in protecting the financial and economic interests of the European Union, and also in the correct collection of customs duties, import VAT and ex-

[12] National Institute of Statistics, Foreign Trade and International Business Activities. Yearbook 2015, Edition 2015; National Institute of Statistics, Foreign Trade and International Business Activities. Yearbook 2022, Edition 2022.

[13] Law No. 184 date 24.12.2014 "On the ratification of the agreement between the Council of Ministers of the Republic of Albania and the European Union, represented by the European Commission, on the participation of the Republic of Albania in the Union programme "Customs 2020", http://president.al/old/presidenti-nishani-dekreton-shpallje-ligji-nr-1842014/ (accessed 8 Sept. 2022).

cise duties; to develop better risk management strategies to protect the financial interests of the European Union; to assist the European Union to better respond to threats to security and to transnational crime; to continue to facilitate rising levels of trade. And to do this in all participating countries, the European Union had made available *EUR* 522.9 million in addition to monies already allocated and spent under the previous "Customs 2013" programme. Albania intelligently deployed a share of this funding.

More specifically in relation to Albania's participation in the "Customs 2020" programme, this will continue to help strengthen cooperation with the other participating EU Member States. Albania has used the programme as an important tool to establish a network of professionals from different EU Member States who provide the Albanian customs administration with specific technical knowledge and skills exchanges in order to identify, develop and implement best practices in all areas of customs processes and to assess the reorganisation of the Albanian customs administrative structure, and also to fine-tune and/or complete the process of harmonisation of Albanian customs rules with the *acquis communautaire*.

2.1. *Reorganisation of the Albanian customs administration and its tasks*

The Albanian customs administration is continuously undergoing reform in order to successfully implement its mission of overseeing and supervising Albania's international trade, so as to safeguard the country's financial and economic interests and to advance the security and protection of Albanian society and of Albania's international trade, thereby contributing to free and fair trade in implementation of commercial policies and also policies of other sectors of the Albanian economy that affect commercial exchanges as well as the security of the entire commercial chain, and also contributing to the furtherance of its commitment to harmonise and coordinate Albanian customs legislation with the *acquis communautaire* in the context of the reforms undertaken by the Albanian government as part of Albania's integration into the European Union.

The new organisational structure of the Albanian customs administration was approved by the Decision of the Council of Ministers No. 9 of 11 January 2017[14]. The aim was to facilitate the process of adaptation with a view to implementing customs administrative activity and realising the customs administration's institutional mission, and also with a view to enhancing work efficiencies and responding to the new challenges of European integration.

This decision defined the composition of the Albanian customs administration: it consists of the General Directorate of Customs and its various branches and is under the supervision of the Ministry of Finance and Economy.

The General Directorate of Customs (GDC) is structured into 17 customs offices and has 1102 employees. Organised into four sectors that cover the Administrative Service, Customs Surveillance, Customs Operations and Security Control, the General Directorate of Customs coordinates five macro areas: 1. Analysis and Customs Clearance Department responsible for the technical sector, the excise sector, customs procedures, tariffs and origin (TARIC), customs laboratory and evaluation service; 2. Technical and Customs Excise Procedures Department responsible for income planning and analysis operations, excise duty controls and technical procedures and customs valuation policies; 3. Law Enforcement Department responsible for anti-smuggling and anti-traffic operations and for investigation, information, risk, analysis and monitoring operations; 4. Administrative Department responsible for humans sources management, support services and legal services; 5. Office of General Manager responsible for international relations and European integration, internal financial control, anti-corruption and professional standards, budget and finance services.

In conclusion, the establishment of this new organisational structure of the Albanian customs administration responds better to the new challenges of the process of European integration which underpins the Albanian legislature's mission, in the customs admin-

[14] Decision of the Council of Ministers of the Republic of Albania No. 9 date 11.1.2017 "For some changes and additions to Decision No. 921 date 29.12.2014 of the Council of Ministers for the personnel of the Customs Administration".

istration field, to establish a modern, professional, impartial, reliable and fully transparent public institution that can also provide support to the business community as a partner and also operate as an effective and efficient administrator on behalf of society and the supply chain.

2.2. *New laws and new projects to further align the Albanian customs administration with European standards*

However, this new structural organisation of the Albanian customs administration needs to be continuously upgraded so that it can adapt more quickly to the EU's standards and best practices, and it also needs to more effectively guarantee the safeguarding of the strategic principles enshrined in Article 2 of the Customs Code of the Republic of Albania, in the fulfilment of its mission.

To this end, therefore, an important role is played by the laws, agreements and protocols of understanding that Albania has implemented or has adhered to, bringing about regulatory improvements in its customs legislation in order to complete the process of harmonisation with the *acquis communautaire*.

Specific measures that are a significant part of these harmonisation efforts should be highlighted: ratification of the protocol for the accession of the Republic of Albania to the Marrakech agreement establishing the World Trade Organisation[15]; ratification of conventions for the harmonisation of the rules for border control of goods[16], mutual administrative assistance for the prevention of investigations and elimination of customs violations[17], mutual admin-

[15] For more see: https://dogana.gov.al/dokument/899/ligj-nr-8646-date-28072000-per-ratifikimin-e-protokollit-te-anetaresimit-te-rsh-ne-marreveshjen-e-marakeshit-qe-themeloi organisaten-boterore-te-tregtise (accessed 9 Sept. 2022).

[16] For more see: https://dogana.gov.al/dokument/900/ligj-nr-8754-date-26032001-per-aderimin-e-rsh-ne-konventen-per-harmonizimin-e-rregullave-per-kontrollin-kufitar-te-mallrave (accessed 9 Sept. 2022).

[17] For more see: https://dogana.gov.al/dokument/901/ligj-nr-8759-date-26032001-per-aderimin-e-rsh-ne-konventen-nderkombetare-per-asistenve-te-ndersjellte-administrative-per-parandalimin-hetimin-dhe-goditjen-e-shkeljeve-doganore-nairobi (accessed 10 Sept. 2022).

istrative assistance in customs matters[18]; contract for the international road transport of goods (CMR) and signature protocol[19], taxation of road vehicles for private use in international traffic and signature protocol, harmonised system of codification and designation of goods[20] and simplification and harmonisation of customs procedures[21].

Despite the regulatory interventions to restructure the customs administration, the approval of new laws and the ratification of numerous conventions as described in the preceding paragraph, it should not go unnoticed that the modernisation and harmonisation of the Albanian customs administration to EU standards also requires significant funding. In this too, the European Union has played a fundamental role in ensuring that Albania becomes a partner in several cooperation projects.

One such cooperative project is the funding project "Innovative Systems to Enhance Customs Anti-Fraud Controls (ISACC)", launched in July of 2020 and to be implemented for 18 months.[22] Italy and Montenegro are cooperating with Albania in this specific case. This project defines the methodologies, models, processes and information structures that can simplify and harmonise the introduction of an innovative approach to the fraud inspection and control phases in the three countries.

The main aim of the "ISACC" project is to define a so-called "*customs footprint*", a digital form that includes all the information

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[18] For more see: https://dogana.gov.al/dokument/902/ligj-nr-9316-date-18112004-per-aderimin-e-rsh-ne-konventen-nderkombetare-per-asistence-tendersjellte-administrative-ne-ceshtjet-doganore-johanesburg (accessed 10 Sept. 2022).

[19] For more see: https://dogana.gov.al/dokument/903/ligj-nr-9503-date-03042006-per-aderimin-e-rsh-ne-konventen-per-kontraten-e-transportit-rrugor-te-mallrave-cmr-dhe-protokolli-i-nenshkrimit (accessed 10 Sept. 2022).

[20] For more see: https://dogana.gov.al/dokument/897/ligj-nr-352012-per-aderimin-e-rsh-ne-konveneten-nderkombetare-per-sistemin-e-harmonizuar-te-kodifikimit-dhe-pershkrimit-te-mallrave (accessed 11 Sept. 2022).

[21] For more see: https://dogana.gov.al/dokument/905/ligj-nr-10077-date-16022009-per-aderimin-e-rsh-ne-konventen-per-lejimin-e-perkohshem-bere-ne-stamboll-mr-26-qershor-1990 (accessed 11 Sept. 2022).

[22] https://dogana.gov.al/english/c/171/213/335/isacc-project (accessed 12 Sept. 2022).

and parameters of a product or good, whose purpose is to check, by intermediate stages through customs control points, the invariance of information generated through automatic data analysis systems and geo-tracking data elaborated by AI technologies. The project has three pillars: – developing an international network of public institutions in the customs sector; – designing, developing and piloting the IT platform in support of customs control activities; – capacity – building for customs officials, focusing on the use and functionality of the "ISACC" platform, and for private stakeholders, focusing on e-Customs procedures.

The EU has allocated additional European funding (EUR 1.8 million) to assist Albania in preparing its customs administration – legislatively and procedurally – for the interoperability of the transit system with the EU's "New Computerised Transit System (NCTS)", and to enhance the administrative capacities in Albanian customs administration departments with remit for law enforcement and intelligence[23]. The "NCTS" project provides technical assistance to the Albanian customs administration to help identify deficiencies and needs in the field of "Joint Community Transit", the drafting of legislative acts, statutory or implementing measures, the creation of the management and maintenance scheme of the "NCTS" system.

Albania is committed to the process of preparing for accession to the European Union, also because it is fully aware that on the day when this ambitious goal actually comes to fruition, all of the legal measures relating to transit must be in force, the computer system must be fully tested at national and international level, and the professionals with the qualification of consignor to be associated with the national "NCTS" system's external field must be operational. The "NCTS" system contributes to making this aim achievable.

Meanwhile, the project "Mobility on the Ionian Coast - COMOBILON" which is part of the INTERREG Programme IPA Cross-border Cooperation Programme "Greece-Albania 2014-2020" is an EU support programme worth up to EUR 7.2 million[24]. This project in-

[23] https://dogana.gov.al/english/c/171/213/215/ncts-project (accessed 12 Sept. 2022).

[24] https://dogana.gov.al/english/c/171/213/337/comobilon-project (accessed 12 Sept. 2022).

cludes, among other things, the construction of a new customs control building and of special equipment for such controls.

Furthermore, the Nuclear Atomic Energy Agency (NAEA) proposed a pilot project of relevance to the Albanian customs administration, for the "Distribution of a control system and pilot installation of detection equipment to ensure the monitoring of radioactive materials outside the regulatory control of the Republic of Albania". The three customs points included in this NAEA pilot project (Hani i Hotit, Durrës and Rinas) will be connected to the alarm/monitoring centre for detection of cases in the General Directorate of Customs" and also to the Institute of Applied Nuclear Physics of Tirana[25].

The difficulty and complexity of Albania's position in relation to the rules that regulate customs activities in the European Union is shown by the fact that, despite the many efforts made, many provisions of its Customs Code of 1999 remain in force, and this references the Community Customs Code of 1992. The necessary aim of the Albanian Law No. 8449 of 27 January 1999[26] was to ensure that the Customs Code of the Republic of Albania took its inspiration from and converged with the Council Regulation (EEC) 2913 of 12 October 1992 establishing the Community Customs Code[27]. The Law No. 8449/1999 has been modified on several occasions for this very purpose[28].

If one considers the clear technological developments and the increasing prevalence of IT in management processes in the last

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[25] https://dogana.gov.al/english/c/171/213/216/anea-project (accessed 13 Sept. 2022).

[26] For more see: https://www.dogana.gov.al/dokument/324/ligji-nr-8449-date-2701-1999-per-kodin-doganor-te-republiken-e-shqiperise (accessed 13 Sept. 2022).

[27] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31992R2913 (accessed 13 Sept. 2022).

[28] For more see: https://www.dogana.gov.al/dokument/327/ligj-nr-8473-date-14041999-per-disa-ndryshime-ne-ligjin-nr-8449-date-27011999-per-kodin-doganor-te-republikes-se-shiperise-i-ndryshuar (accessed 13 Sept. 2022); https://www.dogana.gov.al/dokument/328/ligj-nr-8719-date-19122000-per-nje-shtese-ne-ligjin-per-kodin-doganor-te-rsh-nr-8449-date-27011999-i-ndryshuar (accessed 13 Sept. 2022); https://www.dogana.gov.al/dokument/329/ligj-nr-8999-date-30012003-per-nje-shtese-ne-ligjin-per-kodin-doganor-te-rsh-nr-8449-date-27011999-i-ndryshuar (accessed 13 Sept. 2022).

20 years in the economic and social fields, it becomes obvious that Albania also requires legislative adaptation in the customs field as well. There has been a partial such modernisation with the enactment of Law No. 102 of 31 July 2014[29] which brought the Customs Code of the Republic of Albania into partial alignment with EU rules (and no longer simply European Community rules) and, more specifically, with the provisions of Regulation No. 952/2013[30].

The Albanian Law No. 102/2014 created what is still referred to today as the "New Customs Code of Albania" but despite this, its application is partial only. It follows that both the old customs code and the so-called "New Customs Code" are both partially in force concurrently in Albania. This situation must clearly be remedied, and the time limit for doing so has shifted until the full entry into force of Law No. 102/2014, at which point the Law No. 8449/1999 will be repealed. As of 1 January 2015, the provisions of the New Customs Code approved by Law 102/2014 and the Council of Ministers Decision No. 919 of 29 December 2014[31] on Authorised Economic Operators (AEO), simplifications and customs exemptions finally came into effect.

But when will the New Customs Code of Albanian come into effect in its entirety? Certainly, this must happen prior to Albania acceding to the European Union. In the meantime, one notes that as of 1 June 2017, the new Albanian Customs Code has fully entered into force in so far as concerns customs regimes and violations.

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[29] https://www.dogana.gov.al/dokument/1179/ligj-nr-102-2014-date-3172014-i-ndryshuar (accessed 14 Sept. 2022).

[30] EU Regulation No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Official Journal of European Union L. 269, 10.10.2013, 1-101.

[31] Decision of the Council of Ministers of the Republic of Albania No. 919, date 29.12.2014, "For the approval of the implementing provisions of Law No. 102/2014, date 31.7.2014, "Customs Code of the Republic of Albania". For more see*:* https://www.dogana.gov.al/dokument/1135/vkm-nr-919-date-29122014-i-ndryshuar-per-miratimin-e-dispozitave-zbatuese-te-ligjit-nr-1022014-date-3172014-kodi-doganor-i-republikes-se-shqiperise1 (accessed 14 Sept. 2022).

3. *Transition from the old to the new Albanian customs code and harmonisation with European Union legislation*

The "old" Albanian Customs Code and the New Customs Code of Albania were, as already noted, subject to amendments, but these related to aspects that were marginal or less significant in comparison with the overall structure of the provisions contained therein[32].

Furthermore, a judgment of the Constitutional Court of the Republic of Albania made reference to the aforementioned Law No. 8449 sanctioning the old Albanian Customs Code, ruling that Article 289(5) was inapplicable: this provision in essence required the remaining portion (60%) of a monetary penalty to be paid if the appeal were rejected by the Customs Authority, while recognising the appellant's entitlement to appeal against this decision to the judicial authority. The Constitutional Court, in its Decision No. 18 of 23 April 2010[33], recognised instead the appellant's right not to pay the remainder of the sanction until the judicial authority availed of by the appellant had ruled on the correct application of that sanction. The repealed paragraph, limited to the monetary part, is this: "If the appeal is not allowed, the applicant must pay the remaining 60% portion of the fine, and can appeal against the decision of the General Director to the judicial authority within 30 days from the date of notification of the decision rejecting the appeal[34]".

For the new Albanian Customs Code established by Law No. 102/2014, note that various amendments were made by Law No. 32

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[32] The old Albanian Customs Code sanctioned by the Law No. 8449 of 27.01.1999, has been subject to continuous changes over the years 1999-2013, which were incorporated into the following laws: Law No. 8473 of 14.4.1999, Law No. 8719 of 19.12.2000, Law No. 8999 of 30.1.2003 and Law No. 152 of 30.5.2013.

[33] Decision No. 18, date 23.04.2010, V-18/10, of the Constitutional Court of the Republic of Albania, Official Journal No. 59 date 21 May 2009.

[34] "If the appeal is not accepted, the appellant must pay the remaining part of 60% of the fine, and may appeal against the decision of the General Director to the judicial authorities within 30 days from the date of notification of the rejection of the appeal", Decision No. 18 of 23.04.2010, V-18/10, of the Constitutional Court of the Republic of Albania, cit. in the reference no. 43.

of 2 April 2015[35]. However, the draft decisions on the implementing provisions of the new Albanian Customs Code, which partially align with the European Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015[36] and with the Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015[37], are yet to be approved.

In the meantime – confirming that the process of alignment between EU regulatory updates and those of the Republic of Albania is ongoing, in which Albania's regulatory amendments clearly seek alignment with those of the EU by means of specific legislative instruments aimed at harmonising the provisions contained therein – one should remember that the aforementioned Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015, which supplements the Regulation (EU) 952/2013 of the European Parliament and of the Council in relation to the modalities specified by certain provisions of the Union Customs Code[38], is itself subject to changes, and that the most recently updated draft is dated 1 January, 2022.

This EU regulation governing the IT regime in the customs field is also of considerable importance for Albanian customs legislation, as one cannot conceive a future without information technology. The European Union and Albania are broadly aware of this reality and, therefore, a number of special EU-funded programmes have been deployed for the modernisation of the Albanian customs ad-

[35] Law No. 32, date 2.4.2015, "For some changes and additions in the Law No. 102/2014 Customs Code of the Republic of Albania", Official Journal No. 63 date 24 April 2015.

[36] Commission Delegated Regulation (EU) No. 2015/2446 of 28 July 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, Official Journal of European Union, L. 343 date 29 December 2015, 1-557.

[37] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, Official Journal of European Union L. 343/558 date 29.12.2015.

[38] Regulation (EU) No. 952/2013 of the European Union Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Official Journal of European Union L. 269/1 date 10.10.2013.

ministration with the aim of harmonising national standards with European standards also in this specific sector.

The main innovations introduced by the Union Customs Code (UCC) in the area of preferential origin include the unilateral preferences recognised under the so-called "Generalised System of Preferences (GSP)", under which the European Union unilaterally applies tariff preferences benefiting imports into the European Union from developing countries[39]. Albania is obviously not included on that list, as it is now aligned with European standards, which is why it is a candidate country for EU accession.

Another important change introduced by the UCC, with reference mainly to bilateral preferences, was the repeal of Regulation (EC) 1207/2001 which regulated "the procedures to facilitate the issuance or compilation in the Community of movement certificates and the issuance of certain approved exporter authorisations under the provisions governing preferential trade between the European Community and certain countries"[40].

It is therefore important to understand the importance – in economic as well as political terms – of such bilateral agreements signed by the EU with non-EU countries. Statistics have highlighted the great advantages obtained by Albania, for example, when exporting its goods to the European Union in the years following these agreements.

3.1. *Statistical data on the progress of Albania's foreign trade with partner countries*

The Albanian National Statistical Institute (INSTAT) in its annual report highlighted that, in 2020, Albanian commercial ex-

[39] Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008, Official Journal of European Union L. 303, 31.10.2012, 1-82.

[40] Council Regulation (EC) No. 1207/2001 of 11 June 2001 on procedures to facilitate the issue of movement certificates EUR.1, the making-out of invoice declarations and forms EUR.2 and the issue of certain approved exporter authorisations under the provisions governing preferential trade between the European Community and certain countries and repealing Regulation (EEC) No. 3351/83, Official Journal L. 165, 21.6.2001, 1-12.

changes with EU countries accounted for 63.1% of all trade. In the period January-December 2020, exports to EU countries accounted for 74.7% of total exports and imports from EU countries accounted for 58.0% of total imports. In 2020, Italy was confirmed as Albania's largest trading partner, with 31.4% of total trade, amounting in total to 275.5 billion lekë (around EUR 2.24 billion). Greece is in second place with 7.7%, followed by Germany with 7.1% and Turkey with 7%[41].

The Albanian National Statistical Institute in its annual report highlighted that Albanian imports from Italy in 2020 were valued at 151.98 billion lekë (around EUR 1.23 billion). The following countries are in second to fifth place, based on value of goods imported into Albania in 2020: Turkey (58 billion lekë), Greece (55 billion lekë), China (54 billion lekë) and Germany (47 billion lekë).

But what does Albania import from Italy? Mainly textiles and footwear (about 22% of imports); machinery, equipment and spare parts (21.7%); food, drink and tobacco (13.1%); chemicals and plastics (13%); building materials and metals (11.9%); leather and leather products (6.8%). Obviously, Albania also exports to Italy and in 2020 the value of its exported goods to that country was around EUR 1 billion. The second most exported category of products to Italy are: construction materials and metals (10.3%) followed by machinery, equipment and spare parts (8.4%) and food, beverages and tobacco (7.8%).

The 2020 statistics show that, after Italy, the most prominent Albanian exports were to Kosovo (26.2 billion lekë), Spain (16.6 billion lekë), Germany (16 billion lekë) and Greece (13.2 billion lekë). One interesting detail is that textile and footwear products exported from Albania to Italy (representing over 62.3% of total Albanian exports) represent practically the same quantities that return to Italy, because many small firms are involved exclusively in the packaging of fabrics or leathers, cutting and processing.

[41] http://www.instat.gov.al/media/7931/tj-dhjetor-2020_.pdf (accessed 17 Sept. 2022).

3.2. *Application in Albania of the inward processing customs regime for foreign products*

One should clarify that the inward processing customs regime applies to all foreign products that are processed in Albania and then exported. The inward processing regime is a customs procedure that allows the use of non-Albanian and Albanian goods in the Albanian customs territory, in one or more processing operations, destined for re-export from that customs territory in the form of compensating products, without being subject to: import duty; other payments, as provided for by applicable provisions in force; commercial policy measures, insofar as they do not prohibit the entry or exit of goods to or from the customs territory of the Republic of Albania.

The use of this economic customs procedure is conditional on authorisation by the competent customs authorities. The issuance of such authorisation is dependent, however, on specific conditions governing such procedure: – it is issued to persons who are in the customs territory of the Republic of Albania; when the persons provide all the necessary guarantees for implementing the operations; – when the customs authorities can supervise and control the procedure; – when in cases of origin of a customs debt or of other obligations in respect of goods placed under the special regime, they provide a guarantee in accordance with Article 84 of Law 102/2014 "Customs Code in the Republic of Albania"; – the authorisation is issued to persons who use the goods or undertake their use or to persons who implement processing operations on the goods or undertake their implementation.

3.3. *The customs valuation procedure in Albanian customs legislation*

Beyond these "particularities" of the Albanian customs system's value indicators, it is without doubt more interesting for the purposes of our study to delve into a number of tax aspects. It is of comfort to know that in Albania the customs assessments represent the customs procedure used to determine the value of imported goods.

The customs valuation procedure must guarantee a fair, impartial and uniform system that excludes the use, in customs procedures, of arbitrary, fictitious and unfounded values. Furthermore, the customs valuation procedure should be based on simple, clear and fair criteria that conform to commercial practices. There is a fiscal and economic aim underlying the determination of the customs value of goods which includes the price of the goods plus transport and insurance expenses. From the fiscal point of view, determining the value of imported goods is necessary and essential for the calculation of *ad valorem* customs duties, while from the economic point of view determining the value of imported goods is necessary in order to produce statistical data on the value of the import/export.

The legal procedure on goods valuation for customs purposes in Albania is in full compliance with international standards, in particular with Article 7 of the General Agreement on Tariffs and Trade (GATT). All goods imported into the customs territory of Albania must be assessed in accordance with one of the following six methods: 1. Transaction value method that focuses on the price actually paid or payable for goods sold for export in Albanian customs territory; 2. Transaction value method that applies the transaction value of identical goods sold for export in Albania and exported at or about the same time as the goods being valued; 3. Transaction value method that applies the transaction value of similar goods sold for export in Albania and exported at or about the same time as the goods being valued; 4. Deductive value method based on the unit price at which identical or similar imported goods are sold inside Albania in the greatest aggregate quantity to persons not related to the sellers; 5. Computed value method – the most difficult – which consists of the sum of the cost or of the value of the materials and of the processing or other processing employed in producing the imported goods, and an amount for profit and overheads equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to Albania; 6. Available data file method: where the customs value of imported goods cannot be determined according to the above mentioned methods, it will be determined based on data available in Albania, in compliance with Article 70(3) of Law

No. 102 of the 31 July 2014[42]. In conclusion, note that the available data file includes data on transport cost as: cost of transport by air; cost of transport by sea; cost of transport by road; cost of transport by rail, etc., which represent a not insignificant element of customs value[43].

3.4. *Customs tariff nomenclature in Albanian customs legislation*

Import and export duties in Albania are based on the customs tariff under Albanian customs legislation. Albanian customs tariffs are applied to all goods specified in the nomenclature based on the Harmonised System and their value ranges from 0% to 15%. The specific aspects are regulated pursuant to Law No. 10366/2010 and Law No. 9981/2008 on the Approval of Customs Tariff Levels, as amended. One change, for example, has resulted in a ban on the import of municipal waste, sewage sludge and clinical waste into Albania.

The customs tariff in Albania includes: 1. Combined Nomenclature of Goods, based on the Harmonised System; 2. Any other nomenclature, wholly or partly based on the Combined Nomenclature of Goods or any subsequent sub-division thereof, as defined by other provisions governing specific sectors based on the application

[42] Instruction No. 25, date 30.11.2007 "For customs value review procedures, sources of information and deadlines for publishing the file with available data, as well as customs clearance of vehicles and their spare parts"; Instruction No. 23, date 25.10.2011 "For some changes in Instruction no. 25, dated 30.11.2007 for customs value review procedures, sources of information and deadlines for publishing the file with available data, as well as customs clearance of vehicles and their spare parts"; Instruction No. 6, dated 31.1.2013 "For some changes in Instruction No. 25, dated 30.11.2007 for customs value review procedures, sources of information and deadlines for publishing the file with available data, as well as customs clearance of vehicles and parts of their exchange", https://dogana.gov.al/english/dokument/774/udhezimi-06-dt-31-01-2013-mf (accessed 17 Sept. 2022); Instruction No. 24, dated 11.9.2015 "For some changes in Instruction No. 25, dated 30.11.2007 for customs value review procedures, sources of information and deadlines for publishing the file with available data, as well as customs clearance of vehicles and their spare parts".

[43] https://dogana.gov.al/english/d/169/182/247/305/transport-costs-file (accessed 17 Sept. 2022).

of tariff measures relating to the trade of goods; 3. Levels of normal or autonomous customs duties applicable to goods included in the Combined Nomenclature of Goods; 4. Preferential tariff regime provided for in agreements that Albania has concluded with a country or territory outside the Albanian customs territory or groups of countries or territories; 5. Preferential tariff measures unilaterally adopted by Albania in respect of certain countries or territories outside the Albanian customs territory or specific groups of countries or territories; 6. Autonomous measures that provide for a reduction or exemption from customs duties on certain goods; 7. The preferential tariff treatment specified for certain goods, based on their nature or their end-use within the measures referenced in the law; 8. Other tariff measures provided for by agricultural or commercial legislation or by any other legislation in Albania[44].

3.5. *Customs tariff classification in Albanian customs legislation*

In relation to the tariff classification, note that the tariff classification of goods determines the subheading of the nomenclature based on the harmonised system or the subheading of any other nomenclature under which the goods are to be classified. Tariff classification is used not only to determine the rate of customs duties for a particular tariff code but is also used to apply non-tariff measures. Thus, even if all goods are subject to zero customs duties, classifications may still be necessary in relation to: 1. Application of a reduced customs duty rate; 2. Certificate of origin; 3. Determining whether a product is subject to the payment of excise duties; 4. Application of import or export restrictions.

The Customs Authorities provide information on the application of customs legislation, including the classification of goods. In the case of the tariff classification of goods, this is mandatory only if the classification is issued within the framework of Binding Tariff Information (BTI). Issuing a BTI decision is free of charge; however, fees for the expert analysis of goods and postal charges to return

[44] https://dogana.gov.al/english/dokument/1904/nomenklatura-2022 (accessed 17 Sept. 2022).

goods to the BTI applicant may be charged, in conformity with the Customs Code.

An application for Binding Tariff Information must be submitted to the General Directorate of Customs by completing the relevant form and must relate to only one type of merchandise. Goods with similar characteristics may be accepted as a product, provided that the differences are irrelevant for the purpose of determining their tariff classification. The BTI applicant is responsible for providing all the information necessary for classification of the goods. Binding tariff information is notified to the applicant within 120 days of the application acceptance date, and the validation period for a BTI decision is three years. The BTI decision is valid after it is issued and is binding on the Customs Administration and on the applicant.

3.6. *Regime of exemption from customs duties in Albanian customs legislation*

Exports are exempt from VAT in Albania, pursuant to the aforementioned agreements, and customs duties must be paid immediately upon the goods entering Albanian territory. VAT on imports is applied at a rate of 20% on the value of the products plus transport and insurance payments made up until the moment of entry into Albanian territory.

It may be useful to clarify what happens, from a fiscal point of view, when goods are imported into Albania temporarily only, to be then returned from there. A typical example is the export of a commercial sample to be shown to a customer, or of specific equipment in order to repair a product that was previously sold, to be then returned to the country of departure. When the export is temporary only, an international customs document is issued – the ATA carnet – which is recognised in Albania and is valid for 12 months. In such cases, the goods in question are fully or partially exempted from import duties.

This arrangement is also permitted for: a) the inward processing regime for foreign products that are subject to processing or transformation inside Albania without being subjected to customs duties,

except for certain administrative customs charges, provided that the products are re-exported; b) processing activities subject to customs control, which permits the importation of goods into Albania for operations that transform their nature or their state, without the payment of import duties or other commercial policy measures (duties will be owed on the finished product and on customs clearance); c) passive processing for Albanian goods which can be temporarily exported to be processed and subsequently re-imported with total or partial exemption from customs duties; d) the transit procedure for goods and vehicles through the Albanian territory is exempt from any customs duty, VAT and excise duties; e) temporary storage regime under which products assume temporary storage status from the moment they enter customs offices until the moment of their final destination. The Customs Authorities hold such temporary export goods in special authorised areas. Obviously the "ATA" carnet can be applied not only when the export is temporary, as the other essential requirement is that the goods must return to the country of departure without having undergone any transformation. Customs checks, to clarify, are carried out in the same way.

"ATA" is an acronym originating from a combination of the French and English versions of the term temporary admission "Admission Temporaire/Temporary Admission". The "ATA" convention, based on a chain of guarantor bodies that ensure document management at international level, streamlines customs procedures. The guarantor bodies act as the first-instance payors of customs duties levied in the event that the scheme is mis-used by operators. With the acceptance of this convention, too, Albania has already shown that it is well integrated (also in the field of customs controls) into a customs system characterised by European and international standards.

3.7. *Customs controls in Albanian customs legislation*

Albanian Customs Authorities can carry out all the customs controls they deem necessary[45]. Customs controls may involve the

[45] For more see: Section 7 of the Law No. 102/2014 date 31.7.2014 "Customs Code in the Republic of Albania".

following, in particular: checking goods, taking samples, verifying the veracity and completeness of information provided in a declaration or notification, verifying its existence, authenticity and accuracy, verifying the validity of documents, examining the accounts of economic operators and other records, inspecting vehicles, inspecting luggage and other goods brought or carried by persons, conducting official investigations or other similar actions.

Customs controls, in addition to random controls, are mainly based on risk analysis, which uses electronic data processing techniques in order to identify and assess risk and draw up the necessary countermeasures, based on criteria laid down at national and (where available) international level.

Customs controls are carried out within a common risk management framework, based on the exchange of information on risks and the results of risk analyses between counterpart customs administrations, establishing common risk criteria and standards, taking control measures and defining areas control priority. Controls based on such information and criteria will be carried out without affecting other controls carried out in accordance with the customs code's legal provisions.

Customs Authorities use risk management techniques to differentiate levels of risk related to the goods that are subject to customs control or supervision, and to decide whether or not to carry out specific controls on these goods. Where a customs control decision is made, the place where the control is done is also determined. Risk management includes actions such as collecting data and information, analysing and assessing risk, identifying and adopting measures, continuous monitoring and review of this process and of its results, based on national and international resources and strategies.

The Customs Authorities exchange information on risks and on the results of the risk analysis when: a) these authorities consider that the risks are high and require a customs control and when the control results show that the event occurred that was assessed as a risk; b) the control results show that the event did not occur that was assessed as high risk, but the Customs Authorities consider that the risk may be high for a different customs administration.

All of the following elements are taken into account when determining common criteria and standards on risk, as well as priority control measures and areas: a) the proportionality of the risk; b) the urgency of the need to implement controls; c) the possible impact on trade exchanges and on the resources needed for these controls. The above common criteria and standards include all the following elements: a) a description of the risks; b) risk factors or indicators that ought to be used to select goods or economic operators for customs controls; c) the type of customs controls to be undertaken by the Customs Authorities; d) the duration of customs controls, defined in letter "c".

The priority control areas relate to specific customs regimes, types of goods, movement routes, modes of transport or economic operators, which, during a certain period, are subject to risk analysis and higher-level customs controls, without affecting the Customs Authorities' normal check procedures.

Cooperation between the authorities becomes operational in the following cases: 1) When other competent authorities conduct controls in respect of the same goods, in addition to the customs controls, the customs authorities will try where possible – in close cooperation with the said competent authorities – to perform these controls at the same place and time as the customs control (One-Stop-Shop comprising a set of fully integrated e-services provided at national and Union level to facilitate information sharing and digital cooperation between customs authorities and partner competent authorities and to streamline goods clearance procedures for traders economic). The Customs Authorities have a coordinating role in these controls. 2) In order to minimise risk and combat fraud, within the context of the aforementioned controls, the Customs Authorities and other responsible bodies inside and outside the country may, in accordance with applicable rules, exchange data received as well as data on: a) entry, exit, transit, movement, storage, special final designation (end-use) of goods, including postal traffic, moving between the customs territory of the Republic of Albania and countries or territories located outside the Albanian customs territory; b) the presence and circulation inside the Albanian customs territory of non-Albanian goods and of goods placed un-

der special final designation (end-use); c) the results of the controls performed. 3. The Customs Authorities cooperate with public or private bodies (Albanian or foreign) in order to ensure the correct implementation of customs rules. The methods and forms of cooperation and of information exchange are determined by decision of the Council of Ministers in implementation of the present Customs Code, in other juridical and statutory instruments or in cooperation agreements. 4. Public institutions and State Police bodies assist the Customs Authorities whenever such assistance is requested in order to implement customs rules, in accordance with their remit and functions.

Once the goods are released, the Customs Authorities may verify the accuracy and completeness of the information provided in the customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification, as well as the existence, authenticity, accuracy and validity of any accompanying documents. In addition, they may verify the declarant's accounting and other records related to the actions that have been carried out on the goods in question or for previous or subsequent commercial actions involving these goods. The Customs Authorities may also check these goods and/or take samples, if such a possibility still exists. Such controls may be carried out at the premises of the party who holds the goods or of the latter's representative, or at the premises of any other person directly or indirectly involved in the aforementioned actions, within the scope of that person's business activity, or of any other person who holds such documents and data for the purposes of the business activity.

The issue of customs controls on natural and legal persons' cash declaration of monetary values also deserves further examination. Natural and legal persons are required to declare monetary values at the Albanian border, in order to prevent money laundering and terrorism financing. Companies and natural and legal persons are required – in addition to completing the standard import, export and transit procedures – to fill in the form for the "Reporting of Value Transportation at Borders (RTVK)" for banknotes, metals, precious stones in order to comply with applicable legal obligations.

If the "RTVK" form is not filled in, the customs procedures cannot continue until this happens[46].

Note, in relation to the customs declaration, that the Albanian Customs Code entitles the declarant to correct this declaration after the goods are released, and entitles the Customs Authority to check the declarant's customs declaration. This control mechanism of the Customs Authority is within the remit of the Post Clearance Control Directorate which performs its functions, tasks and duties under the Albania Customs Code. The Customs Authorities may, after authorising the goods' release and in order to ensure the accuracy of the customs declaration data, check the commercial documents and the data on import and export operations as well as any further commercial transactions related to these operations. These checks may be carried out at the premises of the declarant or of any person directly or indirectly involved in the aforementioned actions by reason of that person's professional activity, or at the premises of any other person who holds the aforementioned documents and data for trading purposes. The Customs Authorities may also control the goods if they can still be presented to customs. If a customs declaration revision – or a verification of the customs declaration after the goods have been released – should establish that the relevant customs procedures were applied based on inaccurate and incomplete information, the customs authorities will take the necessary measures to adjust the situation based on the new information available, as well as enforcing any sanctions provided for by the Albanian Customs Code.

4. *Facilitating international trade efficiently and safely: streamlining the computerisation of customs procedures*

Customs officers operating in Albania, as in the EU, are under pressure to speed up customs procedures, and this, of course, is true of any country. This is an important goal, and one that is achieved

[46] https://dogana.gov.al/english/dokument/354/ligji-9917-dt-19-5-2008 (accessed 17 Sept. 2022).

by simplifying procedures and through computerisation. The Union Customs Code has introduced significant innovations in order to simplify customs procedures. To achieve this goal, European lawmakers are cognisant of the need to focus on computerisation and the streamlining and speeding up of procedures related to international trade. In relation to the progress that has resulted from computerisation, note that the Union Customs Code has made possible the use of electronic files when submitting documents to the Customs Agency. An online platform has been made available to the business operator who can now transmit electronic customs declarations, upload additional documents in case of document controls, and download the issued declaration, and all of this represents considerable time savings compared to the previous physical file submission procedure.

The repetition of customs controls obviously runs counter to the streamlining and speeding up of procedures. Fortunately, this problem is resolved by Mutual Recognition Agreements (MRA) through which the customs administrations of signatory countries reciprocally recognise the results of the validation process and the certifications issued under the respective Authorised Economic Operator programmes, granting substantial concessions that are comparable and (where possible) reciprocal to Authorised Economic Operators (AEOs) subject to mutual recognition, who are certified as safe and reliable partners.

The activation of Authorised Economic Operators reflects Albania's efforts to align itself with customs union standards. Registration procedures for the first 8 operators in 2021 have been completed in Albania. Furthermore, 34 out of 41 customs services are now accessible online for their management on the E-Albania platform. Active collaboration is also underway enabling the police to access and verify customs management data. Administrative capacity has been strengthened with 5 officials certified by EUROPOL as users and trainers of the so-called "SIENA" platform. But a number of concrete problems that compromise rapid procedural flows remain in other cases, as confirmed by the typology examined below.

On the website of the Italian Excise, Customs and Monopolies Agency (www.admin.gov.it), Albania is on the "list of third countries

and territories for which certain information is available"[47]. Although good intentions are beyond dispute, the certainty of the information nevertheless remains to be demonstrated. In fact, despite the agreements between the European Union and Albania and the cooperation agreements between Italy and Albania which require the application, while at customs, of Article 17(1) of Regulation (EC) 612/2009 of the Commission of 7 July 2009[48] (amended by Regulation (EU) 1084/2010 of the Commission of 25 November 2010)[49], the situation appears increasingly complicated over time, including bureaucratic aspects. Article 17 (1) provides that in order to prove the completion of customs formalities, the exporter can document the definitive import of the goods into the third country by a copy or photocopy of the customs document or a printout of equivalent information recorded electronically by the competent Customs Authority. But certificates must, in any case, always be compliant. Despite this, for example, in Italy the "Autonomous Intervention Service in the Agricultural Sector (SAISA)[50]" – also committed to mutual assistance in the recovery of credits resulting from duties, excise duties, taxes and other measures and acting as a national reference point for the application of Directive 2010/24/EU of the Council of 16 March 2010[51] – may request additional documentation whenever it deems appropriate, if doubts exist about the content or about the success of the operation.

Another somewhat chaotic aspect is the demonstration of the conformity of documents. A concrete example in Albania's case is

[47] https://www.adm.gov.it/portale/web/saisa/dogane/operatore/restituzioni-esportazione/documentazione/elenco-dei-paesi-terzi (accessed 18 Sept. 2022); https://www.adm.gov.it/portale/web/saisa/-/albania (accessed 18 Sept. 2022).

[48] Commission Regulation (EC) No. 612/2009 of 7 July 2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products (Recast), Official Journal of European Union L. 186/1 date 17.7.2009.

[49] Commission Regulation (EU) No. 1084/2010 of 25 November 2010 amending Regulation (EC) No. 612/2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products, as regards equivalence under Inward Processing.

[50] https://www.adm.gov.it/portale/web/saisa/-/il-servizio-autonomo-interventi-nel-settore-agricolo (accessed 18 Sept. 2022).

[51] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Official Journal of European Union L. 84/1 date 31.3.2010.

as follows: the document suitable for certifying the definitive importation of goods into Albanian territory, pursuant to Article 17(1) of Regulation (EC) 612/2009, is the customs declaration of the typology "Single Administrative Document"[52] (forms 6, 7 and 8) issued by the local Customs Authority.

This document must contain all the elements that can enable the cited document to be traced to the exported items, and must be stamped and signed by the Albanian Customs Authority. If the document is not produced in the original, it must be a true copy of the original. Conformity with the original can be certified in the manner provided for by Regulation (EC) 612/2009 and this will be done by the Albanian Customs Authority or by the Italian Trade Agency (ICE)[53], based in Albania, or by the consulates or embassies of EU countries or the local notarial authority. In this latter case, however, the procedure is further complicated because the attestation of conformity with the original, done by the Albanian notary, will be deemed acceptable only if accompanied by an endorsement affixed by the Authentication Office of the Albanian Ministry of Foreign Affairs (which holds a list of notaries authorised to endorse Albanian documents destined for abroad), and by an authentication affixed by the Italian Consulate in Albania.

Procedures are further complicated by the fact that, in Italy, SAISA (Autonomous Intervention Service in the Agricultural Sector) can request a sworn translation where the Office deems it necessary to clarify certain aspects of the document (for example annotations made by the Albanian authority on the document, or the translation (where applicable) of the description of the imported product in cases of doubt); the translation must have all the relevant stamps affixed to the document, and it must be carried out by an official translator recognised by the competent Italian judicial au-

[52] The Single Administrative Document (Documento Amministrativo Unico – DAU) is a form with precise characteristics provided for by Community legislation. It comprises the customs declaration, for all customs procedures and customs destinations used by operators. Its application was regulated by the Regulation (EEC) No. 2454/93 on the methods of application of Community Customs Code Regulation (EC) No. 952/13.

[53] https://www.ice.it/it (accessed 19 Sept. 2022).

thorities (the translation's individual sheets must, in fact, be linked together with the joint stamp of the competent territorial authority, and must in turn be linked to the foreign document submitted for translation), and it must be certified that the document in its entirety has been faithfully translated. Note, however, that the desired streamlining and speeding up of procedures is also achieved by avoiding the duplication of customs checks, except for sample checks, and this already happens in the case of certified operators.

The World Customs Organisation regards the mutual recognition of certified operators as a key pillar to strengthening and promoting safety throughout international supply chains, as well as a tool to avoid duplication of security and compliance controls. A Mutual Recognition Agreement (MRA) entails that the signatory States give favourable consideration to the Authorised Economic Operator (AEO) status of an operator certified by another Customs Authority in their assessment of security risks, in order to reduce inspections and controls and ensure greater predictability of the release of goods. It should be noted, in fact, that only AEOs who meet the safety and security criterion are recognised and can enjoy the benefits available under a Mutual Recognition Agreement (MRA).

The favourable treatment entails a reduction of costs, simplified procedures and greater security and fluidity in legitimate global trade, and this allows Customs Authorities to focus their resources on goods regarded as being most "at-risk". The completion date of the gradual transition to a paperless, interconnected environment with fully electronic systems is scheduled for the end of 2025. This date is reiterated as the final deadline with reference to both Articles 6 and 278 of the Union Customs Code, as amended by the Regulation (EU) 2019/632[54].

Article 6 of the UCC refers to the means of exchange and storage of information and common data requirements. Article 6(1) clearly establishes that "the following must be carried out using computer-

[54] Regulation (EU) 2019/632 of the European Parliament and of the Council of 17 April 2019 amending Regulation (EU) No. 952/2013 to prolong the transitional use of means other than the electronic data-processing techniques provided for in the Union Customs Code, Official Journal of European Union L. 111/54 date 25.4.2019.

ised procedures: all exchanges of information, such as declarations, requests or decisions, between customs authorities as well as between business operators and customs authorities, and the storage of such information required by customs legislation". Article 6(2) of the UCC defines common data requirements for the purposes of the exchange and storage of information referred to in paragraph 1. Article 278 of the UCC specifically references the end of the year 2025, thus linking to Article 6 already examined: "At the latest until 31 December 2025, means other than the IT procedures referred to in Article 6(1), may be used on a transitional basis if the necessary electronic systems for the application of the following provisions of the Code are not yet operational".

The collection, management and sharing of data is essential in order to achieve security, safety and control objectives; shared infrastructures and new electronic platforms are essential for a modern and efficient customs system. It is therefore essential, within the EU, to strengthen and complete a network of fully integrated electronic data management systems and procedures.

In this respect Albania is still struggling to catch up with the EU, despite its participation in specific EU-funded projects. Just seventy miles from Albania lies the EU – the coast of Italy, whose customs administrations have been already using the electronic file system for some time.[55] This system enables companies to avoid customs documentary checks on imports or exports. The necessary documents, except for those already checked by administrations that have joined the EU customs One-Stop-Shop (for the description of the definition see page 14), can in fact be digitised and transmitted electronically to customs. Thanks to the exchange of data between customs and the declarant, business operators who use the electronic file system, as well as benefiting from significantly reduced times, are also substantially assisted by e.g. customs clearance without time limits, reduction of control times and traceability of the control process.

[55] The related facilities and instructions for the use and management of the electronic file are contained in note no. 45898 of 19 April 2016 "Union Customs Code (CDU). Innovations introduced and operating instructions starting from 1 May 2016".

More generally, the benefits of computerised customs operations are highlighted by the operation of the "Customs Telematic Service (CTS)"[56], which allows business operators to interact with the Customs and Monopolies Agency's information system when submitting declarations of interest to customs authorities. More specifically: import and export declarations; community transit; summary declarations; summary lists of goods and services; manifests of incoming and outgoing goods; declarations on excise duties.

Business operators have evaluated the services as being efficient and user-friendly, above all due to the fast response times, and this has resulted in the services being rated as successful. This is not surprising as users receive, for the most part, instantaneous online feedback on the formal correctness of declarations submitted; furthermore, it generally takes only a few minutes to receive the final results from the system, enabling them to avoid customs, except perhaps for certain concluding procedures and only for particular types of data that require validation.

To achieve this goal of simplification, European legislators are cognisant that there must be a focus on computerisation and on the streamlining and speeding up of procedures relative to international trade.

This procedural streamlining process is also achieved by the introduction and application of the system "Online Tax Refund at Exit: Light Lane Optimisation (OTELLO)[57], which fast-tracks the obtaining of customs visas for travellers residing in third countries who hold invoices issued by merchants with an Italian VAT number associated with refund companies. The refund company returns the VAT to the traveller and stores the customs visa produced by OTELLO, without requiring further formalities.

The use of computerised databases and telematic platforms has also been applied in anti-counterfeiting operations. The telematic

[56] Circular No. 63 date 03/11/2004 on "Customs Telematic Service. Submission of applications for membership via the internet - How to request changes to the authorisations already issued", Customs Agency, Agency of Customs.

[57] From 1 September 2018, it is mandatory to issue tax free invoices electronically and the affixing of the customs visa on these invoices takes place, at national exit points, exclusively digitally through the system "Online Tax Refund at Exit Light Lane Optimisation (OTELLO)".

platform "Fully Automated Logical System to Avoid Forgery and Fraud (FALFSTAFF)"[58] goes in this direction, and its purpose is the administrative simplification of obligations and the implementation of an effective strategy to combat counterfeiting. The FALFSTAFF platform consists of a multimedia database that contains the characteristics and qualitative details of authentic products, including images of the product and mapping of customs itineraries. This database is part of the Customs and Monopolies Agency's information system and enables one to compare the characteristics of a suspected counterfeit product with those of the original.

The data is exchanged bidirectionally with the EU as part of the project named "Anti-Counterfeit and Anti-Piracy Information System (COPIS)": since the start of the initiative, over 2,100,000 messages have been exchanged with the European Community. All technical information related to the product is recorded in a datasheet that the database processes for each company that has requested an intervention to safeguard a product[59]. The database is available to customs officials who can thus obtain answers in real time and who can also – if requests for intervention arise – count on the support of technicians from trade associations and product quality certification bodies. The customs control circuit elaborates the risk profiles of products also based on parameters indicated by companies in the individual data sheets. Indeed, the customs control circuit analyses import and export declarations presented to customs and transmits them to the channels matched to the risk profiles. All of the actions required in order to protect trademark products can be activated in this way.

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[58] Intervention by the customs authorities in relation to goods suspected of infringing intellectual property rights: Regulation (EU) No. 608/2013, Regulation of Implementing (EU) No. 1352/2013. Regulation of Implementing (EU) No. 582/2018, Project FALSTAFF - Operating instructions for the application for the management of requests for intervention, Customs Agency and Monopolies, 23.7.2018.

[59] Since 2014, the EU customs notices are administered through an online database – the anti-Counterfeit and anti-Piracy Information System (COPIS), which is used by customs authorities to register the applications for actions from rights-holders and all infringements. Each case is registered according to the category of goods and right-holder. For more see: New report highlights crucial role of EU customs authorities in fighting against counterfeit goods, European Commission, 27 October 2015.

In its legislative output related to the customs administration, Albania demonstrates full awareness that the future is inevitably going in the direction of the systematic computerised management of customs procedures, as this is also a clear aim of the EU, which is already implementing it extensively and reinforcing it in each area of application in its so-called "EU Customs 2040" manifesto[60]. Despite this awareness, however, one should bear in mind that in Albania the "New Customs Code" (i.e. the Law No. 102/2014) refers to the use of telematic procedures or computerised systems only in Articles 17, 286 and 287.

Article 17(1) of the Albanian Customs Code sets out the tools for sharing information and requirements on common data. It states that "All exchanges of information, such as declarations, applications or decisions between Customs Authorities and between business operators and Customs Authorities, and the storage of such information as required in the implementation of customs legislation, are carried out using computerised procedures". Article 17(2) of the Albanian Customs Code, mirroring the provisions of Article 6(2) of the Union Customs Code, states that "Common data requirements shall be drawn up for the purpose of the exchange and storage of information, as referred to in paragraph 1". Article 17(3) of the Albanian Customs Code, however, states that "in addition to the computerised data processing techniques provided for in paragraph 1, other methods of sharing and storing of information can be used, as follows; a) permanently, where – based on the type of movement of goods or on the use of the goods in question – computerised data processing techniques are not suitable for customs formalities; b) temporarily, where there are temporary shortcomings in the IT systems of Customs Authorities or business operators".

This means that in Albania, actions to computerise customs procedures which reflect the provisions of the Union Customs Code are taken as a reference basis, but at the same time, in view of the regulatory lacunae that exists in relation to EU rules, paper procedures

[60] A. Ghiran, A. Hakami, L. Bontoux, F. Scapolo, The Future of Customs in the EU 2040.

are still used and, in certain areas, the procedures established by the "old" Customs Code dating back to 1999 are still in force.

This "double track" involving the use of both paper and IT procedures merely confirms that Albanian customs are in the habit of using electronic systems. These systems are provided and managed by the "National Agency of the Information Society/Agjencia Kombëtare e Shoqërisë së Informacionit (AKSHI)", established by Albanian Council of Ministers Decision No. 673 of 22 November 2017, which came into effect only in January 2018 after the Council of Ministers' amending instrument No. 36 of 24 January 2018 was enacted[61]. AKSHI, which is under the Prime Minister' jurisdiction, is also tasked with promoting new information society technologies and promoting the use of telecommunications in the public sector.

AKSHI administers the "Automated System for Customs Data World (ASYCUDA World)" which is the most recent version of the automated system for customs data management supplied by the United Nations Conference and Development (UNCTAD) and is in use by the Albanian customs[62].

4.1. *Albanian customs: towards a fully computerised model*

As already clarified, the new Albanian Customs Code aims to implement the complete digitisation of customs procedures. To complete the picture, Articles 286 and 287 are of relevance here in relation to the procedures established by the new Albanian Customs Code in the context of the imperative of database computerisation. Article 286 also establishes a deadline, by which time however the IT systems may not yet be operational. This Article, which analyses

[61] National Agency of the Information Society (AKSHI) was established by Decision No. 673, date 22.11.2017, "On the Reorganisation of the National Agency of the Information Society (amended by Decision No. 36 of 24.1.2018, Decision No. 448 of 26.7.2018, Decision No. 872 of 24.12.2019), https://akshi.gov.al/wp-content/uploads/2019/12/VKM-Nr.-673-dat%C3%AB-22.11.2017-e-ndryshuar-2019.pdf (accessed 22 Sept. 2022).

[62] For more see: Manual for declaration in the ASYCUDA world system for goods placed in free circulation entered by means of sea transport (ship), https://dogana.gov.al/dokument/712/manual-per-deklarimin-e-thjeshtuar-ne-sistemin-asycuda-world (accessed 22 Sept. 2022)

the topic of transitional rules, establishes that "means for the exchange and storage of information, other than the IT data processing techniques defined in Article 17(1), may be used for a transitional period until 31 December 2021, during which the IT systems required for the application of the provisions of this Code, are not yet operational".

But 2021 is over and we are now in 2023, and the Albanian customs IT infrastructure is only partially in operation. Article 287 is of assistance in this context: it entrusts to a "decision by the Council of Ministers, the rules for the exchange and storage of data in the situation referenced in Article 286". Therefore it permits a deferral from the end of 2021 to a possible new date for the full processing of such data using IT systems. It may not be possible to accurately establish that date, yet it is clear that there must be full implementation by the date when Albania is, for all purposes, admitted as a Member State to the European Union.

However, another relevant reason exists which may retrospectively justify Albania's non-commitment to a further deadline by which to implement the computerisation of all customs procedures: namely, that the EU recently (29 March 2021) repealed the Implementing Regulation (EU) 2019/1026[63], replacing it with Implementing Regulation (EU) 2021/414[64] which establishes technical provisions for the development, maintenance and use of electronic customs systems in relation to the following systems: the customs decisions mechanism; the uniform user management and digital signature system; the European binding tariff information system (EBTI); the system for the registration and identification of economic operators (EORI); the system of authorised economic operators (AEO); the import control 2 system (ICS2); the automated export system

[63] Commission Implementing Regulation (EU) 2019/1026 of 21 June 2019 on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code, Official Journal L. 167/3 date 24.6.2019.

[64] Commission Implementing Regulation (EU) 2021/414 of 8 March 2021 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No. 952/2013 of the European Parliament and of the Council, Official Journal L. 81 date 9.3.2021, 37-64.

(AES); the new computerised transit system (NCTS); information sheets for the system of special procedures; the system for the Centralised Clearance of Imports (CCI). In addition, the new Commission Implementing Regulation No. 414/2021 of 8 March 2021 on technical arrangements for developing, maintaining and deploying electronic systems for the exchange and storage of information[65] under Regulation (EU) 952/2013 of the European Parliament and of the Council, also concerns the customs portal of the European Union and the customs risk management system.

This means that, just when Albania was on the point of completing its transition to total customs computerisation, the EU took a further step forward towards better and more precise regulation in this direction within its borders, and Albania – which aims to fully conform to European models and standards – must now make further efforts in this specific direction.

There are very detailed provisions contained in the new Implementing Regulation (EU) 2019/1026, but this needs to legislate by means of specific directives in all fields deriving from Article 8(1)(b) and from Article 17 of the Regulation (EU) 952/2013, establishing the EU's UCC. The main purpose of the Implementing Regulation (EU) 2021/414 may well be the one indicated in Recital 3 of same: "Important technical arrangements for the functioning of electronic systems should be specified, such as arrangements for development, testing and deployment as well as for maintenance and for changes to be introduced in electronic systems. Further provisions should be specified concerning data protection, updating of data, limitation of data processing and ownership and security of the systems".

What happens in the case of Albania, whose previous level of computerisation was not yet up to date, and what happens for EU Member States that will be unable to implement the new provisions of the aforementioned Implementing Regulation (EU) 2021/414? The solution is indicated in Article 63 of the same regulation which,

[65] Commission Implementing Regulation (EU) 2021/414 of 8 March 2021 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) 952/2013 of the European Parliament and of the Council, C/2021/145, Official Journal L. 81 date 9.3.2021, 37-64.

in four paragraphs, provides information on procedures to be followed during the transitional phase, i.e. during the transition from the current situation to the conclusive phase established by this Implementing Regulation.

To repeat: Albania is not a member of the EU Customs Union, but as it aims to become an EU Member State and has signed specific bilateral customs agreements with the EU, it needs to prepare for this by achieving substantially the same results. During the transition period – according to paragraph 1 of Implementing Regulation (EU) 2021/414 – "The Commission provides Member States with additional common components, transitional rules and support mechanisms to create an operational environment in which Member States that have not yet used the new system may temporarily continue to interact with Member States that have already introduced it".

Also of interest in reference to the administration of the transitional phase, are the provisions of paragraph 4 of the Implementing Regulation (EU) 2021/414: "The Commission, in collaboration with the Member States, draws up the technical standards to be applied during the transition period, which are of an operational and technical nature such as to permit mapping and interoperability between the old requirements on the exchange of information (defined in the Delegated Regulation (EU) 2016/341) and the new requirements on the exchange of information [defined in the Delegated Regulation (EU) 2015/2446 together with the Implementing Regulation (EU) 2015/2447]".

In view of the novelties and specificities contained in the new Implementing Regulation (EU) 2021/414, Albania could – based on the cooperation activities referenced in its bilateral agreements with the EU – request the European Commission to use the same tools that grant some Member States interoperability between the old and the new information exchange requirements.

Albania wishes to join the EU in the near future, at which point it will become a Member State of the Customs Union in which the Customs Authorities of all EU Member States naturally collaborate as a single entity: the same tariffs will be applied to goods imported into their territory from the rest of the world, while no customs

duties will be applied to goods transported from one Member State to another.

The Implementing Regulation (EU) 2021/414 is very important also for Albania in that it provides guidelines to the acquisition and use of new technologies for the management of customs procedures, based on a future that will inevitably also witness the centralisation of customs governance at EU level.

The EU Customs aims to act as a single customs system, standardising Member States' approaches and presenting a more cohesive common identity in the international context than is visible today. As indicated in the "EU Customs 2040" project, the establishment of a European Customs Agency is envisaged as a long-term strategy whose aim will be to standardise and strengthen the EU's complex customs system as a whole.

4.2. *Albanian customs legislation differentiates also in terms of the values attached to sanctions*

It is standard practice in all places – in the European Union, in Albania and in the rest of the world – to sanction non-compliance with the provisions of customs codes.

The first Article of the Albanian Customs Code to make reference to sanctions is Article 43: "The Customs Authorities of the Republic of Albania lay down sanctions for violations in reference to favourable decisions in conformity with customs legislation. These sanctions must be effective, proportionate and dissuasive". Note that this formulation was copied practically word for word from the Union Customs Code. The Article continues as follows: "Sanctions are applied regardless of the possible revocation, cancellation or modification of a decision".

Section five of Implementing Regulation (EU) 2021/414 covers the chapter on sanctions of Article 42, and states, in essence, that "each State lays down the sanctions that are to apply to infringements of customs rules. The sanctions shall be effective, proportionate and dissuasive". Paragraph 2 clarifies the form that the sanction may take: "Where administrative sanctions are applied, they

may take the following form: a) a monetary charge imposed by the customs authorities, if necessary also applied instead of a criminal sanction; b) the revocation, suspension or modification of any authorisation held by the interested party". Sanctions are mentioned in Article 83 of the Implementing Regulation (EU) 2021/414, on prohibitions and restrictions, and paragraph 3 states that "for the purposes of sanctions applicable to customs violations, a customs obligation is considered to have arisen when a Member State's legislation provides that import or export duties or the existence of a customs debt serve as a basis for determining sanctions". Other references to sanctions may be found in Articles 124 and 125 of the Albanian Customs Code.

That Code contains many more references to sanctions, however. After the aforementioned Article 43, Article 250 is of interest: paragraph 6 of this article (on the classification of violations) states that: "sanctions imposed on the basis of customs legislation are applied regardless of the application of sanctions provided for by other laws". Other references to sanctions may also be found in paragraphs 3 and 5 of the same articles. Sanctions are also referenced in Article 256 of the Albanian Customs Code, in the part dealing with crimes involving objective liability. The values of sanctions are determined in paras. 1 and 2 of Article 256[66].

It is interesting to note that under Article 285 of the Albanian Customs Code, the Albanian State allocates income received from customs penalties and seizures to the following uses: 50% is allocated to the State budget and the remaining 50% is assigned as follows, applying a criterion established by the Minister of Finance: to investments and expenses to improve the working conditions of personnel; to remunerations for customs personnel who participated directly or indirectly in examining the customs infringement; payment for whistleblowers who drew attention to customs infringements.

The sanctions system still lacks uniformity, but the "Customs 2040" project indicates this as a key objective. The future Europe-

[66] The minimum and maximum values of sanctions are established in the articles 257-270, 272, 274, 275, 277, 281, 282 and 283 of the Albanian Customs Code.

an Customs Agency will have the aim of standardising and strengthening the EU's complex customs system as a whole, beginning with the sanctions system but also achieving objectives such as the centralisation of customs governance, the implementation of electronic systems for the safety and speed of trade, combating fraud, centralised risk analysis.

But how can the European Union actually guarantee a uniform, impartial and reasonable administration of customs law if there are EU Member States, or countries with which the EU has signed agreements, that apply the Union Customs Code according to an interpretation of rules that diverge from the common line?

This is true for Albania which, as we have already seen, applies penalties with low values. But from the standpoint of comparison with the Italian customs law, not only does it appear that the UCC is applied very differently within the EU, but also that different EU Member States have divergent interpretations of proportionality variations in the values of sanctions, and this difference is also evident vis-a-vis Albania.

Unfortunately, the differences and divergences are very clear in relation to sanctions, but the underlying cause – if one would wish to highlight it – is Article 42 of the Union Customs Code which, as we have already seen, grants Member States full discretion in determining sanctions, binding them to a criterion of proportionality that is subjective and requiring that sanctions be effective and dissuasive.

Until a truly harmonised system of customs sanctions is implemented – and it would indeed be desirable to have a unified and fully enforceable system established within the EU – the EU Court of Justice will be repeatedly called upon to scrutinise the conformity of each Member State's domestic laws with EU rules on customs sanctions. Inevitable damage will accrue to the EU at international level if even a single Member State fails to interpret its own customs sanctions regime in conformity with the general principles of European law. If this occurred, then international EU commitments to a uniform, impartial and reasonable administration of customs law would be compromised and ignored, with attendant risks in the con-

text of the provisions of Article X of the General Agreement on Tariffs and Trade (GATT)[67].

It should be the responsibility of each Member State to oversee its internal laws by continually checking and realigning its existing rules with those of the European Union. More and more frequently, it is citizens or companies or their organisations that, adversely affected by e.g. the unfair application of customs duties, bring legal proceedings before domestic courts and before the European Court of Justice calling attention to divergences from the UCC, with the result that a judicial ruling forces their own State to adjust the domestic customs code to ensure harmonisation with the UCC's provisions. Albania has, in fairness, been conducting such realignment, verification and harmonisation activities with even greater commitment in recent years, in view of its ultimate aim of becoming an EU Member State.

5. *Conclusions*

In conclusion, it is evident that the Albanian Government is keen to improve efficiencies in its customs system, not only because such improvements positively affect relations between those administering these services and their users, but also – and perhaps primarily – because of the awareness that this sector can be an important showcase for the European Union when the more comprehensive Country System is being evaluated with a view to Albanian accession to the European Union. In order to ensure that the clear good omens translate into projects and the latter materialise into concrete benefits in relation to the current situation, it is necessary to leverage a number of key elements of the customs system: staff, computerisation, digitalisation of procedures, internal audit.

One would have to say that, objectively speaking, the Albanian customs system is certainly not lacking in personnel. Staff numbers are adequate and there appear to be no vacant positions to be

[67] https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleX (accessed 25 Sept. 2022).

filled by new recruits. It would be desirable, however, to improve the quality of the personnel service, by providing refresher training and simultaneously introducing merit-based methods to evaluate individual worker productivity.

In the meantime, however, the customs system needs to become a hyper-computerised domain that facilitates increasingly efficient and effective dialogue and "networking" with Albania, but also with the rest of the world and in particular with the European Union, by deploying and improving the management IT programme already supplied or migrating to the one predominantly in use in the EU. In addition, each border station should be equipped with all the necessary technological equipment to enable rapid controls that ensure the certain (and, as necessary, automatic) detection of material in transit: e.g. "sniffer" devices, banknote counters, electrical measurement instruments, spectrometers, etc. In short, all the tools that assist in the task of combating fraud and maintaining the security of international goods trade.

In relation to the objective of speeding up procedures by having them fully digitised, we have already broadly dealt with this matter in this research project and, consequently, we offer the simple conclusion in this final section: digitalisation is an essential precondition for improving the customs system.

Finally, another aspect should not be overlooked: internal auditing (IA). This should be a periodic commitment, preferably on an annual basis. Such a systematic and disciplined approach is required in order to evaluate and measure the improvement of the customs management process and the customs control process.

In a nutshell, a set of actions is required to improve the structure of the customs administration and customs operations in Albania and to optimally deploy EU funding for the modernisation of customs as well as available national budgetary resources with the aim – in the short and medium term – to further optimise performance until it matches EU standards.

The new Albanian Customs Code has already gained tremendous impetus from its commendable commitment and, if required, parliamentary actions and measures can bring about the requisite changes in terms of updates and adaptations to EU regulations. But

the greatest efforts – which will have to be monitored and if necessary assisted by concrete measures – will need to be made in the customs administration itself, to ensure that the stimulus required in order to improve the efficiency and quality of the services provided is not lacking. If all these conditions are met, then the harmonisation of the Republic of Albania's customs system to that of the European Union will be justifiably seen as imminent and, for all practical purposes, complete.

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