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CUSTOMS COMPLIANCE & RISK MANAGEMENT

JOURNAL FOR PRACTITIONERS IN EUROPE

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Editorial

Dear Reader,

For the past three months, Europe, and the rest of the world, have been living under the conditions of Russia's unjustified and unprovoked aggression in Ukraine. The war has created new sanctions and challenges concerning international trade, as well as customs and logistics that must be taken into account by exporters, distributors, and other stakeholders. In this regard, I would like to draw to your attention recent legislative changes in Ukraine, dictated by martial law and the extremely difficult conditions for foreign trade, prepared by Iryna Pavlenko and Oleg Kyryievskyi, as well as the article 'Sanctioned persons: get to know your customers and suppliers' by Andrius Košel, and the article 'Kaliningrad - Russia transit: are there any special simplifications?' by Jurgita Stanienė.

The origin of goods is one of the most frequent topics in the CCRM Journal. In the current issue, Peter Mitchell and Enrika Naujokė analyse the process of post-clearance verification of preferential origin set out in some of the free trade agreements of Canada, the UK, and the EU. Practical examples and suggestions on how the preferential origin-related risk could be managed by importers are provided.

In the article 'Keep an eye on customs case law or Who has enough money to throw away?' Dr Talke Ovie advises on how not to lose money, i.e. ask for payment of interest in the case of reimbursement of customs duties collected unlawfully. In this regard, Gediminas Valantiejus analyses the case law of the Court of Justice of the EU and summaries conditions under which persons are entitled to receive compensation in the form of interest.

The case law section is also represented by Ingrida Kemežienė, who overviews 'The case with the smell of vanilla', which deals with the classification of vanilla extracts containing ethanol and their exemption from excise duty on alcohol. Continuing the classification topic, Dr David Savage describes the challenges of appealing classification rulings in the article 'The "dark art" of classification (challenging a BTI ruling)'. Prof Krzysztof Lasiński-Sulecki draws attention to the fact that the validity of a BTI can be affected by the soft law in the article 'A few remarks on the softness of soft law in the sphere of customs classification'.

The complexity and diversity of activities that fall under customs control involve many employees and departments of a company. Who should ensure compliance with numerous requirements and regulations? You will find some suggestions in an article 'Who is responsible for customs compliance? or When everyone is responsible - no one is!' by Enrika Naujokė. A further point to consider concerning the topic of compliance is made by Samuel Draginich, who highlights in his article on the US CBP's current developments that customs compliance practitioners are pivotal in strategic business planning. Regarding the topic of planning, Monika Bielskienė invites readers to consider the future of the EU customs through a review of the Wise Persons Group's proposals for customs reforms.

In addition, in the current CCRM issue, you can find other interesting and valuable information, particularly on the non-transparent licensing of imports in various countries, the issues that go with a low customs value of goods, and the opportunities that implementation of Port Community Systems brings, and more.

Please enjoy reading and leave your comments, suggestions, or questions to an article online or email them to info@lcpa.lt.

Dr Ilona Mishchenko
Member of the Editorial Board
Odesa, Ukraine, 31st May 2022

EU LAW AND CASE LAW

EU law news: April/May 22

Overview of customs-related legal acts, case law, notices published in the EU Official Journal; information published by European Commission, World Customs Organization and World Trade Organization. Updated weekly!

News in week 21 (23-29 May): an updated version of the guidance document on the Registered Exporter (REX) system; regulations concerning anti-dumping and/or countervailing duties on imports of certain iron or steel fasteners originating in China, woven and/or stitched glass fibre fabrics originating in China and Egypt, and electrolytic chromium coated steel products originating in China and Brazil.

OFFICIAL JOURNAL

Russia and Belarus - sanctions

4.5.2022 L 130I Commission Delegated Regulation (EU) 2022/699 of 3 May 2022 amending Regulation (EU) **2021/821** of the European Parliament and of the Council by removing **Russia** as a destination from the scope of **Union general export authorisations**. Regulation (EU) 2021/821 introduces eight Union general export authorisations for exports of certain items to certain destinations under specific conditions and requirements. Currently, three Union general export authorisations can be used for exports to Russia: EU003 (re-export of items after repair or replacement in the EU), EU004 (export of items for fairs or exhibitions), EU005 (exports of telecommunications equipment). In view of the Union's actions against Russia, it is appropriate to remove Russia from the destination lists of Union general export authorisations Nos EU003, EU004 and EU005 in order to prevent Russia from gaining access to critical technologies and dual-use items. Regulation (EU) 2021/821 is therefore amended accordingly.

21.4.2022 L 120 Council Decision (CFSP) 2022/660 of 21 April 2022 amending Decision **2014/145/CFSP** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. **Two individuals** were added to the list of persons, entities and bodies subject to restrictive measures set out in the Annex to Decision 2014/145/CFSP.

21.4.2022 L 120 Council Implementing Regulation (EU) 2022/658 of 21 April 2022 implementing Regulation (EU) No **269/2014** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity,

sovereignty and independence of Ukraine. **Two individuals** were added to the list of persons, entities and bodies subject to restrictive measures set out in Annex I to Regulation (EU) No 269/2014.

13.4.2022 L 116 Council Decision (CFSP) 2022/628 of 13 April 2022 amending Decision (CFSP) **2022/266** concerning restrictive measures in response to the recognition of the non-government controlled areas of the **Donetsk and Luhansk** oblasts of Ukraine and the ordering of Russian armed forces into those areas. The new decision provides for exceptions for **humanitarian purposes**.

13.4.2022 L 116 Council Decision (CFSP) 2022/627 of 13 April 2022 amending Decision **2014/145/CFSP** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. The new decision provides for exceptions for **humanitarian purposes**.

13.4.2022 L 116 Council Regulation (EU) 2022/626 of 13 April 2022 amending Regulation (EU) **2022/263** (which gives effect to several measures provided for by Council Decision (CFSP) **2022/266**),concerning restrictive measures in response to the recognition of the non-government controlled areas of the **Donetsk and Luhansk** oblasts of Ukraine and the ordering of Russian armed forces into those areas. The regulation provides for exceptions that allow clearly defined categories of bodies, persons, entities, organisations and agencies to provide goods and technology for use in certain sectors, as well as certain restricted services and assistance related to such goods and technology, to persons, entities and bodies in the non-government-controlled areas of the Donetsk and Luhansk oblasts of Ukraine or for use in those areas, where necessary for **humanitarian purposes**.

13.4.2022 L 116 Council Regulation (EU) 2022/625 of 13 April 2022 amending Regulation (EU) No **269/2014** (which gives effect to certain measures provided for by Council Decision **2014/145/CFSP**) concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. The new regulation provides for exceptions to the freezing of the assets of, and the restrictions on making funds and economic resources available to, designated persons, entities and bodies for certain clearly defined categories of bodies, persons, entities, organisations and agencies for exclusively **humanitarian purposes** in Ukraine.

8.4.2022 L 111 Council Decision (CFSP) 2022/579 of 8 April 2022 amending Decision **2012/642/CFSP** concerning restrictive measures in view of the situation in **Belarus** and the involvement of Belarus in the Russian aggression against Ukraine. Some of the restrictive measures: prohibited sale, supply, transfer or export to Belarus of banknotes denominated in any **official currency of a Member State**; it is prohibited to any road transport **undertaking established in Belarus** to transport goods by road within the territory of the Union, including in transit.

8.4.2022 L 111 Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision **2014/512/CFSP** concerning restrictive measures in view of **Russia's** actions destabilising the situation in Ukraine. Some of the restrictive measures: extended prohibition on the export of euro-denominated banknotes and on the sale of euro-denominated transferrable securities to all **official currencies of the Member States**; prohibited access to ports in the territory of the Union to **vessels registered under the flag of Russia**; restricted exports of jet fuel and other goods to Russia; **import** restrictions on certain goods exported by or originating from Russia, including **coal and other solid fossil fuels**; it is prohibited to any **road transport undertaking established in Russia** to transport goods by road within the territory of the Union, including in transit.

8.4.2022 L 111 Council Regulation (EU) 2022/577 of 8 April 2022 amending Regulation (EC) No **765/2006** concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine. Restrictive measures: prohibiting the sale to Belarus of transferable securities denominated in any official currency of a Member State, and prohibiting the sale, supply, transfer or export to Belarus of **banknotes denominated in any official currency of a Member State**; prohibiting **road transport undertakings established in Belarus** from transporting goods by road within the territory of the European Union.

8.4.2022 L 111 Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No **833/2014** concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Some of the restrictions: it

shall be prohibited to purchase, import, or transfer, directly or indirectly, **coal** and other solid fossil fuels; extended prohibitions on the export of euro-denominated banknotes and on the sale of euro-denominated transferrable securities to all **official currencies of the MS**; a prohibition for **road transport undertakings established in Russia** to transport goods by road in the Union, and prohibited access to ports to vessels registered under the flag of Russia.

8.4.2022 L 110 Council Decision (CFSP) 2022/582 of 8 April 2022 amending Decision **2014/145/CFSP** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. **216 individuals and 18 entities** added to the list of persons, entities and bodies subject to restrictive measures set out in the Annex to Decision 2014/145/CFSP.

8.4.2022 L 110 Council Implementing Regulation (EU) 2022/581 of 8 April 2022 implementing Regulation (EU) No **269/2014** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. **216 individuals and 18 entities** added to the list of persons, entities and bodies subject to restrictive measures set out in Annex I to Regulation (EU) No 269/2014.

8.4.2022 L 110 Council Regulation (EU) 2022/580 of 8 April 2022 amending Regulation (EU) No **269/2014** concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. Derogation options from the **asset freeze** and the prohibition to make funds and economic resources available to designated persons and entities.

1.4.2022 CI 145 Notice to economic operators, importers and exporters. In view of the **risk of circumvention of sanctions on Russia and Belorus**, economic operators in the EU are advised to take adequate due diligence measures available in order to prevent circumvention of the measures.

E-customs

10.5.2022 L 133 Commission Implementing Decision (EU) 2022/714 and Commission Implementing Decision (EU) 2022/715 of 5 May 2022 granting a derogation allowing Belgium, Bulgaria, Cyprus, Hungary, Lithuania, the Netherlands and Finland to use means other than electronic data-processing techniques for the exchange and storage of information for the Import Control System 2 in relation to goods in postal consignments.

Tariff classification

20.5.2022 L 141 Commission Implementing Regulation (EU) 2022/788 of 16 May 2022 concerning the classification of certain goods in the Combined Nomenclature. The goods: a **shower-bath**, **in the form of a flat tray**, made out of a mixture of minerals and plastics and a white outer plastic coating. CN code: 3922 10 00.

12.5.2022 C 193 Communication in accordance with Article 34 (7)(a)(iii) of Regulation (EU) No 952/2013 of the European Parliament and of the Council, on decisions relating to **binding information** issued by the customs authorities of the Member States concerning the classification of goods in the customs nomenclature.

8.4.2022 C 154 Explanatory Notes to the Combined Nomenclature of the European Union regarding **information displays**.

7.4.2022 L 108 Commission Implementing Regulation (EU) 2022/557 of 1 April 2022 concerning the classification of certain goods in the Combined Nomenclature. **Protein-rich fraction** from the separation of pea flour, CN code: 2309 90 31. **Starch-rich fraction** from the separation of pea flour, CN code 2309 90 51.

7.4.2022 L 108 Commission Implementing Regulation (EU) 2022/556 of 1 April 2022 concerning the classification of certain goods in the Combined Nomenclature. A set described as a "**composite system for dental repair**" put up for retail sale in a carton box in which all the elements are presented together with an instruction for use. CN code: 3006 40 00.

6.4.2022 C 151 Explanatory Notes to the Combined Nomenclature of the European Union regarding tractors.

6.4.2022 C 151 Explanatory Notes to the Combined Nomenclature of the European Union regarding **dried vegetables, roots and tubers**.

6.4.2022 C 151 Explanatory Notes to the Combined Nomenclature of the European Union regarding some sorts of **fish**.

6.4.2022 C 151 Explanatory Notes to the Combined Nomenclature of the European Union regarding **chewing tobacco and snuff**.

Origin

19.5.2022 C 202 Commission notice concerning the application of the **transitional rules of origin** providing for diagonal cumulation between the applying Contracting Parties in the pan-Euro-Mediterranean (**PEM**) zone.

20.4.2022 C 166 Notice to importers – Imports of open mesh **fabrics of glass fibres** into the European Union from GSP beneficiary countries belonging to the regional cumulation group I and group III.

20.4.2022 C 166 Notice to importers – Imports of **textile products** from Bangladesh into the Community.

20.4.2022 C 166 Notice to importers – Imports of **garlic** into the Community.

Duties, tariff quotas

24.5.2022 L 145 Commission Implementing Regulation (EU) 2022/807 of 23 May 2022 correcting Implementing Regulation (EU) 2022/191 imposing a definitive **anti-dumping** duty on imports of certain **iron or steel fasteners** originating in the People's Republic of China.

24.5.2022 L 145 Commission Implementing Regulation (EU) 2022/806 of 23 May 2022 amending Implementing Regulation (EU) 2020/492 imposing definitive **anti-dumping** duties on imports of certain woven **and/or stitched glass fibre fabrics** originating in the People's Republic of China and Egypt and Implementing Regulation (EU) 2020/776 imposing definitive **countervailing** duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and imposing the definitive anti-dumping duties and the definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt brought to an artificial island, a fixed or floating installation or any other structure in the continental shelf of a Member State or the exclusive economic zone declared by a Member State pursuant to UNCLOS.

23.5.2022 L 143 Commission Implementing Regulation (EU) 2022/802 of 20 May 2022 imposing a provisional **anti-dumping** duty on imports of **electrolytic chromium coated steel products** originating in the People's Republic of China and Brazil.

20.5.2022 L 141 Commission Implementing Regulation (EU) 2022/789 of 18 May 2022 amending Regulation (EC) No 1484/95 as regards fixing **representative prices** in the poultrymeat and egg sectors and for egg albumin.

19.5.2022 L 140 Council Decision (EU) 2022/781 of 16 May 2022 on the signing, on behalf of the Union, of the Agreement between the European Union and **New Zealand** pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions on all the **tariff-rate quotas** included in the EU Schedule CLXXV as a consequence of the United Kingdom's withdrawal from the European Union.

16.5.2022 L 137 Commission Implementing Regulation (EU) 2022/739 of 13 May 2022 amending Implementing Regulation (EU) 2020/761 as regards the management of certain tariff quotas for importing poultry and of a **tariff quotas** for exporting milk powder to the **Dominican Republic**.

16.5.2022 C 197 Notice of the impending expiry of certain **anti-dumping** measures. Product: certain **corrosion resistant steels**. Country of origin or exportation: China.

13.5.2022 C 195 Notice of initiation of an **anti-dumping** proceeding concerning imports of **Stainless Steel Refillable Kegs** originating in the People's Republic of China.

13.5.2022 C 195 Notice of the impending expiry of certain **anti-dumping** measures. Product: certain **cast iron articles**. Country of origin or exportation: China.

13.5.2022 C 195 Notice of initiation of an **anti-subsidy** proceeding concerning imports of **fatty acid** originating in Indonesia.

12.5.2022 C 193 Notice of initiation of an expiry review of the **anti-dumping** measures applicable to imports of certain **seamless pipes and tubes** of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406,4 mm, originating in the People's Republic of China.

13.5.2022 L 136 Commission Implementing Regulation (EU) 2022/731 of 12 May 2022 amending Implementing Regulation (EU) 2021/1266 imposing a definitive anti-dumping duty on imports of **biodiesel** originating in the United States of America and Implementing Regulation (EU) 2021/1267 imposing definitive **countervailing** duties on imports of biodiesel originating in the United States of America.

3.5.2022 C 180 Notice of initiation of an expiry review of the **anti-dumping** measures applicable to imports of certain **lightweight thermal paper** originating in the Republic of Korea.

29.4.2022 L 126 Commission Delegated Regulation (EU) 2022/682 of 25 February 2022 amending Regulation (EU) 2018/196 of the European Parliament and of the Council on additional customs **duties on imports of certain products originating in the USA**.

29.4.2022 L 126 Commission Implementing Regulation (EU) 2022/683 of 27 April 2022 amending Regulation (EC) No 1484/95 as regards fixing **representative prices** in the poultrymeat and egg sectors and for egg albumin.

25.4.2022 L 122 Commission Implementing Regulation (EU) 2022/674 of 22 April 2022 correcting Implementing Regulation (EU) 2022/95 imposing a definitive **anti-dumping** duty on imports of certain **tube and pipe fittings**, of iron or steel, originating in the People's Republic of China, as extended to imports of certain tube and pipe fittings, of iron or steel consigned from Taiwan, Indonesia, Sri Lanka and the Philippines, whether declared as originating in these countries or not following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council.

22.4.2022 L 121 Commission Implementing Regulation (EU) 2022/664 of 21 April 2022 amending Implementing Regulation (EU) 2019/159 imposing a definitive **safeguard measure** against imports of certain **steel products**.

22.4.2022 L 121 Commission Implementing Regulation (EU) 2022/663 of 21 April 2022 amending Implementing Regulation (EU) 2020/761 as regards the volume of the **tariff rate quota** for high-quality **beef** from Paraguay.

21.4.2022 C 167 Notice of initiation of an expiry review of the **anti-dumping** measures applicable to imports of continuous filament **glass fibre products** originating in the People's Republic of China.

21.4.2022 L 119 Commission Implementing Regulation (EU) 2022/651 of 20 April 2022 initiating a review of Implementing Regulation (EU) 2017/1993 imposing a definitive **anti-dumping** duty on imports of certain open mesh **fabrics of glass fibres** originating in the People's Republic of China as extended to imports of certain open mesh fabrics of glass fibres consigned from India, Indonesia, Malaysia, Taiwan and Thailand, whether declared as originating in these countries or not, for the purposes of determining the possibility of granting an exemption from those measures to one Indian exporting producer, repealing the anti-dumping duty with regard to imports from that exporting producer and making imports from that exporting producer subject to registration.

13.4.2022 L 115 Commission Implementing Regulation (EU) 2022/619 of 12 April 2022 terminating the 'new exporter' reviews of Implementing Regulation (EU) 2017/2230 imposing a definitive **anti-dumping** duty on imports of **trichloroisocyanuric** acid originating in the People's Republic of China, for three Chinese exporting producers,

imposing the duty with regard to these producers' imports and terminating the registration of these imports.

11.4.2022 C 157 Notice to economic operators – New round of requests for the **suspension of the autonomous** Common Customs Tariff **duties** on certain industrial and agricultural products. The list of the products for which a duty suspension is requested is now available on the Commission's thematic website. The deadline for objections against new requests to reach the Commission, via the national administrations, is 21 June 2022.

7.4.2022 L 108 Commission Implementing Regulation (EU) 2022/558 of 6 April 2022 imposing a definitive **anti-dumping** duty and definitively collecting the provisional duty imposed on imports of certain **graphite electrode systems** originating in the People's Republic of China.

6.7.2022 L 107 Commission Implementing Regulation (EU) 2022/547 of 5 April 2022 imposing a definitive **anti-dumping** duty on imports of **superabsorbent polymers** originating in the Republic of Korea.

5.4.2022 C 150 Notice of initiation of an expiry review of the **anti-dumping** measures applicable to imports of certain **hot-rolled flat products of iron**, **non-alloy or other alloy steel** originating in the People's Republic of China.

5.4.2022 C 150 Notice of initiation of an expiry review of the **anti-dumping** measures applicable to imports of **okoumé plywood** originating in the People's Republic of China.

30.3.2022 L 102 Commission Implementing Decision (EU) 2022/505 of 23 March 2022 concerning **exemptions** from the extended anti-dumping duty on certain **bicycle parts** originating in the People's Republic of China pursuant to Regulation (EC) No 88/97. Information on parties, to whom the exemption authorisation was granted, withdrawn or updated.

Non-tariff measures

18.5.2022 L 139 Commission Delegated Regulation (EU) 2022/760 of 8 April 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for **certificates of inspection issued in Ukraine** (using TRACES and bearing a qualified electronic seal).

5.5.2022 L 131 Commission Implementing Regulation (EU) 2022/700 of 4 May 2022 amending Regulation (EC) No 1295/2008 on the **importation of hops** from third countries. Annex I 'Agencies authorised to issue attestations in respect of hop cones CN code ex 12 10, hop powders CN code ex 12 10, saps and extracts of hops CN code 1302 13 00' to Regulation (EC) No 1295/2008 is replaced by the text in the Annex to this Regulation.

28.4.2022 L 125 Commission Implementing Regulation (EU) 2022/680 of 27 April 2022 amending the information in the Annex to Implementing Regulation (EU) 2020/178 by including United Kingdom (Northern Ireland) as an origin for which a phytosanitary certificate is not required for the introduction into the Union of **plants, fruits, vegetables, flowers or seeds**.

25.4.2022 L 122 Commission Delegated Regulation (EU) 2022/671 of 4 February 2022 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council as regards specific rules on official controls performed by the competent authorities on animals, products of animal origin and germinal products, follow-up action to be taken by the competent authority in case of non-compliance with identification and registration rules for **bovine, ovine and caprine animals** or of non-compliance during transit through the Union of certain bovine animals, and repealing Commission Regulation (EC) No 494/98.

20.4.2022 L 118 Commission Delegated Regulation (EU) 2022/643 of 10 February 2022 amending Regulation (EU) No 649/2012 of the European Parliament and of the Council as regards the listing of **pesticides, industrial chemicals, persistent organic pollutants and mercury** and an update of **customs codes**.

18.4.2022 L 117 Commission Implementing Regulation (EU) 2022/632 of 13 April 2022 setting out temporary measures in respect of specified **fruits** originating in Argentina, Brazil, South Africa, Uruguay and Zimbabwe to

prevent the introduction into, and the spread within, the Union territory of the pest Phyllosticta citricarpa (McAlpine) Van der Aa.

8.4.2022 L 109 Commission Implementing Decision (EU) 2022/575 of 6 April 2022 concerning emergency measures to prevent the introduction into the Union of foot and mouth disease through consignments of **hay and straw** from third countries or territories and repealing Implementing Regulation (EU) 2020/2208.

8.4.2022 C 154 List of Member States and their competent authorities concerning Articles 15(2), 17(8) and 21(3) of Council Regulation (EC) No 1005/2008; List of competent authorities in Northern Ireland concerning Article 17(8) of Council Regulation (EC) No 1005/2008 in accordance with the Protocol on Ireland/Northern Ireland of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. Information about competent authorities for the checks and verifications of the **catch certificates**.

1.4.2022 L 104 Commission Regulation (EU) 2022/520 of 31 March 2022 amending Regulation (EC) No 1418/2007 concerning the **export for recovery of certain waste** listed in Annex III or IIIA to Regulation (EC) No 1013/2006 of the European Parliament and of the Council to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply. The regulation has been amended considering the urgent need to resume shipments of waste (e.g. metal, textile, tyres) to India and Moldova.

1.4.2022 C 145 Summary of European Commission Decisions on authorisations for the placing on the market for the use and/or for use of substances listed in Annex XIV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (**REACH**). Company Cytiva Sweden AB was granted an authorisation for placing on the market certain substances, because the socio-economic benefits outweigh the risk to human health and the environment from the uses of the substance and there are no suitable alternative substances or technologies.

29.3.2022 L 101 Commission Implementing Regulation (EU) 2022/497 of 28 March 2022 amending and correcting Annexes I and II to Implementing Regulation (EU) 2021/403 as regards **certain model animal health certificate**s, animal health/official certificates and declarations for the movements between the Member States and the entry into the Union of consignments of certain species and categories of terrestrial animals and germinal products thereof.

28.3.2022 L 100 Commission Implementing Regulation (EU) 2022/490 of 25 March 2022 amending Implementing Regulation (EU) 2018/2019 as regards certain plants for planting of Juglans regia L., Nerium oleander L. and Robinia pseudoacacia L. originating in Turkey, and amending Implementing Regulation (EU) 2020/1213 as regards the **phytosanitary measures** for the introduction of those plants for planting into the Union territory.

EUROPEAN COMMISSION

23.5.2022 The Registered Exporter system. An updated version of the guidance document on the Registered Exporter system (the **REX system**) is available. This revision considers the evolution of the application of the REX system, in particular, its use in preferential trade agreements and the end of the transition period for its application in the Generalized System of Preferences (GSP).

20.5.2022 EU and its international partners call for **Russia and Belarus' participation at the WCO to be suspended**. The EU, EU Member States, and their international partners at the World Customs Organization (WCO) have today issued a Joint Statement condemning in the strongest possible terms Russia's unjustified aggression in Ukraine with Belarus' support, and reiterating the damage that the invasion of one WCO Member by another has caused to the climate of trust and cooperation on which the WCO is based.

19.5.2022 Customs Union: Commission welcomes political agreement on the new '**EU Single Window Environment for Customs**' - a tool to streamline digital customs cooperation and facilitate trade. The European Commission welcomes the provisional political agreement reached between the co-legislators on the new EU Single Window

for Customs initiative, making it easier for different authorities involved in goods clearance to exchange electronic information submitted by traders. As the next step, businesses will be able to submit customs and regulatory information required for import, transit or export of goods only once through a single point of entry.

12.5.2022 Commission to establish Solidarity Lanes to help **Ukraine export agricultural goods**.

10.5.2022 New features on the **Access2Markets** portal. The new Access2Markets homepage was launched. On the new homepage, information is now organised in a clearer and more intuitive manner. New features have also been added, including a trade assistant for services and investment.

5.5.2022 **Agression against Ukraine**, updated FAQ: the list of the EU sanctions; specific instructions, guidance, and notices to importers.

29.4.2022 WTO panel rejects most of **Turkey's challenges of the EU's steel safeguard**. The EU takes note of the World Trade Organization (WTO) panel ruling on the EU steel safeguard. The verdict is overall satisfactory for the EU because the most important questions were resolved in the EU's favour.

28.4.2022 WTO Panel rules against **Turkey's discrimination of foreign medicines** in line with EU's claims. The EU welcomes the WTO Panel ruling that Turkey cannot require foreign producers of pharmaceuticals to move their production to the country for those pharmaceuticals to be eligible for reimbursement under Turkish social security schemes.

26.4.2022 The European Commission has approved, under EU State aid rules, a €130 million Lithuanian scheme to support and facilitate access to finance by companies affected by the exceptional circumstances resulting from **China's discriminatory trade restrictions on Lithuania**.

25.4.2022 Safety Gate: Motor vehicles and toys top the list of **dangerous non-food products** this year.

8.4.2022 Question and answers on the **fifth package of restrictive measures against Russia**.

8.4.2022 Ukraine: EU agrees **fifth package of restrictive measures against Russia**.

4.4.2022 New tool to help Member States control **prohibited and restricted goods**.

31.3.2022 EU knocks down **barriers to exports of ceramic tiles**. As of today, 31 March 2022, EU exporters of ceramic tiles will no longer need to undergo redundant testing or product audits when they export to Saudi Arabia, meaning exporting will become cheaper, faster and more predictable. The EU secured a commitment from Saudi Arabia on the latter's removal of a number of obstacles currently affecting the import of ceramic tiles.

31.3.2022 Report by the **Wise Persons Group on the Reform of the EU Customs Union**. The report concludes that the Customs Union needs to be better prepared to address forthcoming challenges, such as growing trade volumes and new trade models, technological developments, the green transition, the evolving geopolitical context and security risks. The WPG proposed 10 sets of measures to be implemented by 2030.

28.3.2022 EU challenges discriminatory practices of UK's green energy subsidy scheme at WTO. The EU is requesting consultations with the United Kingdom (UK) at the World Trade Organization (WTO) on the UK's discriminatory practices when granting support for green energy projects. The criteria used by the UK government in awarding **subsidies for offshore wind energy projects favour UK over imported content.**

WORLD TRADE ORGANIZATION (WTO)

17.5.2022 Members review notification activity on national customs legislation. WTO members reviewed the status of notifications of national customs legislation as well as questions regarding that legislation at a meeting of the **Committee on Customs Valuation** on 17 May. Members also explored the possibility of organizing an experience-sharing session for a future meeting of the Committee and heard a WTO Secretariat presentation on the e-Agenda platform.

17.5.2022 WTO launches new **WTO data portal.** The WTO has launched a new WTO data portal to provide easy access to key databases offering trade statistics and information on WTO members' trade-related measures.

5.5.2022 Transparency, analysis, cooperation key to address trade **impacts of subsidies** - report. Transparency is an essential first step to understanding how government subsidies impact international trade and how to minimize any negative effects.

29.4.2022 WTO dispute panel issues report regarding EU **safeguard measures on steel imports**. The WTO circulated the panel report in the case brought by Turkey in 'European Union — Safeguard Measures on Certain Steel Products'.

27.4.2022 How Artificial Intelligence (AI) can help Customs in **automating HS Classification**.

25.4.2022 The SAFE Working Group urges **greater harmonization of AEO programmes**.

7.4.2022 Webinar revisits **trade preferences** and factors impacting their use.

5.4.2022 Members reinvigorate **Trade Facilitation Agreement** monitoring following last year's review.

31.3.2022 The new **WTO statistics dashboard** provides graphical presentation of trade and tariff data.

Richard Bartlett courses: https://www.customsclearance.net/en/search?q=Richard+Bartlett

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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About the author

EU LAW AND CASE LAW

Keep an eye on customs case law or Who has enough money to throw away?

‘Compliance’ with statute law has given rise to a lot of publications and debates. However, when considering compliance, it should not be forgotten that case law also influences a company’s organisation and processes. Can you think of any court cases which are having an effect on your internal operations? Using the current proceedings on ‘reimbursement interest’ as an example, this contribution shows that court rulings can influence customs practice in companies and so it is important that you follow court proceedings from the outset. This is because even pending proceedings may enable you to earn money with customs or at least avoid throwing it away. Court judgements do not always operate to the detriment of the economic participant.

If customs duties are collected unlawfully, Art. 117 of the Union Customs Code (UCC; Art. 236 CC, former edition) provides for their **reimbursement**. However, it is disputed if the customs debtor should also receive **interest** on the customs debt paid.

In ‘Wortmann’, the **European Court of Justice (ECJ)** decided as follows:

“Where import duties, including anti-dumping duties, are reimbursed on the ground that they have been levied in breach of EU law, […] there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties.”

According to the ECJ, therefore, there is also a right to **interest payments** which results directly from Union law and exists alongside the general prohibition on interest payments as provided for in the old edition of the Customs Code (and now the UCC) in the classic case of unlawfully levied import duties. This particularly applies if the national interest regime does not order interest to be calculated from the date of the undue payment, thereby denying the customs debtor reasonable compensation for the loss suffered by paying the unlawful customs duties. This is the situation in Germany because, according to § 236 para. 1 AO, interest will only start to run once proceedings are pending (i.e., once the action has been initiated in the fiscal courts). The reimbursement of interest does not cover the period before this (i.e., from the payment of the customs duties).

Since the Wortmann judgement, there has been a debate with Customs over its application in cases where import duties were unlawfully levied. Irrespective of the fact that Customs regards interest as 'hard cash', the (legal) background is that the Wortmann judgement dealt with cases involving a legislative defect. Wortmann KG paid anti-dumping duties on the basis of an Anti-Dumping Regulation which the ECJ had declared unlawful. Since the matter concerned a legislative defect, Customs challenged interest payments in all cases which did not involve the

unlawfulness of the Anti-Dumping Regulation but rather errors in the application of customs law (i.e., the application of law in daily import clearance).

HOWEVER, IS IT FAIR THAT ONLY LEGISLATIVE DEFECTS JUSTIFY THE PAYMENT OF INTEREST UNDER UNION LAW AND NOT THE INCORRECT APPLICATION OF THE LAW?

Following the Wortmann judgement, the Federal Fiscal Court ('Bundesfinanzhof', hereinafter 'BFH') similarly decided in March 2021, that a company could claim the reimbursement of interest on the payment of unlawfully levied import duties. This case concerned the importation of LCD monitors and reversing video systems for which the claimant had received Binding Tariff Information (BTI), which it objected to but declared in order to prevent negative consequences on importation. Parallel to the objection proceedings, a Classification Regulation was enacted in the claimant's favour. This led to the latter claiming the reimbursement of interest on the duties reimbursed. Customs refused to pay reimbursement interest. However, both the Düsseldorf Fiscal Court ('Finanzgericht', hereinafter 'FG') and the BFH upheld the claim for interest referring to the ECJ's judgement.

IN PRACTICE, THIS MEANS THAT:

"An unlawful BTI means that there is no legal basis for establishing import duties. If a company pays excessive import duties on the basis of a BTI, then it can demand that Customs reimburse the excess amount paid and the interest thereon."

HOWEVER:

According to the BFH, interest can only be claimed if customs duties have been reimbursed owing to the loss of legal justification. As far as 'typical errors in import clearance' are concerned, the BFH observed that the customs authorities, owing to the high volume of imports, examine most cases retroactively. If Customs determines, retroactively, that the duties levied are excessive, they will correct the original ruling and reimburse the excess amount paid. Accordingly, if Customs has not checked the customs declaration before acceptance and the unlawful duty ruling is due to the speed of the clearance procedure there will be no right to the payment of interest. The 'usual case' is due to the fallibility of the clearance system and does not indicate any arbitrariness on the part of Customs when determining the customs duties. However, the situation would be different if import clearance were based on an 'incorrect' BTI which had to be cancelled owing to a Classification Regulation. If, after submission of the customs declaration, the Combined Nomenclature (CN) were amended, resulting in the imported goods being subject to a different customs tariff number, then the customs tariff rate determining the calculation of customs duties would also change.


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WHAT NOW?

Parallel to the judgement of the BFH, the Hamburg FG referred three cases to the ECJ which concerned interest payments on unlawfully levied customs duties in which BTIs had not played a role.

The Hamburg FG stated that the Wortmann-Judgement and other related judgements were similar in that i*nter alia* a Regulation had been declared unlawful, a Directive incorrectly transposed or national legislation enacted in contravention of European law (i.e., that reimbursement was due to a legislative defect). However, it was unclear whether a claim for interest also extended to cases involving the incorrect application of customs law by Customs (i.e., whether reimbursement should be granted owing to errors when applying the law). The ECJ has not yet answered this question.

Specifically, the referral procedure concerns the following disputes which should be known to all:

- Interest payments on unlawfully established anti-dumping duties are reimbursed after final judgement.
- Interest payments on duties which customs levied ex-post because it took a different view of classification but reimbursed after final judgement.
- Interest payment on export refunds was wrongfully denied.

WHAT THIS MEANS FOR YOU:

If you think you have paid excessive duties or that your export refunds have been wrongly denied and you are challenging the lawfulness of Customs' ruling, you should also apply for the payment of interest on the duties you think should be repaid or the export refunds denied and keep an eye on the relevant case law.

HOWEVER, BEAR IN MIND THAT:

Since it is likely that your claim will be denied, you should apply for a suspension of your interest claim (until the ECJ and subsequently the Hamburg FG have made a judgement), referring to proceedings pending before the ECJ.

Regardless of the formal claim, you must of course examine whether the facts of your case correlate to the cases before the court or whether they constitute a new claim for reimbursement interest - which, if denied, may also have to be resolved before the courts.

We will inform you about the decision of ECJ. In January 2022 the Advocate General has given his opinion. This opinion is giving hope to economic operators.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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EU LAW AND CASE LAW

Payment of interest on returned sums that were unlawfully recovered by the customs authorities in the EU Member States and their assessment by the EU courts

In business practice, the customs authorities often recover from the traders (business entities) (or sometimes – refuse to pay to these persons) various duties, charges, levies, or sanctions administered by them, even though such recovery or refusing to pay them at the later date may be declared illegal, contrary to the EU law, e.g. by national courts. Accordingly, in such a situation the question arises whether such wrongly recovered and/or paid sums (customs duties, other charges, penalties) administered by the customs authorities in the EU Member States must be repaid together with additionally calculated interest for the period during which the person concerned was unlawfully deprived of the relevant sums of money? The article analyses how such issues should be addressed in the light of recent case law of the European Court of Justice (CJEU).

FACTUAL CIRCUMSTANCES OF CASES C-415/20, C-419/20 AND C-427/20 OF THE CJEU

In joined cases C-415/20, C-419/20, and C-427/20, the CJEU has heard references from the national courts of the Federal Republic of Germany related to the interpretation of provisions of EU customs law concerning the calculation of interest on recovery of amounts of customs duties or other taxes or payments (charges) administered by the customs authorities.

In particular, these cases dealt with three related situations in which national courts of the Federal Republic of Germany referred interrelated questions to the CJEU concerning the provisions of EU customs legislation on the application of interest corresponding to the recovery of duties/charges or sanctions administered by customs authorities.

The first situation in case C-415/20 concerned *Gräfendorfer*, i.e. y. activities of a company established in Germany exporting poultry carcases to the third countries. The Principal Customs Office, Hamburg, refused to grant *Gräfendorfer* export refunds on poultry carcasses which it had exported to third countries between January and June 2012 on the ground that the poultry carcasses were not of 'fair marketable quality' within the meaning of the EU legislation on export refunds for agricultural products, since they had not been fully plucked and contained too many giblets. The Principal Customs Office, Hamburg, also imposed a financial penalty on *Gräfendorfer* on the ground that it had applied for an export refund in excess of the refund applicable. *Gräfendorfer* brought an administrative appeal against that refusal, and then another against that financial penalty.

The *Finanzgericht Hamburg* (Finance Court, Hamburg, Germany) subsequently ruled, in legal proceedings brought by two companies other than *Gräfendorfer*, that the presence of a small number of feathers and a certain amount

of giblets on poultry carcasses had to be classified, in the light of the judgment of 24 November 2011, Gebr. Stolle and Doux Geflügel (C-323/10 to C-326/10, EU:C:2011:774) as not precluding the grant of export refunds on those products. In the light of that judgment, the Principal Customs Office, Hamburg, decided to grant Gräfendorfer the export refunds claimed by it and to repay it for the financial penalty imposed on it.

By letter of 16 April 2015, *Gräfendorfer* applied to the Principal Customs Office, Hamburg, for payment of interest both on those export refunds and on that financial penalty, for the entirety of the periods during which it had been unlawfully deprived of the possibility of having the corresponding sums of money available. The Principal Customs Office, Hamburg, rejected that application and then the administrative appeal brought by *Gräfendorfer* against the rejection of that application. Accordingly, following the referral of the case to the *Finanzgericht Hamburg*, t**he court initiated a request to the CJEU asking for a preliminary ruling on the interpretation of EU customs legislation and the possibility of calculating and paying the interest claimed by the *Gräfendorfer.***

The second situation analyzed by the CJEU in case C-419/20, concerned *Reyher* 2010, a company established in Germany. The company imported into the European Union, during 2010 and 2011, fasteners from a company established in Indonesia which is the subsidiary of another company established in China. The Principal Customs Office, Hamburg, took the view that those fasteners had to be regarded as originating in China and as such should be subject, when imported into the European Union, to the anti-dumping duties set out in Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1). It, therefore, decided to impose the payment of those anti-dumping duties on *Reyher*.

While paying those anti-dumping duties, *Reyher* brought an action against that decision before the *Finanzgericht Hamburg*. In a decision of 3 April 2019, that court held that the anti-dumping duties imposed *on Reyher* were not legally owed, since the Principal Customs Office, Hamburg, had failed to prove that the fasteners imported into the European Union by *Reyher* originated in China. In May 2019, that principal customs office repaid the amount of the anti-dumping duties concerned to *Reyher*. However, it refused to pay interest on that amount, for the period from the date of payment of those duties to the date of their repayment, and then dismissed the administrative appeal brought against that refusal by Reyher. When the dispute was initiated in the national court, in those circumstances, the Finanzgericht Hamburg decided to refer a question to the CJEU for a preliminary ruling on the application of EU customs legislation. **The court asked the CJEU to explain is there an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the Court of Justice, where a Member State authority imposes a duty pursuant to EU law but a Member State court subsequently finds that the factual conditions for the imposition of the duty have not been met?**

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The third situation analyzed in the case C-427/20 concerned the company *Flexi Montagetechnik*. *Flexi Montagetechnik* was a company established in Germany which imported into the European Union bolt hooks which are used in the production of dog leashes. The Principal Customs Office, Kiel, took the view that those bolt hooks fell under a different heading of the Combined Nomenclature set out in Annex I to Regulation No 2658/87 from that declared by *Flexi Montagetechnik* and that they should, on that basis, be subject to import duties of a higher amount than those paid by *Flexi Montagetechnik*. It, therefore, decided to amend, to that extent, the amount of those import duties.

While paying the difference between the amount of the import duties initially paid and the amount of those duties as resulting from that amendment, *Flexi Montagetechnik* brought legal proceedings in September 2014 which ultimately led the *Bundesfinanzhof* (Federal Finance Court, Germany) to deliver, on 20 June 2017, a judgment by which it held that the bolt hooks concerned fell under the heading declared by *Flexi Montagetechnik* and, consequently, annulled the notices by which the Principal Customs Office, Kiel, had amended the amount of the corresponding import duties. The Principal Customs Office, Kiel, then repaid *Flexi Montagetechnik* the difference between the amount of import duties initially paid by it and the amount of those duties as subsequently amended. However, it refused to pay interest on that difference for the period from the date of payment of those duties to the date of their partial repayment, and then dismissed the administrative appeal brought against that refusal.

When a dispute over the payment of interest was initiated in the court, the *Finanzgericht Hamburg* decided to stop the proceedings and to refer a question to the CJEU asking for a preliminary ruling on the possibility of calculating interest in this case. In particular, **the EU Court of Justice has been asked is there an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the Court of Justice, where a Member State authority imposes a duty in breach of legally valid provisions of EU law and a Member State court makes a finding of that infringement of EU law**.

The answers to these questions, all of which relate to the legal possibilities for calculating and applying interest on amounts unduly extracted by or paid to customs authorities and recovered from an EU Member State, have been provided by the CJEU in joined cases C-415/20, C-419/20 and C-427/20.

PROVISIONS OF EU CUSTOMS LEGISLATION APPLIED BY THE CJEU IN CASES C - 415/20, C - 419/20, AND C - 427/20

The CJEU applied Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Community Customs Code') (in force during the period when legal relations, addressed in the cases, has formed) which was repealed and replaced by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1, and corrigendum OJ 2013 L 287, p. 90) ('the Union Customs Code').

Article 236(1) of the Community Customs Code provided*, inter alia:*

'Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed …'

Article 241 of that Code stated, *inter alia:*

'Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payments of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid: – where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision, – where national provisions so stipulate'

Article 116 of the Union Customs Code, which is entitled 'General provisions', is currently worded as follows:

'1. Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds: (a) overcharged amounts of import or export duty; … (c) error by the competent authorities;

6. Repayment shall not give rise to the payment of interest by the customs authorities concerned.
However, interest shall be paid where a decision granting repayment is not implemented within three months of the date on which that decision was taken unless the failure to meet the deadline was outside the control of the customs authorities.
In such cases, the interest shall be paid from the date of expiry of the three-month period until the date of repayment.'

The CJEU also applied EU legislation concerning export refunds on agricultural products. Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11), to which the national courts referred to was repealed and replaced by 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 (OJ 2009 L 186, p. 1).

Article 51(1) of Regulation No 800/1999 stated, *inter alia:*

'Where it is found that an exporter with a view to the grant of an export refund has applied for a refund exceeding that applicable, the refund due for the relevant exportation shall be that applicable to the products actually exported, reduced by: (a) half the difference between the refund applied for and that applicable to the actual export; (b) twice the difference between the refund applied for and that applicable where the exporter intentionally provides false information'.

Article 48(1) of Regulation No 612/2009 reproduces the provisions formerly set out in Article 51(1) of Regulation No 800/1999.

INTERPRETATIONS BY THE CJEU ON THE APPLICATION OF THE PROVISIONS OF EU CUSTOMS LEGISLATION GOVERNING THE CALCULATION OF INTEREST

In Cases C-415/20, C-419/20 and C-427/20, the CJEU provided generalized interpretations appropriate to all three factual situations. **According to the CJEU, the principles of EU customs law concerning the right of individuals to recover sums which a Member State has ordered to be paid in breach of European Union law and to receive interest on those sums must be interpreted as follows:**

- first, as meaning that they apply where the sums of money in question correspond, on the one hand, to export refunds which were granted late to a person, after having been refused in breach of EU law, and, on the other hand, to a financial penalty which was imposed on that person as a result of that breach;
- second, as meaning that they apply where it follows from a decision of the Court or a decision of a national court that the payment of export refunds, a financial penalty, anti-dumping duties or import duties has, as the case may be, been refused or imposed by a national authority on the basis either of an incorrect interpretation of EU law or of an incorrect application of that law, and
- third, as precluding national legislation which provides that, where the payment of export refunds, a financial penalty, anti-dumping duties or import duties has, as the case may be, been refused or imposed in breach of EU law, the payment of interest may be made only in respect of the period from the date on which the legal proceedings seeking the payment or repayment of the sum of money in question were brought to the date of the decision given by the court having jurisdiction, to the exclusion of the earlier period. On the other hand, those principles do not, in themselves, preclude such legislation from providing that that payment is to be due only if such proceedings have been brought, provided that this does not have the effect of making the exercise of the rights which persons derive from EU law excessively difficult.

To summarize these interpretations by the CJEU, **it should be noted that the CJEU takes the position that is the fact that the payment of a tax, duty, charge or other levy has been imposed by a national authority 'in breach of EU law' which forms the basis for and justifies the right, for persons who have wrongly paid the corresponding sum of money, to obtain the repayment of that sum by the Member State which levied it and the payment of interest by that Member State.** In that regard, as the CJEU noted, it must be observed, first of

all, that such a breach may concern any rule of EU law, whether it be a provision of primary or secondary law, or a general principle of EU law. The rights to repayment and to the payment of interest which persons derive from EU law are the expression of a general principle, the application of which is not limited to certain breaches of EU law or excluded where there are other breaches. **Those rights may be relied on not only where a national authority has imposed the payment of a sum of money, such as a levy, tax or anti-dumping duty, on a person on the basis of an EU act which proves to be vitiated by illegality, but also in other situations**.

For example, according to the explanations of the CJEU, such rights may be relied on, in particular, where the payment of a tax or charge has been imposed on a person on the basis of national legislation which proves to be contrary to a provision of primary or secondary EU law, or where it is found that a national authority has misapplied, in the light of EU law, an EU act or national legislation implementing or transposing such an act when it imposed the payment of a tax on that person.

The CJEU has emphasized that **all three legal and factual situations which have been referred to the Court in cases C-415/20, C-419/20, and C-427/20 fall into the latter category, which gives rise to compensation and payment of interest**. As regards case C-415/20, the national authority concerned incorrectly applied EU law, based on a misinterpretation of EU law, when it refused to grant export refunds to a person and imposed a financial penalty on that person. Similarly, in cases C-419/20 and C-427/20, the national authorities concerned incorrectly applied EU law, based on an error of law or an error in the assessment of the facts, when they imposed, respectively, anti-dumping and import duties on persons.

The CJEU has also recognized, that the **existence of a breach of EU law (EU customs law) giving rise to the right to repayment and to the payment of interest to the person concerned and at the same time requiring the Member State in question to make that repayment and that payment of interest may be established not only by the EU judicature**, which alone has jurisdiction to annul an EU measure or to declare it invalid, but **also by a national court**, whether that court is called upon to draw the appropriate conclusions from a finding of illegality or invalidity previously made by the EU judicature or to find that a measure adopted by a national authority is vitiated by an incorrect implementation of EU law.

CONCLUSIONS AND GENERALIZATIONS

Summarizing the case law of the CJEU in cases C - 415/20, C - 419/20 and C - 427/20 on the calculation and application of interest on recoveries of customs duties and/or other sums, administered by the customs authorities, from an EU Member State, it should be noted that the possibility of paying such interest (as compensation for the violation of individual rights) in the EU Member States was explicitly recognized by the CJEU. This right can be exercised when a national authority (customs) has refused to pay (or, where appropriate, ordered to pay and recovered/extract) export refunds, a financial penalty (sanction), anti-dumping or import duties, other charges based on a misinterpretation or misapplication of EU law recognized by a national court (not EU courts only). However, as it was also emphasized by the CJEU, the calculation and/or payment of such interest may be linked to the requirement to formally bring an action for payment of interest in the EU Member State concerned, i.e. this may require additional active proceedings before national courts to exercise the right to payment of interest.

It should be emphasized that the case law of the CJEU in cases C-415/20, C-419/20 and C-427/20 ensures more effective protection of the rights and legitimate interests of persons involved in customs legal relations in cases when taxes, levies, charges, sanctions, or other payments administered by customs authorities were illegally recovered or refused to be paid by them (in breach of EU law). The application of these provisions regarding the right of persons (business entities) to compensation in the form of interest must be ensured in all EU Member States, therefore, national authorities and courts must consider the issue of return and payment of interest on the sums of amounts recovered in a breach of EU law.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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EU LAW AND CASE LAW

The case with the smell of vanilla

On 7 April 2022 the Court of Justice of the European Union (CJEU) examined the case C-668/20, the goal of which was to clarify the tariff position that covers a runny and golden-brown product with a strong smell of vanilla, consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of 0.5% (the Goods), and whether the Goods of such composition shall be exempt from excise duty on alcohol. The CJEU had to clarify whether the Goods are classified as vegetable extracts, extracted oleoresins or a mixture thereof. It was also necessary to comment on the interpretation of 'flavouring', which is not defined in either the Combined Nomenclature (CN) or Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (Directive 92/83).

The CJEU only partially agreed with the decision of the German Principal Customs Office (Hauptzollamt), i.e., the CJEU agreed that the Goods should be classified under the subheading 1302 19 05 of the CN. As regards the levying of excise duty on alcohol, the CJEU ruled that vanilla oleoresin falling within subheading 1302 19 05 of the CN was to be regarded as a 'flavouring' within the meaning of Article 27 (1) (e) of Directive 92/83, provided that it constitutes an ingredient which brings a specific taste or smell to a particular product.

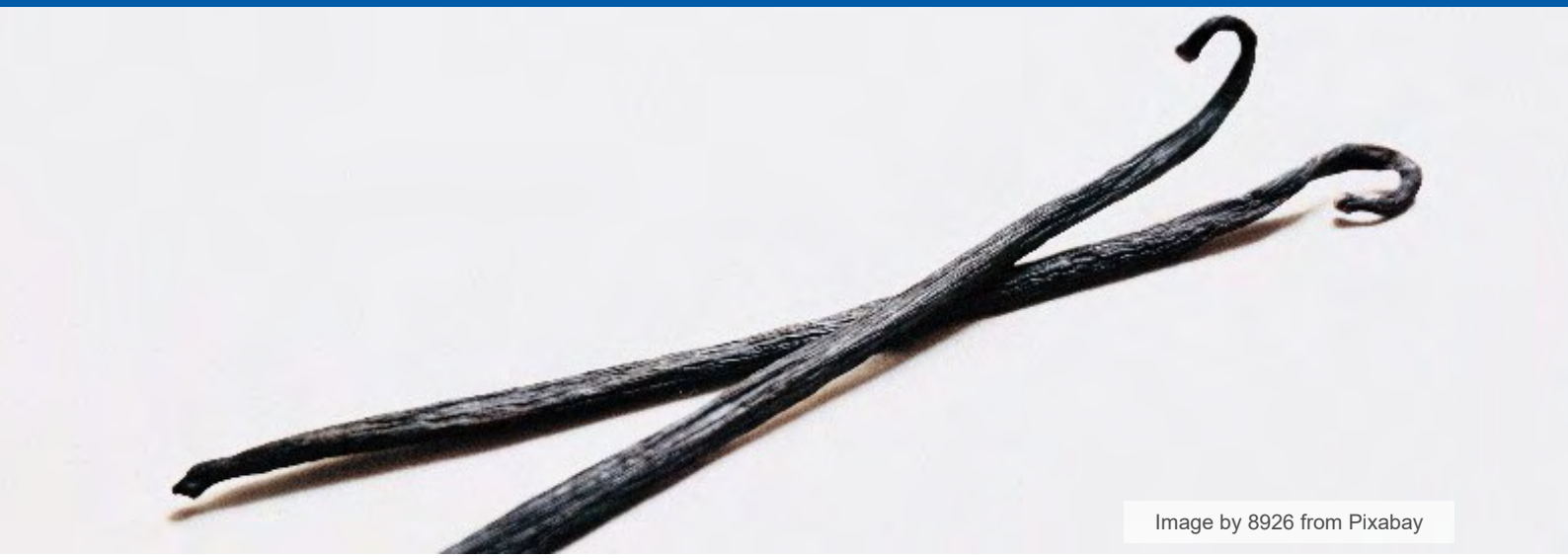
SITUATION

Y GmbH imported the Goods to Germany. In order to obtain such goods an intermediate product is extracted from the vanilla bean using ethanol (the intermediate product). That strongly aromatic, viscous, dark brown intermediate product is then diluted with alcohol and water in order to obtain the Goods. Y GmbH declared those Goods for release for free circulation under subheading 3302 10 90 on 10 February 2016.

On 25 April 2016, the Hauptzollamt took the view that the Goods should be classified under subheading 1302 19 05 of the CN and, therefore, that they were also subject to excise duty on spirits under German law. This position was also confirmed by the German Finance Court (Finanzgericht).

Y GmbH did not agree with the decision of the Finanzgericht and brought an appeal on a point of law to the German Federal Finance Court (Bundesfinanzhof, Court), which referred the question to the CJEU for a preliminary ruling.

In the first place, the Court noted, that heading 1302 of the CN includes vegetable saps and extracts, provided that, according to the Explanatory Notes to the Harmonized Commodity Description and Coding System (the HS), they



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are not specified or included in more specific headings. Again, according to those Explanatory Notes, vegetable saps and extracts differ, in particular, from oleoresins, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of vegetable materials.

The Court noted that the intermediate product, extracted from the vanilla bean using a solvent, could be regarded as a vegetable extract. Nevertheless, since that intermediate product is then diluted into a considerable quantity of water and alcohol, the Court was doubtful whether the goods can still be regarded as a vegetable extract within the meaning of heading 1302 of the CN. That is, whether the significant dilution of the intermediate product required to adjust the vanilla content to 0.5% may be regarded as standardisation.

Secondly, the Court noted that extracted oleoresins are expressly referred to in heading 3301 of the CN and that the goods at issue in the main proceedings contain the objective constituents mentioned in the Explanatory Notes to the HS such that those goods can be classified under the heading 3301 of the CN. In addition, Note 1(ij) to Chapter 13 of the CN excludes all extracted oleoresins from that chapter and, consequently, also from heading 1302 of the CN. However, Note 1(a) to Chapter 33 of the CN states, conversely, that vegetable extracts under heading 1302 are excluded from that Chapter and, therefore, from heading 3301 of the CN.

Thirdly, the Court was uncertain about the distinction between heading 3301 and heading 3302 of the CN. Having regard to the Explanatory Notes to the HS, it takes the view that heading 3302 covers not only mixtures of several extracted oleoresins, but also mixtures of one or more odoriferous substances with added diluents, such that it might also be possible to classify the goods under that heading, in so far as, in the present case, vanilla oleoresin, which is based on an odoriferous substance, has been diluted by adding alcohol and water.

In its reference for a preliminary ruling, the Court also stated that it is necessary to determine whether the goods containing spirits, and as a rule, subject to the excise duty provided for in Paragraph 130(1), first sentence, and (4) of the BranntwMonG, may benefit from the exemption provided for under the former Paragraph 152(1)(5) of the BranntwMonG. To answer that question, it is necessary to interpret Article 27(1)(e) of Directive 92/83, which that national provision transposed into German law, and, more specifically, to determine what is to be understood by ‘flavours’.

In its reference for a preliminary ruling, the Court expressed doubts as to whether the Commission’s Committee on Excise Duty, in Guideline No. 458 of 19 November 2003, considered that such an exemption applied from the production stage or the importation onwards to flavourings of subheadings 1302 19 30, 2106 90 20 and 3302 of the CN, in the versions in force at that time, and the competence conferred to limit the scope of Article 27(1)(e) of Directive 92/83 in that way.

Accordingly, in all those circumstances, the Court referred the matter to the CJEU for clarification as to which of the subheadings 302 19 05, 3301 90 30 or 3302 10 90 of the CN the Goods fall within and whether they may be exempted from alcohol excise duty under the provisions of Article 1 (1) (e) of the Directive 92/83.

INTERPRETATION BY THE CJEU

Classification of the goods

The CJEU recalled that, in accordance with Rule 1 of the CN (General rules for the interpretation of the CN), the tariff classification as a rule is determined by reference to headings and Explanatory Notes of sections or chapters.

Thus, the CJEU ruled in its judgment that:

- the heading 1302 in Chapter 13 of the CN covers vegetable extracts, with subheading 1302 19 05 of the CN referring, more specifically, to vanilla oleoresin;
- the heading 3301 in Chapter 33 of the CN covers extracted oleoresins, with subheading 3301 90 30 of the CN covering, more specifically, extracted oleoresins other than those of liquorice and hops;
- the heading 3302 in Chapter 33 of the CN covers mixtures of odoriferous substances and mixtures, including alcoholic solutions, with a basis of one or more of those substances, of a kind used as raw materials in the industry. The subheading 3302 10 90 of the CN covers, inter alia, such mixtures when they are of a kind used in the food industries.

The CJEU also stated that in accordance with Note 1, second paragraph, point (ij) to Chapter 13 of the CN, heading 1302 of that nomenclature does not apply to 'extracted oleoresins' covered by heading 3301 of the CN. And in accordance with Note 1(a) to Chapter 33 of the CN, that Chapter does not cover 'vegetable extracts' falling under heading 1302 of the CN.

The CJEU examined the goods falling within subheadings 1302 19 05, 3301 90 30 and 3302 10 90 of the CN and concluded that goods were to be regarded as a vegetable extract within the meaning of heading 1302 of the CN, namely vanilla oleoresin within the meaning of the subheading 1302 1905 of the CN.

The CJEU reached this conclusion in the light of the General rules for the interpretation of the CN, the notes of the chapters, sections, subheadings of the CN and the HS Explanatory Notes. It should be noted that the CJEU indicated that the Explanatory Notes to the HS are not binding and cannot therefore take precedence over the provisions of the CN or alter their content. The CJEU therefore based the classification of the product under subheading 1302 1905 of the CN on the following arguments:

- the heading 1302 of the CN is not to be regarded as a subsidiary;
- it follows from the Explanatory Notes to the HS that, as regards heading 1302 thereof, the more specific headings to which reference is made are those referred to at the end of Part (A) of the note concerned. The list of goods in that list does not mention the goods of headings 3301 or 3302 of the HS;
- the intermediate product, retrieved by extracting from vanilla bean using ethanol, referred to in paragraph 24 of the present judgment, may be classified as vanilla oleoresin within the meaning of heading 1302 19 05 of the CN. The CJEU noted that the first paragraph of Note 1 to Chapter 13 of the CN expressly provides that 'extract of pyrethrum' falls under heading 1302 of the CN. According to the Explanatory Notes to the HS, that extract is obtained 'by extraction with an organic solvent', like the intermediate product;
- the vanilla oleoresin, within the meaning of CN subheading 1302 19 05, must therefore be regarded as a vegetable extract which is not obtained in a 'natural' manner, but by means of a technological extraction process, for instance by means of a solvent;
- the Explanatory Notes to the CN, as regards heading 1302, which state that 'vegetable extracts of heading 1302 are crude raw vegetable materials obtained by, for instance, solvent extraction';

- the Explanatory Notes to the CN state as regards heading 1302, a vegetable extract will still fall under that heading even if it undergoes processing related to standardisation;
- regarding the Explanatory Notes to the HS it is stated, as regards heading 1302, that that heading also covers 'fluid extracts', namely '[generally standardised] solutions of [vegetable] extracts in … alcohol', to produce commercial grades with a standard vegetable extract content in the product;
- neither the provisions of the CN or the HS nor their explanatory notes set a maximum limit on the quantities of other products which can be used to standardise the vegetable extract. Therefore, when a vegetable extract is diluted in order to ensure its standardisation, the vegetable extract thus diluted can still fall under heading 1302 of the CN;
- the Explanatory Notes to the HS state, as regards headings 1302 and 3301 of the HS, that vegetable extracts of heading 1302 differ from extracted oleoresins, within the meaning of heading 3301 of the HS, in that, apart from volatile odoriferous constituents, they contain ordinarily a far higher proportion of other plant substances than the extracted oleoresins of heading 3301 of the HS. In this case the proportion of dry residues in vanilla bean is nine times higher than the proportion of vanilla in the Goods.

Exemption of goods from excise duty on alcohol

Article 27 of Directive 92/83 provides that Member States are to exempt the products covered by that directive from the excise duty established by that directive, inter alia, where those products are used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol. However only products falling within the scope of Directive 92/83 are able to benefit from the exemption under Article 27 and it is irrelevant that those products comprise goods which do not, as such, fall under the scope of that directive

The CJEU stated in the decision that considering that the concept of 'flavour' is not defined in either Directive 92/83 or in the CN, its meaning and scope must be determined in accordance with the usual meaning of that notion in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part. According to the CJEU in its usual meaning, the concept of 'flavour' refers to an ingredient which brings a specific taste or smell to a particular product. Such an interpretation is not, as stated by the CJEU, contradicted by the general scheme or objectives of Directive 92/83.

The CJEU thus concluded that, if it fulfils such a definition, which it is for the referring court to ascertain, a vanilla oleoresin must be regarded as a 'flavour' within the meaning of Article 27 of that directive, and that no excise duty may be levied on the ethanol which it contains when such a flavour is used for the preparation of foodstuffs or non-alcoholic beverages with an alcoholic strength not exceeding 1.2% vol. The CJEU also concluded that the Commission's Committee on Excise has no permit to restrict the scope of the concept 'flavour'.

FINALISING REMARK

The correct application of the General rules for the interpretation of the CN (Rules), of which there are six, is a prerequisite for the correct tariff classification of goods. Particular attention should be paid to the first Rule, which sets out that classification for the purpose of customs duties is, in principle, to be determined according to the terms of the headings and any relative section or chapter notes. Unless otherwise specified in the headings and in the relevant notes, classification shall be done in accordance with those. And only if it is not possible to do this, other Rules shall be applied.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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CLASSIFICATION, VALUATION AND ORIGIN

The "dark art" of tariff classification (challenging a BTI ruling)

In March 2021, an article reporting on the deliberations of the Irish Tax Appeals Commission regarding a tariff classification dispute between the Irish Revenue Commissioners and a medical technology company appeared in an Irish daily newspaper.

As a customs consultant and a former civil servant with a particular interest in tariff classification, my attention was immediately piqued. Sometimes, it is interesting to see how legal cases can clarify the scope of tariff headings. Sometimes, it is interesting simply to see what the general level of knowledge of tariff classification in the greater public is.

Through a variety of sources and familiarity with the process, it has been possible to track the progress of this issue through the various layers of appeal.

In March 2021, the Irish Tax Appeals Commission (TAC) issued a ruling regarding the classification of a plastic basin with a plastic disposable liner. Both components were embedded with silver ions. The silver ions gave this product antimicrobial properties. Its envisaged use was in clinical settings and its function was to prevent the spread of infection.

This issue was referred to the TAC because Irish Customs had issued a Binding Tariff Information (BTI) ruling for the product in question under heading 3922. Heading 3922 covers *'Baths, shower-baths, sinks, wash-basins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics'.*

However, the applicant did not agree with the BTI and appealed that classification under heading 3922 was not correct. The company put forward its argument in favour of classification under heading 9018 as a medical device.

The proceedings of this case are presented in case number 22TACD2021 on the Tax Appeals Commission website.

From the point of view of a classification expert, the determination of the TAC began quite promisingly. The 6 General Interpretive Rules were quoted as were the EU Regulations that give legal force to the Harmonised System convention and the European Union's external tariff.

In the report from the proceedings, both the appellant company and the Revenue Commissioners set out the basis for their respective classification opinions for this product.

The company claimed that this basin and liner system can prevent the spread of life-threatening hospital acquired infections and as such, should be classified under heading 9018 as an *'Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-*

testing instrument'.

Somewhat bizarrely, as a 'back-up' opinion, the company suggested that classification under heading 3004, which covers *'medicaments put up in measured doses or in forms or packages for retail sale'.*

On the other hand, the Revenue Commissioners, were of the opinion that this was a plastic item of heading 3922 and BTI was issued using GIR 1, 3b and 6 as justification for classification. GIR 3b indicates that for multicomponent items, classification is assigned according to the component that gives the product its essential character. In this instance, in the justification in the BTI, the Revenue Commissioners ruled that the plastic component gave this basin system its essential character and as such, classification was given under heading 3922.

In its reasons for excluding this product from classification under heading 9018, the Revenue Commissioners cited exclusionary notes in the HSENs to heading 9018 that covered hygienic glassware and sanitary ware of base metal. It was argued that by logical extension, this exclusion is not exhaustive and should also cover items of plastic.

Furthermore, the Revenue Commissioners cited 2 rulings from the European Court of Justice (i.e. C152/10 and C-547/13), where items typically used in a clinical setting were classified outside of heading 9018 on the basis that those items did not specifically provide medical treatment to a patient.

Both sides provided expert witnesses to support their respective cases. On the appellant side, a university professor of microbiology gave evidence, whilst on the Revenue Commissioner's side a chartered engineer testified.

In its verdict, the TAC ruled in favour of the appellant who sought classification in heading 9018, rather than heading 3922 as was favoured by Irish Customs Authority.

COMMENTARY ON THE TAX APPEALS COMMISSION RULING

Firstly, it is interesting to note that despite the hundreds of tax cases that are listed on the TAC website, this would appear to be the only one that refers to a disputed BTI.

The area of classification is often seen as a *dark art* and impenetrable to most people. This is of course untrue, but it does require experience and repeated and frequent exposure in order to operate confidently and competently within this discipline.

It would appear that this ruling from the TAC depended heavily on the evidence provided by the expert witnesses of the appellant who argued on the basis of the capabilities of the item in question but with little or no reference to the actual rules of classification.

This was in contrast to the evidence from the Revenue Commissioners, the competent authority for the State who performs the function of customs classification on a daily basis and is obliged to be an impartial arbiter of the EU's classification rules. In contrast, the Revenue Commissioners made their case with reference to the rules of classification and by referring to the case law.

Consequently, it is this commentator's opinion that the Tax Appeals Commissioner's ruling was not made only with consideration in respect of the rules of classification and any applicable case law, but rather by the emotive evidence given by a relative who may have been traumatised by his experience of a loved one contracting a hospital acquired infection.

The end result was that the Tax Appeals Commission agreed with the opinion of the appellant company and classification for the basin system with embedded silver ions was ruled to be classified under heading 9018 which carried a 0% import duty rate.

FALLOUT FROM TAX APPEALS COMMISSION RULING

It subsequently became clear that the Revenue Commissioners did not agree with the opinion of the Tax Appeals Commission.

It is important to understand that an incorrect ruling from a national court is not very unusual. However, an incorrect ruling can cause problems for other member states and consequently must be addressed. For example, if a national court rules on a classification question but does not apply the rules correctly, the risk exists of a BTI being issued by a national customs authority which may be divergent with a BTI from another Member State. Divergent BTIs have the potential to cause a distortion in trade throughout the EU. For example, if the plastic basin with embedded silver ions was classified under heading 3922, it would attract an import duty of 6.5% whereas if it was classified under heading 9018 it would attract a 0% duty rate.

It was in this context, that the Revenue Commissioners referred this issue to the Customs Code Committee for its attention.

The Customs Code Committee, Tariff and Nomenclature Section meet about 10 times per year, usually in Brussels. This committee discusses issues relating to classification and correct interpretation of the Harmonised System and Combined Nomenclature. The committee is comprised of classification experts from each Member State. There are subgroups that address classification issues that arise in different areas of commerce.

Classification issues are referred to this committee if the scope of a heading requires further clarification by means of a new Combined Nomenclature Explanatory Note, if there are divergent BTIs for the same product or in this instance, if a member state is of the opinion that their national court has made an incorrect ruling.

This classification issue appeared on the agenda of the 223rd meeting of the Customs Code Committee (sub-section MEC/MISC/TEX) in September 2021.

The Committee unanimously agreed that classification of this system under heading 9018 (as a medical instrument or appliance) is incorrect as the system does not provide any medical treatment. While the system helps prevent the spread of infection, it does not cure or treat an illness.

This issue neared its conclusion at the 230th Meeting of the Customs Code Committee (sub-section Agriculture/ Chemistry) that took place on the 14th and 15th of March 2022. Following on from the unanimous opinion of the Committee that this product was not classified in heading 9018, the committee was of the opinion that classification should be under heading 3924.

A draft classification regulation was prepared and was entered into the European Commission's interservice legal process. The minutes to the meeting (available on the European Commission's comitology website) indicate that this issue will be voted on at a future meeting or by a written procedure.

An EU regulation once published automatically becomes law throughout the EU. As EU law has primacy over the national law of its member states, it is now likely that the ruling of the Tax Appeals Commission will now be overruled by the classification regulation which will be adopted.

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WHAT CAN BE LEARNED FROM THIS CASE?

There are number of lessons for businesses that can be learned from this episode.

Due process can work for you and against you. Our system allows for decisions even from national competent bodies to be challenged. This is healthy.

However, due process is expensive. It is likely that the appellant company had legal representation at the Tax Appeals Commission hearing and this would not have been cheap.

In this instance, most likely the appellant company were delighted at the ruling of the Tax Appeals Committee. Classification of the product under a duty-free heading meant more profit for their business. I am sure, it would have looked at the time like an excellent return on their investment.

However, due process in this instance allowed for the appealed decisions to be further appealed.

Ultimately, the opinion of Revenue Commissioners would appear to have prevailed. This most likely leaves the appellant company with legal bills, and an unfavourable classification.

Perhaps the appellant company felt this was a risk worth taking or maybe they did not understand how the process works. Knowledge as to how the process works may have changed their risk calculus in pursuing this case.

For the appellant company, this may be an expensive lesson learned.

All consultants will know that their national customs agencies get things wrong from time to time. Nobody is infallible. However, this should be coupled with the knowledge that all customs agencies in the EU and throughout the world invest significant resources in developing their staff to understand how to interpret the rules of the HS and CN. Furthermore, EU member states constantly communicate together especially when a troublesome issue presents itself. The consensus reached on classification issues is usually very robust.

That said, depending on the risk appetite of the appellant, classification regulations can be referred to the Court of Justice of the EU for a final ruling. Again, this happens on a fairly regular basis. In this author's experience, these rulings can be landmark decisions e.g. the Swiss Caps case C-410/08 and the Siebrand case C-150/08 and can really help clarify how a specific product is classified.

These CJEU rulings are final and will settle the matter definitively.

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CLASSIFICATION, VALUATION AND ORIGIN

A few remarks on the softness of soft law in the sphere of customs classification

The application of customs classification provisions is facilitated by soft law and hard law. The former category comprises opinions issued by the World Customs Organization (explanatory notes and classification opinions of the Harmonized System Committee) and the European Commission (explanatory notes), whereas the latter classification regulations of the European Commission. The said regulations will not be discussed in this article, as they are examples of hard law, even if very specific.

Soft law measures (as well as classification regulations of the European Commission) are aimed at explaining the meaning of the classification rules and not at altering these rules (even for the sake of clarity). This is particularly easy to notice in the reindeer meat case, where practical problems with distinguishing between the meat of domesticated reindeers and wild ones were not considered to justify treating these types of products as one for customs classification purposes. The Court of Justice, in its judgment of 12 December 1973 in case 149/73 *Otto Witt KG v Hauptzollamt Hamburg-Ericus* held:

"1. (…) In this matter the customs authorities referred to the explanatory notes to the Common Customs Tariff, published by the Commission, according to which reindeer are held to be domestic animals, with the result that their meat is not classified under subheading 02.04-b and must be classified under subheading 02.04-c-iii.

2. The arguments put forward by the Commission to justify the classification of all reindeer meat under the same subheading in this way, leaving no possibility for a different treatment of the meat of wild reindeer as compared with that of domestic reindeer, consist in the absence as between the two products of objective characteristics and properties which would allow one to be distinguished from the other when submitted for customs clearance.

However, this similarity between the products is not such as to exclude treatment differentiated on the basis of other objective factors, of which evidence can be given when the products are submitted for customs clearance, for example by means of certificates of origin.

3. The explanatory notes to the Common Customs Tariff, although an important factor as regards interpretation in all cases where the provisions of the tariff provoke uncertainty, cannot amend those provisions, the meaning and scope of which are sufficiently clear.

The expression "game" in its ordinary meaning designates those categories of animal living in the wild state which are hunted."

Acts of soft law are only aimed at explaining intricacies appearing in the process of interpreting hard law. This also means that the soft law measures produce *ex tunc* effects. It informs how interested parties should understand a

given classification provision since the interpreted provision entered into force. This sounds highly reasonable not only because of the aims of soft law but also due to the fact that it is not developed during a legislative process. These features of explanatory notes may create significant problems that will be highlighted later in this article.

Soft law measures are not binding on any entity. This means that both customs authorities and declarants can disregard such measures, although doing so should be preceded by an in-depth analysis of the soft law measure and classification rules to which it refers. According to the Court of Justice, it is settled in the case-law that the Explanatory Notes drafted by the European Commission, in respect of the Combined Nomenclature, and those adopted by the World Customs Organization, in respect of the Harmonized System, are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force (see, for instance, judgment in case C-376/07 *Kamino International Logistics*).

Interestingly, the soft law may produce certain effects typical for hard law, namely, it affects the validity of binding tariff information. This effect is rather bizarre as the same documents are far from decisive in ordinary customs proceedings. Under rules in force until the end of April 2016, the Court of Justice has taken the following position: *"Article 12(5)(a) of the Customs Code and Article 12(1) and (2)(a), third indent, of the implementing regulation must be interpreted as meaning that national customs authorities are required to issue BTIs that are in conformity with the Explanatory Notes to the CN. If a disagreement arises between those authorities and economic operators as to the compatibility of those notes with the CN and on the classification of goods, it is for the economic operators to bring proceedings before the competent authority pursuant to Article 243 of the Customs Code. The court seised is to rule on the classification of the product, if necessary after making a preliminary reference to the Court as provided in Article 267 TFEU. Furthermore, the Member State to which those authorities belong may call upon the committee provided for in Article 247 of the Customs Code, in accordance with the procedure referred to in Article 8 of Regulation No 2658/87." (judgment in joined cases C 288/09 and C 289/09 British Sky Broadcasting Group plc and Pace plc).*

Soft law emerges as particularly risky when domestic legislation of the Member States of the European Union refers to the Combined Nomenclature (for the sake of clarity, as one may suppose). Such a reference allows both at the same time – quite concise wording of domestic provisions and very detailed rules found in the background of the CN. The rules seem to be detailed as long as one observes all interpretative material connected with them. Yet, this interpretative material is not uniform in nature as it comprises soft law without any date of entry into force indicated. Such a case occurred in the field of excise duty on passenger cars in Poland, where the cars were defined by references to the CN. Explanatory notes contributed to the widening of the concept of a passenger car in the Polish tax authorities' practice. The explanatory notes produced a retroactive effect, and they broadened the understanding of the object of taxation ex tunc, which should not be accepted due constitutional standards of taxation (also beyond Poland).

Soft law in the sphere of customs classification is not as soft as it may seem at first sight. At the EU level, it affects the validity of binding tariff information. Domestically, it may affect understanding provisions comprising references to the CN.

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CLASSIFICATION, VALUATION AND ORIGIN

Low value - is it the market price, a result of good business negotiation skills, or fraud?

The problem of declaring a low value of goods and undervaluation to customs has always been relevant, and the control of determining the correct customs value has never left the sight of customs.

This topic was explored in various ways during the international conference in Rotterdam on the 31st March 2022, organised by the academic community. It resulted from a collaboration between the four European universities (Münster, Valencia, Bologna and Rotterdam).

Academics, lawyers, and customs representatives presented the international legal framework governing customs valuation, commented on the notable Hamamatsu case. The judgement of the European Court of Justice (ECJ) at the end of 2017 shook the customs world. The question arose as to how the provisions of the legislation would have to be applied in practice, when the court ruled on the value that could not be accepted in the transactions of related companies for customs valuation purposes, but did not rule on what the practice should. From the current perspective, in the opinion of experts, the judgment did not substantially change the business and customs practices.

Questions have been raised concerning what needs to be improved in the legal framework so that it would not create unwanted bureaucracy or create additional costs for business. The customs law in the rapidly changing business environment was described as ‘old-fashioned‘ and outdated, and few of the participants of the discussion ‘have sent‘ it to the museum. The customs representatives themselves debated whether an invoice in e-commerce was really the only way to justify the customs value, and whether electronic data alone would not be enough. However, it must be acknowledged that the EU law is affected by international agreements of the World Trade Organization, the fundamental change of which would be a considerable challenge.

E-COMMERCE AND UNDERVALUATION

The issue of the risk of undervaluation in e-commerce attracted much attention at the event. With the abolition of the import VAT exemption, which took effect from the 1st of July 2021, this problem did not decrease; rather, it was exacerbated. The practise shows that the declared value of goods purchased in e-commerce has decreased.

The question has been raised as to what measures to control fraudulent undervaluation could be effective. It has been suggested that the application of certain risk management measures could lead to stricter controls or even blocking of certain risky sales platforms by regulators. However, the discussions concluded that such a measure is unlikely to have a lasting effect, as goods shipped by a blacklisted seller today will be sold tomorrow in an e-shop under a different name.

The speakers and participants of the discussions agreed that the provisions of customs law governing the control of the value of small consignments and consignments weighing several tonnes are not very different. Customs control in the EU is not on the same level. The Dutch customs authorities, who presented their reports at the seminar, take a pragmatic approach, stating that it is impossible to carry out large-scale checks on low-value consignments. Customs must set a balance between control measures and trade facilitation. E-commerce has introduced many changes: new data sets of standard import declarations have appeared, and the number of import declarations has increased significantly since the abolition of the VAT exemption. 521 million of import declarations were registered in the Netherlands during 2021 alone. If such a volume of consignments was controlled traditionally, 1850 physical inspections of goods would have to be performed per minute and an additional 45 thousand workers would have to be employed.

Like customs cannot check all declared consignments 100%, the companies declaring consignments should not question the value of goods, the accuracy of the data, and the accuracy of the documents for each small consignment. Both sides must work on applying risk-based control. The control applied should be adequate, as should sanctions for possible non-compliance with customs legislation be.

ECJ CASES CONCERNING UNDERVALUATION

During the event, the specific cases that have reached the European Court of Justice (ECJ), including low-value declarations, were covered. Some of these cases have already been closed; others are still awaiting trial.

Specifically, the ECJ cases listed below were reviewed. Most of the cases have their legal background in the Community Customs Code (Council Regulation (EEC) No 2913/92 as of 12 October 1992, hereinafter referred to as the CCC) and its implementing regulation (Commission Regulation of 2 July 1993 (EEC) No 2454/93 (hereinafter referred to as the CCC IR).

ECJ case C-291/15 EURO 2004. Hungary Kft.

In this case, the ECJ clarifies that under Article 181a of the CCC IR, customs are not required to determine the customs value of imported goods applying the transaction value method if there is reasonable doubt of whether the customs value declared under the transaction value method reflects the total amount paid or payable.

According to the ECJ, the Article 181a of the CCC IR must be interpreted as not precluding customs practice, whereby the customs value of the imported goods is determined on the basis of the transaction value of similar goods, i.e., the method set in the Article 30 of the CCC, provided the declared transaction value is considered to be unreasonably low

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in comparison with the statistical average of the purchase prices verified in the context of the importation of similar goods; and even though the customs authority does not refute or call into question the authenticity of the invoice or the bank transfer certificate produced in order to establish the price actually paid for the imported goods; and without the importer having submitted, in response to a request to that effect from the customs authority, additional evidence to demonstrate the accuracy of the declared transaction value of those goods.

In other words, the customs argument that the declared value is 50% lower than the statistical average of other transactions in similar goods was found by the ECJ to be sufficient grounds to confirm the doubt and to reject the declared value of the transaction as an inappropriate customs value.

According to the speakers at the conference, such an approach is in some respects contrary to the basic principle of the WTO Customs Valuation Agreement that the declared value of goods should be based as far as possible on the price actually paid or payable for the goods; and that a lower than market value is not yet a reason for non-application of the transaction value method.

ECJ case C-1/18 Oribalt Riga SIA

ECJ case C-1/18 was also discussed. The customs audit found that the value of goods - medicinal products - declared by the importer could not be determined using the transaction value method and suggested that the importer use the deductive customs valuation method. According to the importer, the customs value could have been lower when using the customs valuation method of identical/ similar goods. However, the customs authorities argued that they had no competence to identify identical/ similar goods (medicinal products).

The Opinion of the Advocate General states that, where the customs authorities require specific expertise, other sources of information may be used to gather information by contacting the importer or another party in the supply chain, the customs administrations of the other Member States or independent experts.

The ECJ also emphasised the importance of proper identification of identical/ similar goods for the application of the deductive method. The interpretation of Article 30 (2)(b) of the CCC is provided in the case as follows: where the customs value of goods, the medicinal products at issue in the present case, shall be determined by using the deductive method provided in that regulation, seeking to identify the similar goods, the competent national customs administration shall take into account all relevant factors and commercial interchangeability, so that it shall carry out an actual assessment, taking into account any possible effect on the real economic value of the goods in question, including the market position of the imported goods and their producer.

ECJ case C-599/20 Baltic Masters, UAB

The name of Lithuania was also mentioned: in the ECJ case C-599/20, a request for a preliminary ruling has been made by the Supreme Administrative Court of Lithuania. The case concerns a situation in which, following a post-clearance inspection, the customs authorities decided not to recognise the declared transaction value because the seller and the buyer were related, even though the relationship had not been legally established.

In the Advocate General's view, many years of cooperation is not yet proof that the companies are related. As a result of a long-term trade relationship, it is normal for the parties to agree on more favourable prices and other terms of the agreement.

The preliminary ruling referred by the Supreme Administrative Court of Lithuania:

1. Whether Article 29(1)(d) of the CCC and Article 143(1)(b), (e) or (f) of the CCC IR are to be interpreted as meaning that the buyer and the seller are deemed to be ‘related persons’ where, despite the absence of evidence proving business partnership or control, the circumstances surrounding the conclusion of transactions are not indicative of the performance of economic activities under normal conditions, but rather the cases where (1) there is a particularly close business relationship between the counter parties and (2) one counter party controls the

other or both parties to the transaction are controlled by a third party?

2. Whether Article 31(1) of the CCC is to be interpreted as it precludes the customs value from being determined based on information contained in a national database relating to a customs value of goods which have the same origin and which, although not similar, within the meaning of Article 142 (1) (d) of the CCC, but falling within the same TARIC heading?

The second question is extremely interesting. The ECJ is unlikely to favour an overly flexible application of customs valuation methods. This would increase the power of customs administrations to use customs databases to select transaction values for customs valuation without relying on objective criteria and selection principles for identical/ similar goods. In addition, the question arises as to whether the information contained in the databases held by the customs authorities includes detailed descriptions of the goods, which allow a conclusion to be drawn as to the suitability of the goods.

According to the participants and speakers, more objectivity could be expected from the assistance of independent experts and/ or the use of EU-level databases for customs valuation.

Case C-187/21 Flawkes Kft

The use of customs databases available in the Union for the application of secondary customs valuation methods is also being addressed by the ECJ in case C-187/21. The Hungarian court has referred the following questions for a preliminary ruling:

1. Must Article 30(2)(a) and (b) of the CCC be interpreted as meaning that only the values listed in the database created from the customs clearances of the Member State's own customs authority may and must be taken into account as the customs value?
2. If the first question is answered in the negative, is it necessary, for the purposes of determining the customs value in accordance with Article 30(2)(a) and (b), to approach the customs authorities of other Member States in order to obtain the customs value of similar goods listed in their databases, and/or is it necessary to consult the EU database and obtain the customs values listed in it?
3. May Article 30(2)(a) and (b) of Regulation No 2913/92 be interpreted as meaning that, for the purposes of determining the customs value, the account may not be taken of transaction values relating to transactions performed by the applicant for customs clearance himself, even if those values have not been challenged either by the national customs authority or by the national authorities of other Member States?

It is really interesting what the outcome of all the ECJ cases still pending will be.

Case C-770/21 OGL- Food Trade Lebensmittelvertrieb GmbH

ECJ case C-770/21 is also still pending before the ECJ, and it concerns the import of vegetables. A list of questions is referred to the ECJ for a preliminary ruling. One of them - does it follow Article 75(5) and (6) of Commission Delegated Regulation (EU) 2017/891 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to the fruit and vegetable sectors, and from the interpretation given in the judgment of 16 June 2016, EURO 2004. Hungary, (Case C-291/15), that the customs value in the importation of vegetables from third countries may not be determined on the basis of the declared transaction value where:

- the transaction value declared is significantly higher than the standard import value determined by the Commission for the same product for the purpose of applying import duties in the vegetable sector;
- the customs authority does not dispute or otherwise question the authenticity of the invoice and the proof of payment of the price of the product, presented as evidence of the import price actually paid;
- the importer, despite being requested to do so by the customs authority, has not provided a contract or other equivalent document as proof of the price payable for the product when sold for export to the customs territory of the European Union, including additional evidence for the determination of the economic elements of the

product justifying the higher value when purchased from the exporter, for an organic product or a particularly high level of quality of the specific vegetables?

ECJ Case C-213/19, European Commission v. UK

The ECJ case C-213/19 is unique in that it is a case brought by the European Commission against the United Kingdom due to the EU Member State's lack of attention to the maintenance of its own traditional resources and the lack of adequate customs system control measures, which resulted in fraudulent actions to reduce customs value by organised crime groups.

ACTIVITIES OF INTERNATIONAL INSTITUTIONS AND WORKING GROUPS IN THE FIELD OF PREVENTION OF UNDERVALUATION

The conference examined what work related to these questions the European Commission's (EC) Anti-Fraud Office (OLAF), EC customs experts and the World Customs Organisation's (WCO) Technical Committee on Customs Valuation is doing or has already done.

Representatives of OLAF were among the speakers. The objective of OLAF is to prevent customs law violations. It is involved in large-scale anti-fraud operations and is interested not only in fraudulent undervaluation but also in fraudulent overvaluation, non-declaration of certain value elements, misuse of preferences, violations of intellectual property rights, prevention of violations in transit, security and safety and other fields.

Meanwhile, the EC and WCO Expert Groups on Customs Valuation aim to ensure a uniform interpretation and application of international law. Thematic meetings are organised within the scope of the WCO Technical Committee on Customs Valuation. One of these has been the practical use of databases for risk management and the fight against fraudulent undervaluation, as well as other effective control measures.

During the conference, a number of the WCO instruments related to fraudulent documentation (WCO Advisory Opinion 10.1), the burden of proof in determining the customs value of imported goods (WCO Advisory Opinion 19.1), the customs value aspect in the context of dumping issues (WCO Comment 3.1), and the treatment of flash sales (also see an article on the topic *Discounts, flash sales and customs valuation*, CCRM Journal for Practitioners in Europe, Issue 11, October / November 2021).

FINAL NOTES

Both when examining the instruments interpreting the regulations of legal acts and going deeper into the cases of court disputes, it is once again possible to be convinced that not only the facts but also the weight of legal interpretation and argumentation are of great importance in law. It is always interesting to listen to and hear different opinions.

In some respects, a fairly pro-business customs authority, which says it is open to business and understands that price reductions can be a natural market-driven phenomenon and recognises that even significant trade discounts are possible, stops here by saying that each case is individual, and it shall be considered on its own merits. Therefore, it is necessary for a bona fide business to provide evidence to the customs authorities and to substantiate the circumstances of the transaction and the negotiated favourable price conditions.

We all agree on the need for transparency in business and the fight against customs fraud, including fraudulent undervaluation. It is gratifying that businesses, customs and universities talk about this together. The topics of the conferences initiated by the academic world, as practice shows, are extremely interesting, relevant and engaging. The author of the article is already looking forward to new events.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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CLASSIFICATION, VALUATION AND ORIGIN

Post-clearance verification of preferential origin of goods

Customs may carry out post-clearance verification of the preferential origin of goods. As a result, a letter from customs might appear on the importer's desk stating that the preferential tariff treatment has been denied. In this article, we look at what is the process of post-clearance verification of preferential origin set out in some of the free trade agreements of Canada, the UK and the EU. Also, we provide practical examples and suggestions on how the preferential origin-related risk could be managed by importers.

CANADIAN PERSPECTIVE

Preferential origin as the source of risk

Importers who claim preferential tariff treatment under a free trade agreement ('FTA') are generally familiar with the certificate of origin provided by the exporter or producer of the goods. In most FTAs, importers are required to have this certificate in their possession at the time the preferential treatment is claimed.

Many importers assume that the certificate of origin is the end of the story or that it shields them from liability should the goods subsequently be found not to originate. Unfortunately, this is not the case.

It is the importer who must pay the duties owing plus interest, and perhaps also penalties, should the certificate be invalid. This can come as an expensive surprise. For example, assume a Canadian importer purchases $10 million of goods from a German supplier over four years. They have certificates from the producer which state the goods originate under CETA and are thus duty free. A verification audit determines that the goods did not qualify under the CETA Rules of Origin, and are subject to the MFN rate of 6.5%. The assessment of duties would be $650,000. With penalties and interest, the total bill could be over a million dollars.

Risk management: provisions in the sales contract, 'red flags'

Where preferential tariff treatment under an FTA is critical to an importer, they might consider negotiating a provision in the sales contract whereby the exporter guarantees that the goods originate and agrees to pay the duties, interest and penalties assessed if they do not.

At a minimum, the importer should take reasonable steps to ensure that the producer has done the work necessary to conclude that the goods originate. They should also review the certificate for 'red flags'. For example, a producer who states that a complex piece of machinery is 'wholly obtained or produced' in the countries that are party to the FTA likely does not understand origin very well. That category would only apply of every part and all the raw materials in them came from those countries.

Customs verification process

The customs authority in the importing country ('Importing Authority') has the right to initiate the verification or audit of a claim for preferential tariff treatment. This generally begins with the Importing Authority requesting from the importer a copy of the certificate of origin and perhaps other information.

If the Importing Authority requires further information, they will contact the exporter, producer and/or suppliers of raw materials to the producer. Under some FTAs, such as the United States-Mexico-Canada Agreement ('USMCA') and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP'), this is done directly. For example, the Canada Border Services Agency ('CBSA') has the right to contact an exporter, producer or supplier in the United States or Mexico to initiate a verification audit under the USMCA.

Under other FTAs, such as Canada's agreements with the European Union ('CETA') and the United Kingdom ('CUKFTA'), the Importing Authority contacts the customs authority in the exporting country, who in turn conducts the verification audit of the exporter, producer or supplier.

A verification audit usually begins with a questionnaire such as Form B231 that was sent by the CBSA to producers in the United States and Mexico where an origin claim under North American Free Trade Agreement ('NAFTA') was based on tariff shift. When it is published, the corresponding USMCA questionnaire should be virtually identical. A corresponding CETA, CUKFTA and CPTPP questionnaire would be similar. The key information requested is:

1. a description of the finished good, with product literature and tariff classification;
2. a description of the production process;
3. a list of the raw materials, segregated between originating and non-originating, and their suppliers, and
4. the tariff classification of non-originating raw materials.

A producer who has done the work necessary to substantiate origin should not have trouble completing the questionnaire. It would have kept documentation and analysis in generally the same format. If the customs authority is satisfied that the questionnaire has been properly completed and reached the correct conclusion, the verification audit would likely end there and there would be no adjustment to the duties paid.

An exporter, producer or supplier who receives a questionnaire is not obligated to respond. However, if they do not, the result will likely be an assessment against the importer.

If the exporter, producer or supplier does respond, but the customs authority is unable to conclude from it that the goods originate, it may request a visit of the producer's production facilities. Again, the producer does not have to consent. However, if they do not the importer will likely be assessed.

Should the importer be assessed at any of these stages, including after a visit by the customs authority to the producer's premises, they will have the right to appeal.

Legal background

The CBSA has set out the details of origin verification procedures for NAFTA (predecessor to the USMCA) and other free trade agreements in its Memorandum D11-4-20, and for CETA and CUKFTA in Memorandum D11-4-21. The details for CPTPP have not been published in a Memorandum but are set out in Articles 3.27 and 3.28 to the Agreement.

EU PERSPECTIVE ON EU-UK FTA: A PRACTICAL CASE

Practical case

An EU company purchases worn textile articles in the UK and imports them under the EU-UK FTA applying a preferential tariff rate (0%) based on the proof of origin (which is the statement on origin) received from the exporter.

After the importation of many shipments, a letter from customs of the EU Member State ('EU Customs') appears on the importer's desk informing about origin verification and asking for the statement on origin and information pertaining to the fulfilment of origin criteria. The importer has no other documents or information than the statement on origin. Therefore, EU Customs send a query to the UK Customs asking for the information on whether the goods are originating. However, no response comes from the UK Customs.

As a result of this verification process, EU Customs inform the importer, that a decision will be taken to deny preferential tariff treatment to the imported goods (which means that savings of more than € 100,000 will be lost!).

How could the importer manage the preferential origin-related risk?

Legal background

The rules of the verification process are set out in the EU-UK TCA Articles 61 'Verification', 62 'Administrative cooperation' and 63 'Denial of preferential tariff treatment'.

In order to answer the question, we should check, what is 'information pertaining to the fulfilment of origin criteria'. The origin criterion for worn textile articles is the change in tariff heading (CTH). Therefore, the information required, as set out in the TCA Article 61, is the list of all the non-originating materials, including their tariff classification in 4-digit format (the 4-digits cannot coincide with 4-digits of the imported goods; tolerances provide for an exception).

The importer could have verified whether the exporter knows the rules of preferential origin, makes such a list and ensures its compliance with the CTH requirement prior to starting the collaboration.

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NON-TARIFF MEASURES, SANCTIONS

What exporters should know about licensing barriers?

Due to the non-transparent import licensing requirements in many countries, such as Turkey, India, Malaysia, Brazil, and Argentina, to mention a few, exporters are denied trade opportunities, which these days are especially important for those who lost their export markets after Russia invaded Ukraine. The article introduces basic information on automatic and non-automatic licensing and provides practical examples of some non-transparent licensing regimes worldwide that must be considered when choosing new export markets.

INTRODUCTION

Despite the somewhat negative attitude of the World Trade Organization (WTO) to quantitative restrictions on international trade, particularly the licensing of imports, many WTO members apply such measures to a wide range of goods. WTO Agreement on Import Licensing Procedures (Agreement) is designed to streamline and structure the application of such actions.

According to the Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing WTO Member. This definition covers both procedures referred to as 'licensing' and other similar administrative procedures. These might be authorisation, permitting, or approval procedures. The restricting essence of such measures is that the importer must take additional, not typical actions, to comply with specific requirements, which do not exist, if the product is not subject to the licensing regime.

There are automatic and non-automatic licensing types.

Automatic import licensing is defined as import licensing where approval of the application is granted in all cases. Automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. This type of import licensing aims to collect statistics, and monitor imports and their geography but not regulate them. In other words, it does not affect the volume of imports, and the restrictive nature may be manifested only in the procedure, which is somewhat more complicated than unlicensed imports (the need to submit additional documents or information, etc.).

Non-automatic import licensing procedures are defined as import licensing not falling within the definition above. Certain conditions must be met before an import license is issued. Countries often use non-automatic licensing to administer import restrictions, for instance, quotas and tariff-rate quotas, or provide for safety or other requirements.

It is worth noting that non-automatic licensing shall not have trade-restrictive or -distortive effects on imports and those caused by the imposition of the restriction. This means that if the licensing regime is intended, for example, to streamline the allocation and application of quotas, obtaining licenses should not in itself create additional barriers and difficulties for importers.

WTO'S ANALYSIS: MOST OFTEN NON-AUTOMATIC LICENSED GOODS[1]

The WTO identifies five main categories of goods that are most often subject to non-automatic licensing in WTO member countries:

1. Hazardous chemicals: Import licensing procedures for these products are usually aimed to protect human, animal, or plant life or health. As of December 2020, eight WTO members have been notified of the use non-automatic type of import licensing procedures in this sector.
2. Rough diamonds: To provide controls on the import of rough diamonds in accordance with the Kimberley Process, three WTO members have clarified that non-automatic licensing procedures are used. The primary purpose of these procedures was to remove 'conflict' or 'blood' diamonds from the global supply chain.
3. Fertilisers and pesticides: The main objective of import licensing procedures is to protect human, animal, or plant life or health. Twelve WTO members have declared the application of a non-automatic import licensing procedure in this sector.
4. Pharmaceutical products: The main object of import licensing on this type of product is to ensure that imported goods meet the specific standards of safety, quality, and efficiency and do not pose any risk to human, animal, or plant life or health. Thirteen WTO members have clarified that the type of import licensing procedure in this sector is non-automatic.
5. Hazardous waste: The licensing in this sector is aimed at eliminating or at least minimising the danger of these products to human and animal life and health as well as the environment as a whole. In this regard, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is the main international legal act setting up certain rights and obligations of its Member States related to inter alia to the import of these products. Twelve WTO members have confirmed the application of non-automatic licensing procedures.

This list is not exhaustive. There are more than enough examples of the use of import licenses on other grounds and with other justifications. To apply them correctly, the agreement requires countries to have a precise, understandable mechanism for applying for licenses, which must be made public and communicated to those concerned. On the other hand, the lack of information on licensing procedures and conditions, lack of importers' knowledge due to unclear mechanisms of such licensing, non-transparency of state policy on the administration of import quotas, and sometimes discriminatory manifestations remain the main problems in this regard. The following examples evidence this.

EXAMPLES OF NON-TRANSPARENT IMPORT LICENSING

Turkey

Turkey has imposed the licensing procedure for the import of frozen carcass beef and fresh and chilled beef (HS codes 0102, 0201). At the same time, it granted the EU an annual quota right.

However, due to the non-transparent administration of import quotas, EU economic operators cannot use their import opportunities. In particular, the quotas for beef have not been opened and could not be used regularly, which contradicts the EU-Turkey Agreement on trade in agricultural products and WTO principles. Currently, only breeding and fattening cattle can be imported into Turkey.

Another example of the Turkish non-automatic import licensing regime is a requirement to obtain a surveillance license for importing certain goods if their price is lower than the threshold unit value set up by the authorities in their communiqués. In such cases, the importer has to apply for a surveillance license from the Turkish Ministry of Trade. The application should contain information about the importer, the exporter, the producer, and information about the imported product. Additional documents such as the original or notary-certified copy of the list of the authorised signatures of the declarant, copies of the pro-forma invoice, or the commercial invoice must be provided as well. Practically this means the necessary requesting from the exporter a lot of documents, including those that contain commercially confidential information. In fact, obtaining such documents is almost impossible. To import these goods into the Turkish territory, importers have to declare the unit price set up in the communique instead of the customs value based on the actual transaction value.

Such measures by Turkey go beyond the usual non-tariff restrictions, including quantitative restrictions, and are rather an attempt to circumvent Article VII of the GATT, which sets out the principles for customs valuation of goods, in particular, based on the actual value of imported goods. The essence of non-automatic import licensing is that the import of certain goods can only occur if the importer meets certain conditions or the goods meet the established requirements. In this case, the requirements relate to the price of the goods, and their customs value. Special mechanisms were developed to control the correctness of its determination. The vast majority of countries in the world, at least all WTO members, have agreed to these mechanisms, so the establishment of additional, including administrative, means of counteracting the underestimation of customs value seems impractical.

At the same time, the Turkish authorities justify this measure by the need to prevent cheap exports from third countries (mainly from Asia). However, such actions ultimately lead to significant overpayments of taxes, including VAT, and violations of importers' rights.

In addition, Turkey imposes licensing regime for imports of old, second-hand, renovated goods. Article 7 of the Turkish Import Code sets out this limitation. For example, importing only certain types of retreaded tires intended for use on aircraft is allowed, subject to a permit from the Civil Aviation Authority and an import license. The decision on such measures is based on environmental considerations (an increase in waste accumulation because of their life cycle), although these goods are type-approved under UNECE Regulations 108/109. Such tires can be legally used under the same conditions as new ones.

Moreover, the competent authorities of Turkey are entitled to create every year new lists of goods that are subject to import licensing.

India and Malaysia

India introduced import licenses for new tires for cars, trucks, buses, and motorcycles (HS code 4011) in June 2020, justifying the measure by the need to promote domestic tires among consumers during the crisis caused by the COVID-19 pandemic. In fact, the reason for introducing these restrictions is rather strange. The pandemic has made significant changes in the functioning of many industries without exaggeration in all countries. If similar restrictive measures were taken in all or at least a large part of the world, a collapse in international trade could hardly have

been avoided. However, the Indian authorities did not publish the licensing procedure in total but required additional information from license applicants not mentioned in the published part of the procedure. This, in turn, is like artificially using the situation to solve internal problems at someone else's expense. Due to the lack of a clear understanding of what needs to be done to obtain a license, the situation with importing these goods to India is highly unpredictable. There have been several attempts to solve this problem at the highest international level. However, a positive solution to increase the transparency of licensing policy has not yet been found.

Malaysia has introduced a non-standard restrictive import licensing system of 'Approved Permits' for automotive (HS code 8703). It comes down to the existence of two types of such permits. The first is a franchise 'Approved Permit', granted free to franchise holders of car brands registered with the Ministry of International Trade and Industry. The second is an open 'Approved Permit', which is to be sold to other importers at around EUR 2200 per permit to import cars of any brand for sale in Malaysia. According to Malaysian experts, this approach should encourage suppliers to collaborate with authorised Malaysian traders. We believe that the licensing regime introduced in Malaysia is based on discriminatory principles. Importers should have equal access to the market, not buy it from the state.

Brazil and Argentina

Brazil has established a licensing regime for industrial cellulose (HS code 3912), which is used in the production of printing inks, wood varnish, or nail polish. The reason for such measures is safety considerations because cellulose can be used to produce explosives, although it has a slightly different composition and properties. Cellulose for military purposes is imported only by special importers-manufacturers of military goods in minimal cases with the permission of the President. However, this greatly complicates the lives of pulp importers for peaceful purposes, who are effectively deprived of the opportunity to import these goods into Brazil.

Argentina has established a non-automatic licensing regime for the import of goods from almost 300 HS headings. It is a record country for the number of goods subject to such licensing. This causes additional difficulties for importers, particularly procedural burdens, loss of time, extra costs, etc., even assuming that the licensing process is appropriate.

CONCLUSIONS

These examples show the lack of unity in approaches to establishing import licensing regimes in different countries. But if the differences in categories of licensed goods are apparent, there are many questions about the reasons for the licensing regime, the procedures related to it, and the requirements for licensed goods or their importers. However, the main problem remains the lack of information exchanged between the state that implements import licenses and other countries - potential suppliers of imports. Unfortunately, this only shows that the import countries are not interested in transparency and clarity regarding the established regimes of such licensing, just as they are not interested in fulfilling the international obligations undertaken in this regard.

[1]The data as of December 2020

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NON-TARIFF MEASURES, SANCTIONS

What strategies may EU traders use to overcome trade barriers?

Recently, the European Commission (EC) terminated the examination procedure concerning obstacles to trade applied by Mexico (see Commission implementing decision (EU) 2022/161, 3.2.2022). This was because the dispute regarding Tequila export licenses was resolved in favour of EU exports by domestic courts in Mexico. The example reveals that exporters can cope with trade barriers in several ways: in courts, and through complaints to the EC.

In this article, we take a deeper look at the latter and discuss the issues that accompany it.

INTRODUCTION

'Pacta sunt servanda' is a Latin phrase meaning treaties must be fulfilled. It is one of the fundamental principles of international law. Indeed, international agreements are concluded between countries with clear intentions to comply with them; otherwise, they would make no sense. These concern agreements in various fields: security, environmental, and economical. It does not matter whether we are discussing global treaties such as the Agreement establishing the WTO, the General Agreement on Tariffs and Trade, etc., or numerous bilateral agreements. Simultaneously, there are cases of violations by individual countries of their obligations voluntarily undertaken based on certain international agreements. Unfortunately, the world often faces similar challenges in the international legal field, when the figurants (violators) are whole countries subject to different jurisdictions, have other laws, and levels of economic, scientific, and technological development significantly complicate countering these challenges.

Examples of such violations were cited in the article 'What exporters should know about licensing barriers?' [1]. This article is about non-transparent import licensing by countries such as Turkey, Brazil, Argentina, India, and Malaysia, which created serious barriers to trade with these countries in the relevant categories of goods. This approach to licensing violates provisions of the Agreement on Import Licensing Procedures, one of the WTO Agreements. All the countries mentioned in this article are WTO members, and accordingly, they comply with these agreements. Therefore, it seems possible to supply goods to countries that use non-transparent and unclear licensing regimes, but in fact, it is impossible. What should, in particular, European exporters do in this situation? Is there a possibility of resolving such a problem quickly, considering that the other party to such a dispute is not a specific person but the state as a whole?

BACKGROUND

It is evident that initially, we need to turn to the origins and look at the Agreement on Import Licensing Procedures, which was violated by the countries mentioned above. Article 6 of this Agreement refers us to Articles XXII and XXIII

of GATT 1947 and the Understanding of rules and procedures governing the settlement of disputes (Annex 2 of the WTO Agreement). It is worth noting that these documents are also agreements by their nature, which, unfortunately, can also be violated by unscrupulous participants. This further complicates the process of solving the problem.

Let's try to describe the provisions of these documents briefly. The central thesis of all these international acts is that in case of disputes, the parties should make every effort to resolve all disputes through consultations. This provision is intended for cases where both the offender and the injured party are ready to make every effort to resolve the dispute. When there is no such desire, and this widespread situation, such a decision in consultation can take a very long time and/or end in nothing.

For example [2], to address the issue of non-transparent licensing of car tires imports by India on the 17th November 2020, a joint letter signed by Ambassadors of the EU and several Member States was sent to the Minister of Commerce and Industry of India. There was no response from this Minister. On the 21st January 2021, a meeting with the Additional Director General of Foreign Trade was organised. He stated that licenses were being issued, and delays had been significantly reduced. Executive Vice-President Valdis Dombrovskis also raised the licensing requirement for imports of tires with the Minister mentioned above at the High-Level Dialogue meeting on the 5th February, 2021. Unfortunately, India was not willing to find a positive solution to the issue.

In such conditions, exporters, no matter whether they are large corporations or small manufacturers, cannot independently resist potential importing country's policies. At the same time, they can and, in our opinion, should initiate a procedure to solve the problem of trade barriers at the highest level.

INTERNATIONAL INSTRUMENTS FOR COMBATING TRADE BARRIERS

To ensure the exercise of the EU's rights under international trade rules and establish rules for its institutions to respond to trade barriers, which are adopted or maintained by third countries that cause injury or otherwise adverse trade effects, the Trade Barriers Regulation [3] has been developed. This document sets out how the European Commission should act as a body representing the interests of EU Member States in international trade relations in response to the application of such barriers by third countries.

The first step of European exporters towards resolving disputes should be complaining, as required by the Trade Barriers Regulation. Such a complaint is submitted by any natural or legal person or association that does not have a legal personality, and any EU enterprise or any association acting on behalf of one or more EU enterprises directly to the European Commission. The complaint must contain sufficient evidence of the obstacles to trade and the adverse trade effects resulting from that place. The European Commission investigates all proper complaints and seeks the most effective ways to resolve disputes.

The priority way to resolve disputes is through consultations between the parties to such a dispute (in our case, the EU and the country that violates the terms of the Agreement on Import Licensing Procedures). Thus, the European Commission may initiate a formal international consultation procedure. This procedure, in turn, must comply with Article 4 of the Understanding on rules and procedures governing the settlement of disputes, as it is a dispute arising from a breach of the Agreement on Import Licensing Procedures covered by this Understanding. In particular, upon the EC's request for consultation, the other party must respond within 10 days after its receipt and enter into consultation in good faith within 30 days. Suppose no such response is received or the consultation process proves ineffective. In that case, the injured party, such as the EU, represented by the EC, has the right to initiate a dispute settlement procedure with the WTO Dispute Settlement Body (whose role is performed by the General Council).

As part of this procedure, an expert panel is set up with representatives from third countries other than the parties to the dispute. Experts examining the subject of the dispute, circumstances, evidence, etc., may seek advice from the UN Economic and Social Council and other intergovernmental organisations. The result of their work is a report with conclusions and recommendations. The WTO Dispute Settlement Body approves this report, and then the recommendations contained within the report become official unless the experts' decision is appealed. Dispute

Settlement Body establishes the Appellate Body for the consideration of appeals. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. The Appellate Body Report is also subject to approval by the General Council and then becomes binding on the parties to the dispute.

In the next step, the offending state must implement the recommendations contained in the report within a reasonable time. If trade barriers are proven, the main goal is to remove them as soon as possible to restore justice and normal trade relations. If this is not done, the country concerned initiates countermeasures, i.e., sanctions. In turn, the Dispute Settlement Body must allow such measures, including the suspension of concessions against the offending country and compensation in favour of the injured party.

Trade Barrier Regulation provides the opportunity for the EC to initiate the following commercial policy measures:

- suspension or withdrawal of any concession resulting from commercial policy negotiations;
- the raising of existing customs duties or the introduction of any other charge on imports;
- the introduction of quantitative restrictions or other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

However, applying such measures is temporary, as it does not substantially address the issue raised in the complaint but only puts pressure on the offending country to expedite the WTO Dispute Settlement Body's recommendations, i.e., remove barriers to trade that harm other countries.

CONCLUSIONS

The thoroughly described process can take approximately two years. Therefore, it is evident that such a period is not acceptable for a particular European exporter who cannot wait so long and has to look for new markets to sell his or her products. As noted above, such disputes cannot be resolved quickly in principle. In addition, the effectiveness of their solution also remains in question. Even domestic disputes are known to be resolved by national courts for a long time, although there are more opportunities to resolve them quickly and effectively than international ones. Current international law is intended for bona fide subjects (this is not only about trade). Mechanisms to counter unscrupulous entities are relatively weak and ineffective due to the cumbersome and inflexible procedure, and the lack of real leverage to influence violators. There are currently no legal ways to counter countries with unfair trade policies quickly. Under international agreements, there are almost no mechanisms to persuade/coerce countries to act within their obligations. The examples mentioned at the beginning of this article demonstrate that the reality differs from the ideal model of coexistence of states, enshrined in many international conventions, treaties, and agreements. Therefore, the main task is to learn to function in these realities, meet challenges, and, if possible, reconsider approaches to the formation of international law mechanisms.

[1] https://www.customsclearance.net/en/articles/what-exporters-should-know-about-licensing-barriers

[2] https://trade.ec.europa.eu/access-to-markets/en/barriers/details?isSps=false&barrier_id=16143

[3] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015

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NON-TARIFF MEASURES, SANCTIONS

Sanctioned persons: get to know your customers and suppliers

As you know, the European Union has adopted several packages of restrictive measures against the Russian Federation in the wake of the Russian war of aggression against Ukraine and restrictive measures against the Republic of Belarus in the light of the situation in Belarus. All these measures must be effectively implemented by the competent authorities and the EU economic operators. Let us discuss one of the measures - directly and indirectly sanctioned persons and how to identify them so that they do not appear among customers or suppliers.

The restrictive measures prohibit the direct and indirect import or export of the goods in question (sectoral sanctions) and restrict the access of the persons and businesses concerned to the use of their assets and financing (personal sanctions). We will look at the latter type of sanctions.

POSSIBLE CONSEQUENCES OF COLLABORATION WITH THE SANCTIONED PERSON

Without calling into question the validity of the social, political and military objectives pursued by the sanctions, let us discuss the possible consequences for a person who knowingly or not collaborates with the sanctioned person.

The first and probably the main consequence is the loss of property; after all, transactions with the sanctioned person, e.g., the supply of goods or services, are very likely to fail to be settled, as funds for payment will be mercilessly frozen by the financial institutions controlling the financial flows. Nor should we underestimate the damage to a business's reputation if information about such illegal business practices becomes public.

LIST OF PERSONS SUBJECT TO EU SANCTIONS

The list of persons subject to EU sanctions is publicly available, and economic operators, regardless of the number of business customers and partners, must ensure that they do not infringe EU sanctions when dealing with their customers or partners. Accordingly, continuous verification of information is the only possible way to avoid errors. The primary condition for such verification is the existence of detailed information about the person, i.e., the collection of data on its ownership and management structure.

In addition to primary sources (legislation), one of the most reliable sources for data verification is the website https://www.sanctionsmap.eu/#/main. It makes it easy to find up-to-date information on sanctioned persons in a variety of languages. Among other things, this dataset contains the names of all sanctioned persons adapted to the specificities of the different languages, which allows for a comparative identification of 'the bad guy' and an assessment of the risk of collaboration.

However, is this list of sanctioned persons exhaustive? Do the sanctions apply to legal entities that are owned, controlled or otherwise associated with listed persons?

INDIRECTLY SANCTIONED PERSONS

Although sanctions are directly imposed on those persons and entities listed in the legislation, if a listed person is deemed to own or control a non-listed entity, it can be presumed that control includes the assets of that entity, which means that funds or economic resources reach the listed person.

The criterion to be taken into account when assessing whether a legal person or entity is owned by another person or entity is the possession of more than 50% of the proprietary rights of an entity or having a majority stake in it. If this criterion is satisfied, it is considered that the legal person or entity is owned by another person or entity.

The criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity, alone or pursuant to an agreement with another shareholder or other third party, could include, *inter alia*:

a. having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;

b. having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person or entity who have held office during the present and previous financial year;

c. controlling alone, pursuant to an agreement with other shareholders, a majority of shareholders' or members' voting rights in that legal person or entity;

d. having the right to exercise a dominant influence over a legal person or entity, pursuant to an agreement entered into with that legal person or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person or entity permits its being subject to such agreement or provision;

e. having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right;

f. having the right to use all or part of the assets of a legal person or entity;

g. managing the business of a legal person or entity on a unified basis, while publishing consolidated accounts;

h. sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them.

If any of these criteria are satisfied, it is considered that the legal person or entity is controlled by another person or entity, unless the contrary can be established on a case-by-case basis.

In Lithuania, the list of persons indirectly sanctioned is prepared and published by the Financial Crime Investigation Service. It is not (yet) very long, but it is clear from its content that those persons whose dependence on the persons specified in legal acts is manifested through a sufficiently complex and remote management structure are also considered to be sanctioned: https://www.fntt.lt/lt/tarptautines-finansines-sankcijos/4166.

Photo by Arisa Chattasa on Unsplash

Slovakia: https://rpvs.gov.sk/rpvs/

Austria: https://www.bmf.gv.at/en/topics/financial-sector/beneficial-owners-register-act/Register-of-Beneficial-Owner.html

EXAMPLES OF MEASURES TO PREVENT BREACHES OF SANCTIONS

Examples of measures to prevent breaches of sanctions are as follows:

- put in place internal control procedures to identify customers, beneficiaries and/ or customer representatives falling within the scope of international sanctions, as well as whether the customer's transactions and operations are not in the scope of other restrictive measures (for example, restricted investment transactions, restricted insurance transactions, transactions involving the prohibited transport of dual-use items to certain jurisdictions, etc.);
- prior to the start of the business relationship, as well as during the business relationship, check and ensure that the customer, beneficiary and/ or customer representative are not subject to sanctions;
- check during the business relationship, whether the customer does not carry out transactions (operations) with persons subject to sanctions;
- ensure that up-to-date information on applicable international financial sanctions and restrictive measures is followed;
- appoint responsible personnel who are properly acquainted with the law governing international sanctions and their application, and provide such personnel with sufficient resources to identify possible breaches of sanctions.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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NON-TARIFF MEASURES, SANCTIONS

Kaliningrad – Russia transit: are there any special simplifications?

Due to the war in Ukraine, the Kaliningrad Oblast is getting increased attention. We receive questions about the 'Kaliningrad transit': whether there are any simplifications for the transportation of goods from Russia to Kaliningrad and vice versa or exemptions from sanctions? The exemptions have been introduced in the fifth EU sanctions package against Russia. But let's start with an overview of some historical events.

SEVERAL HISTORICAL FACTS

Historically it has been the case that the territory of the Kaliningrad Oblast mainly was a territorial exclave [1]. The political link of this land with the metropolis was not always accompanied by a territorial connection. East Prussia, Lithuania Minor, Kaliningrad - all these names unite the same territory. The land of East Prussia since the unification of Germany in the 19th century belonged to Germany. After World War II, the territory was ceded to the Soviet Union, after the dissolution of which, it was separated from the main state and now it borders the countries of the EU.

Until the dissolution of the Soviet Union, the issue of transit to/ from Kaliningrad did not exist, as both Lithuania and Kaliningrad were parts of the same state. The issue of transit arose after Lithuania regained its independence and this issue became especially relevant after Lithuania joined the EU.

SUWALKI CORRIDOR

A geopolitically important area is located between the Kaliningrad region and Belarus in Poland, the so-called Suwalki Corridor, which runs through a narrow stretch of land on the Lithuanian-Polish border and is about 80 km long. According to Russia, due to the "excessive transit fees" applied by Lithuania, Russia envisaged a more advantageous way of transporting goods through Poland and in 1993 publicly announced the project to connect the Kaliningrad Oblast and Belarus through the territory of Poland by an extraterritorial highway. However, the Polish leadership rejected the Suwalki corridor project, arguing for ecological damage to the landscape and possible deterioration of relations with Lithuania.

The issue of the Suwalki corridor became particularly important in 1999 after Poland joined NATO, and in 2004, when Lithuania, Latvia and Estonia did the same. In the event of a conflict, Russia could cut off here the Alliance's military supplies to the Baltic states [2].

KALININGRAD TRANSIT

In 1991, Lithuania and Russia decided to regulate the conditions of transit of persons permanently residing in the Russian Federation through the territory of Lithuania by a separate agreement. Under this agreement, after Lithuania introduced the visa regime to Russia and other states of the Commonwealth of Independent States (CIS) in 1993, by exception this was not applied to the residents of Kaliningrad.

On November 11, 2002, the EU signed a Joint Declaration with Russia approving the facilitated transit of Russian citizens and goods to/ from the Kaliningrad region. On July 1, 2003, following the expiry of the visa-free regime between Lithuania and the Kaliningrad Oblast in accordance with Council Regulation (EC) No. 693/2003 (14 April 2003) seeking to simplify the transit, a specific Facilitated Transit Document (FTD) and Facilitated Rail Transit Document (FRTD) were established for the third-country nationals traveling from one part of their country to another, when these are geographically separate territories. The Government of Lithuania has approved the Special Kaliningrad Transit Programme for 2003-2004 (prior to the membership in the European Union) for the implementation of the FTD and FRTD.

However, the agreement signed between the EU and Russia two decades ago has not been implemented in terms of goods. The 'Kaliningrad transit of goods' is an integral part of the EU law and in customs terms, it has no difference from the transit through the EU customs territory to other directions.

EXCEPTIONS FROM EU SANCTIONS AGAINST RUSSIA

Aiming to stop the war in Ukraine, the European Union is issuing a series of sanctions against Russia. Until the fifth package was announced on 8 April this year, no exemptions were provided for transit from/ to Kaliningrad.

The exemption is now provided under the Council Regulation (EU) No 2022/576 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Article 3l of the new regulation sets the prohibition for any road transport undertaking established in Russia to transport goods by road within the territory of the Union, including in transit. It also provides an exemption: the prohibition shall not apply to road transport undertakings transporting goods in transit through the Union between the Kaliningrad Oblast and Russia, provided that the transport of such goods is not otherwise prohibited under this regulation.

Thus, in one or another way, the topic of the 'Kaliningrad transit' remains relevant.

[1] A small part of the territory of a State separated from the territory of the main State by the territory of another State (or States)

[2] Information and image taken from http://www.voruta.lt/savaites-pjuvis-suvalku-koridorius-vilioja-agresorius/

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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OVERVIEWS AND COMMENTS

Wise Persons Group recommendations: what is the future of EU customs?

In order to stimulate 'thinking outside the box' in the EU debate on the future of the Customs Union, the European Commission has established a Wise Persons Group on Challenges Facing the Customs Union (WPG) to reflect on four key topics: e-commerce, risk management, the effective management of non-financial tasks and the future of customs governance structure. The group consists of 12 representatives of business, science and state institutions. The result of their work is presented in the report published on 31 March 2022, reviewing both the current customs situation and the origins of the systemic problems, as well as providing 10 recommendations for a major breakthrough.

The report provides many statistical data, based on the results of stakeholders' survey, and also data and findings of international organizations or bodies (such as OLAF). On top of this, both the minutes of the meetings of this group and the interim documents are published on the EU website, so there is a lot of material for further analysis. In this article, we will briefly review namely the part of the recommendations.

RECOMMENDATIONS BY THE WPG

1. **A package of reforms by the end of 2022**

The European Commission by the end of 2022 should table a package of reforms, including of the Union Customs Code, implementing the recommendations contained in this report, relating to processes, responsibilities and liabilities, and governance of the European Customs Union.

The report sets an ambitious target of putting forward concrete reform proposals by the end of this year, with a target of implementing them by 2030. The speed under which the EU adapts to innovations is raised as one of the systemic challenges, while some provisions of the UCC approved in 2013 and entered into force in 2016 for the implementation have been postponed until 2025.

2. **A new approach to data**

Rather than relying principally on customs declarations, customs shall focus on obtaining better quality data based on commercial sources, ensuring it is cross-validated along the chain, better shared among administrations, and better used for EU risk management. Certain e-commerce platforms should be required to provide data to customs. Also, businesses should be provided with a single data entry point for customs formalities and a single window portal.

The report recommends collecting a variety of data to verify declarations, from manufacturers, carriers, customs

brokers and, in particular, from platforms and payment institutions. It is proposed to start the implementation of systems based on blockchain technology, that will greatly assist traders and Customs, and would allow retrospective verification of the transaction - ensuring that the data will not be changed.

3. **Set up a framework for cooperation**

In addition to individual customs authorities, other authorities, such as market surveillance authorities, tax authorities and other law enforcement bodies, should share data for comprehensive management of risks at the EU level.

Another acute problem identified is the differences in practice between the EU Member States. Although customs administrations should act as a single EU customs office, the disparities between the 90,000 employees in the EU's 2,000 customs offices are still huge and are being exploited by unfair businesses, to the detriment of the fair ones. Therefore, as proposed in the report, both information and competencies should be exchanged so that the operation, as well as the sanctions for possible non-compliances or infringements, are the same wherever goods enter the EU. Cooperation is also a prerequisite for effective risk management and data quality.

4. **An establishment of a European Customs Agency**

This Agency should provide customs-related services to the European Commission and the Member States. The Agency would not substitute the division of existing competencies but would be a tool for assistance and cooperation.

The Agency could be given EU-level risk management functions, supervision of AEOs, data management, IT infrastructure development, joint procurement, crisis management, pooling and sharing of know-how, organising a forum for international discussions, and assistance to individual Member States upon request.

Picture from the Report by the Wise Persons Group on the Reform of the EU Customs Union – Brussels March 2022

5. **A reformed and expanded AEO system based on trust**

The AEO system should become expanded in scope, multi-layered and more effective to better facilitate trade.

It is proposed that holders of AEO status should be able to share data with customs not on a transaction-by-transaction basis but on a periodic basis. The cooperation between the AEO and the customs should be mutually beneficial, with the AEO providing the data to customs, while customs could provide facilitation at the level of working capital (for example by reducing the required guarantees). The confidence should be based on continuous internal control by the companies themselves and occasional customs inspections. In a trust-based system, infringements should be punished at a particularly high level, with additional information being communicated to all the EU Member States and other concerned economic operators. AEOs would also be allowed to provide bonds for other companies that do not have AEO status so that they can also participate as reliable parties in the supply chain.

6. A new framework of responsibility and trust

ABC model (Authorised, Bonded or subject to greater Control) should be introduced, in which operators would seek Authorised Economic Operators status to gain commercial access to the EU market. Failing this, a bond provided to an AEO, against which the EU authorities may levy a significant charge for mis-declaration or rule breaches, may allow access to the market. Small non-commercial consignments would continue to be sent through the usual processes, but without priority and subject to a level of controls that reflects their "non-trusted" status.

This proposal relates to the fifth recommendation of the extension of the AEO status and the fourth recommendation of the establishment of a European Customs Agency with a supervisory role for AEO operators.

7. The removal of the customs duty exemption threshold of EUR 150 for e-commerce

The existence of the exemption does create an incentive for exporters to the EU to break consignments down into smaller packages so that they can effectively trade free of customs duties. Since a similar VAT exemption was abolished, the customs duty exemption does not even save the importing person the trouble of making a customs declaration, therefore, it is no longer meaningful. The report proposes a simplification of tariffs for small consignments instead of this exemption (so that, for example, there is not so much hassle in classifying goods and checking the correctness of classification).

8. Green customs

Customs have an important role to play in helping the EU deliver its Green Deal agenda, therefore customs themselves need to internally be maximally 'green'. Maximum digitalisation, the uniform application of customs rules, and the removal of the EUR 150 duty exemption (which will prevent goods from being transported on inefficient routes or splitting into smaller consignments solely because of a more favourable customs approach) would help to achieve sustainability. It is also proposed that the EU take the lead to revise the Harmonised System (HS) Nomenclature so that sustainable goods can easily benefit from the most favourable customs regime.

9. Properly resource, skill and equip customs to ensure the capacity to fulfill their mission

The report suggests looking at how to attract new talents and new skills to the job, whilst providing adequate reskilling to customs officers who have to be state of the art in complex matters as diverse as chemicals, drug precursors, electronics, food composition, complex fiscal schemes and many other.

10. An Annual Customs Revenue Gap Report

'What you can't measure, you can't manage'. There is currently no reliable data and methodology to determine the extent to which duty is not collected due to irregularities and fraudulent schemes (while the VAT gap is being measured). For example, EUR 25 billion in customs duties were collected in 2020 (11% of the EU budget); the abolition of the EUR 150 exemption alone could, by conservative estimates, bring in an additional EUR 1.5 billion in income per year.

CONCLUDING REMARKS

Some of the proposals are really ambitious, such as a short deadline for implementing reforms or implementation of the blockchain technology. However, some, for example, the removal of the EUR 150 customs duty exemption is to be expected in the near future. This vision for the future of EU customs is relevant for businesses as an indicator of where customs move forward to adapt their activities accordingly. One such area is the seeking of the AEO status. This may not be an easy challenge, but it seems likely that it may be inevitable in the future to participate effectively in international trade.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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OVERVIEWS AND COMMENTS

Who is responsible for customs compliance? or When everyone is responsible - no one is!

Reader's question: We are a medium-sized EU manufacturing company. We import and export goods, and customs clearance is handled by customs agents. We are going to set up our own customs warehouse, apply for the AEO status and obtain authorisations for customs simplifications. We have also faced restrictions in regard to the sanctions imposed on Russia and Belarus. The question is, who in the company should be responsible for fulfilling the customs requirements and complying with them so that customs-related processes run smoothly?

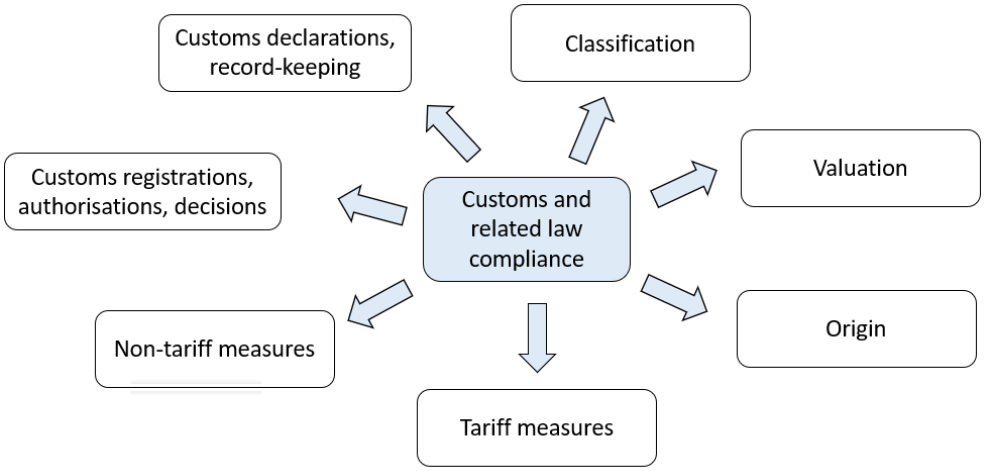
When answering the question, let's first look at the areas of customs control and related requirements that businesses have to meet.

CUSTOMS AND RELATED REQUIREMENTS

There are indeed many customs and related (i.e., arising from legal regulation falling within the competence of other institutions) requirements. There is no uniform breakdown of the areas from which they originate, but in any case:

- The customs shall control the physical movement of goods across borders with third countries and the goods shall be declared to customs under the chosen customs procedure applied for. So, it is necessary to know:
  - What is needed - customs registrations (e.g., EORI number), authorisations, decisions, and
  - how to do this - notifications and declarations, and keeping of information and documents after the clearance.
- The purpose of customs controls on goods is to check the compliance with
  - tariff (tax-related) measures and
  - non-tariff (not tax-related) measures.
- The tariff-related measures, i.e., the correct calculation of import duties and taxes, are based on three pillars:
  - the tariff classification of the goods (commodity code),
  - the customs value and
  - the origin.

The application of non-tariff measures, which is a very wide-ranging area of measures, including the sanctions mentioned in the inquiry, as well often depends on these data - commodity code, customs value and origin of goods.



LEGAL REGULATION FALLING UNDER THE COMPETENCE OF OTHER AUTHORITIES ('RELATED' OR 'NON-CUSTOMS REQUIREMENTS')

In practice, some requirements, which relate to the cross-border movement of goods and are controlled by customs, are referred to as 'non-customs requirements', since they arise not from the legal regulation of customs but from that of other authorities.

For example, with regard to international sanctions, the Government of Lithuania has adopted the Law on the Implementation of Economic and other International Sanctions, which stipulates that the implementation of international sanctions in Lithuania is coordinated by the Ministry of Foreign Affairs, and the Customs Department under the Ministry of Finance is one of the many institutions responsible for the supervision of the implementation of international sanctions. This means that when goods cross the border, customs will check whether the goods are sanctioned and, where appropriate, whether all the necessary licences for export or import are obtained; however, the licences themselves are issued and the relevant checks are carried out by other authorities.

Some other examples of 'non-customs requirements' in one of the EU Members States (Lithuania):

- The control of imports of organic products is the competence of the State Food and Veterinary Service;
- The control of plants and plant products is the competence of the State Plant Service;
- The control of safety and compliance of non-food products is the competence of many institutions: State Consumer Rights Protection Authority; State Accreditation Services for Health Care Activities (medical devices); the Transport Safety Administration (motor vehicles, their trailers, etc.), the National Public Health Center (cosmetic products), the Communications Regulatory Authority (electronic means of communication). The annual report of Lithuanian Customs indicates that due to the control of non-food products safety and compliance 56,130 inspections were carried out in 2021. In 239 cases, decisions were taken not to release the goods for free circulation.

The examples above show that these are broad areas of legal regulation, and the primary role of customs is to check the availability of the necessary documents, such as licenses, permits, certificates, and other evidence of compliance with certain conditions, according to the data provided in the customs declaration. The compliance of goods themselves with 'non-customs regulations' is usually carried out by the competent authority.

It would therefore be appropriate to address the issue of responsibility for compliance with 'non-customs regulations' by assessing who in the company will be the main contact in the case of the inspection by the competent authority, as well as in the case of the inspection reveals non-compliance, which may result in non-release of goods, fines, etc. For example, if your Legal Department is responsible for the preparation of sales-purchase contracts, the inclusion of sanctions-related provisions into the contracts and the verification of sanctions lists, responsibility for compliance with sanctions could be provided for in the job description of the Head of the Legal Department.

Following this logic, the responsibility for compliance with the 'customs regulations' could also be attributed, so let us first discuss what customs will check/ can check in the situation you specify in the inquiry.

RESPONSIBILITY FOR CUSTOMS COMPLIANCE

Duties and taxes

We can find out what kind of customs inspections you may have to face, for example, in the annual report of Lithuanian Customs.

*The part of the report concerning the results of post-clearance audits for 2021 includes: regarding the **tariff classification of goods**, **origin of goods**, the application of other tariff regulatory measures after customs clearance, the number of additional duties amounted to **€ 5.4 million. € 7 million 698 thousand** additional duties were the result of post-clearance audits of customs value of imported goods.*

As we can see, the focus is on the correct calculation of import duties. Responsibility for the correct payment of taxes is usually provided for in the job description of the Head of the Finance Department.

Other customs controls

The other areas mentioned in your inquiry are non-tariff. They are about customs warehouse, AEO and simplification authorisations, their acquisition and maintenance. Customs will assess compliance with the relevant requirements. For example, in 2021, Lithuanian Customs prepared 72 surveillance reports, according to which it was ascertained that the inspected persons comply with the requirements for AEO status.

Your Customs Warehouse Manager is likely to be responsible for the operation of the customs warehouse and related customs simplifications, and possibly will also take care of the AEO status. This could, therefore, be reflected in his/her job description.

In further consideration of the attribution of responsibility, it is important to consider that the work with customs brokers in declaring goods to customs is usually coordinated by the Logistics Department, which takes care of providing the documents and data required for the customs declaration, answers the questions raised and receives the declaration after it has been customs cleared. In addition, you should consider the important role of the Purchase and Sales Departments in customs related processes.

SO... EVERYONE IS RESPONSIBLE – NO ONE IS RESPONSIBLE?

In summary, we can see that the various responsibilities related to customs compliance are spread across many departments of the company. In such a case, however, there is a risk that situations arise where, when everyone is responsible, no one is responsible. It is therefore important to concentrate responsibility in the hands of one, as is correctly stated in the question. But whose responsibility shall it be?

Unless a separate position for the Customs Compliance Manager or Supervisor is created, there is usually a choice between the Logistics and Finance department. In view of the importance of tax risk for a company, the Finance Department is often held responsible, with the Head of that department responsible for compliance with customs requirements and, as we have discussed, with all others, not just tariff-related requirements.

FINAL OBSERVATION: YOU CANNOT CONTROL WHAT YOU DO NOT UNDERSTAND!

Indicating responsibility for compliance with customs requirements in the job description is the first step in ensuring compliance. As the legal requirements in this area are complex and constantly evolving, and business risk can be high (additional duties, loss of authorisations, non-release of goods, etc.), the next step is to ensure that this is not just a paper-based formality. The responsible individual must possess the necessary knowledge to assess and manage the relevant risks and ensure that customs-related staff has them. It is therefore important to put in place an effective learning process to acquire, deepen and update the necessary customs knowledge.

Thank you for the opinion and insights to Ingrida Kemežienė, Tax expert at Law firm Ellex Valiūnas ir partneriai and to Monika Blelskienė, Manager in the Indirect Tax Team at PwC Lithuania.

We would appreciate your views, what would you advise the company? Leave your comment to the article online or write us info@lcpa.lt

CUSTOMS COMPLIANCE & RISK MANAGEMENT
JOURNAL FOR PRACTITIONERS IN EUROPE

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OVERVIEWS AND COMMENTS

Port Community Systems & Customs (Part I)

Customs put the pieces of the various authorities' puzzle together and release the goods with an overall decision. Therefore, among many other players, the customs administration plays an extremely important role in effective operations in the port, and close cooperation among all the stakeholders is an obvious guarantor of quality. In this part, we examine the tasks and challenges facing the logistics industry, the core mandate of customs and their challenges, and how can another dimension of effective process flow be created?

A ROUGH LOOK AT THE TASKS AND CHALLENGES FACING THE LOGISTICS INDUSTRY

The current worldwide supply bottlenecks, and the associated stagnation in the availability of goods clearly show us how strong global networking is in everyday life, and how the time factor dominates our economic fate due to the ever increasing demands for effectivity and efficiency.

Buzzwords, such as the 24/7 principle or delivery on time, and the even more dramatic 'on sequence', and the explosive growth in e-commerce, pose immense organisational challenges for logistics. It should also not be forgotten that in the emerging age of the next industrial phase - Industry 4.0 - the demands on the time factor and the smooth flow of the delivery of goods are becoming increasingly important.

Last but not least, there is, of course, the question of costs and resources. The topic of effectivity and efficiency also affects logistics and every possibility of reducing burdens has a positive impact on the overall process.

To reconcile the resulting effort with the limited resources in the best possible way, fundamental topics such as the continuous improvement of the trusted partnership must not be allowed to falter when considering and focusing on technological approaches. AEO programmes and their mutual recognition could be mentioned here as an example. Digitisation will also be able to provide a positive boost in that respect.

However, we must ask ourselves, how far can such approaches go, and how can cooperation between customs and the port industry contribute to this?

THE CORE MANDATE OF THE CUSTOMS ADMINISTRATIONS AND THEIR CHALLENGES

The priorities of customs administrations have changed in recent years because safety and security now play the leading role. On the other hand, governments are undoubtedly interested in securing prosperity for society and, thus, also in setting the course for trade facilitation or intensifying efforts in this area.

Since speed and volume are increasing, customs administrations are also faced with the challenge of constantly

adapting their activities to fulfil their tasks in the best possible way, but also not to slow down the flow of goods.

In particular, the current events of the COVID-19 pandemic, call for increased commitment to the digitalisation of processes and infrastructure. In the last few years, before the pandemic, customs administrations went into action and extensively invested in electronic solutions.

The introduction of solutions for the modernisation of customs clearance systems such as ASYCUDA World, and the associated configuration efforts to adapt to local needs, and extensive implementations of various other IT projects worldwide on the part of customs administrations, testify to the clear strategy of giving priority to the use of electronic means. This deserves respect and can be recognised as a significant contribution to improving the supply chain.

However, these efforts are accompanied by new and old challenges:

- Does the legal situation allow us to change simply our behaviour from 'push' to 'pull'? Today, there is a lively discussion concerning (especially in the world of the large logistics players) if we should not move forward and use data pipelines for the data exchange (besides the well-known mega-trends like blockchain). The involved parties would simply make their data available and, for example, customs would pull it if needed. This is the opposite behaviour of what is presentrly done regarding the legal environment, i.e. the person is obliged to lodge the declaration at a defined time and so on ('push' mechanism).
- Is the required data available in an acceptable quality?
- Does the use of technology solve this, at least partially?
- Do problems continue to arise because of non-harmonised approaches and data?

As an example, I would like to draw attention to a frequently returning point of discussion on the agendas of the meetings related to global supply chains, which is the question of harmonisation.

We could get lost in discussions about formats and the technical incompatibility of different computer languages. However, technical challenges are a lesser evil than the significance of the content and its interpretation. What exactly does submitting an 'ETA' data element mean for the individual participants? Does the Port Authority have the same understanding of this information as, for example, the customs authority?

In the mass of efforts, one crucial issue is often not treated with the right respect: cooperation! Everyone involved in the overall process has his own interests and tasks. That is fine and it is exactly the reason why a good functioning community should think together about the development of its eco-system. Of course, it is impossible to find 100% solutions for all participants and every constellation in this cooperation.

Since, among many other players, the customs administration plays an extremely important role in effective operations in the port, close cooperation here is an obvious guarantor of quality.

Adobe Stock

Various decision-making lines come together in the port business; among others, the 'commercial release' from the economic operators' side unites with the 'customs release' as the final 'GO' (or just no-go) from the part of the governmental entities. About the import and export, customs put the pieces of the authorities' puzzle together and release the goods with its overall decision. This can happen in various ways. However, we are talking about effective solutions and speed, and this should be valid for the entire port community.

HOW CAN ANOTHER DIMENSION OF EFFECTIVE PROCESS FLOW BE CREATED?

When we talk about digitalisation initiatives, we have to pay special attention to the topic of 'technology'.

All the points listed reflect the lively discussion that presently concerns the topic of digitalisation. Mega-trends, such as artificial intelligence, blockchain, or data pipelines must be carefully aligned with the actual necessities and must also face a critical evaluation. Not every business process urgently needs to be replaced by a blockchain mechanism. The question of the sense can be asked anew for each individual issue and discussed enthusiastically. In this context, it should not be forgotten that the right mandate and political will are essential building blocks for success.

Is the introduction of technology helpful? Without a question! Does it solve problems as a standalone solution? Doubts are appropriate! For example, automation related to cross-border movement can be achieved by using diverse technology components. Ultimately, this also requires integration into the entire electronic infrastructure consisting of up-to-date customs clearance systems and the logistics systems directly involved. At this point, we can list all sorts of things which are helpful to support this. Starting with comprehensive and modern risk and rule engines, through very effectively designed data flows, and Single Window solutions, up to video gate possibilities. At the end of the day, if the complementary infrastructure is not adapted or if the authorities still lack an understanding of a coordinated approach, the use of the technology will not bring the desired result.

To make it more dramatic, let’s think of a situation when a cross-border data exchange is agreed between upon two parties using modern means. Then this seems to be the right milestone on the way to shaping the future. Everyone involved is happy and proud. However, this ignores the fact that the real bottleneck is not such an agreement but something completely different. For example, when we think together about the ambitious goal of the UK government to introduce the world-leading border management by 2025, and then we take a closer look at the current situation in Dover, UK, it should be clear that technology and new free trade agreements are not the keys to solving the Dover situation sufficiently. The latest news about the postponement of border controls in the UK underlines that.

Is the achieved agreement still a good mood maker then?

LET'S PUT SOME LIGHT ON A NUMBER OF THE LISTED ITEMS

Single Window (SW) is great and fully supported. But let's not get lost in endless discussions about the definition of SW and whether the chosen approach can be considered SW. The magic word is interoperation. Anything that helps us along the path of facilitating our workflow should be welcomed. We have to be fair and see activities concerning what is feasible.

Pre-clearance is a timely separation between the data flow related to the goods and their actual physical arrival at customs. It can be a great contribution to using the available resources efficiently while striking a balance between monitoring and keeping the movement of goods as delay-free as possible.

Organisational re-design. Talking about data and flows of goods and the use of technology and mega-trends is important. However, the organisational structure ofen slows down or even stalls the process. Keywords here are:

- put more attention on common control approaches,
- smart border activities in general,
- putting significant attention onto the still cumbersome regulations of responsibilities and empowerment in the national legal framework...

All these should receive equal attention and keep pace with the changes in the overall context.

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OVERVIEWS AND COMMENTS

Port Community Systems & Customs (Part II)

The aim of Port Community Systems (PCS) or trade Single Windows (SW) activities is not to replace existing systems. Rather, it is to create a sufficient landscape of electronic infrastructure and exchange mechanisms to link the administrative processes with the operation of all stakeholders involved. Collaboration/ cooperation is the key to getting everyone on board and creating the right modern environment for an effective port. This can create an attractive environment for trade and, thus, an increase of economic activities. So, what role do PCS play, and are or can they be a building block for the process?

PORT COMMUNITY SYSTEMS ENVIRONMENT

Let's turn our attention to the Port Community Systems environment and the cooperation of the industry with the customs services. To start with, it might be helpful to state a few facts and information.

Port Community Systems can be considered as Single Window solutions. They act as a data hub for the respective community, but mostly in a local environment. Acting in a local environment does not necessarily mean that PCS has limited capabilities. Rather, it is due to the fact that almost every port has its own individual characteristics and approach.

It is not something new or a great modern trend. PCS have existed since the beginning of the 1970s. In the course of the first big wave of the use of electronic tools at that time, the port industry also benefited from 'modern' activities. Especially in Europe, the 'boom' around this topic began at this time. Thus, there is also a concentration of PCS know-how in Europe. However, this does not mean that current solutions outside Europe are simple replicas of European solutions.

The PCS responsible for the ports of Bremen, Bremerhaven and Wilhelmshaven has more than 500 companies using its services. Another very impressive example comes from Morocco. There, a PCS was first founded and established, and then gradually developed into the Single Window (Portnet.ma) for Morocco. The truly unique success story in Morocco leads to impressive figures of 45,000 connected importers and exporters, 1500 forwarding companies, 20 banks and 43 authorities.

Currently, more than 80% of maritime trade and 30% of air cargo in Europe run via PCS solutions. For global trade, it is approximately 50% in the maritime sector, and the tendency is increasing.

Concerning the history of the Bremish PCS in 1973 it shows that from day one, alongside terminals, the freight forwarding industry, shipping lines and other aspects of the private sector, customs was involved on the government

side and played a very significant part in shaping the PCS map and still does.

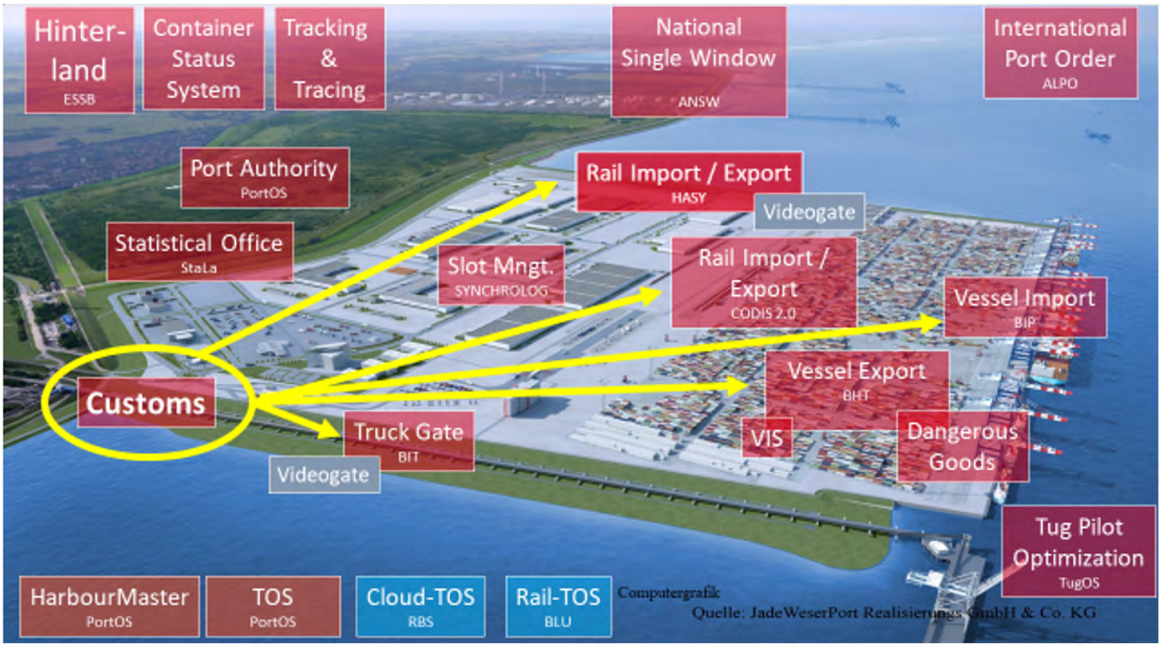
ADVANTAGES OF A PORT COMMUNITY SYSTEM

The advantages of a PCS are obvious. As the name 'Port Community Systems' suggests, all stakeholders are involved and get their part of the process mapped and supported by data exchange and status models. This works all under agreed rules and in-line with data protection and the right governance model, and compliance with legal requirements.

PCS activities are to be seen as accelerators for the overall handling in the port. They act as data hubs and ultimately distribute the data received once for the respective process to the concerned players involved and return the answers to the players intended in the status model. PCS also act as converter tools to make life easier with respect to different data formats and message types. PCS are guarantors of transparency and, since they are jointly defined by the entire community, are respected as trusted partners by all parties.

PCS AND CUSTOMS

As already mentioned, the functional scope of said PCS focuses on acting as a data hub for the designated participants. This also means that PCS create the link between the commercial port industry and the public authority sector. Again, on the side of the authorities, it is already often a fact or in the process of becoming the fact that the connection of the authorities involved in cross-border trade takes place via the SW mechanism and the customs administration acts as the 'point of contact'. In simplified terms, this means PCS to customs and customs to other authorities and vice versa. This is, of course, a rather rough illustration and can be given further variants.



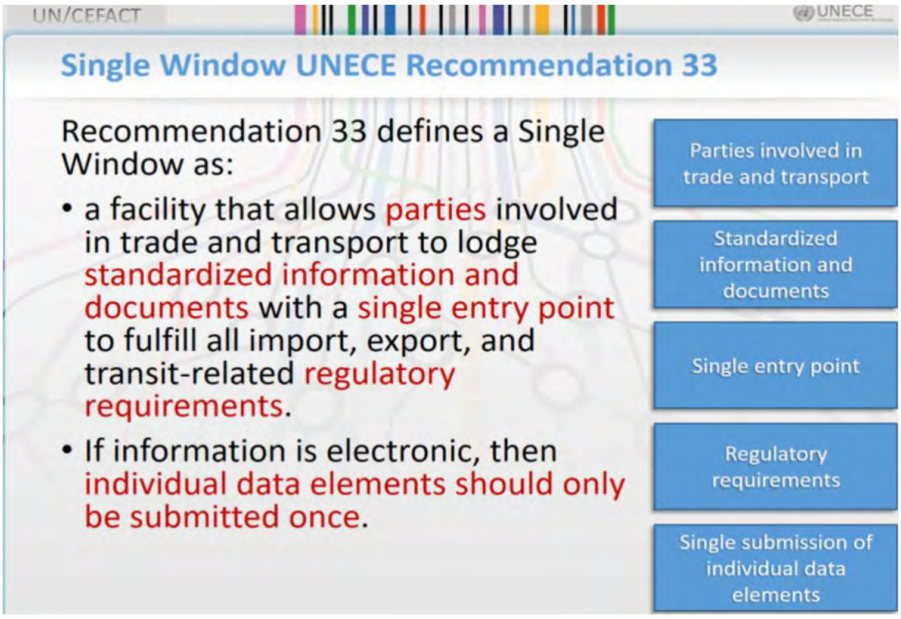
Since all stakeholders use the processes and services of the PCS in a clear procedure, this results in transparency and a basis of trust that is based on clear, coherent rules agreed upon with the community.

Each and every port and the PCS in operation (if there are any) are different. For example, you can see above an illustration of the Jade Weser Port in Wilhelmshaven, Germany. There are numerous functionalities offered as a service of the Port Community System. One of the very crucial parts is the interfacing with Customs and the respective data exchange. Whatever is agreed upon and necessary regarding the data exchange, in the end, the goal must be an effective and efficient flow of cargo in every direction. Only if the most important player is integrated into the data flow and has agreed on the right scheme of the related event triggers automation at the gate or less burden for the loading process can be achieved with the appropriate results.

A FEW BRIEF WORDS TO DISTINGUISH THE PCS FROM THE OFFICIAL 'SINGLE WINDOW'

You can see in the picture below the references that the UN has published as recommendations for SW. These are valuable and a good basis for any discussion on this topic.

However, it must always be clear that the introduction of a Single Window should also be about what it is to be used



for in the specific case and who are the stakeholders who are to benefit from the existence of such a solution. In my opinion, the realisation of introducing a Single Window does not necessarily go hand in hand with the unconditional demand for a single solution for the country.

Trade Single Window (e.g. also PCS), Customs Single Window, Maritime Single Window, etc. These are examples that can easily serve a meaningful purpose and live in peaceful coexistence. So, at this point, we are back to the buzzword 'interoperability'.

INTEROPERABILITY OF SYSTEMS

PCS acts as a link between the regulatory decision-making process and the operational flows in the ports and can or should be part of the Single Window environment for the country.

Is there anything brand new to report from this environment?

PCS operators have also been thinking about how their services can contribute to a new level in the global supply chain. One of the pressing questions is the availability of logistical data as quickly as possible and of course for cross-border exchange. To this end, the PCS and SW operators have agreed on the creation of a governance platform, which can then be used to make services available to each other worldwide, or better, to the customers via the participating PCS.

To give an example, an interested customer can approach his home PCS in Abu Dhabi, for example, and have a port call order generated for Antwerp. It is also conceivable that customs administrations could be involved in order to provide further data for risk purposes.

PRACTICAL EXAMPLES

There are a few interesting findings about the cooperation between customs and PCS initiatives.

Djibouti. ASYCUDA connected

To speed up the processes and increase the attractiveness of Djibouti ports they introduced a PCS. In the course of

the project, it was one of the tasks to exchange the important status information and notifications with the customs authority. Because Djibouti Customs (as many others outside of Europe) use the ASYCUDA electronic customs clearance system, the basis for interfacing and the right configuration had to be made; the result is a success.

Poland. Taskforce and the result of the right cooperation

Poland created and is still in the phase of extending it with new functionalities, a very comprehensive and impressive Single Window driven by Polish Customs; in parallel, an initiative on the side of the private sector started with the aim to establish a PCS for the three major ports in Poland (Gdansk, Gdynia, Szczecin). Polish Customs realised from the beginning on that they should support the PCS activities to the benefit of the country and also to receive data and status information which might help as additional information customs in general and the Single Window efforts in particular; Polish Customs established a kind of a task force and went into talks with the operators of Polski PCS; the outcome was fruitful despite the fact that the expectations were of a different nature; nevertheless, both sides realised that the results of that cooperation are crucial for a new level of quality in Polish ports; the result is a success.

Italy. The vessel has left information

It was not very comfortable to receive the final information on the side of Italian Customs that the goods declared for export had really left the Italian territory; of course, as in the most EU countries, customs received the required notifications; but the final logistical information was missing; that issue is now solved by the fact that there is a cooperation between the PCS environment and Italian Customs to get that final bit submitted (this example is from Genova).

Nigeria, British Columbia, Sri Lanka, Barbados, Chile, etc. On the way to PCS

Last but not least the question remains 'Are there new efforts besides the already existing cooperations or are PCS discontinued models and no longer of high attractiveness?'. The listed examples are only a few countries and regions which have already started their projects or are at the level to launch PCS projects for their countries. Often the topic is pushed purely into the maritime corner. However, modern PCS approaches and the further development of PCS services see themselves as providers of solutions for far more than just maritime logistics. Hinterland connections, dry ports, airport cargo flows, interface to governmental Single Windows, etc., are just a small list that shows that global digitalisation also acts as an accelerator for the topic of PCS.

It should also always be clear that it is not about reinventing the wheel, and it is not about replacing existing systems or even taking over the activities of others. It is about the coordination of those involved, working out the necessary status model and mapping it in such a way that a landscape is created through an extensive connection of the systems that allow plenty of room for an effective and efficient flow of goods without being at the disadvantage of monitoring and security.

CONCLUSIONS

Collaboration/ cooperation is the key to getting everyone on board and creating the right modern environment for an effective port, and based on this, an attractive environment for trade and thus the increase of economic activities.

Customs is one of the most crucial players when it comes to the cross-border movement of goods, so it must be part of the discussions from the beginning. It makes no sense to create a break in the exchange flow of the respective data when there is an interest in enhancing the effectiveness and efficiency of logistics and attracting investors. Customs decisions are not only of interest to declarants or representatives, or consignees. The pace in the movement of goods is also a matter of the right information at the right time amongst all players in the port.

The aim of PCS or Trade Single Windows activities is not to replace existing systems. It is more to create a sufficient landscape of electronic infrastructure and exchange mechanisms to link the administrative processes with the operation of all stakeholders involved.

The advantages for customs administrations when considering a PCS project do not always seem particularly attractive at first glance. However, it must lead to an overall view and be seen in-line with the vision for the whole country. This usually results in a different perspective.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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COUNTRY-SPECIFIC

Ukraine customs-related news: April/May 2022

News at a glance: the ban on the export of Ukrainian agricultural products during martial law; the limitation of foreign currency transactions for import operations; USA: temporary suspension of tariffs on Ukrainian steel; UK: agreement on “cutting” tariffs on all goods from Ukraine to zero; EU: “Solidarity Lanes” for Ukrainian agro-products; common transit in Ukraine: first special transit simplification; FTA between Ukraine and Moldova: amendments on applying PEM; EU: a one-year suspension of EU import duties on all Ukrainian exports.

THE BAN ON THE EXPORT OF UKRAINIAN AGRICULTURAL PRODUCTS DURING MARTIAL LAW

At the beginning of March, the Ukrainian government established new rules for the export of agricultural goods under martial law. Especially, the export of Ukrainian oats, millet, buckwheat, sugar, salt, and meat is prohibited. Some kinds of goods such as wheat and a mixture of wheat and rye (meslin), corn, meat/eggs of domestic chicken and sunflower oil are allowed to be exported only with obtaining a permit (license).

THE LIMITATION OF FOREIGN CURRENCY TRANSACTIONS FOR IMPORT OPERATIONS

As to martial law, the National Bank of Ukraine established new rules and prohibitions for foreign currency transactions, including payments for import operations. The legal entity can provide payments in foreign currency abroad only for making payments for 1) goods as the part of humanitarian aim; 2) goods, which are included in the list of critical import goods (such list of goods was established by the government of Ukraine).

USA: TEMPORARY SUSPENSION OF SECTION 232 TARIFFS ON UKRAINIAN STEEL

The United States of America decided to suspend import duties on Ukrainian steel and steel products. Such suspension will last for 12 months.

According to statistics, 359 thousand tons of Ukrainian metallurgical products were exported to the United States in 2020, and 428.9 thousand tons - in 2021.

UK: AGREEMENT ON “CUTTING” TARIFFS ON ALL GOODS FROM UKRAINE TO ZERO

At the end of April, the UK government announced new trade measures as part of broad UK economic support to Ukraine, especially establishing a 0% rate of customs tariffs for all goods, imported from Ukraine.

At the beginning of May, Ukraine and the United Kingdom signed an agreement on the abolition of import duties and

tariff quotas in bilateral trade. It will be valid for 12 months but may be extended by agreement between the parties for a new term.

EU: 'SOLIDARITY LANES' FOR UKRAINIAN AGRO-PRODUCTS

The European Commission has developed an action plan to create 'Solidarity Lanes'. This plan aims to promote the export of Ukrainian grain, as well as the import of necessary goods to Ukraine - from humanitarian aid to feed and fertilizers. This plan envisages the use of additional transport, giving priority to Ukrainian supplies, maximum acceleration of customs procedures, etc.

COMMON TRANSIT IN UKRAINE: FIRST SPECIAL TRANSIT SIMPLIFICATION

The stage of national application of NCTS is underway in Ukraine. During this national stage, companies can get special transit simplifications, which will be valid in the future, during the international application of the common transit regime.

In May, the first company in Ukraine received a permit to apply for a special transit simplification "general financial guarantee". In turn, Ukrainian companies may also receive other simplifications such as “authorized consignor” and “authorized consignee”.

On the national stage, a company can apply for simplifications if it has previously issued at least 50+ declarations in common transit (T1UA). In turn, such a simplification as a "general financial guarantee" can be obtained by a company that has not yet issued 50+ but confirmed compliance with the criteria of ensuring practical standards of competence or professional qualifications of responsible employees.

FTA BETWEEN UKRAINE AND MOLDOVA: AMENDMENTS ON APPLYING PEM

On August 28, 2021, the Prime Minister of Ukraine and the Prime Minister of the Republic of Moldova signed a Protocol on amending the Free Trade Agreement.

In May 2022, a bill for ratifying such a protocol was submitted to the Ukrainian parliament. The changes provided in the Protocol concern the application of the rules of origin provided by the Regional PEM Convention between Ukraine and Moldova. This, in turn, will make it possible to apply diagonal cumulation between these countries and, for example, the EU.

EU: A ONE-YEAR SUSPENSION OF EU IMPORT DUTIES ON ALL UKRAINIAN EXPORTS

In April, The EU Commission proposed a one-year suspension of all customs duties and removal of quotas on goods from Ukraine. In May, the European Parliament voted in favour of such a one-year suspension. This decision provides:

- complete abolition of import duties on industrial products;
- suspension of the application of the entry price system to fruit and vegetables;
- abolition of anti-dumping duties and safeguards on steel imports for up to one year.

This is also formally approved by the decision of the EU Council.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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COUNTRY-SPECIFIC

Keeping abreast of U.S. CBP's current strategies and developments

Every year U.S. Customs and Border Protection ('CBP') releases the 'CBP Trade and Travel Report'. Trade compliance practitioners should take note of these annual reports to keep abreast of CBP's current strategies and developments. Additionally, the information contained can provide insight into CBP's strategic outlook for the future, a valuable tool for planning purposes.

'CBP Trade and Travel Report' provides an in-depth look at the challenges, successes, plans, and overall state of the agency. In its 2021 report unsurprisingly there's a strong focus on COVID-related challenges. Other major topics covered include new technology deployments (e.g. blockchain ledger technology), trade facilitation and enforcement, anti-dumping/countervailing enforcement and counterfeit goods (particularly personal protective equipment (PPE)).

As trade compliance professionals our work is not limited to complying with current regulations; anticipating future regulatory changes to ensure preparations are in place is an equally critical function.

COVID AND COUNTERFEIT PPE

Much like 2020, 2021 was very much bogged down by COVID-related restrictions and fears. While these restrictions had a drastic, negative impact on daily life as well as both business and leisure travel, this was an entirely different story for trade. CBP processed 36.9 million entries valued at over 2.8 trillion USD during FY2021 which marked a 14.9 percent increase over FY2020. As anyone working in the trade field is aware, the pandemic marked record consumer purchases which is reflected by these figures.

Whenever a crisis unfolds an unfortunate set of characters always appear: profiteers. COVID is certainly no different. As demand for PPE remained strong throughout 2021 so did the flow of counterfeit PPE and COVID testing kits. In FY2021 CBP seized over 35 million counterfeit face masks, and 38,154 illicit test kits. Over 31 percent of these originated in China.

As trade compliance professionals it is our role to ensure we perform proper due diligence on our business partners; we are the first line of defense in the battle against illicit and counterfeit goods.

TECHNOLOGY

Technology has always played an integral role in CBP's ability to detect threats and enhance enforcement techniques. One transformative technology CBP has made significant progress on in FY2021 is the development of blockchain ledgers that cover steel, natural gas, oil, food safety and e-commerce. The goal is to improve pre-arrival/pre-release

data, fully digitalize transactions, increase supply chain transparency, and enhance entity identification.

The widespread adoption of blockchain ledger technology across the industry is inevitable; trade compliance practitioners must familiarize themselves with this technology and its uses in a trade compliance context.

PROTECTION OF DOMESTIC INDUSTRIES: IMPOSING INCREASED TARIFFS

CBP has a three-pronged role of trade facilitator, revenue generator and law enforcement. Part of the law enforcement prong is protecting domestic U.S. industry from unfair competition. There are three main tools used to accomplish this: Section 201, Section 301, and Section 232. While the three sections have differing mechanisms their shared functionality is that of imposing increased tariffs on goods from countries which are seen as threats to U.S. industry. President Donald Trump in 2018 and 2019 famously placed a 25 percent Section 301 tariff on most goods made in China entering the U.S. While many of these measures have been rescinded or reduced, they are still a massive driver of revenue for CBP. Duties collected in FY2021 exceeded FY2020 by 14.9 percent with an astonishing 143 percent total increase over the last five fiscal years.

As trade compliance professionals it is crucial we are aware of these special duty programs as they are ever changing and can drastically alter the cost structure of business models. Section 301, in particular, continues to be in a constant state of flux and must be monitored closely.

CONCLUDING REMARKS

Unsurprisingly, FY2021 was as tumultuous a year for CBP as it was for everyone else. As trade compliance practitioners it is critical that we stay informed of the direction in which customs agencies globally are moving. We are all aware of what regulations we must contend with on a daily basis; the true test is staying ahead of the curve to anticipate changes as they come so our stakeholders can prepare accordingly.

Trade compliance practitioners must embrace the fact they are pivotal in strategic business planning, not merely administrators ticking boxes as they come across their desk.

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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KNOWLEDGE

Journals on Customs: Why should you attend the Global Webinar?

On April 28th, 2022, another edition of the event 'Global Webinar: Journals on Customs' took place, during which editors of six leading journals shared their insights concerning some of the most significant topics, events and articles that have taken place in specialist editions over the past year. For me, as a young researcher, such events are of great importance, as they allow me to learn what are the current important issues in the field of global customs control. In the next few lines, I will try to outline what impressed me the most in the presentations of the speakers in the meeting.

PROFESSOR BORYS KORMYCH, UKRAINE, EDITOR OF THE ACADEMIC JOURNAL 'LEX PORTUS'

Professor Borys Kormych addressed the logistical export goods issues that Ukraine faces in the conditions of war. At first glance, the transportation of goods should not directly concern customs, but in fact, it should not be forgotten that customs formalities exist to control and facilitate international trade, and logistics is a significant part of the import-export process. The situation in Ukraine is worrying and affects not only Europe, but the whole world. With the imposition of economic and financial sanctions, more barriers are being placed on international trade relations, and it is the responsibility of customs to apply them as far as the movement of goods is concerned. Of course, the outcome and specific consequences of the war will only become clear once a peace agreement has been signed.

Therefore, current events make me think of the following question: is the time of de-globalization coming and what changes will take place in international supply chains and, therefore, in customs formalities?

LAURE TEMPIER, BELGIUM, EDITOR OF THE 'WCO NEWS'

Laure Tempier highlighted other very interesting topics that are likely to have an increasing impact in the coming decades not only on customs administrations and public sector institutions, but also on the business and human population in general. In particular, the collection, processing and analysis of data and the application of new technologies,-specifically blockchain. Blockchain is an innovative technology that has long been associated with the emergence and development of crypto currencies, but South Korea has demonstrated how it can be applied in customs administration as well. The implementation of blockchain has undoubtedly led to faster shipment processing, an enhanced level of digitization, simplification of customs formalities and procedures, and a high level of data security and cost optimization. Whether blockchain is the technology that can help build an EU customs 'as one' and provide a general solution to public sector issues are questions that are still difficult to answer, as more in-depth

theoretical and practical studies have yet to be carried out.

The application of blockchain and artificial intelligence in customs as a means of facilitating customs formalities and at the same time improving the quality of control is of great interest to me, as the topic of the dissertation I am working on is 'Digitization of import customs procedures in the Republic of Bulgaria'.

PROFESSOR ANDREW GRAINGER, THE UNITED KINGDOM, EDITOR OF THE 'WORLD CUSTOMS JOURNAL'

In this line of thought, as a person who is just getting into the depth of customs control and is only at the beginning of her studies in the field, it was extremely useful for me to learn from Professor Andrew Grainger, from the United Kingdom, editor of the 'World Customs Journal', that the edition is rich in high-quality articles of scientific and practical value, and that the Journal supports and encourages students, masters and PhD students publications who have concluded their own research, i.e. people who have an interest and skills to develop further in this field. Such initiatives have a strong stimulating effect on those entering the field, because mainly on the basis of the quality of their work, their research can reach the public in a journal with international importance. From there on, the path to realizing new practical ideas can be much shorter.

PROFESSOR SANDRA RINNERT, GERMANY, THE EDITOR OF THE 'AW-PRAX' JOURNAL

Professor Sandra Rinnert also stressed the need to introduce technologies such as blockchain and artificial intelligence into customs activity. She pointed out that blockchain can help to certify the origin of goods in a fully electronic environment and, based on an information collection on electronic databases, fraud regarding the origin of goods can be minimized. Regarding artificial intelligence, Professor Rinnert believes that its use could find widespread application in the tariff classification of goods. But this would only be the beginning of its use in this area. Keeping in mind that artificial intelligence is distinguished by its function to analyse a significant amount of data in a very short period, it could certainly be implemented in other customs activities such as risk analysis and risk profiling to achieve a more precise and accurate result.

Classical problems from an academic and practical point of view are the determination of the customs value of goods and transfer pricing. The BMW case she presented shows that the business needs clearer rules on the formalities for determining the customs value of goods when it comes to products made using or with implemented software. In my opinion, it is reasonable to adopt an additional regulation in this direction, as IT technology is developing very rapidly and is now, in fact, an integral part of the production process for a variety of goods.

JEFFREY SNYDER, THE USA, EDITOR OF THE 'GLOBAL TRADE AND CUSTOMS JOURNAL'

Jeffrey Snyder highlighted another important issue related to the task of the US Customs Administration to develop and implement practically the new Uyghur Forced Labor Prevention Act regarding the ban on import of goods coming from the Chinese province of Xinjiang. For some industries, proving the origin of the components of a commodity can be overwhelming, such as the clothing industry. It is estimated that 84% of China's cotton supply comes from Xinjiang. At the same time, People's Republic of China is one of the major producers and suppliers of cotton, ranking first globally along with India and other Asian countries. Even if an economic operator imports cotton from another country, what would be the guarantee that no part of the imported product originates from Xinjiang, especially since the certificate of origin would not be sufficient proof for this purpose. On the other hand, the application of this legislation may lead to future reconsideration of the role of the certificate of origin as a document, and of the rules for determining the origin of goods in general. Technological developments combined with clear rules may help to build a new certification system that both strengthens control over the process and simplifies its technological implementation.

DAVID SAVAGE, IRELAND, EDITOR OF THE 'CUSTOMS COMPLIANCE & RISK MANAGEMENT JOURNAL'

David Savage addressed the process of adapting to the new conditions and customs formalities regarding the UK-EU trade relationship. Such a period is necessary because the UK has been an essential part of the EU for decades. It is interesting that some of the top 5 customs compliance mistakes in foreign trade transactions between the EU and the UK are in fact very common in other countries as well. One example is the use of the tariff number of goods provided by the exporter without it being properly verified by the importer. This shows how important it is not only for customs professionals, but for all those involved in international trade to know and apply the rules of compliance when it comes to customs formalities.

CONCLUSION

In conclusion, it could be summarised that all these specialist journals contribute significantly not only to a better understanding and interpretation of customs formalities and specificity, but also to the presentation and development of new ideas that will lead to the future development of customs in general.

Special thanks to Enrika Naujoke for the opportunity to not only attend the event but also for the possibility to write my own impressions of the meeting.

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