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CUSTOMS COMPLIANCE & RISK MANAGEMENT

JOURNAL FOR PRACTITIONERS IN EUROPE

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JOURNAL FOR PRACTITIONERS IN EUROPE

CONTENT

Editorial

Dear Readers,

On behalf of the Editorial Board I'd like to offer you a warm welcome to the 22nd issue of the Customs Compliance & Risk Management Journal (CCRM). As a member of this highly international board, I currently work as a Senior Trade Compliance Manager for Amazon at their EU headquarters in Luxembourg where my focus is on import/export trade compliance and AEO governance.

This issue packs a wide array of topics pertinent in today's trade compliance landscape!

What role does and should the EU play in the development of 'mega-free' trade agreements? Asia-Pacific and the Americas take the spotlight, with the traditional WTO-focused model eroding. Take an in-depth look into current and future 'mega' free trade agreements, what are the implications for the EU and its role in their development.

With the advent of ChatGPT, the world has been a flutter with talk of AI and its role in the workplace. A customs broker takes an in-depth look and how such tools can be used to assist in HS classification, generating customs response letters and more.

For those of us based in the EU, the upcoming CBAM legislation has undoubtedly been on the docket of many meetings. How CBAM will play out in practice and its management within companies is an open question; explore with us with a thorough analysis of the legislation, its mechanics and management best practices.

I sincerely hope you enjoy this 22nd issue of the CCRM. While you're here, why not consider contributing? We are always on the lookout for fresh content from trade compliance practioners around the world. Reach out to info@customsclear.net for more information and to introduce yourself!

Best regards,
Sam Draginich

EU LAW

EU law news August/September 2023

Overview of customs-related legal acts, case law, notices published in the EU Official Journal; information published by Customs of some EU Member States and the United Kingdom, European Commission, World Customs Organization (WCO) and World Trade Organization (WTO). Updated weekly (Mondays, by 13:00 PM CET/CEST).

WEEK 39

News at a glance: Prohibition to import iron and steel products processed in a third country that incorporate iron and steel products originating in Russia enters into force on 30 September - see Irish Customs notification and explanations; on 1 October, the Carbon Border Adjustment Mechanism (CBAM) enters into application; provisional list of CBAM National Competent Authorities; regulations related to entry of goods into Northern Ireland; the UK inform about world's first fully digitalised goods shipment; and more updates.

29.9.2023 European Commission: On 1 October, the **Carbon Border Adjustment Mechanism (CBAM) enters into application** in its transitional phase. CBAM is the EU's landmark tool to fight carbon leakage and one of the central pillars of the EU's ambitious Fit for 55 Agenda. In its transitional phase, CBAM will only apply to imports of cement, iron and steel, aluminium, fertilisers, electricity and hydrogen. EU importers of those goods will have to report on the volume of their imports and the greenhouse gas (GHG) emissions embedded during their production, but without paying any financial adjustment at this stage.

29.9.2023 European Commission: **Provisional list of CBAM National Competent Authorities** (NCAs). The NCAs will in particular be responsible for granting authorisation to the importers established in their Member States to access the CBAM Transitional Registry. This Registry will become accessible to reporting declarants and all competent authorities in the EU once it goes live on Sunday 1 October 2023. It will become fully operational by early November 2023.

29.9.2023 OJ L 241 Commission Implementing Regulation (EU) 2023/2092 of 28 September 2023 on fixing the **representative prices, import duties and additional import duties applicable to molasses** in the sugar sector from 1 October 2023.

29.9.2023 OJ L 241 Commission Implementing Regulation (EU) 2023/2085 of 27 September 2023 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for

Please continue reading online.

Ingrida Kemežienė
Project manager, PwC Lithuania

About the author

EU LAW AND CASE LAW

Fraudsters in the supply chain: Who pays taxes as a result of fraudulently completed formalities?

Presumption of guilt - you'll say it doesn't work that way. Unfortunately, in tax law, the taxpayer is presumed to be guilty of breaching the tax law unless he proves otherwise. The only question is whether, even if proven not guilty, the taxpayer will not have to pay the tax. In a recent judgment [1], the Court of Justice of the European Union (CJEU) clarified whether the owner of an excise warehouse (whose guilt has not been proven) will have to pay the suspended taxes (in this case almost €3 million) in a case where the evidence of the completion of the formalities has been falsified and where the goods have been transported to an unknown destination. The clarifications are important not only for the owners of excise warehouses, but also for all users of suspended tax regimes - transit, customs warehousing, temporary admission for processing and others - in order to better understand, assess and manage the risks involved. The CJEU has also clarified when goods are considered "lost" and no tax is due.

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"The value of the CPD programme is very clear. The legal environment is highly complex and constantly changing. Not knowing what you're doing means a high risk of non-compliance. What's more, it saves time - learning on your own would take much longer."

Thomas Knebel, CPD programme participant,
Trade Compliance Officer, Sandvik Group, Sweden

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Mark Rowbotham
Customs, Excise & VAT Consultant, PORTCULLIS ISC, the UK
About the author

EU LAW AND CASE LAW

Transport services VAT exempt because already in import tax base? You will need to prove it!

The Romanian company provides transportation services. It transported goods from the port of Rotterdam (the Netherlands) to Cluj-Napoca (Romania) under transit procedure. Goods were released into free circulation in Romania. It treated transportation service as VAT exempt because it assumed that transportation cost was included into the import VAT taxable base. Tax authorities claimed otherwise: the taxpayer failed to provide documents confirming that the transportation cost was included into the import VAT taxable base. Consequently, they denied the exemption. The dispute between the company and the tax authorities reached as far as the Court of Justice of the EU (CJEU), which recently issued clarifications on the application of the provisions of the

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Prof. Dr. Hans-Michael Wolffgang

Head of the Institute of Customs and International Trade Law, University of Münster, Germany

About the author

OVERVIEWS AND COMMENTS

The developments of mega-free trade agreements

The development of free trade areas around the world, with most attention paid to the Asia-Pacific region and the Americas, is a major theme of the article. It also raises the question of the role of the EU in this development. The article is based on the presentation at the European Customs Practitioners' Conference held in Vilnius, Lithuania on 25-26 May and online.

International trade - the basis of the world economy and of the stability and development of countries - is a highly complex phenomenon from every point of view. From a legal perspective, this is easily explained by the fact that its participants belong to different jurisdictions, which means that they have different legislation and different approaches to regulating trade relations. Most importantly, all the participants have their own objectives and seek to protect their interests. International relations in any context, including economic, are always about compromises, concessions and some losses for the sake of some common good, benefit and interest. And, of course, the fewer the participants who are united in finding such a compromise and common good, the easier it is to achieve.

At the same time, there are a large number of different international economic agreements in the world - from global agreements, such as those concluded under the auspices of the WTO, to bilateral trade agreements between neighbouring countries. All of them affect world trade to some extent.

WORLD TRADE: MULTIRATELISM VS REGIONALISM

The WTO is well known for its promotion of globalisation and multilateralism in trade relations to the maximum extent possible. Let's just mention the most-favoured-nation principle enshrined in Article 1 of the GATT. It obliges member countries that grant certain benefits to some member countries to grant the same benefits to other member countries. At the same time, the GATT/WTO allows for exceptions to this rule, such as free trade areas or customs unions (see GATT Article 24).

It is widely recognised, including by the WTO, that free trade areas are an effective tool for facilitating trade. By definition, free-trade areas are formed by international agreements (free trade agreements, or FTAs) of at least two countries. Accordingly, there are bilateral FTAs between two parties and regional FTAs between a larger number of countries. The latter are so-called mega-FTAs and can span not only several countries but even continents.

More than 600 FTAs - bilateral or regional - have been notified to the WTO and 356 are currently in force. Since the 2000s, more regional FTAs have been concluded. So we can see a trend towards increasing regionalism in world

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About the author

OVERVIEWS AND COMMENTS

Chat GPT and Google Bard: How customs brokers can use these AI tools

Artificial Intelligence (AI) - a topic that was barely heard of last year, it now seems to be a topic that appears at almost every conference and can be applied in every field. When we heard about artificial intelligence and its availability on the market, it seemed so distant and unheard of, and when the first reports appeared in the press, we certainly did not think that we, as customs brokers, would be able to apply it to our own operations. I will not hide the fact that the first people to try out the CHAT GPT tool in our company were our colleagues who are the most interested in information technology and innovations in the market.

INFORMATION ABOUT A PRODUCT AND ITS HS CODE

We started using CHAT GPT (the free version) at the beginning of this year. As customs brokers, we are most interested in the possibility to simplify the daily work of determining the HS code of goods, but the tool is also very useful to find out more about the goods to be declared or their purpose. Whether it is *polarisation-maintaining fibre optic components, endoscopic tissue extraction bags or CPAP filters*, sometimes there is a real lack of knowledge about the intended use of a declared product, but asking a question in CHAT GPT can give you the answer you need quickly and easily. The system is fascinating because if the answer is not complete enough, you can ask for clarification, where the information came from, whether it can be trusted, etc. In fact, when dealing with a selected question, I would even recommend that you always request a more precise answer or the data on which the answer was based.

Over time, another tool has come to our attention - Google Bard. This tool works on a very similar principle, but we found it to be more specific in terms of information retrieval. Here is an example where the same question was asked in both CHAT GPT and Google Bard:

As can be seen in the examples, the answer given in Google Bard is more detailed, indicating more product characteristics. It should also be noted that when asking questions in both systems in English, we get more accurate and detailed answers than when asking questions in Lithuanian. Both systems communicate reasonably well in Lithuanian, but the answers in English are much broader, with explanations and recommendations.

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Enrika Naujokė
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About the author

OVERVIEWS AND COMMENTS

Customs HI&AI: new crisis or new opportunities?

'It is December 2039, and various newsbots push the following content to their subscribers: ... Customs is being abolished next January (2040) when the EU's new customs system [Artificial Customs Intelligence Depository, ACID] comes into operation... The new system means that most of the approximately 5,500 Customs employees will lose their jobs.' This is how the introduction to the book "Customs Inside Anywhere, Insights Everywhere" by Frank Heijmann and John Peters begins [1].

CRISIS OR NOT?

Indeed, we can see AI as a new man-made crisis, on a par with climate change and the threat of nuclear war; or as an opportunity. An opportunity to enhance human intelligence at a time when the world desperately needs innovative, smart solutions that can be implemented quickly. And visionaries, scientists, entrepreneurs and all those who believe in the synergies between HI (human intelligence) and AI (artificial intelligence) are already working on this.

AN EXAMPLE OF AN OPPORTUNITY

For example, Sal Khan, founder and CEO of Khan Academy (a non-profit organisation which mission is to provide a free, world-class education for anyone, anywhere), believes that artificial intelligence could spark the greatest positive transformation education has ever seen. In a TED talk 'How AI Could Save (Not Destroy) Education', he shares the opportunities he sees for students and educators to collaborate with AI tools - including the potential of a personal AI tutor for every student and an AI teaching assistant for every teacher - and demonstrates some exciting new features of the educational chatbot, Khanmigo.

In the future, it is likely that we will each have an assistant, a teacher, or perhaps... a friend in our computer. This will not only help us to make better informed decisions faster, generate ideas and do research, but will also be a tool to foster curiosity, personal development and continuous professional growth.

THE STATE OF CUSTOMS HI

Do we have sufficient HI in customs? Do we have enough colleagues with the right knowledge and skills to find and implement the urgently needed solutions mentioned above? The answer is unequivocal around the world - "no, we do not". This answer is also encoded in this year's theme of the World Customs Organisation, which is about sharing knowledge, promoting pride in the profession and nurturing the next generation - in short, the need for a modern HI.

Read continuation on Customs Clear (€)

Adobe Stock

IMPORT TAXES OTHER THAN DUTY

Management of import taxes other than duties

What are the pitfalls and opportunities of 42 import procedure? What about post-Brexit VAT? What do you need to know about import GST (VAT) in Canada? Do traders and brokers understand excise risk? What about "domestic" import taxation in Latvia? The CBAM – what does the future hold? These were the main questions discussed during the 17th Authors' Meeting on 24 August. We invite you to read the key points from this meeting in the article below.

MANAGEMENT OF CUSTOMS PROCEDURE CODE 42 IN AUSTRIA AND GERMANY – PITFALLS AND OPPORTUNITIES

Michael Lux, Attorney, Michael Lux BVBA, Belgium

Michael discussed the pitfalls and opportunities of using import procedure code 42 in Austria and Germany. Instead of declaring non-Union goods for release for free circulation under code 40 (in which case import VAT will also become due), an importer established in another Member State than that in which such goods will be released for the procedure has the option of declaring code 42. This way the importer avoids the obligation to pay the import VAT in the Member State of import, with the consequence that (only) the regular VAT is to be paid in the Member State of destination (where the importer or consignee is established) on an intra-EU acquisition.

The use of procedure code 42 often involves the services of a representative who is either a freight forwarder or a customs broker. Michael identified two pitfalls in this regard:

- The indirect customs representative is treated as the import VAT debtor;
- The representative is made the importer but deprived of the right to deduct the VAT.

There are many other aspects to consider, as described in the article 'Management of customs procedure code 42 in Austria and Germany – pitfalls and opportunities' by Michael Lux.

PROCEDURE 42 FROM THE SWISS AND GERMAN PERSPECTIVE

Annette Raiser, Attorney, Switzerland

Following on the topic of Procedure 42, Annette also commented on the particularities of its use in Switzerland and Germany. The procedure is quite common for Swiss companies supplying goods to the EU. The name of the procedure in Switzerland is the 'EU procedure'. From her experience of working in Germany, Annette found that most

accountants did not recognise procedure 42 because they are not aware of it. As they see the goods as coming from abroad on the invoice, they do not pay and deduct VAT from the intercommunity delivery. This is a risk and company's receiving goods with procedure 42 should be aware of the handling.

Following the topic "Procedure 42", Annette also went into the specifics of its application in Switzerland and Germany. The procedure is quite common for Swiss companies delivering goods to the EU. The name of the procedure in Switzerland is "EU procedure". When working in Germany, Annette found that most accountants do not know about the 42 procedure because they are not aware of it. When they see the goods on the invoice as coming from abroad, they do not pay and deduct VAT from the intra-Community supply. This is a risk - businesses receiving goods under procedure 42 should be aware of how to handle it.

THE PARTICULARITIES OF PROCEDURE 42 AND THE RIGHT TO DEDUCT VAT – THE LITHUANIAN PERSPECTIVE

Enrika Naujoke, Director, Lithuanian Customs Practitioners Association

Enrika talked about the extent of the risk in figures. According to the Lithuanian Customs report for 2019, customs authorities conducted four audits of importers using procedure code 42. In all cases, the procedure was rejected for non-compliance with one of the requirements and importers had to pay EUR 599 000 (VAT, fines of 10-50% of the VAT amount due, and interest of approximately 11%/year).

She also pointed out that according to national regulations, the client (e.g., a Swiss company) has to register in Lithuania in order to obtain a VAT number, even if he uses a fiscal representative. Therefore, fiscal representation is not or rarely used in Lithuania.

Finally, as regards the right to deduct VAT, this is an issue that applies not only to this procedure but also to other procedures where the payment of VAT is suspended and the holder of the procedure is not the importer. For example, when a transit procedure is not properly discharged, the holder of the transit procedure is obliged to pay the VAT. They have no right to deduct VAT. In this context, there was a recent case law in Lithuania. In this case, the Lithuanian holder of the transit procedure - the freight forwarder who delivered the goods to Belgium - had not properly discharged the T1 procedure. Although the importer confirmed receipt of the goods, Lithuanian customs and national courts refused to allow the importer to pay VAT in Belgium. As a result, the transit holder had to pay the VAT in Lithuania.

POST-BREXIT VAT ISSUE

Zandra Horgan, Co-Founder, HFS Accountants, Ireland

Zandra addressed the impact of Brexit on the cash flow of businesses paying VAT at a point of entry of goods. Most of the 27 EU member states, plus the UK, have introduced legislation at the end of 2020 to allow deferred accounting of VAT on imports at a point of entry. This should be cash flow neutral for those registered for VAT. However, after two years, the negative impact of deferred VAT accounting is becoming apparent. The problem arises for organisations that are exempt from VAT - hospitals, government organisations. They cannot claim input tax. While the idea of deferred VAT accounting is beneficial in some cases, it proves costly in others.

Another point highlighted by Zandra is the Import One Stop Shop (IOSS) system. The IOSS system is available to all taxable persons making distance sales of goods imported from a third country with an intrinsic value of less than €150 per consignment (it does not apply to excisable goods). Non-established traders must use an intermediary. The use of the IOSS system has proven to be costly, especially for the SME sector. It is a monthly transaction that must be carried out.

There is a three-tier system to complete the importation of consignments, including import procedures, VAT procedures and excise procedures. Zandra expects that all these procedures will be consolidated under the EU customs reform and a newer system will replace the IOSS.

INPUT TAX CREDITS ON IMPORTED GOODS IN CANADA

Peter Mitchell, Chartered Professional Accountant, Peter L. Mitchell Professional Corporation, Canada

The person entitled to claim an input tax credit for Goods and Services Tax (GST) payable on imported goods in Canada is not always the person who pays the tax. This counter-intuitive situation generally occurs when the importer of record is a non-resident. It arises because more than one person may accept liability for duties, taxes and other customs obligations.

The primary liability under the Customs Act rests with the “importer”, a term that is not defined. Case law has established that the importer is the person who causes the goods to be imported into Canada. If the owner at the point of release is not the importer, the owner becomes jointly and severally liable for duties and taxes. The goods may be accounted for on the B3 customs entry document by either person.

The Canada Border Services Agency (“CBSA”) has always held that imported goods may only be accounted for by the importer, owner or, in certain cases, a customs broker. However, in practice, they generally allow anyone willing to accept the customs obligations to identify themselves as the “importer of record”. If issues arise after release, the CBSA looks to the importer of record for resolution and, if required, may raise a Detailed Adjustment Statement (assessment) against that person, even if they are not the importer or owner. Learn more by reading the article 'Input tax credits on imported goods in Canada'.

COMPLEXITY OF EXCISE RULES: THERE IS A LOT OF WORK TO BE DONE

Mark Rowbotham, Customs, Excise & VAT Consultant, PORTCULLIS ISC, the UK

Mark dedicated his presentation to excise duties. He argued that excise rules are very complex both in the UK and in the EU, where each Member State has its own rules. The challenge is also how to enforce these rules.

This affects not only buyers and sellers of excisable goods, but also transportation companies because of the guarantees in place, particularly the movement guarantees. It also involves the use of facilities such as the Excise Movement and Control System (EMCS). There is also the issue of who is authorised to do what. In other words, are you a registered consignor? Are you a registered importer or even exporter? What facilities do you have to control the movement of these goods? Obviously, all the big players, let's say in the alcohol market, are registered. But what about the smaller players?

Excise duty is worth more money than customs duties and even VAT. Moreover, the rules are complex, which means a huge effort to comply with and understand the regulations. There are many anomalies, but also a large number of fraud cases that go unreported. Unfortunately, many traders and brokers do not understand the risks. They do the work, but they don't understand the rules and they need to learn what to do to stay out of trouble and comply with the regulations. So there is a lot to do.

NATIONAL TAXES WHEN IMPORTING GOODS INTO LATVIA

Dr. Karlis Ketners, Professor, BA School of Business and Finance, Latvia

Continuing the theme of tax compliance, Karlis pointed out the national taxes in Latvia that may be incurred when goods are imported. These are noncustoms taxes that are payable when a person imports goods into the territory of the EU for the first time and releases them for free circulation on the domestic market. In Latvia, for example, there is a tax on natural resources. Non-residents also have to pay the natural resources tax to the Latvian state budget, as the taxable person is the one who first sells environmentally harmful goods or packaged goods on the territory of the Republic of Latvia or imports them in order to carry out his economic activity (including the primary, secondary and tertiary packaging attached to the goods and imported together with the goods). Thus, when a taxable good is placed on the market in the territory of the Republic of Latvia, tax liability arises. In the legal framework of the Republic of Latvia, items containing compounds harmful to humans and animals, e.g., electric accumulators, all types of tyres, lubricating oils, etc., are included in a group of items subject to natural resources tax. Used cars are another example

of environmentally harmful goods.

This tax could be a problem if a foreign trader imports goods packed in polypropylene bags into Latvia, does not sell them but stores them in a warehouse in Latvia and later sells them in EU countries. This packaging of goods imported into Latvia for the first time is not subject to the natural resources tax because it is not sold on Latvian territory but in other EU countries. If a foreign trader sells goods online to a natural person in Latvia and has the goods delivered by another delivery service provider (e.g., a courier or postal service), the natural resources tax is due. In this case, a foreign trader selling goods online to a natural person in Latvia is a taxpayer, as the courier service provider only physically delivers the goods. Natural persons who do not engage in economic activities, on the other hand, are not subject to natural resources tax.

Another example of a non-customs-related domestic tax is motor vehicle tax. The motor vehicle tax comprises a motor vehicle use tax, a tax on light commercial vehicles and a tax on vehicles registered abroad. The first tax is payable on all vehicles (except tractors, car trailers weighing 3 500 kg or less, trams, trolleybuses, off-road vehicles, snowmobiles, mopeds and bicycles). The second applies to light vehicles owned by a company. The third applies to M1 and N1 vehicles registered abroad. The first and third points could lead to compliance problems for customs clearance and further intra-Community deliveries to other Member States.

Karlis concluded that compliance risks in the case of Europe could also arise from domestic taxation of foreign goods released for free circulation.

EU'S CARBON BORDER ADJUSTMENT MECHANISM (CBAM): WHAT LIES AHEAD OF US?

Tomasz M. Orłowski, Manager, PwC Poland

Tomasz provided an overview of the EU's Carbon Border Adjustment Mechanism, which applies from 1 October 2023 for a transitional period, with full policy implementation scheduled for 1 January 2026. The EU's Carbon Border Adjustment Mechanism (CBAM) is a landmark tool to put a fair price on the carbon emitted during the production of carbon-intensive goods entering the EU and to encourage cleaner industrial production in non-EU countries.

CBAM is designed to levy a charge for CO2 emissions (known as a carbon tax) on high-emitting products entering the EU market. The carbon tax is designed to reflect and complement the operation of the EU Emissions Trading System (ETS) for imported goods. The CBAM requires importers to purchase certificates in quantities that correspond to the embedded emissions of their imports and reflect the ETS price.

The Regulation currently applies to goods from high-carbon sectors - aluminium, electricity, steel, etc. However, the scope of the sectors may be extended at a later stage. There are recent developments related to the CBAM. Guidelines have been published with many examples, recommendations and best practices. On the one hand, a more lenient approach than expected has been presented by the European Commission. On the other hand, there is underlined that sanctions for noncompliance are foreseen.

At the moment, there are more questions than answers because we have something totally new ahead of us. We have to look at all the practices that are going to emerge. If you look at the market, tax teams or customs teams think that these should be procurement or finance or environmental departments that will be burdened with CBAM challenges and obligations on a daily basis.

In Poland, it remains to be seen which competent authority will deal with it (maybe The National Centre for Emissions Management - KOBiZE). Depending on the chosen authority, the approaches to fulfilling the day-to-day obligations would be different.

There are many questions to be answered, for example: How will non-EU countries react? Will there be trade tensions? How will it affect Europe? Who will be most affected? Will the CBAM certificates have an impact on the price of ETS allowances and to what extent?

CUSTOMS COMPLIANCE & RISK MANAGEMENT
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Michael Lux
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About the author

IMPORT TAXES OTHER THAN DUTY

Management of customs procedure code 42 in Austria and Germany – pitfalls and opportunities

Why does code 42 exist?

Instead of declaring non-Union goods for release for free circulation under code 40 (in which case import VAT will also become due), an importer established in another Member State (MS) than that in which such goods will be released for the procedure (and will thus become Union goods) has – often using the services of a representative who is either a freight forwarder or a customs broker – the option of declaring code 42, thus avoiding the obligation to pay the import VAT and regular VAT in the import clearance MS, with the consequence that (only) the regular VAT is to be paid in the MS of destination (where the importer or consignee is established) on an intra-EU acquisition (and the importer can thus avoid a VAT registration in the MS of import clearance). This is already my summary of the opportunities. The remaining part of this article will deal with the pitfalls experienced by customs practitioners in Austria (AT) and Germany (DE). At the end, I will also try to give an outlook into the future.

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Meet some of the lecturers

Anthony Buckley
CEO of Anthony Buckley Consulting Ltd., former Head of Irish Customs, Ireland

Jessica Yang
Customs & Trade Compliance Specialist at Takeda, Switzerland/the United Kingdom

Patrick Nieveler
Manager Customs & Excise Tax at BMW, Founder & CEO of PASSANI Academy, Germany

Dr. Momchil Antov
Associated Professor at the D. A. Tsenov Academy of Economics, Bulgaria

Inessa Platonova
Vice President FIATA, Vice President ICC Ukraine, Founder & CEO of PLASKE Academy, Ukraine

Dr. Gediminas Valantiejus
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CUSTOMS COMPLIANCE & RISK MANAGEMENT
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IMPORT TAXES OTHER THAN DUTY

Input tax credits on imported goods in Canada

The person entitled to claim an input tax credit for Goods and Services Tax (GST) payable on imported goods in Canada is not always the person who pays the tax. This counter-intuitive situation generally occurs when the importer of record is a non-resident. It arises because more than one person may accept liability for duties, taxes and other customs obligations [1].

LIABILITY UNDER THE CUSTOMS ACT

The primary liability under the Customs Act rests with the "importer", a term that is not defined. Case law has established that the importer is the person who causes the goods to be imported into Canada. If the owner at the point of release is not the importer, the owner becomes jointly and severally liable for duties and taxes [2]. The goods may be accounted for on the B3 customs entry document by either person [3].

The Canada Border Services Agency ("**CBSA**") has always held that imported goods may only be accounted for by the importer, owner or, in certain cases, a customs broker. However, in practice, they generally allow anyone willing to accept the customs obligations to identify themselves as the "importer of record". If issues arise after release

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JOURNAL FOR PRACTITIONERS IN EUROPE

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About the author

IMPORT TAXES OTHER THAN DUTY

The risk challenge of indirect tax - customs (Part I)

This article has been written to acquaint the reader with various types of indirect tax, i.e. tax that is based on individual transactions or on the consumption of specific commodities, such as alcohol, tobacco or fuel, and therefore on what basis these taxes are levied.

Before analysing the specific issues of indirect tax, namely customs, excise and VAT, it is important to determine the nature of indirect tax as opposed to direct tax. Direct tax concerns taxes that are levied on profits and gains, be they corporate or individual. These include corporate tax, personal income tax, capital gains tax and inheritance tax, as well as international taxes such as withholding tax. Indirect tax concerns taxes levied on sales and purchase transactions, imports, alcoholic goods, tobacco based goods, perfumes, fuels, in particular combustibles, road tax

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IMPORT TAXES OTHER THAN DUTY

The risk challenge of indirect tax - VAT (Part II)

Editors' note: In this article, Mr Rowbotham, author of numerous books on trade and logistics topics, shares some parts of the book he is currently working on. Topics covered: Introduction to VAT and the challenges it poses for businesses, types of VAT fraud, EU triangulation (How do we prove VAT zero-rating?), call off and consignment stock VAT, postponed VAT accounting. This is the continuation of the article "The risk challenge of indirect tax - customs (Part I)".

Due diligence is also a requirement in other tax areas, for example, VAT; in the case of HMRC, VAT Notice 726 (GOV.UK) provides more detail, and similar provisions exist with other national Revenue Authorities globally. Where excise due diligence concerns are identified, you should also consider whether there are any wider 'cross tax' implications to your findings and share your concerns with appropriate teams.

The effective management of indirect taxes is crucial to a company's successful operation in the present-day global marketplace. As supply chains grow longer and become more international and more complex, understanding the impact of VAT/GST, Excise duties, Customs duties and export controls is not just an issue for the tax function. Indirect

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JOURNAL FOR PRACTITIONERS IN EUROPE

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IMPORT TAXES OTHER THAN DUTY

The risk challenge of indirect tax - excise (Part III)

Editors' note: In this article, Mr Rowbotham, author of numerous books on trade and logistics topics, shares some parts of the book he is currently working on. Topics covered: Introduction to domestic duties, excise duty and the UK due diligence requirements, for both domestic and import purposes. This is the continuation of the articles "The risk challenge of indirect tax - customs (Part I)" and "The risk challenge of indirect tax - VAT (Part II)".

EXCISE DUTY

Domestic Duties are consumption-based taxes, i.e. based on the consumption of specific products, and are levied on the specific strength or nature of the product concerned, i.e. tobacco, fuels or alcoholic beverages. These also include several other taxes and duties, from Landfill Tax and Air Passenger Duty, through Vehicle Excise Duty and Gambling and Gaming Taxes to specific Excise Duties on Hydrocarbon-based products such as Vehicle Fuel, namely petrol or diesel, Tobacco and Alcoholic goods. Excise Duties are much higher than other duties, such as import duty, and have their own due diligence requirements, for both domestic and import purposes, including the domestic

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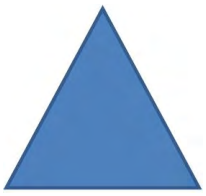
IMPORT TAXES OTHER THAN DUTY

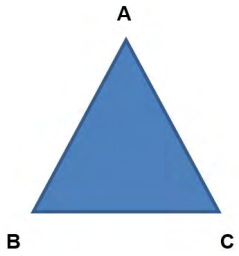
Triangulation - what is it?

TRIANGULATION - WHAT IS IT?

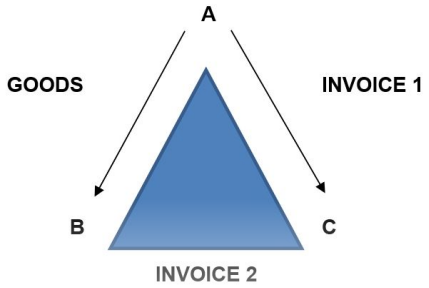
Think of geometry from schooldays past, and in particular an equilateral or isosceles triangle.



Now, add the letters A, B and C, with A at the top (the apex), B at bottom left and C at bottom right.



Now convert this into the movement of both invoice and goods. In this example, Company A is based in the UK, and despatches a consignment to Company B in Spain. The invoice, however, goes to Company C, the overall owner of Company B. The address of Company C is in Germany.



Because the movement of the goods is between Company A and Company B, the transport documentation must show the VAT Numbers of each company in order to comply with Triangulation rules and show the cross-border movement. The invoice shows the details of the Consignor (Company A), the Customer (Company C), and the

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SUSTAINABILITY

Can Brussels save the worlds rainforests?

The link between climate change and biodiversity loss is by now well established. As part of its "Green Deal", the European Union Deforestation Regulation has been published in the Official Journal. This Regulation seeks to protect the worlds forests by banning certain products from being placed on the EU market. This will create an extra layer of bureaucracy for operators in the EU.

I live the in the middle of Ireland, a country known for its verdant countryside due to the rain that regularly cascades from the endless Atlantic depressions that queue up to pass over us. We often laugh at a joke that we tell ourselves – *it would be a great country if we could put a roof on it.*

Quite often we curse the geographical misfortune that puts us in the path of the North Atlantic jet stream that prevents us from enjoying dependable sunny weather unlike most of our European friends. The weather in Ireland has always been a game of luck. In recent years the summers had been quite nice. However, the summer of 2023 in Ireland was cool and wet. It will be remembered as a bad summer.

In the context of what people were experiencing in other parts of Europe, North Africa and especially Canada, few people complained too loudly. It is no longer controversial to say that hotter summers are a manifestation of climate change.

An overwhelming consensus supported by scientific data has emerged that man's activities are putting all life on earth in peril. In addition to a hotter planet, biosystems are breaking down. The imperative to grow economies and feed ballooning populations has resulted in unsustainable strain being placed on nature and natural habitats. We all know something must be done and done urgently.

EU'S DEFORESTATION REGULATION

In the Summer of 2023, the European Commission published its deforestation regulation (Regulation 2023/1115 of the European Parliament and of the Council) also known as the EUDR.

The preamble to the regulation the EU sets out its extensive justification for its implementation. It specifies that consumers in the EU are heavily responsible for excessive consumption. The ever-increasing demand for resources has led to widespread destruction of natural habitats resulting in catastrophic loss of biodiversity and removing vital carbon sinks. Furthermore, the legal and illegal removal of forestry is identified as a factor that violates the human rights of indigenous populations.

The EUDR will ban placing on the EU market a number of commodities if sourced from land that has been deforested

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SUSTAINABILITY

Who is responsible for CBAM in the company?

If you import aluminium, steel and iron products, cement, fertilisers, hydrogen or electricity, you should already have answered the question of who in your company speaks the language of the Carbon Border Adjustment Mechanism (CBAM), i.e. is knowledgeable in this area and responsible for compliance. And not just you, but also your suppliers from outside the EU, as they will provide you with information on the carbon emissions generated in the production of goods. So who in your supplier company speaks the CBAM language? In this article we look at the links between CBAM and customs, as well as other areas, to help you answer the question of whether the primary responsibility for CBAM compliance should lie with the person responsible for customs matters.

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SUSTAINABILITY

CBAM transitional period: roles and responsibilities

EU's Carbon Border Adjustment Mechanism (CBAM) regulation [1] entered its transitional phase on 1st October, 2023. From that day on, importers have to collect and report data on greenhouse gases emitted during the production of CBAM goods. Since the data must be collected from the manufacturers in non-EU countries, a process must be established for the corresponding communication. Given the complexity of supply chains, this process may involve multiple actors between the importer and third country facilities. In addition, several EU and national authorities are involved. Who is/can be who? Who does what? What are the responsibilities?

SHORT OVERVIEW OF CURRENTLY AVAILABLE INFORMATION

In TARIC, to the affected commodity codes (e.g. Portland cement) there is already information about the reporting obligations – who, when and what data in the quarterly report has to submit, and where. All non-EU countries are affected, with the exception of goods originating in countries, which use the EU's Emissions Trading System -Switzerland, Iceland, Liechtenstein, Norway, Ceuta, and Melilla.

It should also be noted that several customs procedures fall within the scope of CBAM: release for free circulation and the inward processing - when the CBAM good is released to the EU market after inward processing, either as the original good or modified, a CBAM reporting obligation arises.

In view of the complexity of the information required to complete the quarterly CBAM report, the European Commission has prepared a CBAM communication template for installations, a guidance document on installations for importers and a guidance document for installation operators outside the EU (please find the guidance documents here), and a series of sector-specific step-by-step checklists. The information is currently only available in English. Please also note that the Commission has indicated during its trainings that the calculations in the guides may contain errors.

An important easement for the reporting declarants, who do not/cannot get the data on actual emissions in time, is the temporary possibility to use default values, which are expected to be published at the end of 2023. Corrections to submitted reports are also possible, but with a time limit, e.g. the first report must be submitted in January and can be corrected until the end of July.

Despite all the information provided by the Commission, since the competent national authorities are involved,

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COUNTRY-SPECIFIC

Ukraine customs and trade news August/ September 2023

News at a glance: Three EU nations ban Ukraine's grain export; reinstating smuggling as a criminal offense; updated free trade agreements between Ukraine and Canada, and Ukraine and North Macedonia; anti-dumping measures.

THREE EU NATIONS BAN UKRAINE'S GRAIN EXPORT

The European Commission has decided not to extend restrictions on imports of Ukrainian agricultural products after September 15, 2023. Nevertheless, three EU countries – Poland, Hungary and Slovakia – have imposed unilateral bans on the import of Ukrainian agricultural products.

Ukraine has filed a formal request to these countries for norms' violation of the World Trade Organization and plans to turn to the WTO arbitration. Ukraine and these three European countries are currently negotiating to reach a compromise.

REINSTATING SMUGGLING AS A CRIMINAL OFFENSE

The Ukrainian Parliament is reintroducing criminal sanctions for smuggling and misdeclaration of goods with draft law No. 5420, which is now scheduled for second reading.

Business representatives have expressed concerns about these changes. The law sets a high threshold for the offence of smuggling and provides no way for businesses to escape prosecution, even if they compensate the state for damages before prosecution. In addition, businesses are unsure whether errors such as misrepresentation of weight, quantity, origin or marking of cargo should be considered a criminal offence.

The European Business Association and the Taxpayers Association of Ukraine have called on the Chairman of the Verkhovna Rada of Ukraine and the leaders of the parliamentary groups to send the draft law No. 5420 for revision.

UKRAINE AND CANADA UPDATE THEIR FREE TRADE AGREEMENT

On September 22, 2023, Ukraine's President Volodymyr Zelensky and Canada's Prime Minister Justin Trudeau signed a new free trade agreement. This document replaces the previous one in effect since 2017. The new agreement introduces the following changes:

- In the service sector, it establishes a principle where activities are considered permissible unless explicitly prohibited.
- New rules of origin, similar to the terms of the preferential rules of the Pan-Euro-Mediterranean (PEM) Convention, have been established. Moreover, an essential aspect of the agreement is the amendment of the cumulation clause, which modernizes and fully enables diagonal cumulation. This allows for the use of

products from the EU, EFTA states, Israel, and the UK to produce preferential goods for export to Canada.
- In digital trade – freedom of cross-border transfer of information and source code, as well as open access to the Internet.
- The updated sections cover trade rules, competition, government procurement, environmental standards, labour regulations, and more. The agreement also addresses anti-corruption measures and promotes responsible business practices.

As part of this document, Ukraine and Canada signed the Digital Trade Agreement, marking the second such agreement for our country, following the corresponding agreement with the United Kingdom.

UPDATED FREE TRADE AGREEMENT BETWEEN UKRAINE AND THE REPUBLIC OF NORTH MACEDONIA

Starting from August 2023, an updated free trade agreement between Ukraine and North Macedonia applies. The agreement has been updated in the following areas:
- Cancellation of import licenses for goods from the Republic of North Macedonia imported under tariff quotas;
- Determination of new rules for the acquisition of preferential origin of goods, namely the application of the Pan-Euro-Med Regional Convention or the Transitional PEM Rules in the relations of trading partners.

As of today, bilateral cumulation is applied between Ukraine and North Macedonia (under current edition of PEM Convention and under the transitional PEM rules). In turn, after the publication in the Official Journal of the EU of information on the application of cumulation between Ukraine and North Macedonia, it will be possible to apply diagonal cumulation, in particular in relations with the European Union, Georgia and EFTA states.

ANTI-DUMPING MEASURES

Due to the ineffectiveness of previous anti-dumping measures, Ukraine has increased anti-dumping duty on imports of carbon and other alloy steel bars originating from Belarus. This increase is effective from September 2, 2023 until January 6, 2025.

In contrast, starting from August 3, 2023, there will be no anti-dumping measures on screws (with countersunk head and SW4 socket head of various thread diameters and lengths) originating in China. However, anti-dumping measures on ferrous metal products with threads from China will continue until September 29, 2025.

Additionally, an interim review found that anti-dumping measures against imports of cement originating in Russia, Belarus, and Moldova, including the Rybnytsia Cement Factory, have been effective. As a result, the anti-dumping duty on these goods will remain in place until June 27, 2024.

Ukraine imposed anti-dumping measures on a range of imported goods from Belarus and China, including:
- Silicon-manganese steel wire originating in the People's Republic of China with an anti-dumping duty rate of 32.6%.
- Flat rolled products of carbon steel, clad, galvanized or otherwise coated, originating from the People's Republic of China. The anti-dumping duty rate for producers and exporters not mentioned in the decision is 48.14%
- Certain products made of asphalt or similar materials, designed for roofing, waterproofing, and/or vapor barrier purposes in various construction applications, including roofing felt and bituminous tiles, originate from the Republic of Belarus. The rate of anti-dumping duty is 27,68 %
- Glass containers, such as jars for preservation (sterilisation jars) with a nominal capacity of 0.15 litres or more, bottles for food and beverages, crafted from flint glass with a nominal capacity of 0.15 litres or more but less than 2.5 litres, originating from the Republic of Belarus. The rate of anti-dumping duty is 49.81%.

These definitive anti-dumping measures will be in effect for five years starting beginning from August 3 this year. There's an exception for flat rolled carbon steel products from China, which started on September 2, 2023, and will also be in effect for five years.

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COUNTRY-SPECIFIC

Three questions about customs value of goods in transactions between the related parties in Ukraine

The issue of customs valuation is extremely important for Ukraine. The author has written about it in previous issues of the journal. A special case of customs valuation is no exception - when the seller and the buyer are related parties. The concept of "related parties" in Ukrainian legislation is fully compatible with the GATT, as the Customs Code of Ukraine refers directly to Article 15 of the WTO Customs Valuation Agreement rather than defining this concept. It would seem that if there is nothing wrong with the legislation and if it is in line with accepted standards and principles, there should be no problems with its application. However, this is not the case.

On the one hand, special attention is paid to the of transaction between the related parties because of the high risk of abuse in order to minimise the tax burden, both in domestic and import taxation. Unscrupulous companies may set prices in related party transactions that do not reflect the true market prices at the time of the transaction in order to save tax. Combating such unfair practices is the responsibility of the country's tax and customs authorities, each in its own area.

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COUNTRY-SPECIFIC

A storm in a tea kettle

A few days ago (5.9.23), an Israeli court accepted a claim by an importer of electric kettles against the customs authority, regarding the classification of the products for customs purposes [1]. The court adopted the importer's position that the kettles should be classified in subheading 851610 of the HS as "immersion heaters" and rejected the customs position to classify them in subheading 851670 as "other electro-thermal devices" [2]. This ruling is an example of the court's creative interpretation of old terms, considering the advancement of technology.

THE STORY

Until 2004, kettles were classified in Israel under Israeli subheading 85.16-1020 to the HS which referred to "immersion heaters - kettles", and the importer classified kettles under this subheading. In 2004, Israel abolished this subheading, and the importer moved to classify the products under subheading 85.16-1090, "other immersion heaters".

Until 2018, the import of kettles was subject to customs duties, all customs HS codes. From 2018 onwards, the customs duty was abolished in subheading 85.16-1090 "other immersion heaters". The customs authority began conducting audits, eventually deciding, in this case, that the classification of the kettles should have been in subheading 85.16-7090 "other electro-thermal devices", which remained dutiable in Israel from 2018 until 2022.

In summary, the customs authority claimed that the WCO explanatory notes to subheading 85.16-70 explain that kettles are included under this subheading. They also claimed that in "immersion heaters" in subheading 85.16-10, it is required that the heating element be immersed directly in water, whereas in the kettles in question, the heating element is covered with a plate and only the plate is immersed in water, therefore it is not an "immersion heater". The customs authority also stated that the foreign supplier also wrote subheading 85.16-70 on the commercial invoice.

The importer claimed, in essence, that in the distant past the heating element in kettles was immersed in water (a coiled heating element), which caused scale, and due to technological development, the heating element is covered with a plate and only the plate is immersed in water. The importer claimed that even such a modern kettle is an immersion heater within the meaning of subheading 85.16-10 since the plate and the heating element inside it are immersed in water. Therefore, the importer filed a financial suit for approximately NIS 620,000 (~150,000 euros).

After submission of the importer's evidence, the customs authority requested to amend its defense position regarding the argument of immersing the heating element in water. The court rejected the request and did not allow the

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COUNTRY-SPECIFIC

Who is a purchaser in Canada and why does it matter for customs valuation?

Can a small difference between Canadian customs legislation and the WTO Customs Valuation Agreement really affect the customs valuation process and its outcome? The following article attempts to answer this question.

The article is an expanded version of the author's presentation at the 16th Authors Meeting on the topic "Customs valuation - the particularities of different countries".

WTO CUSTOMS VALUATION AGREEMENT VS CANADA'S CUSTOMS ACT

Canada, like all other WTO members, adheres to the WTO's basic rules and standards in developing its national legislation, including in the area of customs valuation. Canada's Customs Act, as well as the WTO Customs Valuation Agreement, establishes the transaction value method as the primary method of customs valuation. The conditions for the application of the transaction value method set out in the Act are also generally based on the Agreement. However, there is one additional provision that may seem insignificant at first glance. Let's take a look at what this addition is and how it affects the customs valuation of goods in Canada.

According to Ss. 48 (1) of the Customs Act, the value for duty of goods is the transaction value if:

1. the goods are sold for export to Canada;
2. the purchaser in the sale for export to Canada is a purchaser in Canada; and
3. the price paid or payable for the goods can be determined.

However, the Agreement contains only the first and third of these requirements. It does not require that the goods be sold to a purchaser in the importing country.

The addition of the phrase "a purchaser in Canada" in the Canadian legislation adds some complexity to the already complex scheme of application of the transaction value method, particularly where the chain of sales is concerned. In such cases, disputes may arise as to which of these sales should be considered the sale for customs valuation purposes. When importing goods into Canada, it is important to consider not only which transaction is used as the basis, but also whether the purchaser of that transaction meets the requirements of Canadian law.

Who can be considered a purchaser in Canada under national law? The definition can be found in Valuation for Duty

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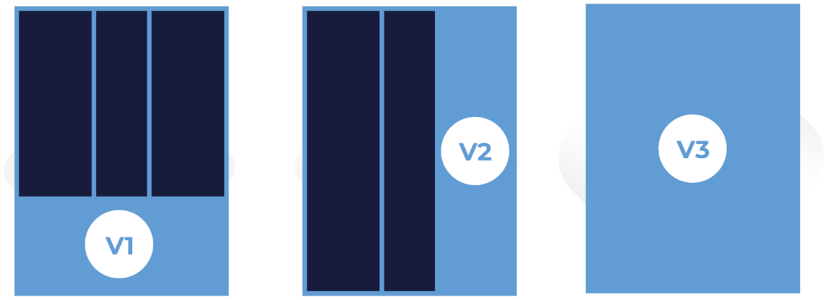

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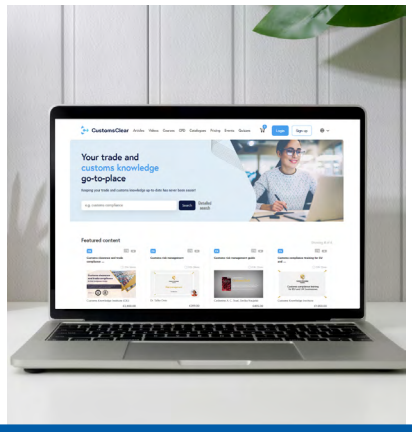

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