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Do Harmonized Provisions Ensure Fairness in International Trade? The European Customs Law Experience

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Although the efforts made by the Union legislator, even more recently, to ensure the correct and uniform tariff classification and determination of customs value are praiseworthy, divergent behaviours among European Union member states are still encountered, which is not without consequences for economic operators and the fair and competitive conduct of the internal market. For the customs classification of goods, the role of the Customs Committee Code comes to the fore, which, in the event of divergent views among member countries about the issuance of binding tariff information, is called upon to reach an agreed solution in a still uncertain regulatory framework. Even for value determination, the residual room for discretion for member states in issuing customs valuation authorisations generates undesirable gaps. This paper will examine the areas described above to determine whether the discrepancies found are physiological or whether action cannot yet be taken. Therefore, some solutions will be proposed without claiming exhaustiveness. We will also consider the draft of the new Union Customs Code that establishes, for the first time, a European Customs Authority currently under consideration by the European Commission.

Keywords: *Customs law; Binding tariff information; Customs value authorisation; Fairness; International trade*

Introduction

Customs law originated as a boundary law that imposed the payment of tribute when passing from one territory to another, accentuating their fragmentation and rivalry. The community that secured the most significant tax revenues was also considered the most powerful.

Despite this original vocation, as the trade flow around the world increased, customs law became, at the end of the last century, a law without borders, in which the first attempts at regulatory harmonization between continents proved to be among the most fruitful.

In the aftermath of World War II, at the proposal of the United Nations Economic and Social Council, the major industrialised countries met at the Bretton Woods Conference to discuss the need to create supranational bodies and rules in the monetary, financial, and trade fields.

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A few years later, in 1947, the General Agreement on Tariff and Trade (GATT) was signed. This agreement aimed to dictate trade rules on a shared basis among the adhering countries, reduce tariffs and other trade barriers, and eliminate discrimination in relations between states[1].

As globalisation expanded to include the agriculture, textile, and apparel sectors, the General Agreement on Tariff and Trade was no longer suited to meet commercial realities. During the Uruguay round of negotiations, the adhering countries signed the Marrakesh Agreement (the so-called 1994 GATT Agreement), which also established the World Trade Organization (WTO)[2].

Thus, international customs law was born. It was the background to the European Economic Community, which - to establish a single market aimed at facilitating transactions among European countries - created the most crucial form of customs union to date.

Initially joined by only a few countries, the internal market has now reached such proportions that it influences universal statistics. According to recent figures published by the European Council, the European Union's share of world trade in goods and services alone is 17 percent; in particular, there has been an increase of 26 percent over the past ten years in the former and 50 percent in the latter[3].

The accession of the then European Community (now European Union) to the World Trade Organization imposed the obligation to respect and comply with the rules and principles expressed in the treaties signed by the Organization by EU member states and the EU legislature.

Scope and Research Question

Despite the European institutions' focus on compliance with international discipline and developing uniform procedural and substantive rules, European Union member states (EU MSs) do not always handle similar cases equally.

The issue has also been discussed in the literature and raised several times by the United States before the World Trade Organization Appellate Body[4].

In this regard, the most problematic areas of customs law are undoubtedly those where the margin of discretion left to member states (MSs) customs

[1]The preamble of the Marrakesh Agreement Establishing the World Trade Organization provides that: "Being desirous of […] entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations […]".

[2]Armella (2017) at 10.

[3]See https://www.consilium.europa.eu/it/infographics/the-eu-s-role-in-global-trade

[4]The reference is to the dispute in the document WT/DS315/AB/R of 13 November 2006, brought to the WTO by the United States, where the European Community was accused of administering the EU customs law in a non-uniform manner, violating Article X:3(a) of the GATT 1994. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS315/AB/R&Language=English&Context=ScriptedSearches&languageUIChanged=true. The Appellate Body was unable to complete the analysis on this claim because the Panel's "general observations" about the role of several institutions and mechanisms in the European Communities provided an insufficient factual basis for assessing whether the European Communities failed to ensure uniform administration of its customs legislation. Similar disputes on classification were decided in documents WT/DS62/AB/R, WT/DS67/AB/R, and WT/DS68/AB/R.

authorities is wider and where the regulation of institutions is left to "merely" interpretive and non-binding rules.

Specifically, customs classification, despite being one of the first, if not the first, areas in which the international community has manifested its intention to adopt a common language, is still today a harbinger of differing behaviours among the Customs Administrations of the various continents, and, sometimes, even among the member countries of the European Union.

Similar considerations also apply to determining the customs value, with specific reference to the elements that must be added. Although there is a unique law body in the European Union, implementing the rules on issuing certain simplifications is left to the discretion of the member states' Customs Authorities.

This research aims to assess whether, in light of the current regulatory tools provided for customs, spaces of non-uniform management by MSs are harmless or to what extent they could distort free competition among MSs.

The study seems timelier considering that, in recent months, the European Commission has been considering a draft of a new Union Customs Code, which could provide an opportunity to remedy any critical issues.

Therefore, after briefly outlining the relationship between international and Union customs regulations, we will focus on the provisions governing classification and value in the Union Customs Code regarding soft law instruments.

Specifically, regarding customs classification, the issues currently being discussed before the Customs Code Committee - Nomenclature and Statistics Section will be examined, also in light of the rules governing the operation of that body; concerning customs value, after reporting on the discipline on the consideration of royalties for customs value determination, we will examine the Customs Valuation Authorisation often used precisely for declaring the customs value of goods that include royalties.

Finally, without claiming exhaustiveness, some proposals will be made to improve the procedural and substantive uniformity among European Union member states in customs matters.

The Relationship between International Standards and European Customs Regulations

As mentioned, the establishment of the World Trade Organization in 1994 marked a shift from a negotiation system among world states that adopted unilateral trade agreements to a supranational organization.

Currently, 164 countries are members of the organization, and among them is the European Union.

According to Article XVI (4) of the Marrakesh Agreement, establishing the World Trade Organization, each member of the Organization is obliged to ensure that its laws, regulations, and administrative procedures comply with the obligations set out in the Agreements annexed to it, both the member

countries of the Union and the European institutions are required to comply with the international agreements entered into[5].

In this sense, around 90% of customs legislation in the European Union is estimated to be determined by international law and soft law instruments[6].

Several corollaries can be drawn from the above assumption.

First, between two possible interpretations of regulatory provisions, the one that does not conflict with international norms should always be preferred because it is "superordinate" to the European discipline as a result, as mentioned, of the EU's membership in the World Trade Organization.

Second, only where international law does not regulate certain aspects can we see the European Union law since the European Union has exclusive competence under Article 3 of the Treaty on the Functioning of the European Union.

Finally, and only residually, for everything that is not regulated even by the European Union, the legislative power of the member states re-emerges.

Moving through the quagmire of sources of customs law is not easy; in fact, one must always ask oneself whether the national discipline respects the European one and whether, in turn, the latter does not conflict with the principles of international law.

Customs Classification Systems. Brief Overviews

To reduce the expenses incurred in redescribing, reclassifying, and recoding goods when switching from one classification system to another in the course of international trade, thus facilitating the standardization of trade documentation and data transmission[7], the International Convention on the Harmonized Commodity Description and Coding System (HS Convention) was signed on June 14, 1983, under the auspices of the then Brussels Customs Cooperation Council (now World Customs Organization - WCO).

Two hundred countries currently adopt the Convention, which classifies more than 98 percent of goods on the international market[8].

It is, therefore, an actual international language tool[9].

The Harmonized Commodity Description and Coding System (HS) classifies products through six-digit codes[10]. Although it is divided into 97 headings and

[5]Regarding methods for transposing international law into Union law see Rogmann (2019).
[6]Rogmann (2019) at 244.
[7]See the preamble of the International Convention on the Harmonized Commodity Description and Coding System. https://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx.
[8]See https://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx.
[9]Kormych (2018) highlights how the adoption of an international classification system, through the elimination or reduction of customs tarrifs, has contributed to modifying the functions attributed to customs authorities by reducing their role as tax collectors.
[10]Regarding the international harmonization of tariffs, see Nakagawa (2011).

numerous subheadings, it cannot always classify products from highly industrialised countries such as Japan or the United States.

For this reason, in compliance with the provisions of Article 3 (3) of the HS Convention, the European Union, through Council Regulation (EEC) No. 2658/87 of July 23, 1987, has added to this harmonized system that of the Combined Nomenclature (CN) by adding two more digits to the six provided by the harmonized system[11].

Finally, even the Customs Union established the Integrated Tariff of the European Communities (Taric)[12]. Describing with codes consisting of 10 digits[13] the goods subject to international trade, the Integrated Tariff of the European Communities assigns to each good a single duty rate valid for all member countries of the European Union, also providing for additional possible trade measures (such as antidumping and countervailing duties), restrictive to the movement of goods (import or export prohibitions and restrictions, quantitative quotas), tariff and non-tariff measures (such as surveillance measures, export refunds, etc.).

The commodity description in a code consisting of a numerical sequence is not only functional for trade facilitation but, for customs purposes, is also necessary for determining preferential and non-preferential customs origin. Classification, therefore, is the pivot around which all customs policy measures revolve[14].

Therefore, a universal sharing about classification attributable to products in international trade is necessary.

Interpretation Tools

Since internationally traded products are also constantly changing due to technological developments, Article 7 of the Harmonized Commodity Description and Coding System Convention (HS) mentioned above provides that the Committee for the HS, established within the WCO and composed of representatives of all participating member countries, may propose to the Council desirable amendments to the classification system[15] because of user needs and changes in technology or patterns of international trade.

Other functions of the Committee worth mentioning include the ability to draft explanatory notes, classification opinions, and different opinions on the interpretation of the HS, which aims to ensure uniformity in its interpretation and application.

[11]See Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1).

[12]Article 31 of the Treaty on the Functioning of the European Union provides: 'Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.'

[13]Under Article 3(4) of Regulation (EEC) no. 2658/87 of the Council of 23 July 1987, exceptionally, an additional four-digit Taric code may be used for the application of specific Community measures that are not codified or are not entirely codified, at the 10th and 11th digit level.

[14]Bellante (2020) at 524.

[15]Any decisions to amend the Convention must be adopted by at least two-thirds of the contracting countries.

The Committee, moreover, is a dispute resolution body[16], which, at the outcome of the investigation of the matter placed before it, makes a recommendation or, if this is impossible, submits the dispute to the Council. In either case, the contracting parties, before referring the matter to the Committee, may agree to consider the recommendations made by the Committee to the Council as binding.

The Combined Nomenclature (CN), in addition to having to be interpreted by the preliminary provisions, additional section or chapter notes, and footnotes of the HS, is also composed of explanatory notes drafted by the Union Committee established *ad hoc* as a tool to assist the European Commission[17]. As clarified by the Court of Justice of the European Union[18], such soft law acts can only supplement those to the HS and can never alter its purpose or conflict with them[19].

To summarise, both the HS and the CN are preceded by the same general rules for their interpretation, and each section, chapter, and sometimes subheading contains interpretative notes.

Both instruments are compulsory for EU member states as components of the World Customs Organization (WCO) and by the supremacy of EU law over national law. In contrast, within the World Customs Organization and the European Commission, the Committees may draft classification decisions, opinions, or explanatory illustrative notes, respectively[20].

According to the EU Court of Justice, explanatory notes, classification decisions, and opinions have no binding force.

If this is the state of the art in case law, a different view is taken by the Union legislature, which regulates binding tariff information (BTI). Article 34 (7) (a) (i) and (iii) of Regulation (EU) No 952/2013 of the European Parliament and the Council of 9 October 2013 laying down the Union Customs Code (UCC) stipulates that the Customs Authorities shall revoke binding tariff information where they are no longer compatible with explanatory notes referred to in the second indent of point (a) of Article 9(1) of Council Regulation (EEC) No 2658/87 of July 23, 1987, on the tariff and statistical nomenclature and the Common Customs Tariff and classification decisions, classification opinions or amendments of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System, adopted by the WCO.

On the one hand, revocation in case of conflict with the classification decisions and opinions adopted by the WCO could be justified by the superordinate character of the Organization that issued these acts concerning the European

[16]The Article 10 (1) and (2) of HS Convention provides: "1. Any dispute between Contracting Parties concerning the interpretation or application of this Convention shall, so far as possible, be settled by negotiation between them. 2. Any dispute which is not so settled shall be referred by the Parties to the dispute to the Harmonized System Committee, which shall thereupon consider the dispute and make recommendations for its Settlement …".

[17]See Article 1 (2 C) del Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and the Common Customs Tariff.

[18]Court of Justice of 3 June 19 February 2009 in the case C-376/07 Staatssecretaris van Financièn v. Kamino International Logistics BV, ECLI:EU: C:2009:105, para 48.

[19]On the topic, see Lasiński-Sulecki (2022).

[20]About this schematization, see Bellante (2020) at 541.

Union, which is a member of the Organization; on the other hand, this rule demonstrates how, despite what the Court of Justice of the European Union has ruled, these are provisions with a *de facto* binding character.

And the same considerations must be reached, *a fortiori*, about the explanatory notes adopted by the Union Committee.

What has been said leads to a first consideration, namely, the absolute vagueness and, in any case, the need for clarity about the legal value of the instruments of interpretation examined so far[21].

In addition to such a soft law, European customs law provides the classification regulations and the binding tariff information mentioned earlier.

The European Commission adopts the formers due to the delegation of authority conferred by Article 285 (4) of the Union Customs Code (UCC) and supplement tariff classifications for all purposes. Unlike the explanatory notes, these have binding force. The literature has pointed out that the different nature of explanatory notes compared to classification regulations gives rise to varying consequences regarding the temporal effectiveness of these instruments. At the same time, the former may have a retroactive effect, but the latter does not[22].

Finally, the Union Customs Code (UCC) empowers the economic operator to propose to the Customs Administration the classification of a product that will be imported by requesting that a decision called Binding Tariff Information (BTI) be issued on the same[23]. This instrument is designed to facilitate customs operations from both the operator's and the customs authority's point of view. The moment the Administration assigns a specific classification to a given product, for all subsequent operations involving that same type of product that the same economic operator will carry out throughout the Union territory in the following three years, the declared classification cannot be questioned, subject to the revocation or suspension of the BTI under Article 34 (7) and (10).

The Customs Code Committee – Tariff and Statistics Section. Cases on Focus

As mentioned before, in matters where the European Parliament and the Council have granted the EU Commission the power to adopt delegated acts under Article 284 Union Customs Code (UCC), the Commission is assisted by the Customs Code Committee[24], whose functioning is governed by a Regulation (EU) No 182/2011 of the European Parliament and of the Council of February 16, 2011[25].

[21]Regarding that, Lasiński-Sulecki (2022) at 171 points out: "If an act of soft law is not binding, can it still be described as a law?"

[22]Lasiński-Sulecki (2022) at 174 points out that it is difficult to understand how an economic operator can respect the content of explanatory notes which, at the time of the incident, had not yet been made public.

[23]About this customs institute, see Laszuk (2018).

[24]See Article 285 (1) UCC.

[25]The Regulation lays down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182.

Concerning the Tariff and Statistic Section[26], under Article 8 of the aforementioned Council Regulation (EEC) No. 2658/87, the Committee may examine any question referred to it by its Chairman, either on his initiative or at the request of a representative of a Member State concerning the Combined Nomenclature (CN) or the Integrated Tariff of the European Communities Nomenclature (Taric) and any other nomenclature which is based wholly or partly on the Combined Nomenclature or which adds subdivisions to it and which is established by specific Community provisions with a view to the application of tariff or other measures relating to trade in goods.

Neither Regulation No. 182/2011 nor the Regulation establishing the Tariff and Statistic Section[27] indicates the value of the minutes of the Committee's meetings. However, it goes without saying that when an opinion remains expressed in the minutes, it has no binding effect; otherwise, when the opinion is adopted through an implementing act, it becomes binding, assuming a proper legal form.

Examining the minutes of the 250th Textile and Mechanical/Various Subsection session helped me better understand this section's role in establishing tariff classification[28].

Several issues were discussed at the meeting[29].

First, it was pointed out by some member states (MSs) that there was a difference of opinion on the classification to be given to the portable Bluetooth wireless speaker used to play music and other audio recordings. Indeed, the Member State[30] that presented the case to the Committee considers that this product falls under Combined Nomenclature (CN) 8518 21 00. Still, other MSs propose classification under heading 8519, having also issued binding tariff information (BTI) to that effect. After discussion, most of the Committee's members preferred classification under heading 8519, so the MSs that had issued BTIs with different classifications were asked to revoke the relevant decisions.

In another case, however, the Committee discussed the classification of surgical gowns with reinforcements concerning divergent BTIs issued in the Union territory to different economic operators. Some had classified the product under Combined Nomenclature (CN) heading 6210 10 92, some under CN 4818 50 00, and others under Harmonized System (HS) 6210. In the discussions, it emerged that the different classifications depended on the approaches taken by the respective chemical laboratories to determine whether the surgical gown was

[26]This Section is, in turn, divided into two subsections, which deal respectively with the nomenclature and the tariff in the textile, mechanical/miscellaneous, and agriculture/chemical sectors. See https:// ec.europa.eu/transparency/comitology-register/screen/committees/C18106/ consult?lang=en

[27] See Rules of Procedure for the Customs Code Committee established by Article 285(1) of the Union Customs Code - Ref. Ares(2018)3444533 - 28/06/2018 in https://ec.europa.eu/transparency/ comitology-register/screen/committees/C18106/consult?lang=en.

[28]see https://ec.europa.eu/transparency/comitology-register/screen/committees/C18106/consult?lang=en.

[29]The meeting minute is divided into 8 points, and at point 7, there are Items submitted to the Committee for discussion under Articles 34 and 57 of Regulation (EU) No. 952/2013 or Article 8 of Regulation (EEC) No. 2658/87.

[30]The minutes do not indicate which Member States have raised issues submitted to the Committee or are BTI holders, nor what positions they expressed in the vote; the countries that raise questions and vote are, that is, anonymous.

considered a nonwoven fabric or composed of a mixture of fibres. Since a shared opinion was not reached at the meeting, the Committee invited interested MSs to contact their laboratories to obtain more information to discuss the topic at a subsequent meeting.

And again, on another occasion concerning the classification of hair color sample books, classifiable under either CN code 4911 10 90 or CN 6307 90 98, a Member State represented that its Court had issued two judgments classifying the product under CN code 6307 90 98 and that an appeal was pending against another judgment that, instead, had classified the product under heading 4911; a heading, moreover, adopted by another MS in issuing a BTI for a similar product. The Committee, having examined the matter, asked the Member State to inform about the outcome of the appeal, following which a draft regulation for classification under CN code 4911 10 90 would be submitted for discussion.

In all the cases cited, the interpretations of explanatory notes and the application of technical rules led to the issuance of different BTIs for similar products within the Union territory, providing unlawful advantages to some economic operators and disadvantages to others.

By doing a check in the Italian Customs and Monopolies Agency's information system called AIDA (Integrated Automation Customs Excise), it was found that in the first case above, and until the Committee ruled, if a trader imported the Bluetooth wireless speaker from China or Taiwan by classifying it under CN code 85192010 it was liable to pay a duty equal to 6 percent of the value of the good; otherwise, if he declared it under HS code 851821 for import from the same countries, the duty would be 0.

Similarly, the company that imports surgical gowns from Brazil into the member country, which classifies them under CN code 62101092, pays a duty of 12 percent. In contrast, it pays no duty if it classifies under CN code 4818 50 00.

Finally, if hair color sample books imported from the United States are classified under Integrated Tariff of the European Communities (Taric) code 63079998 99, they pay a duty of 6.03%, while if classified under code 4911 10 90, there would be no duty to pay.

Only when the Committee makes a qualified majority decision are member states under obligation to revoke BTIs that have already been issued[31]. There is only provision for suspending the adoption of new BTIs and ensuring that the correct and uniform classification or determination of origin should be subject to consultation at the European Union level at the earliest opportunity and, at the latest, within 120 days of the Commission notification of the suspension[32].

Although the legislature stipulates that member states, when they are unable to resolve an interpretive doubt within 90 days, submit the issue to the Commission and that the Commission will bring the matter up for discussion

[31]See Article 23 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015, laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

[32]The introduction of this term arises from an audit by the European Court of Auditors. See Special Report No 2/2008 concerning Binding Tariff Information (BTI) together with the Commission's replies (2008/C 103/01).

within four months, it is not certain that a majority solution will be reached as quickly, as some issues may require multiple meetings or complex investigations (see the case of surgical gowns where the Committee requested the involvement of the chemical laboratories of the MS Customs Authority).

Customs Value Definition. From International Rules to the European Customs Code

As mentioned above, the issue of customs value could also be susceptible to inhomogeneity within the Union territory.

Normatively, it should be recalled that under Article VII of the General Agreement on Tariff and Trade (GATT), the adhering states have adopted uniform criteria for determining customs value as described in the Article.

The article revolves around the notion of the actual value of goods understood as the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. When the actual value is not ascertainable in this way, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

In 1979, the General Agreement on Tariff and Trade (GATT) member countries entered the Customs Valuation Agreement to implement the above provision[33].

This Agreement specifies that the primary method for determining present value is the transaction price, namely the price paid or payable for the goods sold for export to the country of importation[34].

Article 2 (1) of this Agreement states that the fact that the buyer and the seller are related does not constitute grounds for the transaction value to be considered unacceptable. In such a case, the circumstances surrounding the sale shall be examined, and the transaction value shall be accepted, provided that the relationship did not influence the price.

Suppose the outcome of the examination of the factual circumstances shows that the relationship between the importer and exporter has influenced the transaction price. In that case, the importer must determine the customs value by secondary criteria weighted on the cost of identical or similar goods.

From a procedural standpoint, Article 18 of the Agreement provides for the establishment of two committees: one internal to the World Trade Organization (WTO), called the Committee on Customs Valuation, responsible for aspects concerning trade policy[35], and the other, under the auspices of the World

[33]It is the Agreement on implementing Article VII of the General Agreement on Tariffs and Trade 1994.

[34]See Article 1 (1).

[35]To allow Members to consult on matters relating to the administration of the customs valuation system by any Member as it might affect the operation of this Agreement or the furtherance of its objectives and carrying out such other responsibilities as may be assigned to it by the Members. See Article 18 (1) of the Customs valuation agreement.

Customs Organization (WCO), called the Technical Committee on Customs Valuation, which is in charge of discussing the operational aspects of the Agreement.

Under Annex II(2)(a) of the Customs Valuation Agreement, the Technical Committee on Customs Valuation may examine technical problems in the administration of valuation systems that members submit to customs and give advisory opinions on appropriate solutions based on the facts presented.

Under paragraph (d) below, the Technical Committee shall be responsible for providing, on any matter concerning the customs valuation of imported goods for customs purposes, information and opinions requested by a member or by the Committee established by Article 18.1 of the Agreement on Customs Valuation. This information and opinions may be advisory opinions, comments, or explanatory notes[36].

Using Council Decision 94/800/EC, the Union approved the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement - CVA), but the definitions of customs value provided at the international level had already been implemented in the 1992 Community Customs Code (CCC).

The current Customs Code has also incorporated the principles enunciated at the international level; in fact, according to Articles 69 to 76 of the current EU Customs Code, the customs value is to be determined first by reference to the transaction price and, if this method is not possible, by recourse to alternative criteria that, in principle, recall those mentioned above.

As with customs classification, the Customs Code Committee has the Customs Valuation Section.

Alongside this Committee, the Customs Expert Group[37] of the EU Commission has the Customs Valuation Section, an advisory body established by the Commission or its departments to provide expert advice on customs matters of a particularly technical nature[38].

Finally, it is helpful to recall that recently, through Council Decision (EU) 2022/656 of April 11, 2022[39], the European Union, in outlining the position to

[36]It is possible to examine the list of instruments of the Customs Valuation Technical Committee at https://www.wcoomd.org/en/topics/valuation/instruments-and-tools/advisory-opinions.aspx.

[37]The Customs Expert Group is not established under Article 284 UCC but is an advisory body whose missions are: to assist the Commission with the implementation of existing Union legislation, programs, and policies and the preparation of delegated acts of legislative proposals and policy initiatives; coordination with Member States, exchange of views; preparation of positions for the negotiation of customs provisions in international agreements, and so on. See https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3419&fromMeetings=true&meetingId=42314.

[38]See the Customs Expert Group - Section Customs Valuation at https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&do=groupDetail.GroupMeeting&meetingId=17655.

[39]On the position to be taken on behalf of the European Union within the Technical Committees on Customs Valuation and on Rules of Origin, established under the auspices of the World Customs Organization, about the adoption of advisory opinions, commentaries, explanatory notes, case studies, studies, and similar acts concerning the valuation of imported goods for customs purposes under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and

be taken in the Technical Committee, ensured that these measures are consistent with the general introduction of the Customs Valuation Agreement and the interpretative notes in Annex I of that Agreement and reaffirmed that it promotes positions consistent with the Union's policies and best practices, including the objective of protecting the Union's financial interests, as well as any other international commitments of the Union in the relevant area.

Dutiable Royalties and Soft Law Guidelines

As seen, both international law and the European framework require that the transaction price reflect the actual value of the goods.

It follows from this precept that license fees that have not already been considered in the price should also be included in the customs value as long as they relate to the imported goods and are a condition of the sale.

Article 8 of the Customs Valuation Agreement states that certain elements must be added to determine the customs value, including, for what is of interest, royalties and license fees related to the goods that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price paid or payable (lett. c).

The issue of royalty eligibility has always been the subject of lively debate in literature[40] and case law.

In particular, the case that has been most perplexing concerns the trilateral relationship, that is, when the producer is not also the owner of the royalty but is owned by a third party.

According to Article 136 (4) of Commission Implementing Regulation (EU) 2015/2447 (IR), royalties and license fees are considered to be paid as a condition of sale for the imported goods when (a) the seller or a person related to the seller requires the buyer to make this payment; (b) the payment by the buyer is made to satisfy an obligation of the seller, by contractual obligations; (c) the goods cannot be sold to, or purchased by, the buyer without payment of the royalties or license fees to a licensor.

The definition of a relation is expansive. Article 127 of Commission Implementing Regulation (EU) 2015/2447 (IR) provides that two persons shall be deemed to be related if, among other things, one of them directly or indirectly controls the other or a third person controls both. One person is considered to control another when the former can legally or operationally exercise direction over the latter.

Therefore, it becomes essential to examine the particularities of the concrete case, particularly the relationship between the licensor and the producer, to determine royalty duty ability.

Trade 1994, and the adoption of advisory opinions, information and advice, and similar acts, concerning the determination of the origin of goods under the Agreement on Rules of Origin.

[40]For a comparative analysis of the customs treatment of royalties and license fees, see Lux, Cannistra & Rodriguez Cuadros (2012).

The casuistic approach, risking divergent decisions among the Customs Authorities of different member states (MSs), has prompted the Technical Committees to intervene[41].

Given the international matrix of customs valuation rules, the pronouncements made by the World Customs Organization (WCO) come, in the first place, to the fore, which, through Commentary 25.1 of the Technical Committee on Valuation[42], in point 9, identified several factors [that - ed.] could be taken into account in determining whether the payment of consideration or a license fee is a condition of sale.

The European Commission, through its Committees mentioned above (i.e., the Customs Valuation Section of CCC and CEG), has also issued guidelines[43] most recently included in the Compendium of Customs Valuation Texts - Edition 2024[44].

Union jurisprudence has pointed out that the committee's conclusions, although not legally binding, are relevant tools for ensuring uniform application and interpretation of the Customs Code[45].

Examination of the Guidelines reveals the European Commission's willingness to tax royalties whenever the circumstances of the concrete fact[46] disclose the existence of a particularly intrusive control by the licensor over the producer/supplier that is not limited to the goods covered by the royalties or license fees but extends to decisions on how the goods are produced and sold[47].

Customs Valuation Authorisation: Different Ways to Manage It

In contrast to classification, the soft law acts developed by the Value Committee never result in regulations and other binding acts. Although the

[41]It is no coincidence that 19 out of 47 advisory opinions of the Technical Committee on Customs Valuation of the WCO deal with royalties. See the Compendium of Customs Valuation - Edition 2024.

[42]The Commentary states that all circumstances concerning the sale (and importation of goods) if required, should be studied. This includes possible links between sales and licensing agreements and other important information. Each situation must be examined given all elements related to the sale and importation of the goods, including the contractual and legal obligations of the parties, as well as other relevant information.

[43]See doc. No. 2623395 revision 2, 17 September 2020. Even before that, the TAXUD document no. had been published. B4/ (2016) 808781, which, with the entry into force of UCC, had, in turn, replaced Comment No. 11 contained in document No. 800/2002.

[44]The compendium is divided into six sections: Section A – EU legal texts on customs valuation; Section B - interpretative notes on customs valuation; Section C – Commentaries of the Customs Code Committee and the Customs Expert Group; Section D – Conclusions of the Customs Code Committee and the Customs Expert Group; Section E – Judgments of the Court of Justice of the European Union and Section F – Index of texts of the Technical Committee on Customs Valuation of the WCO.

[45]See European Court of Justice, 9 March 2017, C-173/2015, *GE Healthcare GmbH*.

[46] The European Court of Justice, 9 July 2020, C-76/19, *Curtis Balkan* specified that to verify the existence of an intrusive control on the supplier/producer, the combined presence of multiple soft law indicators is required, and the presence of just one of them is not sufficient.

[47]See Armella (2020).

guidelines are not contained in hard law acts, the case law of national courts has much regard for the indicators proposed by the Union Committee and WCO.

Nonetheless, there are procedural discrepancies that, like those highlighted in the customs classification, can be unduly prejudicial to economic operators.

In this regard, the Customs Valuation Authorisation (CVA) in Article 73 UCC is relieved.

The provision stipulates that the customs authorities may, upon application, authorise that the following amounts be determined based on specific criteria, where they are not quantifiable on the date on which the customs declaration is accepted: (a) amounts which are to be included in the customs value by Article 70(2); and (b) the amounts referred to in Articles 71 and 72.

Simplification, so, can be used to quantify any customs value elements[48].

As the European Commission also recently clarified, the simplification can only be granted when the customs value of imported goods is determined using the transaction value method[49].

The authorisation allows the operator to determine some elements of the customs value based on the transaction value method that is not quantifiable on the date the customs declaration is accepted based on appropriate and specific criteria.

It is precisely because of this function that it is often used to determine royalties and license fees when they have been established as a percentage of the quantity of goods sold. The enterprise can resort to licensing since predicting how many goods bearing the trademark will be sold during importation is impossible.

The concession to the flat-rate value, however, is subject to a demonstration that using the simplified declaration under Article 166 of the Union Customs Code (UCC) would result in an excessively disproportionate administrative burden (a circumstance that often occurs when the number of declarations is large, forcing the trader to submit as many supplementary declarations as the simplified ones within two years).

The authorisation has a potentially unlimited duration, but Customs Authorities are required to monitor whether the requirements are met continuously. The Commission has recently suggested that the audit be conducted at least once a year[50].

Because of this freedom, member states have occasionally decided to identify a time limit within their borders.

In Italy, the term is one year, with the consequence that once this term has expired, the importer must submit a new application attaching all the required documentation; in Belgium, the validity of the authorisation is unlimited[51]; also, in

[48]Unlike what happened before under article 156 (a) of Regulation (EEC) no. 2454/1993 of the Commission of 2 July 1993 and the implementing regulation no. 2913/1993 of the Council, in which the scope of the authorisation was limited to additions and deductions relating to the value of the transaction without also considering the price paid or to be paid for the imported goods.

[49]See Valuation Simplification Under Article 73 UCC and Article 71 UCC Da Guidance for Member States and Trade, doc. TAXUD/A6/2024/1621936, 12 March 2024 20on%20valuation% 20simplification%20under%20Article%2073%20UCC.pdf

[50]See Valuation Simplification Under Article 73 UCC and Article 71 UCC Da Guidance for Member States and Trade, doc. TAXUD/A6/2024/1621936, 12 March 2024.

[51]See https://finance.belgium.be/en/customs_excises/enterprises/customs/valuation/cva#q6.

France, the validity is one year, but two months before the expiry date the importer may apply for renewal of the authorisation[52], whose preliminary process is certainly less onerous than the one already carried out for the examination of the first application; in the Netherlands, on the other hand, depending on the circumstances, the duration of the authorisation is set at one quarter, six months or one year and is indicated in the authorisation itself[53].

Not only that, but the methods of royalty calculation adopted by each member state also differ[54].

It is the individual license agreement that determines how royalties are calculated so each customs Authority will be required to verify whether the calculation method set out therein is suitable for providing a true representation of the value of the license fees or not.

Relevant in this regard is the recently proposed amendment to the Article mentioned above 23 of Commission Implementing Regulation (EU) 2015/2447 (IR), which suspended the adoption of Binding Information on Value (IVVD) - which is only regulated by the legislator and not adopted actually by the member states (MSs) - if the methods of determination of value differ substantially among member states[55].

There is no similar provision for Customs Valuation Authorisation (CVA), although even in this case, the economic operator must propose a value to the Customs Authority using a precise calculation method.

In addition, the Customs Valuation Authorisation (CVA) issued by one country is potentially valid throughout the Union[56].

Like for BTIs, the non-uniformity[57] is a harbinger of illegitimate distortion of competition, inducing the economic operator to apply in the country where it has unlimited validity, or the monitoring is less frequent or less rigorous, or even the Customs Authority's adopted method of determination is more favourable because it leads to a lower value than in other MS.

[52]See https://www.douane.gouv.fr/fiche/lautorisation-dajustement-aj#Duree_de_validite.

[53]See https://www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HDU/douanewaarde-douanewaarde.html.

[54]About tax consequences of different determination customs value methods see Artemyev, Sidorova & Lasloom (2023).

[55]See the Commission Implementing Regulation (EU) 2024/1071 of 12 April 2024 amending Implementing Regulation (EU) 2015/2447 as regards decisions relating to binding information in the field of customs valuation and introducing an electronic system for binding origin and valuation information

[56] Unless the effects of the decision are logically limited to one or more MS, as can happen about the determination of the amount of transport costs from a third country to a given point of entry in the Union customs territory, under a specific contract for transportation. In this case, the simplification granted under such authorisation could be, in principle, valid only for the MS concerned and only for one or more consignments destined for that given point of entry.

[57]The literature has highlighted that legislative codification is not sufficient, but uniformity in management is necessary to guarantee a true customs union. See Timothy Lions (2017).

Conclusive Proposals

As mentioned, customs law has evolved from a border protection tool to one of the keys to globalisation.

But while the reduction of customs duties and efforts to ensure as much uniformity of procedures as possible have played, and still play, a key role in encouraging increased international trade, the involvement of numerous countries, each with its legal tradition and Customs Authority, does not make the harmonization process easy.

This is also the case within the European Union, which, although it is one of the leading examples of a customs union, still has to contend with regulatory, practice, and cultural differences among its member countries.

Although the efforts made by the EU legislature, even more recently, to ensure the correct and uniform tariff classification and determination of customs value are commendable, divergent behaviour among member states is still present and does have consequences for economic operators and the fair and competitive conduct of the internal market.

It has been shown that although the Customs Code Committee plays a strategic role in promoting interpretative uniformity of customs classification rules, the absence of prearranged timeframes for the adoption of a solution determines time intervals in which the importation of goods subject to doubts may generate unlawful advantages to some economic operators, leaving the fate of BTIs already issued uncertain.

Similarly, leaving the management of customs valuation authorizations to the discretion of member states can generate forum shopping phenomena potentially detrimental to competition.

Three resolving proposals are made below to compose such distorting phenomena.

First, matters that still generate dissimilarities among member countries could be regulated by hard law. For example, it should provide specific time frames within the Committee to reach a solution and conclude with a classification adopted by a majority. This provision is challenging to implement because of the degree of inquiry that some classification issues impose[58]. Not only that but there is also a risk that - to meet the strict deadlines set by the Union legislature - decisions made downstream will be ineffective and require a second review shortly after that. Similarly, the use of hard law to define the timeframes for the validity of Customs Valuation Authorisation (CVA) would perhaps be perceived by member states as an excessive interference in their decision-making autonomy. Here, too, the provision of definite timeframes for discussing the most problematic timeframes could be a double-edged sword about the correctness of decisions taken downstream[59].

Second, implementing and regulating these aspects could be delegated to the EU Customs Authority (EUCA). As is well known, on May 17, 2023, the

[58]Galbraith & Zaring (2014) pointed out that the hard law is not efficient "*Unless there is shared meaning and value, codification is unlikely to lead to uniformity of result*".
[59]Rosett (1992).

European Commission published a Proposal for a Regulation of the European Parliament and the Council establishing the Union Customs Code and the European Union Customs Authority and repealing Regulation (EU) No 952/2013 (UCC)[60]. The proposal, among other things, establishes for the first time the EU Customs Authority (EUCA) in charge of running a central risk analysis and supporting national administrations, leading to coordinated customs action[61].

It should also cooperate at the EU level with other agencies, bodies, and networks and facilitate cooperation between administrations, including the work of expert groups, training, and the exchange of staff between countries. This Authority could, therefore, also be tasked with making final and binding pronouncements on cases of dubious classification and methods of calculating royalties for customs value determination according to a system similar to the one currently in place in China[62]. Even this prospect appears to be challenging due to the historical need of member states (MS) to maintain a certain degree of autonomy and decision-making power on customs issues, which also significantly impact the national economy of each member state (MS).

Finally, according to the ancient Latin proverb *in media stat virtus*, the solution could combine the abovementioned proposals.

In particular, as seen on the subject of classification, the prejudice suffered by economic operators derives directly from the timing of the adoption of agreed solutions by the member countries participating in the Customs Code Committee - Section Nomenclature and Statistics. Indeed, in the interval between the submission of the matter to the Committee and the decision with the adoption of a binding act by the European Commission, binding tariff information (BTI) already issued continues to have effect, and member states are under no obligation to disallow a given classification. Therefore, it would be appropriate to provide for a rule of hard law that establishes definite timeframes for the adoption of the solution and that, at the same time, provides for the mandatory suspension of those already issued subject to discussion by the Committee, with the clarification that, if the majority is not reached within the time limit specified by the EU legislature, the matter is submitted to the EUCA, which may issue a binding opinion.

Adopting such a solution for CVAs seems possible, too, and in such a way, the European Union’s path is in this direction.

It was mentioned that last May 12, 2024, the European Commission published some guidelines regarding the adoption of CVAs, imposing constant monitoring but clarifying at the same time that the authoriaation has unlimited validity. Therefore, it is hoped that member states will adapt their rules of practice to this guidance as soon as possible.

Admittedly, one cannot understand the Commission's choice to include such provisions in soft law rather than brutal law acts, but who knows whether the proposed new code will remedy this choice, perhaps by providing for authorisation management rules that are binding on all member states while

[60]See doc. COM(2023) 258 final.
[61]About the dysfunctions resulting from the non-harmonized and decentralised European custom control system see Erkoreka (2020).
[62]See Shu-Chien (2016).

also leaving a margin of final control, before the issuance of the authorisation, to the EUCA.

In conclusion, while soft law rules are understandable given the need to regulate ever-changing sectors, such rules have undoubtedly taken on *de facto* binding value for states to date.

Therefore, it is perhaps time to have the courage to regulate even these aspects with hard law rules by tempering the choice with the involvement of an EU customs authority that, by definition, represents all member states and can be given the role of settling the residual, more difficult conflicts.

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