

Risk Analysis in EU Customs Controls

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Over the past century, risk analysis has become the European Union's preferred tool for selecting commercial transactions for customs control. Its adoption coincided with the onset of globalisation; a period characterised by a sharp increase in international trade. Given the impracticality of inspecting all goods crossing customs borders without severely disrupting trade flows, it became essential to develop a tool capable of filtering customs declarations effectively. Such a tool should enable customs authorities to focus their efforts solely on incorrect or fraudulent declarations. This paper seeks to examine how the European Union regulates customs risk analysis. By outlining the risk analysis systems currently in place within the EU, alongside those implemented in Italy, the paper aims to identify key shortcomings in the present customs risk management framework and to propose corrective measures.

Keywords: customs controls, risk analysis, selection, economic operator, customs declaration.

Introduction

The topic of customs controls has rarely been addressed in legal and economic literature as an autonomous topic. Instead, there is a tendency to believe that controls are relevant only to other institutions of customs law. Consider the discussions about the definition of customs value and the problems connected to the phenomenon of under-invoicing; also, the interpretation of the rules of non-preferential origin has engaged, and still engages, scholars and judges with the issues connected to the evidence documents. Those traditional customs law institutions add to the problem of the uniformity of sanctions in EU territory, the right to be heard, and so on.

From this perspective, customs controls are regarded as merely the occasion for the emergence of breaches of the aforementioned substantive institutions of customs law.

Nor have the technological changes of the last thirty years, which have substantially automated customs controls, changed the fortunes of this academic disregard.

On the contrary, the use of risk analysis to select upstream the cross-border commercial transactions to be subjected to control, reducing the intervention and discretion of the ascertaining agent and, therefore, his margins of error, have probably led to the belief that there is no longer any need to investigate the phenomenon of customs controls.

Thinking like this would be wrong.

The use of mechanical tools for selecting transactions and subjects for control, such as risk analysis, raises the question of the rules that make this tool legitimate.

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The circumstance that the selection is entrusted to machines cannot lead to the conclusion that it is always and, in any case, correct, since it must instead have regard to the protection of economic operators. If they are selected for customs control, they will suffer delays in customs clearance and may pay compensation for breach of contract with their customers.

Thus, customs controls, in a probably unfortunate but effective expression, represent “asymptomatic” institutions that - even if, due to the conspicuous use of IT tools, they do not seem to manifest pitfalls of immediate or tangible perception - are not, however, incapable of altering the function of the customs system and of causing damage, sometimes of no minor importance.

It is precisely from this awareness that this paper intends to analyse the institution of risk analysis because only by understanding how it works is it possible to trace this instrument’s legitimacy limits.

Roadmap and Sources

This investigation begins with a concise historical and normative overview. Risk analysis emerged in response to the dual pressures brought about by the rise in international trade: the need to maintain effective border controls and the imperative to avoid disrupting the flow of commerce.

Following the creation of the customs union which eliminated internal tariffs and introduced a common external tariff for trade between the EU and the rest of the world in the final decade of the 20th century there arose a pressing need to harmonise customs control procedures across Member States.

Accordingly, the paper will first trace the historical and legal milestones that led to the formal adoption of risk analysis as a tool for selecting customs declarations for inspection. It will also examine the recent proposal for a new EU Customs Code, which introduces significant changes, including the establishment of a European Customs Authority to oversee risk management.

The next section will describe the current system of risk analysis, with a focus on the provisions of the Union Customs Code concerning the security and safety of the EU customs territory. The scarcity of sources on this subject due in part to the secrecy surrounding how customs risks are defined and how controls are selected has made this reconstruction particularly challenging. Such confidentiality is maintained to prevent economic operators from evading customs obligations.

As the EU has developed and implemented IT systems for standardised risk analysis focused solely on safety and security, Member States remain responsible for designing tools to address other risks - such as fiscal risks - related to customs operations. Because these tools vary across jurisdictions, the paper will examine the system employed by the Italian Customs Authority, offering a concrete example of how risk analysis is applied in practice. This will involve analysing the operational guidelines issued by the Italian Customs Authority, given the absence of codified legal provisions in the national framework.

Finally, the paper will identify the critical issues within both the EU’s and Italy’s current risk management systems and propose measures to strengthen the

framework—particularly regarding the legal protections available to economic operators.

Through this analysis, it is hoped that greater academic attention and legitimacy will be accorded to customs controls by highlighting their complexity, impact, and evolving nature in a digitised regulatory environment.

Customs Controls and Risk Analysis in the EU: A Legal and Institutional Perspective

The subject of customs controls has seldom been treated as an autonomous area within legal and economic literature. Instead, there is a prevailing assumption that customs controls are merely ancillary to other, more central, institutions of customs law. Consider, for instance, the extensive discussions surrounding the definition of customs value and the issues posed by under-invoicing, or the ongoing debates among scholars and courts regarding the interpretation of non-preferential origin rules and the evidentiary challenges involved. These traditional pillars of customs law are further complicated by concerns such as the harmonisation of sanctions across the EU, the right to be heard, and other procedural safeguards.

From this perspective, customs controls are often viewed merely as the trigger for violations of the aforementioned substantive legal norms. Even the sweeping technological advancements of the past three decades, particularly the automation of customs procedures have done little to elevate the academic standing of customs controls.

On the contrary, the introduction of risk analysis as a means to pre-select cross-border customs controls no longer warrant in-depth scrutiny. By limiting the discretion and involvement of customs officers - and thus reducing the risk of human error - automated tools have created an illusion of reliability and infallibility.

Yet the very use of such mechanical selection tools raises critical legal questions about their legitimacy. The fact that selection is entrusted to machines does not imply that it is inherently correct. It must still be evaluated in light of the rights of economic operators. Being flagged for customs control can lead to significant delays in clearance and potential contractual penalties for late delivery.

Customs controls thus represent what could be termed albeit somewhat inelegantly but aptly "asymptomatic institutions": their heavy reliance on digital tools may render them outwardly unproblematic, yet they retain the potential to distort the functioning of the customs system and to cause significant, if less visible, harm.

It is with this awareness that this paper sets out to analyse the institution of risk analysis. Only by understanding how this mechanism operates can we begin to delineate the limits of its legal legitimacy.

The Process of Implementing Risk Analysis in European Customs Controls

Having eliminated internal tariff barriers, established standard duty rates in trade operations with third countries, and developed shared criteria for customs valuation, one of the main "enemies" of fair competition in the EU and international market is the divergence of customs control procedures.

On this ground, Member States may, more or less unwittingly, feed the breach of customs provisions through excessively permissive attitudes to controls or, conversely, unjustifiably delay trade, thus guiding economic operators on the choice of entry and exit points for goods.

Precisely to provide clear, complete, common and binding customs instructions for all the Member States, following the signing of the Maastricht Treaty¹, Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (CCC), in force since 1 January 1994, was issued.

That legal act was followed by the drafting of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (Implementing Regulation).

This is the first and most extensive work of codification that has taken place in customs law, bringing together in a single text all the customs institutions developed since the birth of the European Community and contained in scattered and fragmentary regulatory acts.

From the point of view of controls, the CCC, in its original text, provided the possibility of verifying the declaration, accompanying documents, accounting records for certain operators, inspection of goods, sampling and laboratory analysis².

This, however, does not mean that the Community was not working to create a more efficient and uniform system of controls.

In fact, on 23 November 1992, the Ecofin Council approved using risk analysis as a tool for targeted customs controls. The homogeneity of controls became one of the objectives of the “Customs 2000” programme³.

The action programme specifically aimed to make customs procedures and controls more effective at any point in the customs territory of the Community by encouraging the development of identification, risk analysis⁴ and post-clearance verification techniques and, where necessary, the determination of the nature of controls to achieve equivalent results.

Subsequently, the 11 September 2001 terrorist attack on the twin towers of the World Trade Centre in New York intervened, which highlighted the need to develop customs border control procedures aimed at increasing transport security. Customs controls, therefore, were no longer aimed at preventing only risks to international trade but also risks to protecting citizens from international trade itself⁵.

The European Union, unable to remain blind to these events, after reaffirming with

¹The Maastricht Treaty was signed on 7 February 1992 and entered into force on 1 November 1993.

²See Article 68 CCC.

³The Customs 2000 programme, provided for in Decision No. 210/97/EC of the European Parliament and of the Council of 19 December 1996, initially covered the period from 1 January 1996 to 31 December 2000 and, subsequently, until 31 December 2002. See Article 1 of Decision 210/96 in its original and subsequently amended versions.

⁴Autiero (1993). In 1993, the Author had already stated that risk analysis would enable the rise to otherwise unattainable heights of service efficiency and effective results.

⁵Truel, Maganaris & Gricorescu (2015). The development of EU customs law: from the community customs code to the union customs code, *Journal of legal studies*, 16(30): 84 pointed out: “Following the events of 11 September 2001 the risk to the trade became a risk from trade”.

the Customs 2007 project⁶ the need for control activity based on a common framework, introduced into the Community code the instrument of risk analysis, hitherto only provided for in isolated decisions and programmes.

In particular, with Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 amending the CCC, it was established for the first time, and in a binding way for all Member States, that customs controls, except random checks, would be based on the risk analysis system⁷ about which the Member States were obliged to construct a common framework, since the disparities in the procedures used⁸ lead to unlawful distortions of trade.

The text of the implementing regulations was also amended⁹ by expressly providing that the risk analysis systems operated by national customs authorities should differentiate between the levels of risk associated with goods subject to customs control or supervision and determine whether - and, if so, where - these goods should be subject to specific customs controls.

Risk levels were determined by assessing the probability of the event being associated with its incidence¹⁰.

This process of computerising controls was also fuelled by demands from the international world, including the WCO which, in 1999, in amending and supplementing the text of the Kyoto Convention for the Harmonisation and Simplification of Customs Procedures (better known as the Revised Kyoto Convention¹¹) invited all adhering countries to use customs risk management tools to intercept operations to be subject to control and to cooperate in their preparation.

Later, given the accession of several Member States to the European Union, the Union legislator felt the need to redraw the Customs Code, considering that it was no longer sufficient to proceed with ad hoc supplementary/ amendments to the existing text¹².

Thus, the modernised customs code (MCC) was enacted.

It is symptomatic, and worth highlighting, that the first provisions, after those of a general nature, in the aforementioned MCC concern the provision of data¹³. Since the European Community felt the need for an adequate and efficient development

⁶See the Decision No. 253/2003/EC of the European Parliament and of the Council of 11 February 2003 adopting an action programme for customs in the Community (Customs 2007) and regarding, under Article 1(1), the five years from 1 January 2003 to 31 December 2007.

⁷See the amendment to Article 13 CCC by Article 1(3).

⁸On the risk analysis methodologies applied by the customs authorities of Germany, France, the Netherlands, Great Britain and Denmark see Petreccia (1993).

⁹See the Commission Regulation (EC) No 1875/2006 of 18 December 2006 amending Implementing Regulation.

¹⁰See Article 4-septies of the Implementing Regulation as amended by the Regulation mentioned above (EC) 1875/2006.

¹¹The Convention entered into force in February 2006. On the benefits of the changes made to the Kyoto Convention, see <https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/Instruments-and-tools/conventions/kyoto-convention/benefitsrkc.pdf?db=web>.

¹²See recital No 3 of the Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code).

¹³See Section I, Chapter II, Article 5 of the MCC.

of risk analysis, now defined as the primary control tool¹⁴, it would have been necessary to ensure the circulation of information and data on commercial transactions affecting the EU customs territory¹⁵.

In this way, there is a transformation in the role of the Customs Authority, which no longer performs investigative tasks but is, in the first instance, a reader of the risk analysis results and, only eventually, an executor of the controls selected by the machine¹⁶.

A variable composition assessment scheme¹⁷ determined primarily by probabilistic calculations is outlined.

The application of the provisions contained in the MCC, having been conditional upon the issuance of implementing provisions, never actually entered into force, but its innovative principles were fully embodied in Regulation (EU) No 952/2013 of the European Parliament and the Council of 9 October 2013 laying down the Union Customs Code, which represents the current text on customs matters in the Union and whose provisions on risk analysis will be described later in this paper.

The Proposed Reform of the Union Customs Code: The Establishment of the EUCA and a European Data Hub

The current framework allows identifying priority control areas and common risk criteria and standards in the area of financial risks to carry out customs controls. However, considerable shortcomings still prevent the objectives of uniformity and effectiveness of controls from being achieved.

This assumption is, to a certain extent, confirmed in the recent proposal for the reform of the Union Customs Code¹⁸, presented on 17 May 2023 by the European Commission¹⁹ as a result of a dialogue with economic stakeholders, academia and international partners on the future of customs in the EU 2040²⁰.

One of the main objectives of the reform²¹ is the adoption of appropriate measures

¹⁴Comparing the texts of the CCC, as amended in 2005, and the MCC one can note how the legislator adds in the latter the adverb “primarily”, to establish that: “Customs controls other than causal controls are based primarily on risk analysis” (see Article 25(2) MCC).

¹⁵Matsudaira & Koh (2022) Customs Administration and digitalisation. In *Customs Matters - Strengthening Customs Administration in a Changing World*. International Monetary Fund, 204 how the first initiatives on information and communication technologies (ITC) in customs administrations are of “digitization” meaning the mere process of converting analogue to digital; whereas, further on, there has been a shift to “digitisation” processes involving the use of digital information to transform the way customs procedures are managed both by traders and by the customs authorities themselves.

¹⁶This assumption is confirmed by recital No. 6 of the CDA, which states, for the first time, that customs authorities are “catalysts to the competitiveness of countries and companies”.

¹⁷See Cerioni (2004).

¹⁸See https://ireland.representation.ec.europa.eu/news-and-events/news/eu-customs-reform-data-driven-vision-simpler-smarter-and-safer-customs-union-2023-05-17_en.

¹⁹See COM (2023) 258 final 2023/0156 (COD) on Proposal for a regulation of the European parliament and of the council establishing the union customs code and the European Union customs authority, and repealing regulation (EU)No. 952/2013.

²⁰On studies and public consultations preparatory to the text of the proposed reform of the Union Customs Code, see Lux (2023).

²¹On the topic see Pickett & Wolffgang (2023). About the impact of the proposed reform on origin, binding tariff information and customs value, see Grave (2024).

to ensure the uniform application of customs controls throughout the customs territory²².

To this end, it is planned to set up a European digital customs centre (EU data hub) that will replace and encapsulate the current more than one hundred information technology systems throughout the customs territory²³ from which EU Member States can draw to process the selection of controls.

EU Member States should continue to be the owners and managers of the risk analysis on their national territory. However, the controls will be selected based on the information and data in this EU data hub.

This should speed up the timing of the controls, which will no longer have to undergo the bureaucratic delays that, instead, characterise the administrative cooperation instruments adopted so far.

Although, as mentioned, customs processes have been digitised, risk analysis and controls are still fragmented and duplicated in several systems belonging to the different 27 EU Member States. Such an approach is costly for customs authorities, inflexible and hampers the efficient use of data, allowing non-compliant traders to turn to EU entry points with lower levels of control.

Through the creation of the EU data hub, on the other hand, information on transactions and importers risking the financial and non-financial interests of the Union will be shared systematically to have a single, comprehensive view of goods entering and leaving the customs territory²⁴.

Therefore, the EU data hub is conceived as an IT system that connects and stores information at the EU level, providing a wide range of advanced data analysis and using artificial intelligence.

The reform of the Customs Code also established the European Union Customs Authority (EUCA)²⁵.

Although this is in line with the recent trend towards the establishment of several at the service of the European Union²⁶, it would represent a further step, taking the customs union to the next level.

Despite the innovative scope of the proposal, unfortunately, examining the reform text does not sufficiently describe the numerous tasks that would be assigned to the EUCA²⁷.

The specific tasks described in Articles 208 to 210 of the proposed new Customs Code are divided into primary, other, and additional tasks.

Regarding the topic, EUCA should have risk management and give operational and coordination support to the EU Member States' customs authorities, including

²²See https://taxation-customs.ec.europa.eu/system/files/2022-03/TAX-20-002-Future%20customs-REPORT_BIS_v5%20%28WEB%29.pdf.

²³The Article 29(3) of the proposal states: "The Commission shall develop, implement and maintain the EU Customs Data Hub, including making publicly available the technical specifications to process data within it, and shall establish a data quality framework".

²⁴See Articles from 29 to 40 of the proposal.

²⁵See Antonini (2023).

²⁶Lyons (2024). The proposed EU Customs Authority: a new Agency in a new system, *Global trade and customs journal*, 19(6):362-370 describes this phenomenon as "agencification process".

²⁷Lyons (2024) states that the text is not clear and precise enough in defining what the agency "will do, nor all the practical aims of its actions".

through diagnostics and monitoring of border crossing points and other places of control, as well as the development of common standards and recommendations for best practices. The recommendations should have a binding character, unless there are justified reasons for the state to deviate from them after notifying the EU Commission. To reduce time-to-market, Member States may also entrust the EUCA with the budget and mandate to develop national applications to use the EU Data Hub²⁸.

Assigning the management of risk analysis processes to a European Customs Authority could ease the tasks of the Member States, which, however, at the same time, will have to guarantee the level of controls indicated by the European Customs Authority itself.

Therefore, horizontally, an organisational model articulated on national and supranational structures is outlined with data and information sharing among the Member States and vertically, in the relations between them and the European Commission²⁹.

The customs reform should be implemented in two phases. In the first phase, the data hub should be implemented, and the European Customs Authority should be established. In the second phase, the EUCA and the EU data hub are to be made operational; the latter should initially only be used for e-commerce shipments, to be subsequently extended to all commercial transactions.

Customs Risk Management. Preface

Customs controls, under Article 5(1)(3) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC), are defined as the “specific acts performed by the customs authorities to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure”.

Despite the literal wording of the provision, Article 46(1) UCC, in regulating this aspect more precisely, gives the customs authorities the power to carry out “any customs controls they deem necessary”.

Under Article 46(2) UCC, customs controls can be carried out either as part of a random investigation or can arise from a report by an IT system designed to identify both the cases in which the control of the goods is necessary and the related methods.

As mentioned, customs controls today are “primarily” carried out using this latter system, i.e. risk analysis³⁰.

²⁸See the recital No. 21 of the proposal.

²⁹See Saponaro (2020).

³⁰Article 6(2) UCC reads as follows: “Customs controls, other than random checks, shall primarily be based on risk analysis using electronic data-processing techniques, with the purpose of identifying and evaluating the risks and developing the necessary countermeasures, on the basis of criteria developed at national, Union and, where available, international level”.

Actually, the control model that emerges from examining the provisions contained in the UCC does not appear to translate into a clear alternative between random controls and risk analysis.

Risk analysis seems to be the prerequisite for any verification activity since no declaration (with some exceptions³¹) can escape preliminary treatment by the customs risk management system.

Risk analysis can be carried out for financial purposes, i.e. to bring to light violations of customs regulations that constitute a prejudice to the economic interests of the European Union, and for the safety and security of the customs territory and of EU citizens.

The UCC, supplementing regulation (SR) and implementing regulation (IR) as they regulate risk analysis, are primarily concerned with those conducted for safety and security purposes. Then, each Member State completes this system by adopting further risk analysis systems at the national level, which, this time, also concern the protection of financial interests.

Since, however, one of the objectives of the Commission is to achieve a high degree of harmonisation of controls, the Common Financial Risk Criteria and Standards (FRC Decision) was adopted concerning tax risk analysis, as well as the guidance document with which, the European Union identifies priority areas and standard risk criteria to ensure, as far as possible, the same adequate degree of controls throughout the customs territory.³²

The following sub-paragraph will account for the risk analysis for safety and security purposes outlined by the EU legislator.

Risk Analysis in the Union Customs Code

Entry summary declarations, exit summary declarations (but the same applies to other pre-departure declarations³³) and customs declarations (when a summary declaration is not required), after being lodged by the person obliged to do so, are registered by the customs authorities and provided with a unique identification code³⁴.

Under Articles 128 and 264 UCC, the risk analysis circuit uses the information of entry and exit summary declarations, or in the absence of these customs declarations, for security purposes³⁵.

Currently, in the EU customs territory, two circuits are planned: the import control system (ICS) information system³⁶ on which the risk analysis of Entry

³¹See Articles 127(2) and 263(2) of 2 UCC and Articles 104 and 245 of the Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing the UCC.

³²Although these actions were ultimately deemed insufficient by the European Court of Auditors. See the Special Report 04/2021 at <https://www.eca.europa.eu/en/publications?Did=58256>.

³³See Article 263(3) UCC.

³⁴See Article 185 of the Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 (IR) laying down detailed rules for implementing specific provisions of UCC regarding the entry summary declarations and see Article 341 of the same regulation regarding the exit summary declaration.

³⁵See Articles 128 and 264 UCC.

³⁶On the Work Programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code, see the Commission Implementing Decision (EU) 2023/2879 of 15 December 2023.

Summary declarations is carried out³⁷ and for export, transit or exit summary declarations acquired in other Member States and which have an Italian office as the exit office is carried out the automated export system (AES)³⁸.

To raise the level of protection of both EU citizens and the internal market and to enable better and faster interception of high-risk shipments, more recently³⁹ the European Union has adopted a new information system, called ICS2, whose end⁴⁰; about the AE implementation has been planned in three phases, which are now coming to an S, however, the request for an extension of the transitional period was accepted, which will currently end on 14 December 2025⁴¹.

The methods and moments of carrying out the risk analysis for safety and security purposes are described by the Implementing Regulation (IR).

In particular, under Article 186 IR, if the entry summary declaration is carried out within the terms set out in Articles 105 to 109 Supplementing Regulation (SR) - which are different depending on the means of transport used - the risk analysis is completed before the arrival of the goods⁴² unless additional analysis is required or a certain degree of risk has been reported⁴³. In the event of the exit of the goods from the customs territory, however, under Article 264 IR, the risk analysis is carried out before the release of the goods at the time between the expiry of the deadline for submitting the pre-departure⁴⁴ declaration and the loading or departure of the goods.

The circumstance that the risk analysis must be concluded before the goods enter or leave the customs territory is strictly connected to the fact that in these cases the purpose of profiling is to avoid the introduction into the Community customs territory of goods that may constitute a threat to the security of the Union, to public health, and the environment and consumers.

To limit the description to the operations of entry of goods into the customs territory of the European Union, the customs office of first entry enters the declaration data into the CRMS, a tool for exchanging information between the Customs Authorities of all EU Member States, which evaluate the data mainly for security purposes.

If the result consists of reporting a risk, the office of first entry completes its risk analysis with this additional information; otherwise, the system communicates that there are no security risks for the operations analysed.

³⁷For the definition of entry summary declaration, see Article 5, par. 1, n. 9 UCC.

³⁸Previously, it was the export control system (ECS).

³⁹See the Commission Delegated Regulation (EU) 2020/877 of 3 April 2020 amending and correcting Delegated Regulation (EU) 2015/2446 supplementing Regulation (EU) No. 952/2013 and amending Delegated Regulation (EU) 2016/341 supplementing Regulation (EU) No. 952/2013, laying down the Union Customs Code.

⁴⁰In addition to all EU Member States, Switzerland and Norway have also joined the ICS2 system.

⁴¹All EU Member States and the UK Tax Authority for the implementation of the Northern Ireland Protocol are members of the AES.

⁴²The Article 7.1.2 of the Trade Facilitation Agreement establishes: "Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival. Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents".

⁴³For goods brought into the customs territory of the Union by air, see Article 186(1) IR.

⁴⁴See Article 244 SR.

It may also happen that the office of first entry needs additional information that can be found in the declaration; otherwise, it cannot complete the risk analysis. In these cases, the customs office of first entry requests the aforementioned information from the person who submitted the entry summary declaration or, if applicable, from the person who submitted the information in the entry summary declaration⁴⁵.

Where the risk analysis system recommends further checks, the customs office of first entry, through the CRMS, notifies the declarant or the carrier of the most appropriate place and measures to carry out such checks.

The competent customs office decides on the control. It makes the results of this decision available to all customs offices potentially affected by the movement of goods, at the latest at the time of presentation of the goods to the customs office of first entry.

This system of controls is carried out before or, at most, when the customs declaration is presented.

However, the UCC allows for carrying out a risk analysis even after the release of the goods and even when that operation has already been subjected to controls.

Article 48 UCC regulates subsequent controls, by which the customs authority has the right to proceed at any time, within three years from acceptance of the customs declaration (or from a minimum of five years to a maximum of ten years in the case of criminally relevant conduct⁴⁶), to verification of the authenticity and validity of the documentation supporting the customs declaration⁴⁷.

These controls may arise from reports by other Authorities involved or risk analysis⁴⁸, when, following an update of the indicators, for example, the electronic system's declaration is deemed risky concerning the obligations of compliance with customs legislation.

In light of what has been said so far and considering that this type of control certainly cannot be aimed at paralysing the entry of goods into the customs territory, since the release has already occurred, it is believed that the risk analysis adopted in this phase does not have primarily the purposes of safety and security but, this is not, however, excluded by the customs legislator.

The Italian Risk Analysis System

As mentioned, in addition to the risk analysis for safety and security purposes carried out on entry summary declarations and pre-departure declarations through the ICS2 and AES systems, each EU member state has the task of preparing and adopting its risk analysis system.

In Italy, two domestic risk analysis systems have been implemented: the customs security circuit (CDS) and the customs control circuit (CDC).

⁴⁵When the declarant differs from the carrier, see Article 186(3) IR.

⁴⁶See Article 103(2) UCC.

⁴⁷Recently, the EU Court of Justice observed that the use of *a posteriori* controls is not subject to any limitation and can also be carried out on declarations concerning goods which, at the time of release, had already been subjected to physical checks. See CGUE of 16 July 2020, C-496/19 “*Capaldo*” and CGUE of 10 December 2015, C-427/14 “*Augustākā Tiesa*”.

⁴⁸See Article 292 IR.

Both entry and exit summary declarations are subject to screening by these systems; however, due to the consequences of introducing goods into Italian territory, it was decided to focus this paper on the risk analysis carried out on entry summary declarations. However, it should be noted that both systems, when assessing customs risks, also analyse declarations relating to export and export combined with transit operations⁴⁹.

As mentioned, entry summary declarations are subject to the risk analysis for safety and security purposes carried out at the Union level (ICS2), the outcome of which is communicated to the Member State involved in the relevant operation.

Suppose the ICS2 system indicates the goods as risky for safety and security purposes. In that case, their entry into the customs territory will be prevented until the customs office for first entry decides how to manage the reported risk.

At this stage, the entry summary declaration is subjected to the control of the CDS above, which can be selected to execute further controls.

This type of control demonstrates the interoperable nature of the information systems the European Union aims to place as the linchpin of customs controls.

Upon first entry of the goods, the Member State is not required to accept *a priori* the results of the control carried out by the Union system. Still, evaluating whether the alert message received from ICS2 deserves to be confirmed based on the data that feeds national risk analysis is necessary.

The verification at the Union level is integrated with the national one, making the control system more efficient.

Where the CDS generally selects a declaration as risky, the suggested control is the physical inspection of the goods, which is carried out in temporary storage warehouses⁵⁰ or sampling for the execution of the appropriate laboratory analyses.

It may happen, however, that the CDS does not consider the operation of the summary declaration to be dangerous, thus identifying a hypothesis of a false positive⁵¹.

In this case, the Italian Customs Authority has the right to ignore the control required by ICS2⁵².

The mechanism described so far concerns the hypothesis that the ICS system has reported a summary declaration to execute safety checks.

However, if this does not happen, the national safety check will be neglected.

The CDS, therefore, is a possible check that is carried out only if the Union system has identified danger in a specific customs operation.

The other check carried out at the national level, namely the CDC, is instead mandatory.

⁴⁹See the document of the Italian Customs Agency of 2 January 2012 No 1/D (page 11) at <https://www.adm.gov.it/portale/documents/20182/889952/dct-c-20120103-circolare1D.pdf/76884afa-54f1-4ee9-b419-d9535be8371a>.

⁵⁰According to Article 5(1), No 17 UCC, “temporary storage means the situation of non-Union goods temporarily stored under customs supervision in the period between their presentation to customs and their placing under a customs procedure or re-export”.

⁵¹These control steps are extensively described in the document of 2 January 2012 No. 1/D drafted by the Italian Customs Agency.

⁵²In these cases, we speak of risk downgrading.

The object of this check is not the summary declaration but the customs declaration, i.e., complete with all the data that compose it, which, as mentioned above, is mainly aimed at binding the goods to a specific customs regime.

If the range of data being examined is wider than the safety check, unlike the latter, and perhaps precisely for this reason, not all declarations, even if they present risk profiles, are selected by the CDC to undergo checks.

This is the so-called targeted control criterion.

In practice, the CDC first identifies the declarations that present specific risk profiles and, based on predetermined percentages, selects those that will be subject to checks by the officials of the Customs Authority⁵³.

The controls in question are document control, goods inspection and scanner control.

To increase the deterrent effect against fraud attempts, all other types of declarations, which do not present specific risk profiles, will also have a residual probability of being selected randomly for one of the controls above. This last type of control is based on a causal logic that responds to the provisions of Article 46(2) UCC and is the necessary completion of the criteria of the profiles⁵⁴.

It should be noted that the declarations that present risk profiles and, nevertheless, are not selected for executing the controls above, have not been exempted from any check. They have passed the automated check carried out by the risk analysis software, so the customs officer who receives this information must proceed immediately with releasing the goods.

The type of checks reported by the risk analysis is not binding for the officer.

Although in the case of selection for control by the customs circuit, the possibility for the customs officer to change the type of check to be carried out is foreseen, the exercise of this faculty must be justified by the presence of concrete doubts, deducible from the documentary check⁵⁵.

Where, therefore, the risk analysis system provides for a possible increase, the simple prediction is not in itself a valid reason for increasing the type of control, as such an increase must occur only if, during the control, the official believes that the risk specified in the profile exists.

Furthermore, the national risk analysis, both for security and tax purposes, is also built based on the information the territorial directorates must send to the central directorates⁵⁶.

They report risk indicators strictly connected to local realities at the central levels, which, as such, would not be easily perceived by the central offices.

⁵³On this topic, see <https://www.adm.gov.it/portale/documents/20182/901640/studi+e+ricerche+2003-01+-+il+miglioramento+della+qualita+del+dato+delle+dichiarazioni+doganali.pdf/90987f90-1bf6-4dd4-8423-cb7490255fc3>.

⁵⁴As is observed in the document of 17 November 2023 No. 23, drafted by the Italian Customs Agency at <https://www.adm.gov.it/portale/documents/20182/97147457/20231117-690749-circ-232023.pdf/63c50a8d-13d9-4c96-2a38-81c266024d68?t=1700812809797>.

⁵⁵See the document of 17 November 2023, No. 23, drafted by the Italian Customs Agency.

⁵⁶Currently, the Anti-Fraud Directorate and the Customs Control Office of the Customs Directorate are competent.

The instrument provided for this purpose is the negative control subject report⁵⁷, through which local offices can report to the central offices the operators for which it is deemed appropriate to evaluate the inclusion in the CDC of subjective corrective profiles that reduce the controls for those economic operators who have been subjected to controls several times, always with a negative or substantially negative outcome.

When the request for the inclusion of new risk profiles concerns only the local area, the central offices will have to maintain the control percentage as requested by the former, since the proposed control percentage considers the impact calibrated on their territorial operations.

When the same offices become aware of any controls with positive outcomes, they may determine the cancellation of the corrective profile inserted and, having assessed the level of risk, the inclusion of new subjective profiles for that economic operator.

In addition to the local risk reports, the data used to develop the risk profiles is also drawn from the constant monitoring and analysis of all the information sources available to the Italian Customs Agency.

These include, in particular, the anti-fraud database, the risk information forms (which feed the CRMS system), the statistical analyses of flow variations, the consultation of the European Official Journal to monitor new anti-dumping regulations and new restrictive measures against particular countries; the investigations underway by the judicial authorities; other databases at national/ European level (such as the tax register, etc.).

Conclusive Proposals

Currently, customs authorities within the European Union conduct controls based on risk management, aiming to identify declarations that are most likely to violate customs regulations.

Three types of risk analysis can be identified:

1. The analysis mandated by the EU customs legal framework for safety and security purposes implemented via the ICS2 system for entry summary declarations and the AES system for exit summary declarations.
2. The analysis carried out by the Italian Customs Agency when ICS or AES identifies a risk in a summary declaration, known as CDS.
3. A second type of national-level analysis by the Italian Customs Agency, aimed at identifying risky customs declarations for financial purposes, referred to as CDC.

From the provisions of the Union Customs Code (UCC) and documents issued by the Italian Customs Agency concerning national risk analysis, it appears that the logic underpinning these three types of risk assessments (ICS2 on one hand, and CDS and CDC on the other) is not uniform.

⁵⁷On the topic, see the documents drafted by the Italian Customs Agency of 23 November 2012, No. 136844 and of 19 August 2015, No. 93621.

As previously mentioned, the safety and security risk analysis required under the UCC applies to all entry and exit summary declarations submitted at EU customs border points. Because its aim is to prevent the import or export of goods posing safety or security threats, every declaration is screened; otherwise, the objective of this risk analysis could not be achieved. Consequently, the logic here is not based on statistical or probabilistic models.

In contrast, when a transaction presents risk indicators, the release of goods is suspended pending the national risk assessment (CDS or CDC in the Italian context). This evaluation determines whether physical inspection, sampling for laboratory testing, or other control measures are needed.

The logic governing national-level risk analysis differs significantly. As indicated, not all declarations flagged by ICS2 or AES undergo further examination by CDS, and only a subset of risky declarations are selected for CDC checks. In these instances, statistical or probabilistic criteria drive the selection.

These distinctions are not formally documented by the Italian Customs Authority or the European Commission, but they can be inferred from analysis of the UCC, the Supplementing Regulation (SR), the Implementing Regulation (IR), and related practice documents.

One of the key shortcomings of the current customs risk management system is the absence of documentation explaining the algorithmic logic behind the selection of customs declarations for control. While maintaining confidentiality regarding high-priority sectors and relevant risk profiles is understandable, this secrecy must be balanced with the right of economic operators to understand the procedures applied during customs controls.

Algorithmic transparency is essential to enable economic operators to assess the legitimacy of the actions taken by customs authorities. Without it, the right to defence of an operator subjected to an unjustified control may be unjustly compromised especially in cases such as Italy's, where selection is based on probabilistic algorithms.

More precisely, when an automated system chooses to exclude some declarations and include others, certain operators are subjected to control measures (which may carry economic and reputational consequences), while others are not. To prevent the misuse of risk analysis as a tool of illegitimate discrimination—contrary to the principle of fair competition—transparency about the selection logic must be ensured.

A promising step in this direction is the recent proposal for a new EU Customs Code. The current UCC defines only “risk” (Art. 5 No. 7) and “risk management” (Art. 5 No. 25). In contrast, the new proposal introduces definitions not only for “risk” (Art. 5 No. 18) and “risk management” (Art. 5 No. 20), but also for related terms such as risk analysis, risk indicators, risk analysis results, control recommendations, control decisions, control results, common priority control areas, and common risk criteria and standards (Art. 5 Nos. 26–33).

This improved definitional framework will undoubtedly aid in understanding and applying risk analysis more effectively.

To enhance legal safeguards for economic operators, it would be highly beneficial if both the European Commission (regarding safety and security risk analysis) and national customs authorities (regarding financial and other forms of risk analysis) adopted binding or soft law instruments. These should provide clear guidelines for

customs officials on how to interpret and use the data from summary and customs declarations. Critically, they must include provisions for regular updates and verification of data accuracy and relevance.

These documents should be publicly accessible. Only then can economic operators evaluate whether customs authorities have followed legal requirements—and seek redress in cases of non-compliance and resultant harm.

In conclusion, the EU has rightly chosen risk analysis as a means to balance effective border controls with the need to facilitate legitimate trade. However, despite efforts to harmonise risk management systems since the tool's inception, there has been no meaningful initiative to ensure that customs authorities across the EU use current and reliable data, or to issue common guidelines.

This gap undermines the legal protection of economic operators and should be addressed in the context of the proposed reform of the EU Customs Code. By doing so, risk analysis can be aligned with the principles of legality and accountability that characterise other areas of administrative action.

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