

# Post-clearance amendment of customs declarations and repayment of customs duties and VAT in the context of EU law

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## Abstract

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The present paper examines whether it is possible to amend a customs declaration filed with respect to goods that are brought into the European Union (EU) customs territory, once such goods have been cleared and released by the customs authorities. Furthermore, it examines whether this amendment could lead to a repayment of customs duties and/or value added tax (VAT) that has been overcharged, upon request of the declarant. Finally, the paper focuses on the rights of the declarant at the stage of examination of their application for repayment of overcharged amounts and upon a potential rejection of such application by the customs authorities.

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## 1. Introduction

Under the provisions of the Union Customs Code (UCC), goods that are brought into the customs territory of the EU must be presented to Customs immediately upon their arrival at the designated customs office or other place designated or approved by the customs authorities (Article 139(1) UCC). Upon the arrival of the goods, a customs declaration is lodged, in order for such goods to be assigned a customs procedure (Article 158(1) UCC). On the basis of Article 5(12), ‘customs declaration’ means the act whereby a person indicates, in the prescribed form and manner, a wish to place the goods under a given customs procedure, with an indication, where appropriate, of any specific arrangements to be applied.

The customs declaration is, in principle, immediately accepted by the competent customs authorities, provided that the goods that are covered by the declaration have been presented to Customs (Article 172(1) UCC). In this respect, it cannot be excluded that the customs declaration contains an error or omission that was not detected upon its filing but at a later stage, once the goods have already been released. Furthermore, even if the customs declaration was accurate when it was filed, a change in the legal situation may also take place following the release of the goods. This could be the case if, for instance, binding tariff information (BTI) is changed and the customs cleared goods are to be classified under a different tariff subheading granting a lower tariff rate.

In cases like this, it is possible that an amount of customs duty and/or VAT has been overcharged, as a result of an error or omission that took place when the customs declaration was completed, or as a result of a subsequent change in the legal situation. The question arises as to whether the declarant is entitled to amend the customs declaration after the release of the goods. In this context, it should be noted that, once the goods have been released, and are no longer at the customs office where they were cleared, there are fewer opportunities to ensure that the declaration lodged matches the actual transaction.

To the extent the post-clearance amendment of the customs declaration is possible, the exact procedure to be followed by the declarant must be determined. As there are no specific rules in EU customs law, such procedure is determined by the national legislation of the member state concerned.

Another question is whether the declarant is entitled to apply for a refund of any overcharged amounts of customs duties and/or VAT, and what legal remedies are available in case of rejection of the relevant application.

## **2. Submission of customs declaration and release of the goods**

As outlined in Section 1, when goods are brought in the customs territory of the EU, such goods must in principle be presented to the competent customs office and a customs declaration is lodged in order for such goods to be placed under a customs procedure.

When a declarant (or their representative) lodges a customs declaration, they are responsible for the accuracy of the information in the declaration, the authenticity of any documents attached to it, and compliance with all the obligations relating to the entry of the goods in respect of the procedure in question. Furthermore, the declarant is one of the persons who may be made liable for the customs debt (Article 77(3) UCC; Lions, 2008, p. 331).

A customs declaration that complies with the requirements set forth in the law is in principle accepted by the customs authorities immediately, provided that the goods to which it refers have been presented to Customs (Article 172(1) UCC). The date of acceptance of the customs declaration by the customs authorities shall in principle be the date used for the application of the provisions governing the customs procedure declared (Article 172(2) UCC).

As soon as the particulars contained in the customs declaration have been verified or accepted without verification, the goods may be released by the customs authorities, provided that no prohibitions or restrictions apply (Article 194 UCC). In the event the placing the goods under a customs procedure gives rise to a customs debt, the release of goods shall be conditional upon the payment of the amount of duty corresponding to the customs debt, or the provision of a guarantee to cover that debt (Article 195(1) UCC). This is the case with the release of goods for free circulation, which in principle gives rise to the obligation for payment of customs duty (Article 201 UCC). Furthermore, the release of goods for free circulation in the EU gives rise to an obligation for payment of VAT (Article 70 VAT Directive).

## **3. Amendment of the customs declaration**

### **3.1 Amendment of the customs declaration under the rules of CCC**

Before the UCC entered into force on 1 May 2016, the rules relating to the amendment of customs declarations after such declarations had been accepted by Customs were provided by Articles 65 and 78 of the Community Customs Code (CCC). That is, the CCC distinguished between cases where amendment of the customs declaration was requested before or after the release of the goods.

On the basis of Article 65 CCC, the declarant was entitled to request the amendment of the customs declaration after it had been accepted, but before the release of the goods, to the extent the amendment did not render the declaration applicable to goods other than those that were originally covered. In order to prevent the risk of fraud, Article 65 CCC did not allow such amendment in situations where the customs authorities had informed the declarant that they intended to examine the goods, or if they had established that the particulars in question were incorrect. Furthermore, declarants could no longer request rectification once the goods were released (see Article 65(c) CCC and Advocate General Poiares Maduro's Opinion in *Overland Footwear* case, para 4).

By way of exception, Article 78 CCC, under the heading ‘Post-clearance examination of declarations’, provided that the customs authorities may, on their own initiative or at the request of the declarant, amend the customs declaration after the release of the goods. Furthermore, on the basis of Article 78(3) CCC, in cases where the revision of the declaration or post-clearance examination indicated that the provisions governing the customs procedure concerned had been applied on the basis of incorrect or incomplete information, the customs authorities could take the measures necessary to regularise the situation, taking account of the new information available to them.

The above article imposed more restrictions on the amendment of customs declarations following release of the goods than Article 65 CCC. This is because, once the goods have been released, the opportunities to ensure that the declarations lodged match the actual transactions are lessened, as the goods are no longer at the office they were cleared. This is why, although the customs authorities were obliged to correct declarations pursuant to Article 65 CCC, they had broad discretion in applying Article 78 (see Advocate General Poiares Maduro’s Opinion, *Overland Footwear* case, para 35).

### **3.1.1 Case law of CJEU on the interpretation of article 78 CCC**

The possibility to amend a customs declaration after the goods have been released has been examined by the Court of Justice of the European Union (CJEU) in several cases. In *Overland Footwear* (C-468/03), the court dealt with the following issues: (i) whether the customs authorities, when presented with an application for revision of a customs declaration after the release of imported goods are required to carry out such revision, and (ii) whether the customs authorities, if they find the declared customs value mistakenly includes a buying commission, are required to regularise the situation by reimbursing the import duties applied to that commission.

In this respect, CJEU ruled that where the declarant applies for a revision, his application must be examined by the customs authorities, at least in relation to the question of whether or not there is a cause to carry out such revision. For example, they may refuse to carry out a revision where the facts to be verified require physical verification and, following the release of the goods, the goods can no longer be presented to them. If on the other hand, the verifications to be carried out do not require physical examination, a revision is possible in principle (see paras 46–49 of the judgment). This is the case, for example, where the application for revision envisages only the examination of accounting or contractual documents.

It follows from the above that the first assessment to be made by the customs authorities is whether the revision of the customs declaration should be carried out. Such assessment is made on the basis of the factual circumstances of each case, taking into account whether or not such revision requires the physical presence of the goods (which may no longer be possible).

At the conclusion of their assessment, the customs authorities must either reject the declarant’s application by reasoned decision, or carry out the requested revision. If the application is accepted, they re-examine the declaration and assess whether the declarant’s claims are well founded in the light of the facts notified (paras 50–51). In this respect it is noted that in certain cases the exercise of this power by the customs authorities should be by way of correction of the customs declaration (see para 55, Judgment of the Court (First Chamber) of 12 July 2012 in joint cases of *Südzucker AG* (C-608/10), *WEGO Landwirtschaftliche Schlachtstellen GmbH* (C-10/11) and *Fleischkontor Moxsel GmbH* (C-23/11)).

If the revision indicates that the customs procedure in question has been applied on the basis of incorrect or incomplete information, the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them (para 52).

In this respect it is noted that, in the aforementioned case, CJEU ruled that article 78 CCC does not make a distinction between errors or omissions that are capable of correction and those that are not. The words ‘incorrect or incomplete information’ must be interpreted as covering both technical errors or

omissions and errors of interpretation of the applicable law (para 63). Thus, if the revision of the customs declaration by the customs authorities leads to the conclusion that the provisions governing the customs procedure concerned have been applied based on incorrect or incomplete information, then they must take the necessary measures to regularise the situation.

In this context, where it becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can only be the reimbursement of the overpaid amount (para 53).

In joint cases *Terex* (C-430/08) and *FG Wilson and Caterpillar* (C-431/08), the court considered whether article 78 CCC permits the revision of customs declarations in order to correct the customs procedure code used and, if so, whether the customs authorities are required to amend the declarations and to regularise the situation.

In the cases at hand, certain goods that had been imported under the inward processing procedure and re-exported following their processing in the EU, were declared as exported community goods rather than re-exported goods for which duties were suspended.

In the aforementioned joint cases, CJEU ruled that Article 78 CCC permits the amendment of the export declaration of the goods in order to correct the customs code given to them by the declarant. In this respect, the customs authorities are obliged first to determine whether (i) the rules governing the customs procedure concerned have been based on incorrect or incomplete information, and (ii) the objectives of the inward processing scheme have not been threatened (in particular that the goods subject to such customs procedure have actually been re-exported). Second, where appropriate, the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them.

In joint cases *Südzucker AG* (C-608/10), *WEGO Landwirtschaftliche Schlachtstellen GmbH* (C-10/11) and *Fleischkontor Moxsel GmbH* (C-23/11), CJEU addressed the question whether Articles 78(1) and (3) CCC permit the post-clearance revision of a customs declaration in order to change the name of the exporter featuring in the box provided for that purpose. Furthermore, the court examined whether, in such case, the customs authorities are obliged to regularise the situation and grant the requested export refund to that exporter.

The court repeated the line of reasoning followed in the aforementioned joint cases *Terex* and *FG Wilson and Caterpillar*, concluding that the aforementioned revision is possible. Furthermore, the court ruled that if the revision of an export customs declaration indicates that the objectives of the respective customs procedure are not threatened (in particular that the goods covered by such procedure have actually been exported), the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them. And this should be possible even if the declarant, by his conduct, has directly affected the ability of customs authorities to carry out controls.

### **3.2 Amendment of the customs declaration under the UCC rules**

As a preliminary remark it should be noted that the amendment of a customs declaration after it has been accepted by Customs is still possible under the rules of UCC. This latter code distinguishes between the situation where the relevant amendment takes place before or after the release of the goods, as was the case under the previous legal framework.

On the basis of paragraphs 1 and 2 of article 173 UCC, if the declarant requests an amendment to the customs declaration after a declaration has been accepted by Customs and the request concerns the goods originally covered by the declaration, the relevant request must be accepted, unless the customs authorities have informed the declarant that they intend to examine the goods, established that the customs declaration is incorrect, or released the goods.

The wording of the above provisions is similar to the wording of Article 65 CCC.

By way of exception from the above rule, Article 173 (3) UCC provides that the customs declaration may be amended, upon application by the declarant, after release of the goods, in order for the declarant to comply with their obligations relating to the placing of goods under the customs procedure concerned.

The wording of the above provision is not identical to that of Article 78 CCC. However, both provisions allow the amendment of customs declarations after the release of goods and mention that such amendment must be relevant to the application of the provisions relating to the placing of goods under the customs procedure concerned.

In this respect it is noted that, according to the *Guidance Document of Customs Code Committee on Customs Formalities on entry and import into the European Union* (European Commission, 2016, p. 38), as a general principle, the declarant may request an amendment of the customs declaration under the UCC, whenever an invalidation of the customs declaration is not required. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights. In this respect, it should be noted that the aforementioned guidance is not legally binding (European Commission, 2016, p. 2). However, such guidance could be used as a tool for the interpretation of the applicable provisions of UCC.

Where a customs declaration may be invalidated after the release of goods (and therefore the customs declaration is not to be amended), the following should be noted: on the basis of Article 148 of the Delegated Act (DA), such invalidation is possible in certain cases that are enumerated in the law and requires the fulfillment of certain conditions, as the case may be.

Cases where the invalidation of the customs declaration is possible include cases where:

- it is established that goods have been declared in error for a customs procedure under which a customs debt is incurred instead of being declared for another customs procedure
- it is established that the goods have been declared in error instead of other goods, for a customs procedure for which a customs debt on import is incurred
- goods that have been sold under a distance contract, as defined in Article 2(7) of Directive 2011/83/EU
- goods have been released for free circulation and are returned
- goods have been released for export, re-export or outward processing and have not left the customs territory of the EU (Directive 2011/83/EU amended Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council)
- goods have been declared in error for a customs procedure applicable to non-union goods, and their customs status as union goods has been proved afterwards by means of a T2L, T2LF or a customs goods manifest
- goods have been erroneously declared in more than one customs declaration.

It follows from the above, the amendment of a customs declaration after the release of the goods on the basis of the provisions of Article 173(3) UCC should be permitted in situations where the relevant customs procedure has been applied on the basis of incorrect or incomplete information, as it was the case with Article 78 CCC. Namely, the amendment of the customs declaration after the release of the goods on the basis of Article 173(3) UCC should be possible in principle where an invalidation of the customs declaration is not required. In this respect, the case law mentioned in Section 3.1.1. could be invoked and applied by analogy in situations where the amendment of the customs declaration is possible under the current rules of UCC.

Indicatively, the amendment of a customs declaration on the basis of article 173(3) UCC may take place in the following cases (European Commission, 2016):

1. Binding tariff information is invalidated or changed and goods are to be classified as a result under a tariff subheading granting a lower tariff rate.
2. Pursuant to the change in binding tariff information the origin of goods is established to be in a country whose originating goods are subject to a more beneficial customs duty regime.
3. A certificate of origin has been annulled and the goods initially declared have to be reclassified and the duties paid adjusted.

Another situation where the amendment of the customs declaration after the release of the goods should be possible is where the name of the importer or the exporter has been incorrectly declared, to the extent there is sufficient evidence in relation to the correct identity of the declarant and the objectives of the respective customs procedure are not threatened.

### **3.2.1 Time limit for the amendment of customs declarations after the release of the goods**

On the basis of Article 173(3) UCC, the amendment of a customs declaration after the release of goods is subject to time restrictions. More specifically, the relevant application of the declarant may be filed within three years from the date of acceptance of the customs declaration (i.e. the date used for the application of the provisions governing the customs procedure declared and for all other import or export formalities), which is the date used for the application of the provisions governing the customs procedure declared (Article 172(2) UCC).

Before the UCC entered in force, the three-year time limit was not directly provided by Article 78 CCC. However, article 236(2) CCC provided that the repayment of import or export duties could only be requested within three years from the date on which the amount of those duties was communicated to the debtor. In this respect, before the UCC there was also a time limit for the declarant to apply for the amendment of the customs declaration. Otherwise, the repayment of customs duties as a result of the requested amendment in such declaration would not be possible.

### **3.2.2 Procedure for the post clearance amendment of the customs declaration**

On the basis of Article 158 UCC, the placement of goods under a customs procedure, other than free zones, requires the filing of a customs declaration. Such declaration must be filed using electronic data processing means (Article 6(1) UCC).

However, EU customs law does not provide for a specific procedure that could be followed by the declarants to amend a customs declaration, when this is possible according to the law, leaving this at the discretion of the member states. Depending on the applicable national rules of the member state concerned, it could be possible for a declarant to amend a customs declaration themselves by accessing the relevant electronic platform/system that is used for the filing of customs declarations and amend it, where the relevant conditions are fulfilled. In member states where the above option is not available, it could be possible for the declarant to file an application for such amendment in writing and, following the approval of such application, the customs authorities could proceed with the respective amendment in their relevant systems by themselves.

In case none of the above options is available and the declarant would be entitled to a repayment of customs duties (and possibly also import VAT) due to a mistake that should give rise to the amendment of the customs declaration, the declarant could explore the possibility of proceeding directly with the submission of an application for the refund of the overpaid amount of customs duties (see Section 4, below). However, this option should not be exercised without consulting the competent authorities and trying to exhaust all possible means for the amendment of the customs declaration according to the applicable rules and administrative guidelines of the national authorities. This is because, in certain

cases, the amendment of the customs declaration may be a prerequisite for the refund of the requested amount of customs duties and taxes. It should be noted that, in joint cases *Südzucker AG (C-608/10)*, *WEGO Landwirtschaftliche Schlachtstellen GmbH (C-10/11)* and *Fleischkontor Moksel GmbH (C-23/11)*, the court dealt with the question of whether the customs authorities could grant an export refund to a holder of an export licence whose details were not entered in box 2 of the customs declaration. The court ruled that the granting of an export refund was not possible without the prior amendment of the customs declaration (para 56).

## **4. Repayment of customs duties and VAT following the amendment of the customs declaration**

This section focuses on the repayment of customs duties and VAT that have been overcharged following the amendment of a customs declaration that has been requested by the declarant. Other cases where the repayment of duties and taxes is possible are not further examined.

### **4.1 Repayment of customs duties**

As explained in Section 3 above, the customs declaration can be amended under the provisions of UCC, even if the goods that were the object of such customs declaration have been released. Considering that the post-clearance amendment of customs declarations was also provided by 78 CCC, it could be supported that the case law of CJEU in relation to the interpretation of this article should still apply by analogy (see Section 3.1.1 above for further analysis).

In such situations, to the extent the amount of customs duties paid by the declarant exceeds the amount legally owed at the time of their payment, the declarant should be entitled to request the repayment of the amount of customs duties that has been paid in excess. This is also evident from the guidance document of the Customs Code Committee on customs formalities on entry and import into the EU, which states:

The amendment of the customs declaration could lead to a repayment or remission of customs duties. In these cases, the conditions applicable for repayment and remission of customs duties should be examined on the basis of the amended customs declaration. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights. (European Commission, 2016, p. 38)

To the extent that the conditions for the amendment of the customs declaration are fulfilled, it could be supported that the case law of CJEU in relation to the interpretation of Article 78 CCC, prior to the entry in force of the UCC, should be applied by analogy with respect to the right of the declarant to request the repayment of customs duties that have been paid in excess.

More specifically, in *Overland Footwear (C-468/03)*, CJEU ruled that

Where it finally becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can consist only in the reimbursement of the overpaid amount. (para 53)

The same conclusion was reached by CJEU in joint cases *Terex (C-430/08)* and *FG Wilson and Caterpillar (C-431/08)*, where the court examined the possibility of post-clearance amendment of customs declarations in order to correct the customs procedure code used.

Furthermore, in joint cases *Südzucker AG (C-608/10)*, *WEGO Landwirtschaftliche Schlachtstellen GmbH (C-10/11)* and *Fleischkontor Moksel GmbH (C-23/11)*, the CJEU concluded that the post-clearance amendment of a customs declaration with respect to the correction of the name of the exporter has a binding effect for the customs authorities that are responsible for paying the export refund. More specifically, the court ruled that,

In the light of all the foregoing considerations, the answer to the third question in case C-23/11 is that Article 5(7) of Regulation No 800/1999 and the custom legislation of the European Union must be interpreted as meaning that the customs office responsible for paying the export refund is not entitled, in a case such as the present one, and if it is not bound under national law by the revision made by the customs office of export, to take at face value the reference in box 2 of the export declaration and to refuse an application for an export refund on the ground that the party making that application is not the exporter of the goods covered by that application. By contrast, if the competent customs office grants the application for amendment and validly rectifies the exporter's name, the customs office responsible for paying the export refund is bound by that decision. (para 76)

## **4.2 Formalities and conditions for repayment of customs duties**

### **4.2.1 Conditions and restrictions for repayment**

In the light of the analysis made in the above sections, it can be validly supported that the repayment of overcharged amounts of customs duties after a post-clearance amendment of the customs declaration is possible under the rules of the UCC (Articles 116(1) and 117). However, the relevant repayment is subject to the following restrictions and conditions:

- (i) the situation which led to the notification of the customs debt must not have resulted from the deception of the declarant (Article 116(5));
- (ii) the goods must be presented to the customs authorities. In cases where the goods cannot be presented, repayment is possible only where there is evidence showing that the goods in question are the goods in respect of which the repayment has been requested (Article 173 IA);
- (iii) the goods for which the repayment is requested should normally not be transferred to a location other than that specified in the relevant application, unless the applicant notifies the competent customs authorities in advance (Article 174 IA); and
- (iv) where the repayment of import or export duties is subject to the prior completion of certain customs formalities, such formalities should be completed within the time limit set to this end by the competent customs authority (Articles 176 and 177 IA).

#### **4.2.1.1 Procedural formalities of the relevant application**

From a procedural perspective, the application for repayment of customs duties must be filed by the person who has paid or was liable to pay the amount of import or export duty that is being requested, or by a person who has succeeded them in their rights and obligations (Article 172 IA).

Furthermore, it may be required for the applicant to be registered with the customs authorities responsible for the place where they are established, or in case the applicant is not established within the EU, with the customs authorities responsible for the place where they lodged the relevant application (Article 11(1) (a) DA and Article 9 UCC). In this respect it is noted that, where required under the procedure which the application concerns, the applicant must be established in the EU customs territory (Article 11(1)(b) DA).

The relevant application must be submitted to the competent customs authority of the member state where the customs debt was notified. The application may be filed either electronically or by other means, depending on the national procedures of the member state concerned (Article 92 DA).



Finally, the application for repayment must not concern a decision with the same purpose that was addressed to the same applicant which, during the one-year period preceding the application, was annulled or revoked on the grounds that the applicant failed to fulfill an obligation imposed under that decision (Article 11(1)(d) DA).

In certain cases that are specifically enumerated in the law, the one-year period shall be three years. Indicatively, this is the case where the following conditions are fulfilled:

- (i) the previous decision was taken on the basis of incorrect or incomplete information;
- (ii) the holder of the decision knew or should have known that the information was incorrect or incomplete; and
- (iii) if the information had been correct and complete, the decision would have been different (Article 11(2) DA and article 27(1) UCC).

#### **4.2.1.2 Limitation of repayment of overcharged amounts of customs duties**

As noted in Section 3.2.1 above, the application for amendment of a customs declaration after the release of the goods may be filed within three years from the date of acceptance. Note that, on the basis of article 172(2) UCC, the date of acceptance of the customs declaration is the date used for the application of the provisions governing the customs procedure declared and for all other import or export formalities. To the extent the customs declaration is amended and an amount of customs duties has been overcharged, the declarant may, under conditions, apply for repayment of the excess amount. Such application, however, must be filed within three years from the notification of the customs debt (Article 121 UCC).

In this respect it is noted that, in principle, the notification of the customs debt takes place at the time of release of the goods by the customs authorities. This is the case where the amount of import or export duty payable is equal to the amount entered in the customs declaration (Article 102(2) UCC). When this is not the case, the customs debt is notified by the competent customs authorities when they are in a position to determine the amount of import or export duty payable and take a decision thereon. It should also be noted that the time of notification of the customs debt may be deferred in certain cases, where such notification would prejudice a criminal investigation. Finally, provided that the payment has been guaranteed, the customs debt corresponding to the total amount of import or export duty relating to all the goods released to one and the same person during a period fixed by the customs authorities (not exceeding 31 days) may be notified at the end of that period (Articles 102(3) and (4) UCC).

However, the three-year limitation period for the submission of an application for the repayment of overcharged customs duties may be extended. This is the case where the applicant provides evidence that they were prevented from submitting an application due to unforeseeable circumstances or force majeure (Article 121(1) UCC). The concepts of 'unforeseeable circumstances' and 'force majeure' are not further defined in the UCC, thus it is a matter that needs to be evaluated on the basis of the particular circumstances of each case. Furthermore, the national provisions and case law of the member state where the application is filed should also be taken into consideration.

In this respect it is noted that, on the basis of the case of CJEU judgment in *Acciaierie e Ferriere Busseni SpA (C-284/82)*, the concept of 'force majeure' covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable if all due care is taken (see para 11 of the judgment).

Furthermore, in cases *Kingdom of Belgium v Commission (C-242/07P)* and *Bayer v Commission (C-195/91P)*, CJEU made clear that the concepts of force majeure and unforeseeable circumstances contain an objective element relating to abnormal circumstances unconnected with the trader in question, and a subjective element involving the obligation, on their part, to guard against the consequences of

the abnormal event by taking appropriate steps without making unreasonable sacrifices. Specifically, the trader must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time limits.

Indicatively, an example of exceptional or unforeseeable circumstances that was accepted by HM Revenue & Customs in the UK is the destruction of the applicant's records by a flood (for guidance on refunds and waivers in the UK see HM Revenue & Customs, 2016).

### **4.3 Repayment of import VAT**

In the event that a customs declaration for the release of goods for free circulation has been amended and, as a result of such amendment it becomes evident that excessive customs duties have been paid, it will often be the case that VAT has also been overcharged.

In this respect, it should be noted that the imposition of VAT upon importation of goods falls within the scope of the VAT Directive (Article 2(1)(d)), which also provides that taxable persons (i.e. persons whose activities are subject to VAT) are entitled to deduct import VAT from the VAT they are liable to pay (Article 168(e)). However, the VAT Directive does not provide any detailed rules in relation to the procedure to be followed for the repayment of overcharged amounts of import VAT.

In cases where the repayment of an overcharged amount of import VAT is requested as a result of a change in the customs value of the goods, it could be supported that the respective rules of EU customs legislation should apply. This is because, on the basis of Article 85 of the VAT Directive, the taxable value in case of importation of goods shall be the customs value, as determined according to customs legislation.

On the other hand, where the repayment of import VAT is requested for other reasons, the determination of the procedure for such repayment should be subject to the national rules of the competent member state. This is because the VAT Directive does not contain more specific rules in this connection. This could be the case, for instance, where the customs declaration is amended due to a change in binding tariff information concerning the respective goods and a lower tariff rate is applicable.

Indicatively, in Slovenia the procedure for repayment of import VAT is the same as the procedure followed for the repayment of import duties (Ministry of Finance, Republic of Slovenia, 2015). On the other hand, in the UK import VAT that has been overpaid as a result of amendment of the customs declaration after the goods have been released can be reclaimed as input tax. More specifically, the relevant claim for the excess amount of tax must be made on the VAT return of the accounting period of reference (Sections 4.2 and 2.3, VAT Notice 702). Finally, according to the relevant guidelines provided by the Customs Procedure Branch of the Corporate Affairs & Customs Division of Ireland (Section 2.5), the following procedure applies to the repayment of import VAT: the request for amendment of a customs declaration is processed automatically through a special electronic account of the declarant and is reviewed by the competent authorities. To the extent such authorities accept the requested amendment, any overpaid amounts of customs duties and VAT are credited to the declarant's account.

#### **4.3.1 Limitation of repayment of import VAT**

As mentioned in Section 4.2 above, the repayment of VAT that has been overcharged following the amendment of a customs declaration is not directly regulated by the rules of UCC, but one has to refer to the VAT Directive. It is noted that the VAT Directive does not contain any rules in relation to the potential limitation of repayment of import VAT that has been overcharged. Accordingly, to the extent that the UCC rules cannot be applied, such as where the customs declaration is amended with respect to the customs value of the goods, one has to refer to the respective national rules of each EU member state.

Indicatively, in Ireland a claim for a refund must be made within four years from the end of the taxable period to which it relates (Customs Procedure Branch of the Corporate Affairs & Customs Division of Ireland, Section 2.5).

#### **4.4 Payment of interest by the customs authorities concerned**

The repayment of the customs debt shall not in principle give rise to the payment of interest by the customs authorities concerned. However, where a decision granting repayment is not implemented within three months of the date on which such decision was taken, interest becomes payable, unless the failure to meet the deadline was outside the control of the customs authorities. In such cases, the interest shall be paid from the date of expiry of the three-month period until the date of repayment (Article 116(6) UCC).

The CJEU examined the issue of calculation of interest on the repayment of customs duties in the Wortman KG Internationale Schuhproduktionen case (C-365/15). The dispute in the main proceedings was relevant to the partial annulment of a regulation imposing anti-dumping duties, as a result of which an application for repayment of anti-dumping duties was filed, along with an application for the payment of interest on the sums repaid, which was calculated from the time of payment of the anti-dumping duties. The court ruled that, where taxes or duties have been levied by a member state pursuant to an EU regulation that has been declared invalid or annulled by the EU judicature, the interested parties who have paid the taxes or duties in question have the right, in principle, to obtain not only the repayment of amounts levied but also interest on those amounts (para 37). The Court went even further, concluding that:

In the light of all the foregoing considerations, the answer to the question referred is that where import duties, including anti-dumping duties, are reimbursed on the ground that they have been levied in breach of EU law, this being a matter for the referring court to determine, there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties reimbursed. (para 39)

This judgment of CJEU was issued in the context of the provisions of Article 241 CCC, which is no longer in force. However, Article 116 (6) UCC, which is currently applicable, has a similar wording, although it does not provide for the payment of interest in cases where national provisions so stipulate. Given, however, that the judgment of CJEU did not focus on the national provisions of the member state concerned in order to determine whether interest should be paid, the conclusions of such judgment could still be invoked for the implementation of the currently applicable rules of UCC.

It should be noted that the rate of interest for member states whose currency is the Euro is equal to the interest rate as published in the *Official Journal of the European Union*, C series, which the European Central Bank applied to its main refinancing operations on the first day of the month in which the due date fell, increased by one percentage point.

For member states whose currency is not the Euro, the rate of the interest shall be equal to the rate applied on the first day of the month in question by the National Central Bank for its main refinancing operations, increased by one percentage point. Finally, for a member state for which the National Central Bank rate is not available, the rate of the interest shall be the most equivalent rate applied on the first day of the month in question on the member state's money market, increased by one percentage point (see Articles 116(6) and 112(2) UCC).

## 4.5 Decision of customs authorities on the repayment of overcharged amounts

Where an application is submitted for the repayment of overcharged amounts of customs duties and, where applicable, VAT, the competent authorities must verify without delay whether the conditions for its acceptance are fulfilled. The relevant verification must be made no later than 30 days from the receipt of the relevant application. If the customs authorities establish that the application contains all the information required to make a decision, they shall communicate its acceptance to the applicant within the 30-day period (Article 22(2) UCC).

If the application is accepted, the competent customs authorities shall notify their decision in relation to the repayment of the requested amounts within 120 days from the date of acceptance of the application. Where the customs authorities are unable to comply with the above time limit for taking a decision, they shall inform the applicant before the expiry of that time limit, stating the reasons and indicating a further period of time that they consider necessary in order to take a decision, which in principle shall not exceed 30 days (Article 22(3) UCC).

Where, after the acceptance of the application, the competent customs authorities consider it necessary to request additional information from the applicant in order to reach a decision, they shall set a time limit, which will not exceed 30 days, for the applicant to provide such information. Thus, the 120-day deadline shall be extended by that period and the applicant shall be informed accordingly (Article 13(1) DA).

The above deadline for the notification of the customs authorities' decision to the applicant shall also be extended by 30 days in cases where the applicant is entitled to a prior hearing (Article 13(2) DA). For more information on the right of the applicant to be heard, please refer to Section 5.1 below.

The 120-day deadline may also be extended where the competent customs authority needs to consult with another customs authority, as well as where there are serious grounds for suspecting an infringement of customs legislation and the customs authorities conduct relevant investigations. In such cases, the applicant must be informed of the extension of the time limit for taking a decision (Articles 13 (3) and (4) DA).

Finally, an extension to the 120-day time limit may also be requested by the applicant, in case they need to carry out adjustments in order to ensure the fulfillment of conditions and criteria relating to the respective application. Those adjustments and the further time required shall be communicated to the competent customs authorities, which will decide on the extension (Article 22(3) UCC).

The decision of the customs authorities shall in principle take effect from the date on which the applicant receives it, or is deemed to have received it, and it shall be valid without limitation of time (Articles 22(4) and (5) UCC).

Decisions shall take effect on a different date to that specified above in the following cases:

- a. where the decision will favourably affect the applicant and the applicant has requested a different date of effect. In such case the decision will take effect from the requested date, provided that it is subsequent to the date on which the applicant receives the decision or is deemed to have received it.
- b. where a previous decision has been issued with a limitation of time and the sole aim of the current decision is to extend its validity. In such case the decision shall take effect from the day after the expiry of the validity of the previous decision.

- c. where the effect of the decision is conditional on the completion of certain formalities by the applicant. In such case that decision shall take effect from the day on which the applicant receives, or is deemed to have received, the notification from the competent customs authority stating that the formalities have been satisfactorily completed (Article 14 DA).

## **5. Right to be heard and legal remedies in case of rejection of the application for repayment of customs duties and VAT**

### **5.1 Right to be heard**

Before the customs authorities reject an application for repayment of overcharged amounts of customs duties and, where applicable, VAT, they shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express their point of view within a period of (in principle) 30 days. This period commences from the date on which they received that communication (or are deemed to have received it) (Articles 22(6) UCC and 8(1) DA). The relevant communication shall consist of the following:

- (i) reference to the documents and information on which the customs authorities intend to base their decision;
- (ii) indication of the period within which the applicant shall express their point of view from the date on which they receive that communication or are deemed to have received it; and
- (iii) reference to the right of the applicant to have access to the documents and information referred to in point (i) above (Article 8 IA).

It should be noted that, in certain cases that are specifically enumerated in the law, the customs authorities may require the person concerned to express their point of view within 24 hours. Indicatively, this is the case where the decision of the customs authorities pertains to the results of control for goods for which no summary declaration or re-export declaration has been lodged (Article 8(2) DA). Following the expiry of the above 30-day or 24-hour period, as the case may be, the applicant shall be notified of the respective decision (Articles 22(6) UCC and 8 DA).

The aforementioned right of the applicant to be heard before a rejecting decision is taken by the competent customs authorities is not granted in specific cases that are enumerated in the law (Article 22(6) UCC). Indicatively, this may happen where the nature or the level of a threat to the security and safety of the EU and its residents, to human, animal or plant health, to the environment or to consumers so requires (Article 22(6) UCC). Furthermore, the right to be heard may not be exercised in cases where this would prejudice investigations initiated for the purposes of combating fraud (Article 22(6)(e) UCC).

Finally, to the extent the applicant exercises their right to be heard, or the respective period that they had at their disposal to this end expires without expressing their views, the customs authorities may issue a decision rejecting their application for repayment of overcharged amounts of duties and, where applicable, VAT. The relevant decision, however, must state the grounds on which it is based. Furthermore, the decision must refer to the right of appeal (Article 22(7) UCC).

## **5.2 Legal remedies to challenge the rejection of the application for repayment of overcharged customs duties and VAT**

### **5.2.1 Legal remedies to challenge the rejection of an application for repayment of overcharged customs duties**

In the event that an application for repayment of overcharged amounts of customs duties is rejected by the competent authorities, the applicant has the right to appeal against the relevant decision. Furthermore, an appeal may be filed in cases where the applicant did not obtain a decision in relation to their application by the competent customs authorities within 120 days from the acceptance of their application (Article 44(1) UCC).

The right of appeal may be exercised in at least two steps:

- (i) initially before the customs authorities or a judicial authority or other body designated for that purpose by the member states
- (ii) subsequently, before a higher independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the member state concerned (Article 44(2) UCC).

The relevant appeal must be addressed to the national court of the member state where the decision that is being challenged was taken or was applied for (Article 44(3) UCC). In this respect it is noted that the competent customs authorities and/or the competent court to which the appeal shall be addressed shall be determined by the national rules of the member state concerned. EU customs law does not provide any further guidance in this respect. However, according to the relevant provisions of the UCC, member states must ensure that the appeals procedure provided by their national legislation enables the prompt confirmation or correction of decisions taken by the customs authorities (Article 44(4) UCC).

### **5.2.2 Legal remedies to challenge the rejection of an application for repayment of overcharged VAT**

As explained in Section 4.2 above, the provisions of UCC in relation to the repayment of overcharged amounts of customs duties (Article 116 UCC) do not always apply to VAT, which is regulated by the VAT Directive. Furthermore, the VAT Directive does not contain provisions in relation to the right of the filing of an appeal in order to challenge the rejection of an application for repayment of overcharged VAT. In this respect, in cases where the procedure for the repayment of import VAT is not the same as the procedure to be followed for customs duties, one has to refer to the national provisions of the member state concerned. To the extent, according to such national provisions, that the collection of import VAT falls within the competence of customs authorities and VAT is collected by such authorities together with customs duties, then the legal remedies that are available in order to challenge the rejection of an application for repayment of overcharged customs duties could also be relevant for VAT purposes.

## 6. Conclusions

Among the issues examined in this paper is whether it is possible to amend a customs declaration once the goods have been released. Article 173 UCC, which has been applicable since 1 May 2016, makes it clear that this is possible, in order for the declarant to comply with their obligations arising from the customs procedure concerned.

In this respect it is noted that the case law of CJEU, which sheds more light on the above issues, has been established on the basis of the provisions of Article 78 CCC, which is no longer in force. According to such case law, when the revision of a customs declaration is requested by the declarant, the competent authorities must first assess whether such revision is possible. To this end, they must take into account the possibility of reviewing the statements contained in the declaration to be revised. If the revision is possible, the customs authorities must either reject the declarant's application or carry out the revision applied for. In certain cases, it is necessary that the exercise of the customs authorities' power should be by way of correction of the customs declaration.

Although the wording of Articles 78 CCC and 173 UCC is not identical, both articles mention that the amendment of the customs declaration after the release of the goods must be relevant to the application of the provisions relating to the placement of the goods under the customs procedure concerned. According to the guidance document of the Customs Code Committee on customs formalities on entry and import into the European Union (European Commission, 2016), the declarant may request an amendment to the customs declaration under the UCC, whenever an invalidation of the customs declaration is not required. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights.

In this respect, it could be argued that the amendment of the customs declaration after the release of the goods should still be possible under the conditions that were applicable under the rules of Article 78 CCC, unless the invalidation of such customs declaration is possible. Accordingly, it could be supported that the case law of CJEU is still relevant under the rules of UCC.

With regard to the procedure to be followed for the post clearance amendment of customs declarations, EU customs law does not provide any specific rules in this connection. Accordingly, the relevant procedure should be determined on the basis of the national provisions of the member state concerned. In the absence of such provisions in domestic law, an alternative that could be examined is to directly apply for the repayment of overcharged amounts of customs duties and/or VAT, as the case may be.

Another issue that is examined in this paper is the repayment of overcharged amounts of customs duties, following the amendment of the customs declaration. It is noted that there is established case law of CJEU indicating that such repayment is possible. This is the case where (i) the customs procedure in question has been applied on the basis of incorrect or incomplete information, and (ii) the objectives of the respective customs procedure have not been threatened. This case law is relevant to the amendment of customs declarations under the rules of Article 78 CCC, which is no longer in force. However, in the light of the above analysis, it can be supported that such case law is still applicable, subject to the conditions and restrictions provided by UCC (see Section 4.1.1.1 above).

The above may not be relevant for the repayment of overcharged amounts of import VAT in all cases, since EU customs law is not always applicable in the field of import VAT as this falls within the scope of the VAT Directive (Article 2(11)(d)), which does not contain any specific provisions in relation to the repayment of VAT that has been overcharged following the post clearance amendment of a customs declaration. Accordingly, unless EU customs law is applicable—such as when the amendment of the customs declaration is requested due to a change in the customs value of the imported goods, where article 85 of the VAT Directive could be invoked—one may have to refer to the national rules of the member state concerned.

This paper also examines the legal rights of the declarant regarding the competent authorities during the examination of their application for repayment of overcharged amounts of customs duties and, where applicable, VAT. Namely, the declarant has a right to be heard before the customs authorities issue a rejecting decision in relation to the declarant's application for repayment of overcharged amounts within a specific time frame (in principle 30 days). Once the applicant has expressed their views and, to the extent the customs authorities are not convinced, they may proceed with the rejection of the application, which may, however, be challenged on appeal.

It is noted that EU customs law provides that a right of appeal may be exercised in at least two steps: initially before a customs authority, a judicial authority or other body designated to this end, and then before a higher independent body. Which authorities are determined to be competent to receive and decide on such appeals are decided by the national rules of the member state concerned. While the above rules of EU customs law are not always relevant to applications for repayment of overcharged VAT, the VAT Directive does not provide any relevant rules and, therefore, in the cases where EU customs law is not applicable, one has to refer to the national rules of the member state concerned.

### List of abbreviations

**EU:** European Union.

**UCC:** Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

**DA:** Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 of the European Parliament and of the Council regarding detailed rules concerning certain provisions of the Union Customs Code.

**IA:** 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.

**CCC:** Council Regulation (ECC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code.

**VAT Directive:** Council Directive 2006/112/EC of 28 November 2006 on the common system of Value Added Tax.

**Member states:** The countries that form the customs territory of the European Union on the basis of Article 4 UCC.



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5. Council Directive 2006/112/EC of 28 November 2006 on the common system of Value Added Tax.
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