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The World Customs Journal (WCJ) is a free, independent, scholarly peer-reviewed journal that focuses on all aspects of Customs and border management. It provides a forum for customs professionals, academics, customs practitioners, industry researchers and research students to contribute and draw upon research, commentary, practical insights and experiences, to enhance its readers' understanding of all aspects of the roles and responsibilities of Customs and other border management agencies.

The WCJ publishes rigorous, original, high quality scholarship and provides a common platform for established academics and customs professionals as well as for those entering this interdisciplinary field. As such, the Journal showcases diverse perspectives and analyses from a broad range of contributors from various backgrounds. The WCJ encourages submission of papers from all social sciences, humanities and other disciplines that relate to border management such as international trade, transport, logistics, law, policy, economics, management and human resource management, public administration, taxation, international relations, information and communications technologies, and data analytics.

The aim of the Journal is to have impact not only in an academic sense, but also in the broader sense of advancing the knowledge on all aspects of Customs and providing intellectual input to strategic decision making through critical analysis and constructive debate. Accordingly, the Journal publishes both theoretical and empirical contributions from both academics and customs practitioners covering the development of theories and concepts, methodological perspectives, empirical analysis and policy debate. The WCJ has an international scope and welcomes the submissions of papers from all corners of the world.

Launched in 2007, the Journal is published twice a year (March and September) by the Centre for Customs and Excise Studies (CCES), Charles Sturt University, Australia, and the Institute of Customs and International Trade Law (ICTL), University of Münster, Germany in association with the International Network of Customs Universities (INCU) and the World Customs Organization (WCO). The funding for the WCJ is independent of business and government to ensure academic integrity.

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INCU (www.incu.org) is an international not-for-profit association that aims to raise the academic standing of the customs profession through the development and promotion of educational programs, providing academic and applied research, and intellectual input to strategic decision-making.

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EDITORIAL

Editorial

David Widdowson, PhD[1][a]

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Each year on International Customs Day (26 January) the World Customs Organization (WCO) adopts its annual theme for implementation by member administrations. This year's theme, *Nurturing the next generation by promoting a culture of knowledge-sharing and professional pride in Customs*, encourages administrations to support their new recruits by sharing knowledge and instilling a sense of pride in their chosen profession.

This theme is further developed in the latest edition of the WCO News,[2] which includes a special dossier on the management of knowledge. In his introduction to the dossier, the WCO Secretary General, Dr Kunio Mikuriya, affirms the importance of providing members of the customs profession with a broad range of learning opportunities that are not limited to training programs, but include mentoring, work experience, forums and other initiatives.

The dossier includes an article I prepared on behalf of the International Network of Customs Universities (INCU), which explores evolving learning models in universities. It discusses the ways in which educational offerings are being reimagined and packaged to satisfy the flexible needs and expectations of administrations and industry to which the Secretary General refers. Learning models such as lectures delivered in classrooms and lecture theatres through scheduled classes are becoming outdated, and learning is beginning to transcend its traditional boundaries – primarily through the use of technology.

A key message is the need to maintain the currency, relevance and utility of WCO-accredited programs, which includes the need to continually align such programs with the PICARD[3] standards and to ensure that course developers have a sound knowledge of the contemporary customs environment, with a practical understanding of how the theory translates to operational reality.

In closing, I would like to congratulate the Solomon Islands, which on 26 January 2023 became the 185th member of the WCO. The Solomon Islands Customs and Excise Division (SICED) has for many years been providing its officers with a range of learning opportunities, including access to the

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2 WCO News No. 100, Issue 1/2023

3 Partnership in Customs Academic Research and Development

comprehensive development programs offered by the Oceania Customs Organisation (OCO), and their WCO membership will now provide access to an even broader range of opportunities.

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Section 1

Academic Contributions

D'Angelo, G., Tarini, F., de Wit, W., Schippers, M., Ibáñez Marsilla, S., Milla Ibañez, J. J., Wolffgang, H.-M., & Wemmer, B. (2023). Interplay between customs valuation and transfer pricing in the European Union: general observations and administrative practices in four countries after the *Hamamatsu Case*. *World Customs Journal, 17*(1). https://doi.org/10.55596/001c.73300

ACADEMIC CONTRIBUTIONS

Interplay Between Customs Valuation and Transfer Pricing in the European Union: General Observations and Administrative Practices in Four Countries After the *Hamamatsu Case*

Giangiacomo D'Angelo[1][a], Federico Tarini, PhD[1][b], Walter de Wit[2][c], Martijn Schippers, PhD[2][d], Santiago Ibáñez Marsilla, PhD[3][e], Jorge Juan Milla Ibañez, PhD[3][f], Hans-Michael Wolffgang, PhD[4][g], Benedikt Wemmer[4][h]

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Although related party transactions account for most of the international trade transactions, they present a unique set of challenges when it comes to accurately representing the actual value of the transaction. Given the different objectives pursued, transfer pricing and customs law approach the issue in quite different ways, which often leads to discrepancies, complications and inconsistencies to be addressed by multinational businesses. The international business community and international organisations aim for an alignment of the two approaches, but so far, no concrete legal solutions have been reached. In the market of the European Union (EU), the European Court of Justice (ECJ) addressed the issue of the potential interplay between the two legal systems in the *Hamamatsu Photonics Deutschland GmbH Case (Hamamatsu Case)*. However, the position held by the ECJ is not clear, nor are the consequences arising from this case law. The result is that a stronger alignment between the two depends to a large extent on the administrative practices in the local EU countries. This article aims at providing a comprehensive examination of the current strategy used by several member states (Spain, Italy, the Netherlands and Germany) both before and after the *Hamamatsu Case*, and explores local practices used to reconcile transfer prices and customs values. Furthermore, in the light of the current fragmented administrative national practices, we present some proposals to amend the Union Customs Code (UCC) that may improve the clarity and fluidity of the interrelationship between transfer pricing and customs valuation in the case of related party transactions.

1. Background

Transactions between 'related parties' (a term often used to indicate a parent company and its subsidiaries or companies under common control) today make up most international trade transactions (Organisation for Economic Co-operation and Development, World Trade Organization & United Nations Conference on Trade and Development, 2013).[1] Given that the parties involved often pursue the same objectives due to their affiliation to the same multinational group, the related parties may want to influence the price paid for the goods exchanged, both upwards and downwards.

Both international (i.e. the OECD) and national law laid down specific transfer pricing (TP) rules to ensure that the price paid for the goods exchanged between related parties is in line with the price paid for the same goods in a transaction carried out between independent parties. Nonetheless, the application of different sets of rules, which in most cases have different objectives, could give rise to problems regarding their relationship and the consequences resulting from them (Mayr & Santacroce, 2019; Ping, 2007, p. 117). This applies for TP methods, which follow the *OECD transfer pricing guidelines for multinational enterprises and tax administrations* (OECD, 2022), and the customs valuation methods applied between related parties, which are regulated by the EU in the Union Customs Code [Regulation (EU) No 952/2013 or UCC].

This paper aims to examine the link between TP methods and customs valuation rules and, most importantly, how the problems arising from their compatibility are addressed both at an international, EU and national level,

1 Prepared for the G-20 Leaders' Summit in Saint Petersburg (Russian Federation) September 2013, which estimated that up to 60 per cent of global trade takes place between associated enterprises.

especially considering the *Hamamatsu Photonics Deutschland GmbH Case (Hamamatsu Case)* of the ECJ (ECJ, *Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984*, 2017).

In this paper, we give an overview of the current situation, starting from the EU perspective, then focus on the national practices of specific EU member states. The paper is organised as follows: in the first section we set the scene by explaining the legal background of determining transfer prices and customs values from an EU law perspective. In the second section, we offer a theoretical overview of the issues, highlighting any points of convergence and divergence between the valuation of transactions between related parties for customs purposes and the valuation of the same transactions for corporate income tax purposes. The third section examines the position assumed by two international organisations while the fourth will summarise the relevant arguments of the ECJ in the *Hamamatsu Case* and the various interpretations that can be given after having read the case. In the fifth section, we present how some EU member states (i.e. Germany, the Netherlands, Spain and Italy) treat TP adjustments for settling the final customs values, pre- and post- the *Hamamatsu Case*. In section six, we share some general observations about the national practices. In section seven, we suggest some proposals for a smooth administrative reconciliation of transfer price adjustment for customs valuation purposes. Finally, in section eight, we draw some conclusions and highlight some possible solutions.

This paper contains some of the results of a legal research program, European Common Customs Evaluation (ECCE), sponsored by the EU Commission–Hercule III Programme.[2]

1.1. Transfer pricing

Transfer pricing refers to the terms and conditions surrounding transactions within a multinational company that could be used to shift income from one country to another (often a country with low-taxation, taxation that is opaque and/or with Double Taxation Conventions that allow taxation avoidance) by applying higher or lower prices in intra-group transactions compared to prices that would be set between independent companies. With this technique, the group could increase the costs of importing goods and reduce its taxable profit.

Due to the potential distortion of taxable income arising from the application of TP, tax authorities can adjust intracompany prices that differ from the price that would be applied for the same transaction between unrelated enterprises dealing at arm's-length (i.e. the so-called arm's-length principle). To do so, the *OECD Transfer Pricing Guidelines* (OECD, 2022) set out five methods that could be used to assess whether the price paid follows the arm's-length principle. At the core of some methods, especially transactional profit methods, there is an adjustment mechanism that allows the taxpayer to

2 An extended version of the paper will also be available in open access at https://site.unibo.it/ecce

adjust (upward or downward) the declared transaction values. In other words, TP allows follow-up adjustments to prevent the transfer price from over- and underestimating the taxable profit for direct tax purposes.

1.2. EU customs law

For customs valuation purposes, the main rule applied by the UCC, in line with the Agreement on the Implementation of Article VII of the GATT of 1994 (WTO, 1994), is the price paid or payable for the goods when they are sold for export. According to Art. 70 of the UCC, the transaction value is the primary valuation method to determine the customs value of imported goods, which is the price paid or payable by the buyer of the imported goods.

The fact that the buyer and seller are related is not enough to prohibit the declarant from using the transfer value as the customs value. However, if the circumstances surrounding the sales raise concerns about the potential impact of the parties' relationship on the price paid or payable, customs authorities may request additional information (Lyons, 2018, p. 336).[3] If this is the case, Art. 134 of the UCC Implementing Regulation (Regulation (EU) 2015/2447)[4] states that the declarant must be given the opportunity to show that the parties' relationship has had no impact on the transaction value by providing additional detailed information ('circumstances of sales test'). In any case, the declarant succeeds in proving so if the declared value closely approximates one of the test values, which are like the secondary methods described in Art. 74 UCC ('test values'). If the declarant fails to fulfil this burden of proof, the customs authorities will use one of the secondary methods to calculate the customs value.[5]

It is worth noting that *The Compendium of Customs Valuation Texts* (European Commission, 2022, p. 11) states that the circumstances surrounding a sale should only be examined if 'there are doubts about the acceptability of the price' (EC, 2022, p. 11).[6] Therefore, the customs authorities should initially determine whether the price is acceptable and only request further information if there are any doubts. In short, the test value tool allows the declarant, after a thorough analysis by the customs authority, to demonstrate that the transaction value has not been influenced by the existence of a relationship – that is, that it is arm's-length – while also offering the importer a margin of tolerance.

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3 Generally, the burden of proof rests with the customs administration, which can request documents and information from the declarant, which the declarant is required to provide. Customs has met its burden of proof if the declarant fails to provide these documents or information (which a diligent declarant should have).

4 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, OJ L 343, 29.12.2015, p. 558–893.

5 The end goal must always be the same: find the actual value of the goods.

6 European Commission (2022, p. 11), 'Paragraph 1 provides that where the buyer and seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs authorities have no doubts about the acceptability of the price, it should be accepted without requesting further information from the declarant.'

2. The differences between TP rules and customs law on the valuation of transaction between related parties (TbRP)

In addition to the different objectives pursued by the two disciplines, there are some other differences between TP and customs legislation, which potentially rule out any convergence between the two values. The major challenges that arise because of these discrepancies can be divided into two groups: the use of TP documentation for customs purposes and the impact of TP adjustments on customs values. The purpose of both TP and customs valuation is to ensure that the parties' relationship has not influenced the price (or is at arm's-length), which requires revenue and customs agencies inspecting the company's financial records, finances and any other relevant information (De Angelis & Elshof, 2018). Companies prepare specific information, known as TP studies, to provide all the relevant important information. The concern is whether TP studies can be used for customs purposes, specifically to ensure that the prices of related party transactions are unaffected by the relationship.

However, while those studies may provide important information for customs purposes, it should be noted that the data is compiled with direct taxes in mind and is based on the *OECD Guidelines* (OECD, 2022), which provide different valuation criteria. The influence of transfer price adjustments on customs valuation, which is the second question, raises a slew of issues originating from the inherent discrepancies between the two sets of rules.

First, whereas the UCC is a set of legally binding provisions that do not allow member states to introduce different rules on customs valuation, the *OECD Guidelines* are simply a soft law instrument that their members can disregard without any national or international repercussions (Touminen, 2018). Second, the customs value is determined for each transaction, whereas TP is often calculated based on the company's overall profit. As a result, TP frequently uses aggregated data, which makes it particularly difficult to identify the value of individual transactions, and which, in turn, makes it hard to use it as part of the customs framework. Third, the fact that two different bodies are responsible for TP and corporate taxation raises the possibility of double taxation.

One of the main aims of TP regulation, as mentioned above, is to prevent profits from being transferred from high-tax countries to low(er)-tax countries. As a result, tax authorities are concentrating their efforts on cases where prices are excessively high. At the same time, EU customs law aims to ensure that the price paid is as close as possible to the actual value, therefore customs authorities are more concerned when the price is too low (Bilaney, 2017, p. 268). When we add in a lack of communication and coordination between the two authorities, it is clear that the business operators have become the puppets of the government and may face double taxation.

The valuation criteria provided by both EU customs law and the *OECD Guidelines*, as well as the meta rules for identifying the method to be used, differ significantly. On the one hand, the *OECD Guidelines* allow the taxpayer to choose the best-suited criterion on a case-by-case basis without any

restriction. On the other hand, under Art. 74 of the UCC, the choice of the appropriate customs valuation method is attributed to the rigid hierarchical order between the methods, which allows progression to the next method only if the previous one cannot be used to appraise the imported goods. In other words, the declarant and the customs authorities cannot pick and choose which criteria are the most appropriate; instead, they must follow a top-down approach (Fabio, 2020, p. 278).

Finally, whereas TP frequently permits retroactive year-end adjustments, EU customs law permits the amendments of customs declarations including changes to the customs value only under limited circumstances and for specific items of the customs value.[7] However, the need for certainty and coherence in the market would benefit from a greater convergence between the two frameworks, while at the same time, recognising their differences.

3. The international perspective

Between 2007 and 2008 the OECD and the WTO established the Focus Group on Transfer Pricing to discuss 'issues of convergence between TP and customs valuation, intangibles and greater certainty for business.' This group, comprising representatives from the WCO, OECD, WTO, customs administrations, tax administrations and the private sector, decided to refer the topic of the impact of TP rules on the 'circumstances surrounding sales'[8] to the Technical Committee on Customs Valuations (TCCV).[9]

Following the focus group's work, the TCCV adopted Commentary 23.1 ('Examination of the expression 'circumstances surrounding the sale' under Article 1.2 (a) in relation to the use of transfer pricing study') and Case studies 14.1 and 14.2 to illustrate that Commentary 23.1's conclusion focused only on the question of whether customs officers can utilise TP studies to assess the circumstances surrounding the sale.

Those documents concluded that, while TP data is not always reliable, the customs agency should consider this information on a case-by-case basis. However, the work of the TCCV does not provide any guidance on the impact of retroactive TP changes on customs valuation. The International Chamber of Commerce's (ICC) 2012 policy statement, revised in 2015, is another important contribution to the research of customs valuation and TP (on this, see Salva, 2016, p. 346). The ICC, after recommending to harmonise the two valuation systems by finding a solution within the existing principles, indicates,

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7 In C-468/03 Overland Footwear, for example, the ECJ affirmed that the declared customs value should be amended if, by mistake, it included the buying commission, because this item is explicitly to be taken out from the customs value, according to the EU customs code. On the contrary, in C-529/16 Hamamatsu, the ECJ ruled that retroactive adjustment of the declared customs value following a corresponding adjustment for TP is not allowed, because such an adjustment is not explicitly mentioned in the EU customs code.

8 TCCV Minutes of Meeting of 18 Oct 2007 (published on 8 Nov 2007).

9 Although the ICC is not part of the WCO, the views of this international business association are often considered by the WCO, as shown by the inclusion of the 2015 policy statement in the WCO Guide to Customs Valuation and Transfer Pricing.

in line with Commentary 23.1 of the WCO TCCV, that TP documentation should be used to analyse the sale's conditions. The ICC goes further than Commentary 23.1, suggesting that:

> businesses that establish prices between related parties in accordance with the arms-length principle (as per Article 9 OECD Model Tax Convention) have generally demonstrated that the relationship of the parties has not influenced the price paid or payable under the transaction value basis of appraisement, and consequently that the prices establish the basis for customs value. (ICC, 2015, p. 2)

This is because the arm's-length principle should be directly aligned with the 'circumstances surrounding the sale' test.

The sixth recommendation indicates that if the customs administration requires extra information beyond that included in TP documentation, those data requirements should be explicitly stated and announced in advance to be incorporated into TP documentation to serve both functions.

Concerning the impact of TP adjustments on customs values, one of the ICC's key suggestions is that customs authorities should recognise post-transaction adjustments made 'as a result of a voluntary compensating adjustment – as agreed upon by the two related parties' (ICC, 2015, p. 2) or because of a tax audit. The most important part of this idea is allowing post-transaction revisions without a provisional valuation method or fines for valuation adjustments. The importer should instead submit a single recapitulative return referencing all original customs declarations, per the fourth recommendation.

In the event of post-transaction TP adjustment, the third proposal offers allowing the importer to select between two procedures to review the customs value. Importers should be able to choose between applying the weighted average customs duty rate method, which divides the total amount of customs duties for the year by the total customs value for the same year, and the TP adjustment method to individual transactions.

3.1. The WCO Guide

The *WCO Guide to Customs Valuation and Transfer Pricing* was released in June 2015 and updated in September 2018 (WCO, 2018).[10] The Guide does not provide a definitive approach to this issue but it 'provides technical background and offers possible solutions regarding the way forward, and shares ideas and national practices, including the trade view' (WCO, 2018, p. 4).

10 The guide 'is designed primarily to assist Customs officials responsible for Customs valuation policy or who are conducting audits and controls on multinational enterprises,' although 'It is also recommended reading for the private sector and tax administrations who have an interest in this topic' (WCO, 2018, p. 4).

In most cases, the 'adjusted price' will be closer to the 'uninfluenced' customs valuation price. Consequently 'Customs may not be able to make a final decision on the question of price influence until any adjustments have been made (or quantified). It is therefore in Customs' interest to study the impact of transfer pricing adjustments on the Customs value' (WCO, 2018, p. 68).

In this regard, a helpful principle can be found in Advisory Opinion 4.1. Price review clauses provide a beneficial principle regarding:

> the Customs value implications of goods contracts which include a "price review clause," whereby the price is only provisionally fixed at the time of importation. (...) This scenario can be compared to situations where the price declared to Customs at importation is based on a transfer price which may be subject to subsequent adjustment (for example to achieve a predetermined profit margin). Hence, the possibility of a transfer pricing adjustment exists at the time of importation. (WCO, 1981)

After a brief description of the TCCV and ICC's earlier work, the handbook recommends the use of TP information to assess the 'circumstances surrounding the sale' and provides more guidance. First, the WCO adds that while customs authorities make decisions based on the 'totality of the evidence,' 'in certain situations a judgment may be based primarily on transfer pricing data' (WCO, 2018, p. 63). Paragraph 5.2 of the guidance analyses TP data usefulness in full (in particular, single product vs product range and the date range). Finally, the WCO encourages customs officials to let business operators obtain an advance ruling to determine if buyer-seller relationship affects price. These judgments could also be based on a TP analysis or an Advance Pricing Agreement (APA).

Regarding TP adjustments that only affect tax liability (i.e. no actual change to the amount paid for the goods), Customs may consider whether this constitutes price influence (WCO, 2018, p. 69).[11] Since the WCO Guide is not legally binding, national customs authorities (NCA) must decide how to review duties after a TP adjustment. Generally, a TP policy should be in place before the importation or clearance of the goods to identify the criteria (or 'formula') used to determine the final transfer price.

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11 'Where the adjustment is initiated by the taxpayer and an adjustment is recorded in the accounts of the taxpayer and a debit or credit note issued, it could be, depending on the nature of the adjustment, considered to have an impact on the price actually paid or payable for the imported goods, for Customs valuation purposes. In other cases, particularly where the adjustment has been initiated by the tax administration the impact may be only on the tax liability and not on the price actually paid or payable for the goods. Where such an adjustment takes place before the goods are imported then the price declared to Customs should take into account the adjustment. If, on the other hand, the adjustment takes place after importation of the goods, (i.e., it is recorded in the accounts of the taxpayer and the debit/credit note issued after Customs clearance of the goods), then Customs may consider that the Customs value is to be determined on the basis of the adjusted price, applying the principles established in Commentary 4.1. In other words, there is an acknowledgement that the original price was not arm's length for transfer pricing purposes, but the price actually paid has not been adjusted'.

4. The EU perspective

Currently, apart from the ECJ *Hamamatsu Case* (see below), neither the UCC nor guidance documents mention the relationship between customs valuation and TP.[12]

In this respect, in view of the differences between them, it seems difficult to achieve a purely 'interpretative' reconciliation of the two values. It is unlikely that provisions in the UCC would acknowledge the use of TP methods because TP regulation is part of the corporate income tax legislation, which is within the EU members state's competence. This may provide a challenge to the uniform application of EU customs law as each EU member state may have its own TP rules, considering that the *OECD Transfer Pricing Guidelines* are not legally binding for the EU member states. It is also unlikely that a direct reference to the OECD standard will be included in the UCC because it would imply that the guidelines drafted in an international forum would have immediate effect.

However, a legally binding, standard position for all EU national customs administrations could result from the rulings of the ECJ (i.e. the legally binding interpretation of the UCC). Under the current customs valuation framework, the first case referred to the ECJ on this matter was the *Hamamatsu Case*, as explained below.

4.1. The ECJ *Hamamatsu Case*

Hamamatsu Photonics Deutschland GmbH (Hamamatsu) is a German company that is part of a worldwide group whose parent company, Hamamatsu Photonics, is based in Japan. The Germany-based Hamamatsu company purchased goods from its parent company at inter-company transfer prices under the APA reached between the group and the German and Japanese tax authorities (based on the 'Residual Profit Split Method' or RPSM). At the close of the relevant accounting period, the company's operating margin fell below the range set for the operating margin, resulting in a transfer price adjustment and consequently, the recognition of a tax credit. Therefore, Hamamatsu asked the Munich customs authorities to refund the excess duties paid under the TP adjustment without allocating the adjustment amount to the individual imported goods.

However, the customs authorities denied the refund because the request was incompatible with Article 29(1) of the Community Customs Code (CCC, the predecessor of the UCC), which refers to the transaction value of individual goods, not that of several consignments that may include diverse types of goods that attract different import duty rates.

12 There are some dated cases in this regard. See ECJ 24 April 1980, C-65/79 (*Procureur de la République v René Chatain*), ECLI:EU:C:1980:108, ECJ 4 December 1980, C-54/80 (Samuel Wilner, director of SA Victory France), ECLI:EU:C:1980:282. However, since all those cases were ruled under the old Brussel Value Definition, it could be argued that the conclusion of the Court in those cases are no longer relevant. In this regard see Marsilla (2011).

The German Finance Court (Finanzgericht, Munich) referred two questions to the ECJ. First, it was asked if Article 28 et seq. of the Customs Code permits an agreed transfer price, which is composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, using an allocation key, regardless of whether a subsequent debit charge or credit is made to the declarant at the end of the accounting period. If so, the national court asked if the customs value may be reviewed and/or determined using a simplified method where the effects of subsequent TP adjustments (both upward and downward) can be recognised.

The Court stated that the CCC allows subsequent adjustment only in a few specific and limited cases, after recalling that the customs value must reflect the real economic value of the transaction. Furthermore:

> the Customs Code does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is adjusted subsequently upwards, and it does not contain any provision enabling the customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments. (ECJ, *Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984*, 2017, p. 33)

Therefore, in the words of the Court, 'the Customs Code, in the version in force, does not allow account to be taken of a subsequent adjustment of the transaction value, such as that at issue in the main proceedings' (ECJ, *Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984*, 2017, p. 34).

4.2. The possible repercussions of the *Hamamatsu Case*

At first, the reasoning of the Court seems to imply total incompatibility between customs value and TP due to the differences between the two legal frameworks. However, as already pointed out in literature, the judgment of the Court could be interpreted in several different ways (Friedhoff & Schippers, 2019, p. 26) First, the decision could be read considering the language of the first question posed by the referring national Court, which asked if the CCC 'permit the adoption, as the customs value, of an agreed transaction value which consists partly of an amount initially invoiced and declared and partly of a flat-rate adjustment made after the end of the accounting period' (ECJ, *Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984*, 2017, p. 23).

The main objective of the ruling is to ascertain whether the transfer price is a suitable criterion for demonstrating the absence of influence between related parties to permit the use of the 'value of the transaction.' If this is the case, the ECJ meant only to exclude the possibility of using the transfer price as the 'transaction value' due to the relationship between the parties involved in the transaction. Hence, in those cases, the customs value can only be determined through a secondary valuation method.

Indeed, both TP and the secondary value test have very similar goals. TP, under the arm's-length principle, aims to verify that the price charged in a controlled transaction between two related parties should be the same as that in a transaction between two unrelated parties on the open market; the alternative transaction values aim to ensure that the declared customs value is the same customs value of identical or similar goods.

Another possible interpretation of the ruling could be that the Court, while allowing the TP as the 'transaction value', does not allow any retroactive adjustment, either upward or downward. However, this interpretation seems to give rise to several problems that cannot easily be overcome. As stated by the Court in the ruling, the customs value must reflect the economic value of the imported goods. Hence, not allowing any adjustment would inevitably permit the use of a value different from the actual one (Rovetta et al., 2018, p. 187). Moreover, not considering any adjustment could also lead to abuse, given that the parties could set the price lower than the actual economic value.

Finally, this interpretation seems to be contradictory to the position of the Court regarding royalty payments, where it established that royalty payments should be included in the customs value even if the amount of the payment is not certain until the end of the year (ECJ, *Case C-173/15 (GE Healthcare), ECLI:EU:C:2017:195*, 2017). The final and last reading of the judgment focuses on the facts of the case at hand. More precisely, three relevant factors could lead to the argument that the ruling should only be interpreted in identical cases.

First, the Court explicitly refers to the Customs Code 'in the version in force' (which was the CCC and not the UCC, (ECJ, *Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984*, 2017, p. 33)) implying that the new version of the code could give rise to a different conclusion. Secondly, prior to the TP adjustment and the request for a partial refund of overpaid customs duties, Hamamatsu did not submit a simplified declaration, nor did the company sign an agreement with the customs authorities, as is the practice in most EU member states. Lastly, the judgment of the Court could be influenced by the RPSM method used by Hamamatsu. Based on the company's profitability, this method focuses not on the individual transaction, as is common in customs matters but, on the contrary, on the profits of the company. Therefore, the Court may have intended to exclude the use of a flat-rate adjustment.

In summary, although extremely concise, the ruling of the Court must be interpreted in a way that does not preclude the usability of the TP for customs value purposes.

After the judgment of the ECJ, the Munich Finance Court, on 15 November 2018, rejected Hamamatsu's lawsuit as unfounded and the company appealed against the decision before the German Federal Fiscal Court.

On 17 May 2022,[13] the Federal Fiscal Court confirmed the decision of the court in Munich and rejected Hamamatsu's claim for reimbursement. The Federal Fiscal Court did not consider a later transfer price adjustment and limited the determination of the customs value to the evaluation of the goods during the year using the subordinate methods in accordance with Art. 74 UCC, in which it only depends on the value of the goods at the time of customs declaration. According to the judges, the subsequent transfer price adjustment is not considered. From a practical point of view, this evaluation will often lead to the use of the fallback method according to Art. 74(3) UCC.

However, the judges pointed out that a simplification according to Art. 166 UCC could possibly be considered. The judgment of the German Federal Fiscal Court thus contributes new facets to the discussion about the relationship between customs value and transfer prices but does not conclusively clarify the issue.

5. Selected administrative practices of the NCA before and after the *Hamamatsu Case*

While there are certain problems in bridging the gap between TP and customs value from a theoretical legal standpoint, we feel it is more suitable to look at the administrative processes in place at the national level. This appears possible, at least in theory, given the discretion granted to each national customs authority in managing their customs controls, and the broad authority granted to each tax authority to enforce audits on TP.

When exploring the alignment of customs values and transfer prices for administrative purposes, one should consider the reciprocal influence of the two, that is, transfer price to determine the customs value, and vice versa. Companies or the tax authority might use the customs value as a baseline for determining the TP, which is relevant for corporate income tax purposes.[14]

This would be possible because the customs value is usually stated and established before the transfer prices are set, as any import goes through a clearance procedure. In other words, the customs value has already been declared by the importer for customs purposes at the time the TP for income taxes should be defined; it would seem reasonable therefore to use this value as a starting point for determining the inventory value for income taxes purposes. A form of entrustment – relative to the fixed price – in favour of the companies vis-a-vis the fiscal authorities, albeit often not the same authority, may be deemed upheld in relation to the fixed pricing.

13 The official publication of the judgment (reasons for the judgment) took place at the end of September 2022.

14 This is the approach adopted by the United States, where, under the 26 US Code, § 1059A(a): 'If any property is imported into the United States in a transaction (directly or indirectly) between related persons (within the meaning of section 482), the amount of any costs— (1) which are taken into account in computing the basis or inventory cost of such property by the purchaser, and (2) which are also taken into account in computing the customs value of such property, shall not, for purposes of computing such basis or inventory cost for purposes of this chapter, be greater than the amount of such costs taken into account in computing such customs value.'

Nonetheless, the practice of inferring transfer prices from customs value does not appear to be in use anywhere in Europe. Neither the companies nor the authorities responsible for the controls on TP consider this approach.

There are several possible explanations for this. The first is based on the traditional separation approach, which states that a value defined for direct tax cannot be used to assess other taxes, even if the tax base refers to the same transaction. While rules on customs value are contained in the UCC and have the status of EU law, TP rules are national in nature and tend to comply with the international standard endorsed at the OECD level. This approach, which might be referred to as 'the autonomy of each tax', is well-established in the legal traditions of the European states and, most importantly, it has also been sanctioned by the ECJ. The same ECJ, in a decision from the 1980s (ECJ, Case C-65/79 (Chatain), ECLI:EU:C:1980:108, 1980), explicitly ruled out the possibility of using customs value for reasons other than the application of customs law, assuming the autonomy of customs values.[15]

Furthermore, one should consider that not taking customs values as the basis for (initial) transfer prices has to do with the mere fact that the methodology framework for transfer prices is more advantageous compared to the methodology framework for customs valuation. Moreover, although customs values are to be determined at the time of import while transfer prices are typically tested at year-end, the benchmark studies resulting in the initial transfer price are typically already completed before the time of import. Therefore, the sequence of events does not necessarily support using customs values as the basis for (initial) transfer prices. It is generally the other way around, although this gives rise to the infamous question what should be done with issue of retroactive transfer price adjustments for customs valuation purposes, which is addressed extensively from a theoretical and operational point of view in this article.

However, there may be another rationale for not using the declared customs value as the basis for TP. Admittedly, in the interests of EU member states, issues related to transfer prices, and therefore to proper income taxation, take precedence over determining the correct customs value of the very same transactions. Transfer pricing, from a disenchanted standpoint, raises difficulties connected to income taxation, which are intertwined with the fiscal self-interest of the member states because income taxes provide direct revenues for them. As a result, state tax administrations have an incentive to prioritise TP assessment, since the difficulties relating to income taxes and their impact on revenue outweigh those concerning customs control. This could be viewed as an unintended consequence of the EU customs system, which requires national administrations to collect income taxes for their respective states and to collect customs revenue for the EU budget. However, it should also be

15 It is useful to point out that the decision was adopted not under the CCC, but under the Brussels Definition of Value (BDV). Therefore, the decision may no longer be compatible with the new regulatory environment.

acknowledged that in recent times, the EC EU bodies are intensifying the audits on NCA, which in turn are under increasing pressure to carry out detailed and accurate controls on customs evaluations.[16]

Whatever the reasons are, we focus on the following, assuming that TP rules have a certain precedence, and we focus on the scenario of customs value adjustments due to a different TP value determined for the specific transactions. As a result, we examined the perspective taken by four member states – Germany, the Netherlands, Spain and Italy – concentrating on the eventual misalignment and on the practices followed by the respective national customs administrations. In each of the following national reports, we begin with the administrative organisation of the customs and tax authority. We then concentrate on how customs authorities deal with the valuation of imports linked to transactions between related parties.

We begin by enquiring as to what value the national authority places on TP documentation in terms of establishing that declared customs values are unaffected by the surrounding circumstances, including the relationships between the parties of the import transactions. Then we look at the impact of TP adjustments on determining the final customs values, focusing on the most common scenario in which a TP adjustment – made by the revenue authority following an audit; or by the taxpayer in applying their intragroup TP policies for allocating profits to each branch of the group – theoretically lead to a downward adjustment of the already declared customs value, and a request for overpaid customs duties.

We were particularly interested in the changes in administrative control practices following the Hamamatsu decision, to see if this had any impact on administrative practices relating to the interplay between TP and customs value for transactions involving related parties.

5.1. Administrative practice in Spain

5.1.1. The Spanish customs authority

Customs is a body within the framework of the Spanish Tax Administration Agency (Agencia Estatal de Administración Tributaria, AEAT). The functions in the Customs and Excise Area are provided by the Resolution of 13 January 2021, of the Presidency of the Tax Agency, on organisation and attributions of functions in the Customs and Excise Area.

5.1.2. Before Hamamatsu

The Spanish Customs Authority, aware of the problem, issued a resolution (Resolution 25/8/2017)[17] and included new instructions for the Single Administrative Document (SAD, or DUA in Spanish), providing new rules regarding the declaration of the customs value in transactions between related

16 See, for example, ECJ 14 June 2022, C-308/14 (*Commission v UK*), ECLI:EU:C:2016:436.

17 Published in the Spanish Gazette on 1 September 2019. More information is available at https://www.boe.es/buscar/doc.php?id=BOE-A-2017-10089. It is very likely that this amendment was made in anticipation of the *Hamamatsu Case*. In Explanatory Note 1/2022 (INSP NI 001/2022), the Tax Administration reminds the reader that use of the simplified declaration is subject to prior authorisation.

parties. According to these new rules, the declarant in related party transactions will be able to use the simplified declaration (Article 166.2 UCC) and then lodge a supplementary declaration (Article 167 UCC) within the time limits provided in Article 147.3 DA (after its amendment, the reference is now to Article 146.3b DA). This time limit is for a maximum of two years from the date of the release of the goods 'in exceptional duly justified circumstances related to the customs value of goods' (Spanish Department of Customs and Excise, 2017, p. 86330).

5.1.3. After Hamamatsu

Although the *Hamamatsu Case* is frequently mentioned in some of the resolutions of the Spanish Central Administrative Economic Tribunal,[18] it is never part of the *ratio decidendi*. We must state that there has been no change after the judgment of case C-529/16, other than in the SAD instructions, and the Spanish customs authority has not issued any explanatory note on the changes derived from the *Hamamatsu Case*.

Spanish Customs has recently issued an Interpretative Note[19] informing that the 'supplementary declaration' can be made in the regular form and, in some cases where the authorisation so provides (including in particular in case of transactions between related parties), in the form of making available the supporting documents (art. 163 UCC) for the final determination of value. Those documents can then be subject to control procedures to make a tax determination. Even if the Note is not explicit about it, it is possible that this development could allow to take a global approach to the determination of the final value, as opposed to a consignment-by-consignment approach.

5.2. The Italian case

5.2.1. The Italian customs authority

The Italian legal system is characterised by two (mostly) autonomous agencies: the Revenue Agency (Agenzia delle Entrate), which has a general jurisdiction regarding direct and indirect taxes, and the Custom and Monopolies Agency (Agenzia delle Dogane e dei Monopoli, ADM), which 'carries out, as a customs authority, all the functions, and tasks assigned to it by the law in the field of customs, movement of goods, internal taxation in connection with international trade' (ADM, Articles of Association, Art. 2; on this see Armella, 2017, p. 76; Bellante, 2020, p. 206; Vismara, 2018, p. 67).[20]

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18 The Central Administrative Economic Tribunal, despite its name, is not a court of justice; it is an administrative body that decides tax appeals.

19 NI DTORA 01/2023 de 16 de febrero, de la Directora del Departamento de Aduanas e Impuestos Especiales, sobre declaraciones en aduana simplificadas y complementarias.

20 Articles of Association of the Customs Agency adopted by the Management Committee.

5.2.2. Before Hamamatsu

Before the Hamamatsu judgment, the ADM published two documents aiming to align customs value with TP (Circular 16/D/2015 and Circular 5/D/2017).[21]

The ADM also outlines two possible solutions that aim to reconcile customs values and TP values: the so-called 'Incomplete declaration' laid down by Art. 76, let. (a) of the CCC (now under the name of 'Simplified declaration' under Article 166 of the UCC), and the flat-rate value adjustment procedure, originally laid down by Art. 178, para. 4 of Regulation 1993/2454 (today this is Art. 73 of the UCC) (on this, see Saponaro, 2020, p. 597).

However, the simplified declaration procedure is currently not practicable due to a lack of suitable channels (i.e. IT problems).[22] Nonetheless, as stated by the Italian Supreme Court, decision no. 7715/2013 and no 7716/2013, in a case regarding TP in customs practices:

> apart from errors or omissions made unintentionally by the importer in the import declaration, and in cases where the incomplete declaration procedure is admissible – except in cases of fraud – per Article 76 CCC and Article 254 CCIP, no subsequent rectification of the import declaration is possible as a result of voluntary choices by the party concerned. (Italian Supreme Court, decision no. 7715/2013, para. 4.3; see also Fabio, 2022, p. 1049)

Therefore, any correction and adjustment resulting from a prior TP agreement must be excluded.[23]

5.2.3. After Hamamatsu

Although the *Hamamatsu Case* seems to contradict the interpretative position adopted by the ADM, it has not released any statement or official document taking these changes into account. Therefore, the situation remains unchanged.

5.3. The Dutch Case

Transfer pricing is a matter that is dealt with by the tax authorities, whereas customs valuation is a matter that belongs to the customs authorities. There are no regular meetings between the TP team of the tax authority and the valuation specialty team of the customs authorities, nor is data related to intercompany pricing and transfer price adjustments automatically exchanged

21 Published on 6 November 2015 and 21 April 2017, respectively.

22 However, the new procedure for the digitisation of customs import declaration data, effective from 9 June 2022, aims to solve this type of problem as well.

23 Nevertheless, if the circumstances considered for authorising the use of the transfer price should change, a consequential amendment of the relevant authorisation (i.e. Art. 73 UCC authorisation) shall occur.

between those teams. The valuation specialty team has, however, a member with a TP background and both teams are allowed to exchange data (on request).

In EU and Dutch customs legislation, it is not stipulated how TP and customs valuation (rules) relate to each other. There have been two, unpublished national court cases about the impact a transfer price adjustment has on determining the customs value of imported goods.[24] In one of the cases the Tariefcommissie (Administrative Court for Customs and Excise), until 2002 the highest Dutch court for customs matters, ruled under reference to the case *Procureur de la République v René Chatain* (ECJ, Case C-65/79 (Chatain), ECLI:EU:C:1980:108, 1980, para. 8) of the ECJ that the refund request following a downward transfer price adjustment was rightfully rejected by the customs authorities.

In the Netherlands, the *Handboek Douane (Handbook on Customs Matters)* provides guidance on how customs officers should interpret and enforce the UCC. Here it is explicitly mentioned that under certain conditions the arm's-length principle used to determine transfer prices can also be used for levying customs duties. In practice it is possible to obtain a customs valuation ruling from the valuation specialty team of the Dutch customs authorities. In related party transactions, this valuation ruling can give legal certainty that the arm's-length principle used for determining the transfer prices can, in the presented case, also be used for determining the customs values. Additionally, practical arrangements can be made about how a TP adjustment can be considered for the purpose of determining the final customs values. Regarding the latter, the customs authorities allow importers to file normal import declarations and declare the goods using the initial transfer price as customs value. A reconciliation sheet should subsequently be submitted after the transfer price adjustments have taken place. If these corrections result in an increase of the customs value, customs duties will be retroactively assessed, whereas the importer is entitled to a partial refund of overpaid import duties in case the correction results in a downward adjustment of the declared customs value. Simplified declarations and Article 73 UCC are not encouraged. This view/approach has not changed since the *Hamamatsu Case*, as Dutch customs authorities take the view that the *Hamamatsu Case* should be interpreted narrowly, meaning that it should only be applied in identical cases.

5.4. The German case

5.4.1. German authorities responsible for TP and customs valuation

In Germany, the customs administration and tax administration are two separate and independent authorities. The tax administration is responsible for assessing the admissibility of TP adjustments. The German customs

24 Tariefcommissie 25 November 1997, Nos. 88/95 until 90/95, 118/95 until 122/95, 131/95 until 155/95 and 10/96 (unpublished, elaboration in the main text is based on a commentary in Douane Update 1997/1115). See also Tariefcommissie 21 December 1994, Nos. 12986, 12988, 12989 and 13049 (unpublished).

administration is responsible for all aspects of customs law. There is a Federal Customs Value Office that provides technical support to the entire customs administration with questions about the customs value. This department has a decisive influence, particularly in transfer prices and customs values. However, there is no joint assessment of the subject by the customs and tax authorities.

5.4.2. Before Hamamatsu

In Germany, there are no additional statutory regulations on dealing with transfer prices in terms of customs value law. Except for the *Hamamatsu Case*, German case law has also not made any significant judgments on this subject. The German customs administration has issued an internal administrative regulation on the customs value, in which the submission of advance pricing agreements is addressed as a means of verification.[25] In the case of subsequent price adjustments, the German customs administration takes a restrictive approach. According to this, customs duties will be levied in the event of subsequent price increases due to transfer price adjustments, but subsequent reductions will not be reimbursed unless the subsequent loss is due to the product or at least the tariff. This form of selective valuation of transfer prices was the reason for the original Hamamatsu lawsuit.

5.4.3. After Hamamatsu

The Hamamatsu lawsuit has been widely discussed in German literature. Due to the unclear wording of the ECJ ruling, both the German customs administration and business-friendly literature opinions felt their views are valid. The German customs administration is therefore adhering to the previous administrative practice after the Hamamatsu decision. Even after the final decision of the Federal Fiscal Court, the customs administration has so far adhered to the existing practice. According to this, different criteria are considered by the customs authorities for the assessment. Which standards are applied in the individual case depends on the TP method used by the companies.

6. General appreciation of the national practices

The picture appears to be quite clear based on the above reports. There are various legal bases, particularly in the EU, for a clear and definitive relationship and alignment between transfer prices and customs value. At present, there are several obstacles that make this extremely challenging, if not impossible.

As we pointed out in the first section of this paper, from a theoretical point of view there are various legal grounds for the separation of customs value and TP, ranging from the different types of taxation to the different levels of regulation of the two taxes. On the other hand, there is a common call at the international level for an alignment between the two valuation systems, moving away from the inherent inconsistency of two different transactions evaluation methods. As we previously stated, the EU law lacks a clear norm

25 See Administrative regulation of 15.09.2021, E-VSF Z 5101 (para. 36).

establishing links between the two values, and as seen from the reports above, none of the EU member states examined have national TP laws that include a link to EU customs legislation. This is likely owing to the differing levels of regulation, as transfer price legislation – although inspired by the international OECD standards – is domestic law, whereas customs law is European law. This does not, however, preclude the existence of certain interrelationships in the administrative practice of customs control. From a practical point of view, NCA are aware of the theoretical separation: evaluation rules for related parties' transactions for customs value and income tax are separated, and each set of rules is independent of the other. In any case, the NCA acknowledge that customs officials cannot overlook documentation drafted for TP purposes and vice versa. So far, no EU member state's customs authority has completely disregarded or dismissed documentation drafted in accordance with the *OECD Guidelines* for establishing the customs value of imported goods when the transaction occurs between related parties.

This is particularly noteworthy if one considers that in almost all the countries considered, there are two separate authorities in charge of income tax (and consequently, TP) and customs duties.

It remains unclear what relevance should be assigned to the complex documentation that businesses, especially groups of companies, typically produce for TP purposes according to the OECD standard. In each of the countries analysed, the TP documentation is seen as a useful instrument, acknowledged by the NCA for gaining a better understanding of the value chain in the intra-group transaction and as an indirect source of information for the determination of the customs value. Despite the fact that taking the TP into account is not legally required by customs authorities, and therefore the lack of this documentation cannot be blamed on importers, the general attitude endorsed by customs authorities in the countries examined is to consider the documentation as a good starting point for understanding the surrounding circumstances, rather than as the core document to refer to for fixing the customs value of the intra-group transactions.

This may lead to the conclusion that there is a widespread acceptance at the administrative level that a degree of consistency between the valuations of the same transactions, even if done for two separate taxes, is required.[26] In three out

26 The Spanish position is somewhat peculiar. The Supreme Court issued the Coca-Cola judgments (see Marsilla, 2011), affirming a logical need for reconciliation of customs value and TP. Nevertheless, parliament reacted by affirming the separation between customs value and TP and stating in the national law the prohibition to use TP values for purposes other than income taxation. This confirms the position of the Spanish legislation to assume a clear separation between taxation by endorsing an atomistic approach. Anyhow, from an administrative point of view, following the indication of the TC for Customs Evaluation, the documents drafted for TP are considered valid tools to be used for demonstrating whether the existence of relationship has had an influence on the price. This may sound quite weird and contrary to the separation principle laid down in section 14 of Art. 18 of the Spanish Act 27/2014 on the Corporation Tax, but note that the relevance recognised here is not to decide the value, but the way in which the parties arrange their business (arm's length or not), so it does not imply that the customs value should be aligned with TP value. A very similar position is assumed in Italy. Here the Supreme Court affirmed the separation between the two values and the Italian customs authority formally follow this separation approach. Nevertheless, the Italian customs authorities accept TP documentation as a viable documentation to infer the customs value of the import goods in transactions between related parties.

of the four countries examined, the customs administrations expressly allow retroactive adjustments of the declared customs value, based on the downward adjustments related to the inventory imported.

German administrative practice appears to be somewhat asymmetrical (customs authorities only acknowledge customs value adjustments on the upside, that is when greater import duties would apply), and this asymmetry was most likely the rationale for the preliminary ruling request to the ECJ. The pragmatic Dutch approach of allowing ex-post adjustments of values (either upwards or downwards) based on a reconciliation option deserves special emphasis. Nonetheless, it appears that this practice lacks a strong, clear and precise legal basis at the EU level. The use of a provisional customs declaration to obtain the alignment, which has been endorsed by Spain and Italy and is also permitted by Dutch customs, appears to have a clear legal basis in the wording of the UCC, but it may be burdensome for businesses and customs authorities that must comply with high numbers of provisional customs declarations and reconcile them with a single prospectus drafted for TP purposes.

In the end, the *Hamamatsu Case* does not appear to have had significant impact on national practices relating to the interplay between customs value and TP. After all, as the literature has pointed out, the judgment may be viewed in a variety of ways due to its conciseness and the unusual circumstances of the facts. It is clear that national authorities did not regard the judgment as being of paramount importance, nor did they change their control practices as a result of it.

National procedures within the EU customs administrations are still relatively different, and there is no uniform view on them at the EU level. This, in our opinion, is the real challenge so far and the main goal should be to have consistent administrative practices that allow enterprises to reconcile customs value and TP throughout the EU. The uniform application of customs duties is one of the main objectives of the entire European customs discipline; it would be appropriate to achieve a clear and unified position on this point at the EU level: common administrative practices that should be simple to implement, putting no additional administrative burdens on them, and that are also likely to avoid fraud. This would eliminate the uncertainty created by Hamamatsu and make the set of fiscal regulations for international trade involving European countries more affordable.

The following sections introduce several proposals that appear to be effective in combating the enduring fragmentation in the EU.

7. Some proposals for a smooth administrative reconciliation (based on the EU rules)

At this time, it does not appear that a legally binding convergence of TP and customs valuation rules will be accomplished, at least not in the near future. This would require legislation at the EU level but given the current situation regarding income tax harmonisation in the European Union, and the unanimity rule for direct taxation, this will be difficult to achieve.

An automatic regulatory acceptance of TP rules for the valuation of imported goods for customs purposes in case of transactions between related parties is also unlikely. Customs legislation on valuation has a certain link with the EU's international agreements, and customs law in the EU claims a certain autonomy from income taxes, even if both income tax and custom duties must be applied to the very same transactions. Building on administrative practices, with some enhancement possible through the revision of the UCC, would be a good option that respects the autonomy of the two realms.

As we have shown, the UCC currently lacks an ad hoc method for predictable adjustments in customs value due to correlative TP adjustment. Importers have several options available to them and none of them seem to be ideal. We focus on two of them, which appear to be the two most viable options: the simplified-supplementary declaration scheme (Art. 166–167 UCC) and the issuance of an authorisation for submitting customs declarations based on particular criteria (Art. 73 UCC). Some NCA, as shown above, already permit the use of these two approaches. Each of these has advantages and disadvantages, which we will attempt to outline in greater detail in the following paragraphs. Furthermore, each of them would necessitate regulatory adjustment that might be highly beneficial in resolving the issue of mismatches between customs valuation and TP.

7.1. Simplified-supplementary declaration (Art. 166–167 UCC)

For transactions between related parties, the Italian and Spanish customs authorities recommend using a simplified preliminary declaration and a supplementary declaration to reconcile the customs values and TP adjustments. The Dutch customs authorities occasionally allow it, but do not endorse this option due to the administrative burden on both the customs authorities and importer. In Germany, national customs legislation does not allow for the submission of a simplified customs declaration (in which a provisional customs value is declared) and subsequently supplementing it with a definitive declaration.

This approach, according to the UCC, should be undertaken by traders and permitted by NCA in any circumstances where an element of the customs declaration, including the value of goods, is not final at the time of importation.

The regular use of a simplified declaration is subject to an authorisation issued by the customs authority, which is not required when the use of the simplified declaration is only occasional.

The simplified declaration shall be supplemented with a declaration that may be either of a general nature (referred to as a single simplified declaration) or of a periodic or recapitulative nature. To make this procedure more attractive for business, and at the same time easy to deal with by the customs authorities in term of control, some amendments have been recently introduced at the regulatory level, and specifically in the European rules.

In short, the 2020 amendment (Commission Del. Reg. 2020/877)[27] clarified the distinction between three types of supplementary declaration: a supplementary declaration of general nature, on one hand, and a periodic or recapitulative supplementary declaration on the other. As a result, the rules provide declarants with a time limit in which to submit the supplementary declaration according to its type (general, periodic or recapitulative).

The time limit for submitting the supplementary declaration of general nature is relatively strict: only 10 days after the release of the goods. Instead, the time limit for submitting a recapitulative and periodic supplementary declaration may be extended by up to two years from the date of release of the imported goods, subject to customs authorisation and only in justified circumstances. As a result, Articles 146–147 UCC Delegated Act (UCC DA) now provide the legal basis for national customs practices to allow a supplementary declaration to be submitted within reasonable time restrictions using an adaptable approach based on the facts of the case. However, it is unclear what conditions may justify extending the deadline for submitting the supplementary declaration. In any case, this practice may need to be properly implemented and supervised by NCA in the EU.

Because of the inherent nature of customs value as the value of specific goods at the time of import, flat-rate adjustments may be regarded as inadequate as they consider multiple consignments as a single unit. As a result, even if the transfer prices can be retroactively reflected on the customs value of the very same goods, the declarant must give a detailed adjusted value to each of the imported goods, avoiding flat-rate adjustments. This is burdensome because TP adjustments are made, normally, on a company's overall profit base, assuming an adjustment of the overall transactions between related parties and with the aims of allocating profits throughout the group.

Therefore, our proposal is for an official interpretation of the legislation at the EU level to clarify that transactions between related parties are, per se, circumstances that justify: the granting of authorisation to use the simplified-supplementary declaration scheme (Art. 166, para. 2 UCC), allowing the submission of a simplified and supplementary declaration as well as providing the related documentation, within the time span of two years from the release of the imported goods (Art. 146 UCC DA, para. 3b).

7.2. Art. 73 authorisation

The approach outlined in Art. 73 UCC could be an alternative to the burdensome practice of simplified and recapitulative declaration. This allows importers to be authorised to declare certain amounts that must be included in the declaration (including the value of the imported goods), based on *specific criteria* if these amounts are not quantifiable at the time the customs declaration is filled out.

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27 The Delegated Regulation has amended – inter alia –Art. 146 and 147 of the Delegate Regulation.

This procedure can only be used after the trader has been granted authorisation, which can only be granted if the simplified declaration procedure entails (i) an excessive administrative burden and if (ii) the determined customs value does not differ significantly from the value determined in the absence of an authorisation. Therefore, it is a scheme that may be considered subsidiary to the simplified-supplementary declaration procedure.

However, this procedure is of great interest and is a good way of reducing, at least in terms of administrative requirements, the dichotomy between customs value and transfer prices. As we have seen, this solution has received support from both Dutch and Italian customs authorities, albeit at the national administrative level. Nevertheless, there are certain concerns about European law because it is not clear that these administrative practices are legally backed by EU rules. It is unclear if the procedure may include all the elements of the value and whether the specific criteria can also include those for determining the transfer prices, based on the wording of Art. 73 UCC.

Again, amendments to the legislation would be necessary to make this procedure safe and quick to use. First, it could be specified, even in the UCC DA, that the Art. 73 procedure is by default usable for transactions between related parties, because ex-post alignment procedures based on transfer prices would impose a disproportionate administrative burden on the importers (which is undoubtedly a disproportionate burden for the importers that follow the scheme simplified-supplementary declaration), and by default, the alignment leads to very similar, if not identical, values.

Of course, there is still the possibility that issuing an authorisation will allow a group of companies to deviate significantly and excessively from customs valuation rules for intra-group imports. This would certainly be unacceptable from an EU customs perspective since it would be incompatible and inconsistent with the autonomy and uniformity that must be ensured in the application of customs legislation across the EU. Therefore, it should be obvious that the 'specific criteria' on which the assessment should be based must be determined before the authorisation is issued. It could be provided that, in the case of transactions between related parties, an authorisation can be obtained by specifying what 'specific criteria' the importers will use at the time of application and filing the subsequent transfer price documents at the same time as the authorisation application.

The decision to issue this authorisation should be based on the verification that the 'specific criteria' are compliant with the customs valuation rules although the customs authorities' ability to control the correct application of these criteria would be unchanged. Transfer pricing documentation could be crucial in this respect and, as it would be made available to them, they would have easy access to it. Similarly, any changes to the group's pricing policy should be notified promptly as updates to the documentation.

Because TP documentation, which is typically drafted and prepared by international company groups, is already widely accepted by customs authorities – even though it is not legally binding – it may serve as the standard baseline for a discussion about granting the authorisation. At the same time, the requirements that businesses should meet to participate in the system provide enough assurance to customs authorities about the risks of major fraud.

The timing of taxation would remain a problem since the customs value is normally assessed at the time of importation, whereas TP is assessed on an annual basis as profits of the overall group are allocated to the companies within the group according to the results achieved over a period (normally one year).

In any case, it should be accepted that under Art. 73 authorisation, the customs value should not be considered as a value assigned to each item imported at the precise moment the import occurs; but rather the customs value assigned to various imports related to the overall transactions between related parties over a span of time (normally one year). It should be noted that many misalignments between TP and customs value occur because the timing of the two are not aligned: imported goods must be given an immediate value at the time of import and for customs clearance, which may result in a higher or lower value than the TP assigned to the very same goods at the end of the year.

It is worth emphasising that declarations following specific criteria properly submitted and agreed by customs should be considered definitive. In theory, this would eliminate the difficulties of having to supplement the submitted simplified declarations. At the same time, it should be borne in mind that, in the event of a TP adjustment made by revenue – that is, in case of an audit where the transfer price assessed differs from the one in the documentation – the retroactive adjustment is also possible through ex-post amendment of the customs declaration.

Finally, for this solution to be effective, another crucial issue that must be addressed is the possibility of broadening the scope of Art. 73. Importers from outside the EU seem not to be able to apply for an Art. 73 authorisation. If this is true, the method's efficiency would suffer significantly, needing a Code change.

7.3. The 'Dutch solution' (Art. 173)

The Dutch administrative procedure may provide a final viable way to harmonise transfer price and customs valuation.

As previously stated, this technique would allow economic operators to submit a reconciliation sheet. Customs duties will be levied retroactively if the pre-adjustment value is increased, but if the correction results in a downward adjustment, a refund should be feasible. However, there are two basic requirements that must be met for this practice to be implemented across the EU.

First and foremost, a sound legal basis for the reconciliation sheet procedure must be identified within the UCC framework. In this case, the best alternative can be found in Article 173 of the UCC, which allows for customs declaration amendments within three years of the date of acceptance of the declaration. However, as with the simplified statement and Art. 73 authorisation, legislative changes would be required to widen the scope of Art. 173 and allow national customs administrations to apply the 'Dutch solution.' For example, adding a new fourth paragraph to Article 173 UCC that allows the submission of the reconciliation sheet in the case of related party transactions could be useful.

This strategy not only solves the problem of reconciling TP and customs value, but it also addresses some of the criticisms levelled at the previous suggestions. To begin with, it is obvious that submitting a simple reconciliation sheet at the end of the year (or for a shorter time) is a less cumbersome practice than filing a supplemental declaration, which would ease the administrative load.

Second, the Dutch solution is 'cleaner' than Art. 73 UCC because it takes TP adjustments into account retroactively and it also applies to non-EU importers. However, there is still a disconnect between customs valuation, which considers the value of imported goods, and TP, which is frequently based on the company's overall profit.

Allowing the economic operator and the customs authorities to enter into an agreement prior to the importation that specifies how the adjustment will reflect on the value of the imported goods is one possible solution in this regard, which would necessitate another amendment to the current legal framework. At the same time, the business should preserve accurate accounting records to determine how adjustments are distributed in connection to particular imports.

8. Conclusion

The decisions established by the Court of Justice in the *Hamamatsu Case* do not yet appear to have fully found recognition in the practice of some of the member states, as is evident from the considerations above.

However, there are a variety of approaches, each of which might be in line with the Customs Code's current structure and achieve (at least in part) harmonisation between customs valuation and transfer price. These are, however, methods, that to achieve the desired results, inevitably call for a legislative intervention aimed at extending the reach of some of the current provisions or, at the very least, establishing precise and trustworthy interpretive standards.

Finally, it must be noted that the much-discussed inclusion of a tool to enable economic operators to request Binding Valuation Information (BVI)[28], within the UCC could enable customs authorities to work with importers to align customs value and transfer price (including how adjustments are accounted for).

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28 Like Binding Origin Information (BOI), Binding Value Information (BVI) should also be binding in all member states, ensuring that customs administrations follow a uniform protocol.

References

Armella, S. (2017). *Diritto doganale dell'Unione Europea [Customs law of the European Union]*. Egea.

Bellante, P. (2020). *Il sistema doganale [The customs system]*. Giappichelli.

Bilaney, S. K. (2017). Suggested approaches to harmonization of transfer pricing and customs rules. *Int Transfer Pricing Jour*, *24*(4), 268.

De Angelis, E., & Elshof, T. (2018). European Union – The interplay between transfer pricing and customs valuation in case of retroactive profit adjustments: the position of the ECJ in the Case Hamamatsu Photonics Deutschland GmbH (C-529/16. *Int Transfer Pricing Jour*, *25*(4), 300–305. https://research-ibfd-org.ezproxy.unibo.it/#/doc?url=/document/itpj_2018_04_e2_2

European Commission. (2022). *The compendium of customs valuation texts. Edition 2022*. https://taxation-customs.ec.europa.eu/system/files/2022-07/2022%20EU%20Valuation%20Compendium%20EN.pdf

Case C-65/79 (Chatain), ECLI:EU:C:1980:108, (1980).

Case C-173/15 (GE Healthcare), ECLI:EU:C:2017:195, (March 9, 2017).

Case C-529/16 (Hamamatsu), ECLI:EU:C:2017:984, (December 20, 2017).

Fabio, M. (2020). Customs value and transfer pricing: WCO and ICC solutions to be adopted by customs authorities. *Global Trade and Customs Journal*, *15*(6), 273–287. https://doi.org/10.54648/gtcj2020069

Fabio, M. (2022). *Manuale di diritto e pratica doganale [Handbook of customs law and practice]*. IPSOA.

Friedhoff, M., & Schippers, M. L. (2019). ECJ judgment in Hamamatsu Case: an abrupt end to interaction between transfer pricing and customs valuation? *EC Tax Review*, *28*(1), 32–42. https://doi.org/10.54648/ecta2019004

International Chamber of Commerce. (2015). *Policy statement on transfer pricing and customs valuation* (180/104-536–52). https://iccwbo.org/publication/policy-statement-of-icc-transfer-pricing-and-customs-valuation-2015-french-version/

Lyons, T. (2018). *EU customs law* (2nd ed.). Oxford University Press.

Marsilla, S. I. (2011). Towards customs valuation compliance through corporate income tax. *World Customs Journal*, *5*(1), 73.

Mayr, S., & Santacroce, B. (2019). *Valore in dogana e transfer pricing [Customs valuation and transfer pricing]*. Wolters Kluwer.

Organisation for Economic Co-operation and Development. (2022). *Transfer pricing guidelines for multinational enterprises and tax administrations 2022*. https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm

Organisation for Economic Co-operation and Development, World Trade Organization & United Nations Conference on Trade and Development. (2013). *Implications of global value chains for trade, investment, development and jobs*. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifuajrprP9AhURRuUKHRuvCoEQFnoECAsQAQ document%2Functad_oecd_wto_2013d1_en.pdf&usg=AOvVaw1l4tSKs-HwF5TEo5thq2Oy

Ping, L. (2007). Transfer pricing and customs value: exploring convergence. *Global Trade and Customs Journal*, *2*(3), 117–128. https://doi.org/10.54648/gtcj2007018

Rovetta, D., Beretta, L. C., & Smiatacz, A. (2018). The Court of Justice of the European Union judgment in the Hamamatsu Case: defending EU customs valuation law from the 'transfer pricing folly' in customs matters. *Global Trade and Customs Journal*, *13*(5), 187190.

Salva, J.-M. (2016). Customs valuation and transfer pricing: ICC proposals. *EC Tax Review*, *25*(5/6), 346–351. https://doi.org/10.54648/ecta2016034

Saponaro, F. (2020). Tributi doganali e transfer pricing: dall'antinomia al coordinamento giuridico [Customs duties and transfer pricing: from antinomy to legal coordination]. *Il diritto dell'economia*, *1*, 597–636.

Spanish Department of Customs and Excise. (2017). Resolution of August 25, 2017, which modifies the Resolution of July 11, 2014. *Spanish Gazette*.

Touminen, J. (2018). The link between transfer pricing and EU customs valuation law: is there any and could it be strengthened? *Int. Transfer Pricing Jour*, *25*(6). https://research-ibfd-org.ezproxy.unibo.it/#/doc?url=/document/itpj_2018_06_e2_1

Vismara, F. (2018). *Corso di diritto doganale [Customs law course]*. Giappichelli.

World Customs Organization. (1981). *Technical committee on customs valuations, advisory opinion 4.1. Royalties and licence fees under Article 8.1 (c) of the Agreement (Royalty that the seller requires the importer to pay to a third party (the patent holder)). Adopted, second Session, 2 October 1981, 27.960*.

World Customs Organization. (2018). *Guide to customs valuation and transfer pricing*. https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/revenue-package/wco-guide-to-customs-valuation-and-transfer-pricing.pdf?db=web

World Trade Organization. (1994). *General Agreement on Tariffs and Trade (GATT) 1994*. https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm

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ACADEMIC CONTRIBUTIONS

Challenges to Customs Imposed by the New European Union Value-Added Tax Rules on Cross-Border E-Commerce – the Case of Bulgaria

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From 1 July 2021, new rules for value-added tax (VAT) on imports of postal and courier items entered into force in the member states of the European Union (EU). With the changes in the tax legislation of the member states, two thresholds for VAT taxation of postal and courier items from third countries have been introduced: the first for goods less than or equal to EUR150 and the second for goods above EUR150. These goods are subject to distance sale (i.e. internet sales to individuals in the EU) and are with a natural person. Three types of customs clearance are now possible for shipments in the first threshold — a standard declaration procedure, a special regime for declaration with deferred payment of import tax, and an Import One-Stop-Shop scheme (IOSS). These options greatly facilitate both importers and customs authorities, but at the same time, they create some new challenges for customs authorities, which need to be addressed. The customs formalities currently in force do not sufficiently cover the risks of fraud and error, as full physical control of these consignments is not possible. The Republic of Bulgaria is a relatively small market in the global online trade of low-value shipments, but the application of the new regulations shows certain trends in the processing of these shipments.

1. Introduction

On 1 July 2021, new value-added tax (VAT) rules on the import of goods worth less than EUR150 were introduced in the member states of the European Union (EU). According to the European Commission (EC), these rules are part of the efforts to ensure a more level playing field for all businesses, to simplify cross-border e-commerce and to bring more transparency to EU buyers in terms of pricing and consumer choice (EC, 2021). The EU's VAT system was last updated in 1993 and is no longer in line with the growth of cross-border e-commerce, which has significantly transformed retailing in recent years. The new rules also respond to the need to simplify administrative formalities for imports both for sellers and buyers, and for postal operators and couriers. At the same time, they also directly affect the activities of the customs and tax administrations in the EU member states. However, the procedural simplifications provided for economic operators are accompanied by several risks, which directly impact the fiscal and protective functions of Customs.

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The aim of this article is to characterise the features of the new EU VAT rules on cross-border e-commerce and outline some of the main challenges facing Customs in this area. Firstly, the main features of the new EU VAT rules on cross-border e-commerce are outlined. Then, the VAT procedures currently in force on importing consignments not exceeding EUR150 are reviewed. Some of the main challenges facing Customs when levying VAT on cross-border e-commerce are also highlighted. Finally, the trends in processing low-value consignments under the new VAT rules in the Republic of Bulgaria are tracked.

2. The problem

In online retailing, consumers can purchase the goods they need directly from manufacturers without using the services of intermediaries or other merchants. Today, it is quite possible to buy any good online without having physical contact with the seller, and the price is often competitive with that of wholesaling. Cross-border e-commerce provides a new mode of business transactions and exerts a fundamental influence on the way in which commercial trade is conducted (Wang, 2017). In turn, this entails several risks, both in terms of the type and quality of the goods sold, and in terms of their real value. These risks are, in principle, the main object of customs control, and in e-commerce managing them is a real challenge for the regulatory authorities. Therefore, in recent years, cross-border e-commerce has occupied an increasingly tangible place among the legal regulation of customs activity, and mechanisms are constantly being sought to guarantee the interests of both society and the fiscal systems of the individual countries.

In its policies, the World Customs Organization (WCO) pays special attention to e-commerce, thus recognising its importance to the systems of customs control on a global scale. In June 2018, the WCO accepted the Cross-Border E-Commerce Framework of Standards (the Framework), which articulates a set of fundamental standards along the key principles identified and adopted in the WCO Luxor Resolution on Cross-Border E-Commerce (WCO, 2022). The Framework provides the standards for the effective management of cross-border e-commerce from both facilitation and control perspectives. Of special interest to this article is *Standard 8: Models of Revenue Collection*, according to which:

> Customs administrations, working with appropriate agencies or Ministries, should consider applying, as appropriate, various types of models of revenue collection (e.g., vendor, intermediary, buyer or consumer, etc.) for duties and/or taxes. In order to ensure the revenue collection, Customs administrations should offer electronic payment options, provide relevant information online, allow for flexible payment types and ensure fairness and transparency in its processes. (WCO, 2022, p. 12)

Along with the USA and China, the European region is among the largest contributors to international retail turnover generated through e-commerce. In the EU member states in 2021 about 20 per cent (over EUR718 billion) of retail sales were realised online, and here, too, there has been an upward trend in recent years (Eurostat, 2022). Over 22 per cent of this turnover (about EUR158 billion) was realised from purchases of goods from third countries, which are subject to the customs control systems of the member states (Amsterdam University of Applied Sciences & Ecommerce Europe, 2022, p. 14). The analysis of the role and importance of Customs in relation to these goods cannot be made solely based on their value, since besides collecting customs duties and other taxes, Customs has several other functions and tasks. Online trade usually involves the movement of small consignments of relatively low value, but it should always be remembered that there is a risk that they pose a threat to the economic or vital interests of their consumers in the EU.

The rise of e-commerce has led to significant changes in the consumer behaviour of millions of people around the world. An additional push in this direction was given by the COVID-19 pandemic, which, until recently, changed the course of socioeconomic life as we knew it. The possibilities of purchasing goods from a distance have unfortunately also proved to be a good environment for the development of several illegal practices affecting both the persons involved in commercial transactions (sellers and buyers) and the competent state authorities exerting control over them. Controlling this particular flow of goods to prevent the movement of prohibited and restricted goods and identify consignments that have been split and/or undervalued to evade duties and taxes presents a number of challenges. They include the collection of electronic advance information on e-commerce consignments, the improvement of compliance and data quality, the simplification of duty and tax payment procedures, which are often too complex, and the strengthening of risk analysis capacities (Mikuriya, 2021). The regime for not levying customs duties and VAT on the import of the so-called 'low-value consignments',[1] existing for many years in the EU, allowed unscrupulous traders and importers to take advantage of such opportunities and import goods illegally into the EU. It is very difficult to prove such fraud by using the current means and methods of customs control, relying primarily on risk analysis and physical checks of part of the consignments. Considering, however, that more than 150 million small consignments enter the territory of the EU member states annually, it is in practice impossible for the customs administrations to check them all effectively. Thus, some of these goods are released for free circulation, although they are a potential object of fraud. According to data from the EC,

1 Consignments containing goods whose intrinsic value did not exceed a total of EUR22 (for Bulgaria the limit was BGN30) were not subject to customs duties and VAT, and consignments containing goods whose intrinsic value did not exceed a total of EUR150 were exempt from paying duties but were not exempt from paying VAT (Article 23 of Council Regulation (EC) No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duties).

this omission costs the EU budget about EUR7 billion per year in the form of unpaid duties and import VAT, which leads to a greater tax burden for regular taxpayers (EC, 2017).

The EC constantly considers the challenges of cross-border e-commerce as listed above and seeks legislative measures to ensure the correct and uniform manifestation of the fiscal and protective functions of Customs in all EU member states. The actions taken to implement the advance cargo information system — Import Control System 2 (ICS2) — are a good example of regulations aimed at limiting illegal trade and increasing the levels of security and safety in terms of the goods imported into the EU. This system will not only help limit fraud, but it also aims to achieve faster processing of consignments and complete digitisation of their import process. An important feature of ICS2 is that the first releases of its implementation cover postal operators and air express couriers (EC, 2019). The new VAT e-commerce package, which introduced several changes in VAT and customs legislation, aimed at responding to the variety of challenges raised by e-commerce, has also had a significant effect in this respect. From 1 July 2021, several amendments to Directive 2006/112/EC (the VAT Directive) came into effect, affecting the VAT rules applicable to cross-border business-to-consumer (B2C) e-commerce activities. The European Council adopted these rules by Directive 2017/2455 in December 2017 and Directive 2019/1995 in November 2019 (VAT e-commerce Directives). The purpose of the package was to level the playing field for businesses, reduce the complexity of the provisions, decrease the compliance burden and provide for more fraud-resistant rules. While it could be concluded that several of the new provisions will indeed contribute to achieving these objectives, others seem to go against them (Papis-Almansa, 2019).

Of interest in this area is the possibility of taking measures in the EU in the future to remove the threshold of EUR150 for charging duties. A similar recommendation is contained in the *Report by the Wise Persons Group*, which also proposes to provide some simplification for the application of customs rates for low-value consignments (Directorate-General for Taxation and Customs Union, 2022, p. 33). Here, the discussion is yet to come, as it is currently unclear to what extent such a move is justified in terms of additional administrative costs for customs administrations. Currently, only 25 per cent of the total amount of duties collected[2] remains in the member states, and considering that these are low-value consignments, it may turn out that the costs of processing them exceed the potential revenue. In this regard, so-called tax analysis, dealing with the question of what effects the changes in tax policy (especially tax rates and tax bases) will have on government revenues, is essential (Haughton, 2008).

2 Pursuant to Article 9, Paragraph 2 of Council Decision 2020/2053, member states shall retain 25 per cent of the amount of customs duties collected on their territory as compensation for the administrative costs incurred in collecting them, and the rest constitutes the so-called 'traditional own resources'.

On the one hand, these measures by the EC regarding the cross-border taxation of e-commerce aim to limit the shortage of customs revenues and the possibilities of avoiding paying them. On the other hand, however, these measures lead to the simplification of customs formalities for a certain category of goods. According to Grainger (2008), for most practitioners, trade facilitation revolves around 'better regulation', and utilising information and communication technology.

3. Features of the new EU VAT rules on cross-border e-commerce

The new VAT rules on cross-border e-commerce of low-value consignments were introduced in the EU on 1 July 2021 as an attempt to overcome the problem of VAT evasion. In addition to the effect on the collection of this tax, the new changes also aim to ensure that the tax will be paid in the member state in which the goods will actually be consumed. With changes in the national tax legislation of the EU member states, two VAT thresholds of postal and courier consignments from third countries, which are the subject of distance sales and are addressed to a natural person in the Union, have been differentiated. In the Republic of Bulgaria, these changes are regulated in Article 57a–57e of the Value Added Tax Law (Bulgarian State Gazette, 2006):

- Consignments of intrinsic value worth up to EUR150: are subject to VAT according to the rates for the goods contained in them, applicable in the EU member state in which these goods are actually declared and imported. These consignments continue to be duty-free under the provisions of Articles 23-24 of Regulation (EC) No. 1186/2009 (European Union, 2009). They are allowed to enter the territory of the European Union under this condition after submitting a customs declaration electronically (Single Administrative Document – SAD) of a super-reduced dataset (H7)[3] of Annex B of the Commission Delegated Regulation (EU) No. 2015/2446 (European Union, 2015), as long as the goods are not subject to prohibitions and restrictions and are not excise goods.

- Consignments of intrinsic value exceeding EUR150: these consignments are subject to customs duties and VAT (according to the VAT rates applicable in the country of import), and for the purposes of their customs clearance, a standard customs declaration is submitted electronically under column H1 of Annex B of the Commission Delegated Regulation (EU) No. 2015/2446.

3 Foreseen in Article143a of the Union Customs Code-Delegated Act (UCC-DA), the so-called super reduced dataset contains a set of data requirements meant to facilitate the implementation of the customs aspects of the VAT e-commerce package. The detailed content (data set) of this particular customs declaration is defined in Annex B of the UCC-DA under column H7. Customs declarations containing the H7 data set can be used: (a) by any person, (b) for goods sent in B2C, B2B or C2C consignments up to an intrinsic value of 150EUR subject to customs duty exemption in accordance with Article 23(1) DRR or in C2C consignments up to an intrinsic value of 45EUR subject to customs duty exemption in accordance with Article 25(1) DRR and (c) for IOSS, special arrangements or the standard import VAT collection mechanism.

The new regulatory regime regarding the importation of low-value consignments means that in such cases, from a fiscal point of view, the customs declaration of super-reduced dataset (H7) must be submitted not so much for customs purposes as for VAT purposes. Some authors even raise the question to what extent such declarations should be called 'customs', since they do not fully cover the objectives of customs control (Bowering, 2018). In practice, the customs authorities take on the role of revenue authorities and assume all responsibility for the VAT administration on such imports without the option of subsequent control by the tax authorities, since in most cases importers are non-taxable persons under the VAT legislation. The goals of the economic policy of each country are reduced to providing financial resources for the country, creating conditions for regulating the economy, as well as influencing the emerging inequality in market relations and income levels of the population (Zhelev, 2020). At the same time, however, Customs has significantly wider powers and responsibilities, such as control over the type and purpose of imported and exported goods.

4. Procedures for levying import VAT on consignments of goods worth up to EUR150

The new VAT regime has led to the need to develop and implement new customs procedures to ensure that imported goods circulate freely in the EU, including the updating of the customs import information systems operating in the member states. To implement the changes above in the VAT regime from 1 July 2021, an updated version of the Customs Import Information System (CIIS) of the Customs Agency was put into operation in the Republic of Bulgaria. It ensures the electronic submission of the new import declaration of a super-reduced dataset (H7), which can be submitted personally by the recipient of the consignment or by a customs representative authorised by the recipient (such as a courier or postal operator). Regardless of who appears as a declarant of the goods before the customs authorities, they need to have a qualified electronic signature (QES), a valid Economic Operators Registration and Identification (EORI) number[4] and registration for electronic data submission in the E-Portal of the Customs Agency.

Currently, in European customs practice, there are three customs procedure options, within which the consignments of goods having an intrinsic value of up to EUR150 are processed.

4.1. Standard procedure

This partially preserves the philosophy of the old regime of customs clearance of such consignments, the difference being expressed only in the absence of *de minimis* when levying import VAT (Figure 1). Once an order has been placed with a third country seller by an EU buyer and the latter has paid the value of the goods and possibly the transport and insurance costs, they are

4 EORI is a registration and identification number of economic operators and natural persons, used in all activities covered by customs and excise legislation applicable throughout the European Union.

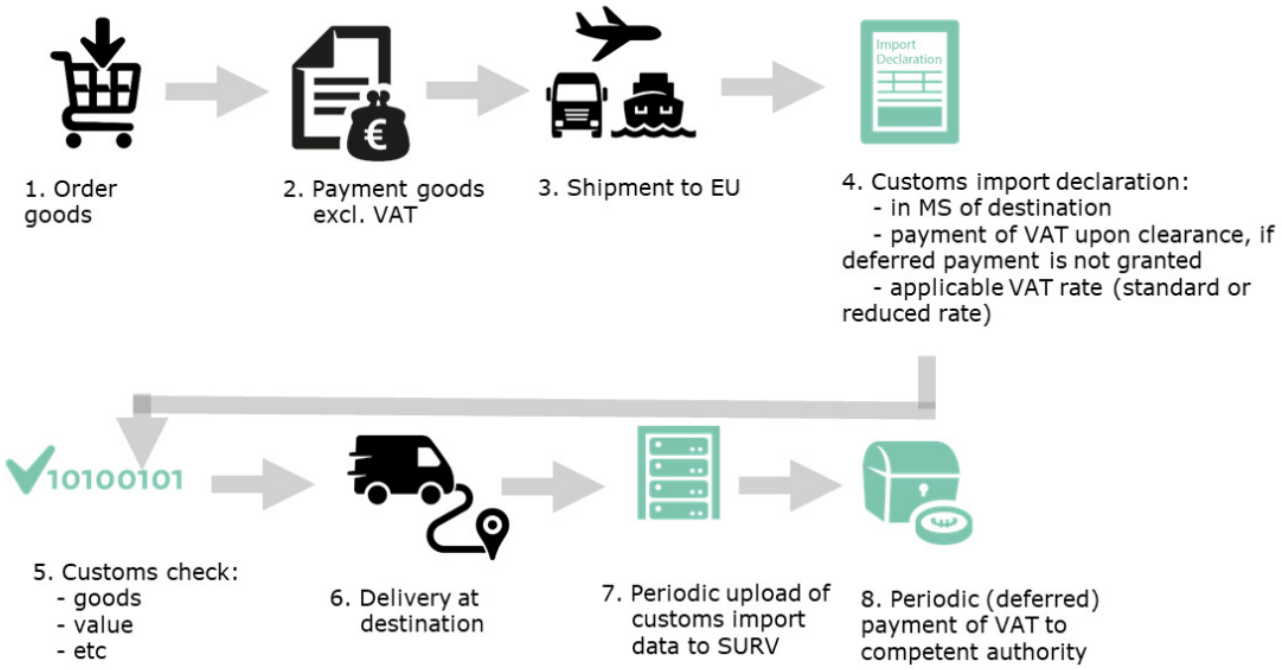

Figure 1. Standard VAT collection mechanism

Notes. MS, Member State; SURV, EU VAT Surveillance system, operated by DG TAXUD.

Source: Directorate-General for Taxation and Customs Union, 2020, p. 55.

physically transported to the member state where the buyer is located. Upon the arrival of the goods and after they are presented to the customs authorities, the recipient, or a person authorised electronically by the recipient (customs representative), submits an import declaration of a super-reduced dataset (H7) and pays the VAT to the respective customs office. Customs authorities can carry out documentary and physical checks on the goods, their value and tariff classification being of particular interest. The first check is aimed at preventing the declaration of undervalued goods and the unlawful avoidance of paying customs duties and VAT, while the second is aimed at establishing the existence of a risk profile for these goods and their falling into a certain import permit or registration regime. If the VAT due has been paid and no inconsistencies have been found during the checks carried out by Customs, then the goods can be released and delivered to their recipient. Customs authorities must regularly send all relevant data from customs declarations to the EU VAT Surveillance system to produce the monthly reports that the VAT legislation requires.

The two new options for collecting VAT when importing consignments with an intrinsic value not exceeding EUR150 contain elements that simplify customs formalities, which is a requirement for their higher efficiency.

4.2. Special arrangement with deferred import VAT payment

This procedure (Figure 2) is regulated in Title XII, Chapter 7 of the VAT Directive (European Union, 2006), and specifically for the Republic of Bulgaria in Article 57a–57e of the VAT Law. A specific fact about this procedure is that after the goods have been ordered, the payment is made to the seller in the third country (including the possible transport and insurance

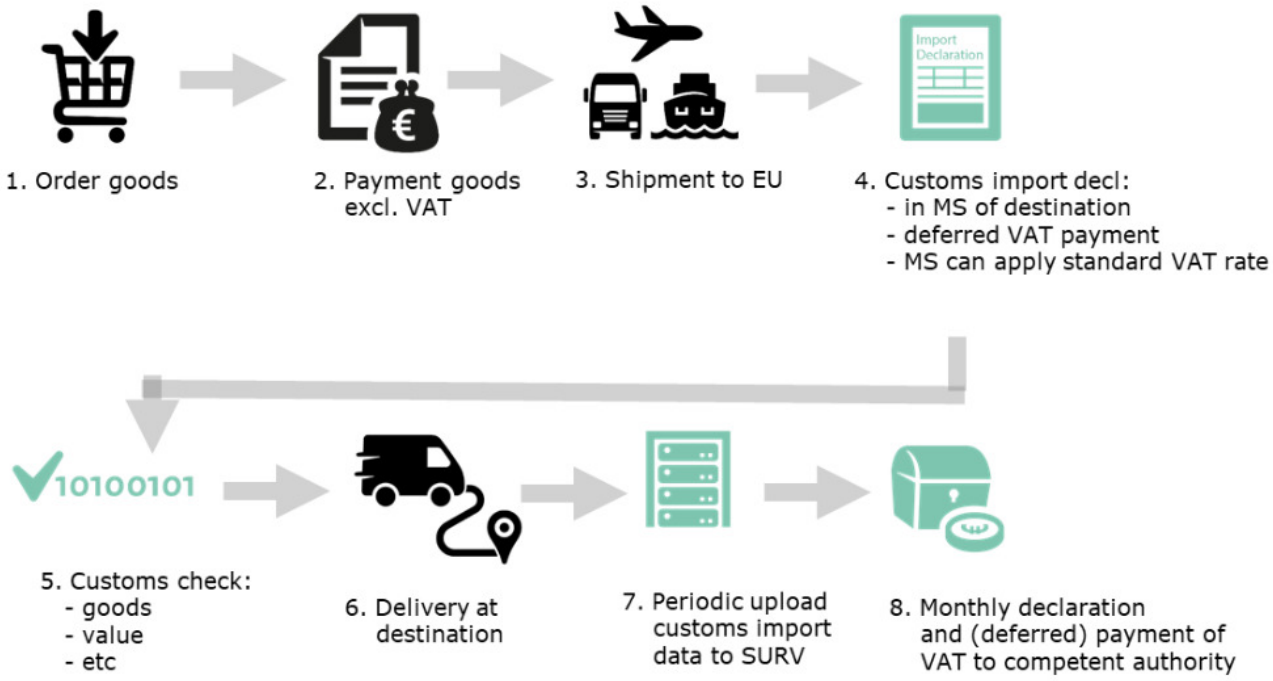

Figure 2. Special arrangement with deferred import VAT payment

Note: MS, Member State; SURV, EU VAT Surveillance system, operated by DG TAXUD.

Source: Directorate-General for Taxation and Customs Union, 2020, p. 50.

costs, if they are at the buyer's expense), and transported to the buyer's member state, an import declaration of a super-reduced dataset (H7) is electronically submitted to the customs authorities, but the VAT due is not paid at the time of importation. In practice, the payment of VAT is postponed, and the declarant must be a person acting as an indirect customs representative of the recipient (such as a courier or postal operator). This person must also be the holder of a deferred payment permit and provide the customs authorities with a bank guarantee assuring the future tax payment into the state budget. Upon acceptance of the H7 declaration by the customs authorities, like the standard procedure above, they can carry out documentary and physical checks of the goods if there is a justified need for this. If there are no discrepancies, the goods are released for free circulation in the EU and are delivered to the recipient, who at the time of their acceptance must pay the courier the import VAT. In turn, the courier or postal operator is obliged to keep an electronic register for the purposes of the special arrangement, which allows the customs authorities to verify its correct application. The tax collected from the recipients for the relevant period must be paid into the account of the relevant customs office that processed the import no later than the 16th of the month following the month of import, and for this purpose a monthly declaration must be submitted electronically.

The special arrangement with deferred payment of the import tax brings benefits to all participants in this process – the recipients of the goods, the couriers and the customs authorities. The recipients of the goods do not need to interact directly with Customs and know in detail the customs regulations

applicable to the goods they purchase, and they must pay the import VAT due only if they accept the consignment. Couriers do not need to complete standard customs declarations and wait for the possible advance payment of VAT by the recipients, which results in faster customs clearance of goods and freeing up of their warehouses. Regarding the customs authorities, the achievement of 100 per cent VAT collection can be considered as an important benefit of this arrangement, since in practice the payment is a commitment of the indirect representative and not of the individual recipients of the goods.

4.3. Import One-Stop-Shop (IOSS)

The IOSS (Figure 3) is a special procedure for distance sales of goods imported from third countries or territories set out in Title XII, Chapter 6, Section 4 of the VAT Directive. Under it, the suppliers of low-value consignments must register in advance with a member state tax office of their choice, and those who are based outside the EU must indicate their accredited representative with headquarters in the EU. The tax office issues individual IOSS identification numbers to suppliers for their registration under this regime. When a non-taxable person established in the EU orders goods through an electronic interface of a third country IOSS operator, along with the price of the goods, they also pay the VAT due according to the applicable rates in their member country. This means that under this procedure the import VAT is administered by the foreign IOSS operator, and the responsibility for its correct determination and collection is theirs. Once the goods are delivered to the EU, they are declared electronically to the customs authorities using a super-reduced dataset import declaration (H7). The consignment is subject to automated Customs and if there is not a risk profile in relation to the type and nature of the goods (based on the tariff number), their declared intrinsic value is below EUR150 and the indicated IOSS number is valid, then the goods are considered released for free circulation. In practice, the goods are delivered to the final recipient without the need for them to have any relationship with the customs authorities and without the tax on their import being effectively paid into the state budget at that moment. Each month, the supplier or their accredited representative submits an electronic VAT return (report) to the tax office of their choice and pays into its accounts the tax collected from all transactions carried out under the IOSS procedure, regardless of the EU member state in which the recipients of the goods are located. It is the duty of the relevant tax office under the IOSS operator registration to forward the collected import VAT to the tax offices of the EU countries where the buyers of the goods are located.

The IOSS regime provides several procedural simplifications regarding the declaration and payment of import VAT, which affect all parties involved in these transactions – non-EU online sellers, EU buyers, and customs and tax authorities of the member states. Some positive effects of this procedure are that:

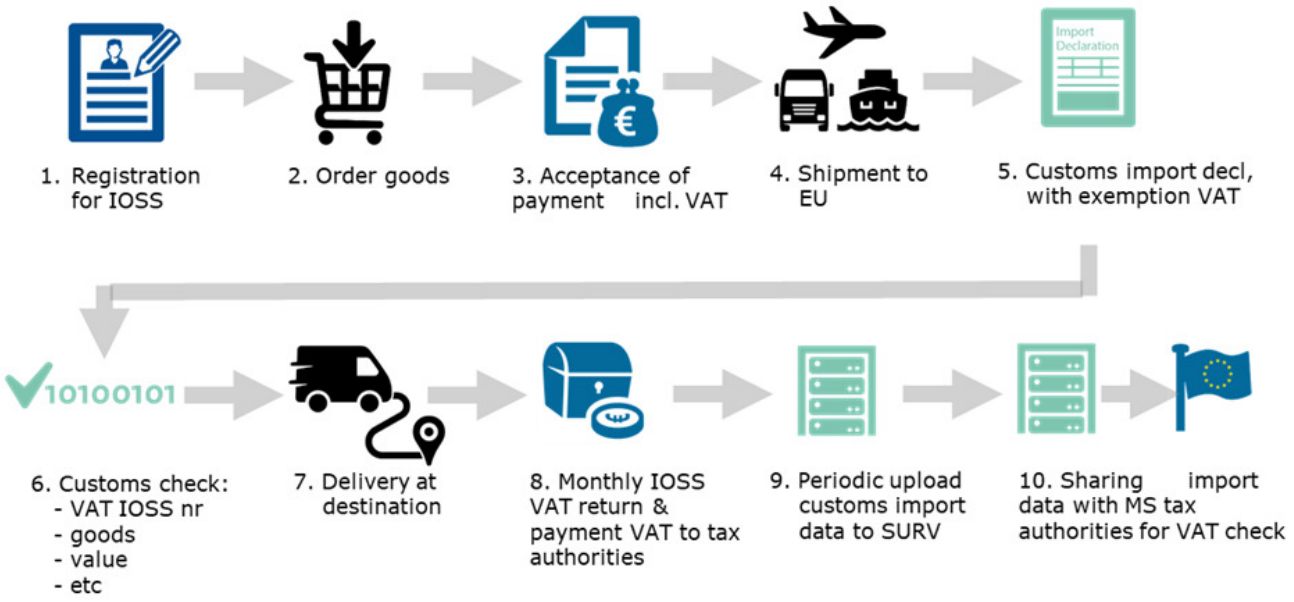

Figure 3. Import One-Stop-Shop – IOSS

Note: MS, Member State; SURV, EU VAT Surveillance system, operated by DG TAXUD.

Source: Directorate-General for Taxation and Customs Union, 2020, p. 41.

- sellers charge and collect the import VAT due at the place of sale in the third country. This is more efficient than the former practice in the EU of collecting VAT on imports at a later stage when the goods are already physically imported into the EU, as their recipient may refuse them, or neither pay VAT nor return them to the sender.
- the buyer is aware in advance of the amount of VAT on the purchase due in their country and pays it to the seller. They can be sure that they will not face additional payments when the goods are delivered to the EU.
- sellers need to register and remit the VAT collected on sales to EU customers in only one member state, although they can sell goods to buyers located throughout the EU. The collected VAT from all sales to recipients from all EU member states is paid to the tax authorities in the country of registration monthly, until then IOSS operators can operate freely with these funds.
- there is more efficient customs clearance as IOSS enables consolidated presentation of consignments to one customs authority to be released for free circulation throughout the EU. In practice, the IOSS scheme is an exception to the rule that the competent customs office before which the goods are declared for import is the customs office located in the EU member state where the transport and delivery of the goods ends.

5. Challenges to Customs in levying VAT on cross-border e-commerce

The new EU VAT rules on cross-border e-commerce of low-value consignments bring several advantages and simplifications for both economic operators (such as sellers, buyers, couriers and postal operators) and customs authorities. At the same time, these new rules will likely produce some new challenges for the customs authorities regarding low-value consignments, which need an adequate response. The customs administrations of the EU member states are obliged by law to exercise control over cross-border commerce and fulfil their fiscal and protective functions, to defend the interests of European consumers and generate revenue for both the EU and its member states (in the form of the so-called Traditional Own Resources, or TOR). Exercising effective Customs on the range of goods in question is, on the one hand, very difficult due to the large number of small consignments that are delivered daily to recipients in the EU. In practice, customs authorities have limited resources (staff and technical means of control), which does not allow them to physically check all goods crossing the external borders of the EU. Therefore, Customs must select the consignments subject to control and check only those in which the levels of fraud risk are high. On the other hand, Customs is placed in a situation where it must increasingly trust the economic operators engaged in this commerce, and especially those who are holders of the special VAT regimes for the importation of low-value consignments mentioned above. This transfer of risk from Customs to businesses implies that the preliminary control regarding the persons applying for access to these regimes is duly implemented and that the criteria and conditions required for this are fulfilled. In other words, Customs must be absolutely convinced that all requirements are met, because in practice part of its fiscal function is transferred to businesses and it does not fully manage the risk of fraud. In this sense, the preliminary checks of the persons who will have access to these procedures are very important.

Considering the nature of this type of commerce and the specifics of the new import VAT regimes for consignments worth less than EUR150, there are some challenges facing Customs, such as:

- undervaluing the declared intrinsic value of the imported goods so that it falls below the threshold of EUR150 and avoidance of the payment of customs duties. Such action should be treated as customs fraud, which is regulated in Art. 234 of the Bulgarian Customs Law (Bulgarian State Gazette, 1998). Such frauds are difficult to detect and prove, in view of the fact that in trading with such small consignments, commercial documents are not always available or their credibility is questionable.

- incorrect tariff classification of goods and avoiding the implementation of non-tariff measures introduced in relation to them (prohibitions or restrictions) on imports. Such action should also be treated as customs fraud according to Art. 234 of the Customs Law. The circumvention of EU trade policy measures can lead, for

example, to the unregulated import of goods dangerous to the life and health of the population, which would not be released for free consumption without the presentation of the required documents (such as certificates, licences, opinions and permits). The only effective way to detect such fraud is to carry out a physical examination of the dutiable consignments and compare their contents with what has been declared. As the number of low-value shipments is very high, it is in practice impossible to do this for all consignments. It is precisely the risk of such frauds that prevents the use of the so-called generic tariff number for low-value consignments.

- Smuggling compromises the fiscal elements of customs control as well as the protective elements. As stated above, full physical control over low-value shipments and comparison of the data in the customs declaration with their actual contents is impossible. The risk of an incomplete declaration, and the avoidance of applicable tariff and non-tariff measures, is high if there is not full control of the shipment. Such an act is treated as a customs violation according to Art. 233 of the Customs Law and, if found, is subject to serious penalties.

- infringing intellectual property rights, which is one of the most common violations when importing goods by means of courier or postal consignments because often the senders are in the informal or grey sector of the economy. The question here is to what extent is it possible to determine whether the goods are genuine or counterfeit, as a trade name is not indicated in the H7 declarations. This, in turn, does not allow the direct operation of the established customs mechanisms to counteract such imports, and the detection of counterfeit goods is possible only through carrying out physical examination by the customs authorities, who have received thorough training in the identification of such goods. On the one hand, the problem is grave, as it can involve cosmetics, medicines, electronic devices, children's toys or other goods that are used directly by people and can have a direct impact on their life and health. On the other hand, the quantities are small and the national supervisory authorities on the market may identify such goods if they are put up for sale in the Union.

- submission of invalid or wrong IOSS numbers by a fraudulent third country supplier when an EU buyer orders the goods. Such fraud or error is a prerequisite for wrongful collection of VAT, which will subsequently not be remitted to the tax authorities in the EU and, upon importation, the buyer will have to pay it again. Such a situation is a serious risk area for this new import VAT regime on low-value consignments. Due to the presence of such a problem, some couriers in the EU are worried about transporting consignments with IOSS

numbers, since (at least now), there is no mechanism for checking their validity by the economic operators. If during import the customs authorities find an invalid IOSS number, the recipients of the goods can refuse to receive them and refuse to pay VAT again. This causes the overloading of the couriers' warehouses with abandoned goods, paying additional costs for their storage, returning them to the sender or destroying them

- fraud committed by importers for paying less or more VAT through the IOSS system.[5] This involves specifying the place of delivery and imposing customs duty on the ordered goods in a member state with lower rates of VAT, but delivering to another member state. IOSS solves several problems from a customs point of view, but since it involves non-taxable persons under the VAT legislation, it cannot be established where the actual consumption of the goods imported under this procedure will be to charge the applicable tax rate in that location

- refusal by the recipient in the EU to accept the consignment, which leads to several problems for couriers and postal services. On the one hand, these problems are purely financial, related to the additional costs of returning the consignment to the sender, its storage or destruction. On the other hand, it should be considered that consignments containing goods posing a danger to the life and health of people or the environment, for which Customs has demanded to obtain the relevant import permits, are usually not released. These consignments remain in the warehouses of couriers or postal services, which may not have the necessary conditions for storing them and thus endanger the remaining stock or even the integrity of the warehouse, as well as the life and health of the warehouse workers and control authorities.

These challenges are present to varying degrees for individual EU member states and their customs systems, such as those for standard customs clearance of commercial shipments. There is a systematic absence of common implementation of customs measures, different control practices across border entry points, both within and across member states, differences in control priorities, and differences in methods and sanctions for non-compliance (Directorate-General for Taxation and Customs Union, 2022).

5 For example, the standard VAT rate in Bulgaria is 20 per cent. If the importer sets the system to charge 21 per cent, this harms the buyer, who may not pay attention to the VAT charged. Thus, the buyer transfers 20 per cent VAT to the tax administration, but the one per cent difference remains with the importer. Since the amounts are small, it is unlikely that the buyer would appeal them.

6. The case of Bulgaria

E-commerce in Bulgaria follows the global trends of constant growth, but the number of shipments and the total value of the goods in the transactions are still below the average levels for the EU as a whole. According to data from the Bulgarian E-commerce Association (BEA), the total turnover of B2C online commerce for 2021 was up 29 per cent compared to 2020 and reached EUR1.2 billion (BEA, 2022). The European e-commerce report for 2021 shows that in Bulgaria about 17 per cent of online purchases of goods (about EUR200 million) are from third countries. The average EU level of this indicator is 22 per cent (Amsterdam University of Applied Sciences & Ecommerce Europe, 2022).

In terms of the present study, the volumes of trade and the VAT on the so-called low-value consignments with an intrinsic value of less than EUR150 are of interest. The data for these are provided by the Bulgarian customs administration (Table 1). The data show that for the period 1 July 2021 to 30 June 2022, a total of 280,658 customs declarations (SAD) of a super-reduced dataset (H7) with a declared customs value of over EUR12.3 million were submitted and processed. Compared to the total volume of online commerce with third countries, it is obvious that only about six per cent of it is classified as low-value consignments. The summarised data show that the average declared value of one declaration is EUR43.95, which at an applicable VAT rate for import into Bulgaria of 20 per cent gives an average of EUR8.79 of collected VAT per declaration. These data should not be taken as indicative of the volume of work carried out by the customs authorities, and general conclusions based on them should not be drawn about the importance of e-commerce for Customs. As already mentioned, in addition to their fiscal function, Customs has other tasks assigned, the implementation of which in such importations is very difficult.

Of interest is the distribution of low-value consignments according to the way they are declared for release into free circulation. In the first year of implementation of the new import VAT rules, more than half the consignments (57 per cent) had customs duty imposed on the use of the special arrangement. The IOSS regime, considered the most efficient and easiest way to declare, ranked second and was used for 29 per cent of the consignments, while the standard import procedure was used for 15 per cent of the consignments.

The number of processed SADs by type of declaration regime by month for the period 1 July 2021 to 30 June 2022 shows a decreasing trend in the processed SADs (H7) for the special arrangement and an increasing trend in the share of those under the IOSS regime (Figure 4). At the beginning of the period the difference between the two regimes is notable (over 20,000 consignments), while at the end the difference is below 5000 consignments. This may be because an increasing number of third country online merchants are now registered for the EU IOSS regime, thus expanding its scope (currently

Table 1. The number of processed customs declarations (SAD) of a super-reduced dataset (H7) by separate declaration regimes[a] and customs value[b] for the period 1 July 2021 to 30 June 2022

Month Year	Code C07 in E.D. 1/11 'Additional regime' in SAD (H7)					
	IOSS regime		Special arrangement		Standard procedure	
	SAD	Customs value €	SAD	Customs value €	SAD	Customs value €
July 2021	1198	77,495	22,904	825,591	3669	226,437
August 2021	3186	149,515	19,085	649,919	3199	207,884
September 2021	5863	228,204	14,675	615,018	3492	207,283
October 2021	5964	231,419	11,768	523,473	3638	219,871
November 2021	7047	276,793	14,348	558,960	3667	258,844
December 2021	10465	341,281	10,456	563,226	3759	259,455
January 2022	10991	316,887	12,121	588,889	3373	246,324
February 2022	8932	284,262	10,631	518,422	3087	228,955
March 2022	8783	276,895	11,092	505,626	3487	276,867
April 2022	4537	194,098	8222	330,059	3065	239,785
May 2022	4864	197,876	9800	402,206	3095	240,706
June 2022	9036	281,354	13,942	538,854	3217	247,477
Total	80,866	2,856,079	159,044	6,620,242	40,748	2,859,887
Relative % share of all SADs	29	23	57	54	15	23

[a]The data are for SADs in the status of 'Release of goods' at the customs office of submission.

[b]The declared customs value in cells E.D. 4/18 in SAD 'Statistical value/Base B00', recalculated in euros at a fixed exchange rate of 1.95583 BGN/EUR.

Source: Reply to request for access to public information No. 32-236055/14.07.2022 to the Bulgarian Customs Agency

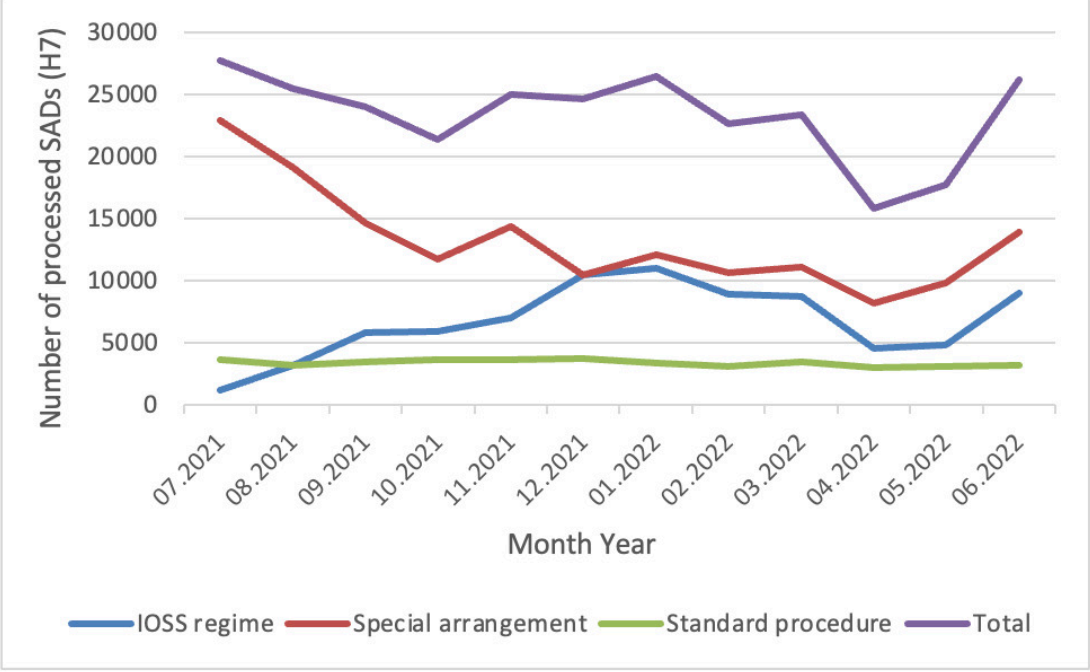

Figure 4. Dynamics of the number of processed SADs (H7) by types of declaration regimes for the period 1 July 2021 to 30 June 2022 (data from Table 1)

their number is more than 8600). The relative stability in using the standard procedure is apparent, which may be the result of users not being familiar with the other two options or the more conservative attitude of online users.

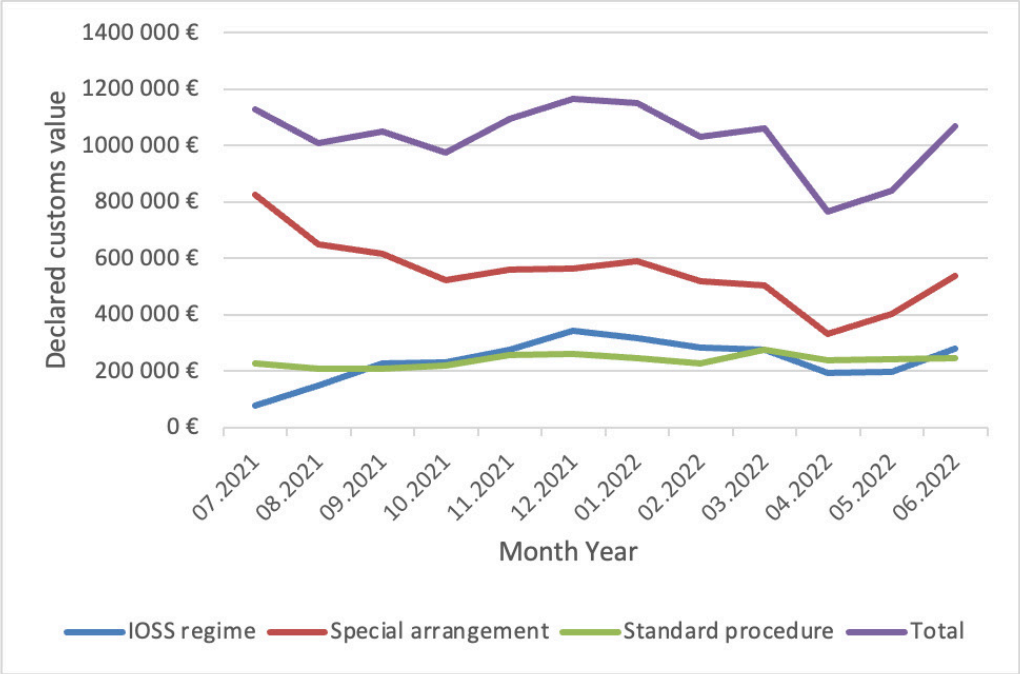

Figure 5. Dynamics of processed SADs (H7) by types of declaration regimes according to declared customs value for the period 1 July 2021 to 30 June 2022

The analysis based on the declared customs value in the processed SADs (H7) shows results similar to Figure 4, with the special arrangement (54 per cent) taking the lead here as well (Table 1). The IOSS regime has seen some decline, accounting for only 23 per cent of the total value of low-value consignments. This decline is mainly due to an increase in the standard procedure, which occupies a share of 23 per cent. Essentially, these data are difficult to analyse, due to a lack of information on the type of declared goods and the tariff numbers.

In terms of the dynamics of the processed SADs (H7) by types of declaration regimes according to the declared customs value by months for the period 1 July 2021 to 30 June 2022, the same development of the standard procedure and the IOSS declaration regime can be seen, with the latter showing a slight growth. Despite its dominant importance in terms of the value of consignments processed, the special arrangement reported a decline (Figure 5).

The two main channels for customs clearance of goods – for standard consignments, usually B2B in nature and of significant value or volume, and for certain categories of consignments, such as postal and courier consignments containing goods of value below a certain threshold (*de minimis*) (Blegen, 2020) – are clearly distinguished in the EU member states. The comparison of these two channels based on the available data also shows interesting results that lead to conclusions about the importance of cross-border e-commerce for Customs in the Republic of Bulgaria (Table 2).

The data in Table 2 show the number of processed consignments and the total value of goods released for free circulation in the country during the period 1 July 2021 to 30 June 2022. It is evident from the data that in terms of the value of the goods, it cannot be claimed that the import of low-value

Table 2. Number and declared customs value of processed customs declarations (SADs) by columns H1 (regime code 40) and H7 (total) by months

Month Year	H1 (procedure code 40)		H7 (total)		Share of H7 in total imports	
	SAD[a]	Customs value €[b]	SAD	Customs value €	SAD %	Customs value %
July 2021	40,403	1,024,109,349	27,771	1,129,524	40.74	0.110
August 2021	38,205	1,090,192,078	25,470	1,007,319	40.00	0.092
September 2021	38,607	1,059,711,668	24,030	1,050,504	38.36	0.099
October 2021	39,752	1,277,974,164	21,370	974,763	34.96	0.076
November 2021	42,321	1,384,580,211	25,062	1,094,597	37.19	0.079
December 2021	39,465	1,204,810,405	24,680	1,163,963	38.48	0.097
January 2022	37,158	1,484,293,823	26,485	1,152,099	41.61	0.078
February 2022	35,666	1,436,715,413	22,650	1,031,639	38.84	0.072
March 2022	41,258	1,391,692,410	23,362	1,059,387	36.15	0.076
April 2022	39,641	1,522,075,459	15,824	763,942	28.53	0.050
May 2022	40,463	1,537,722,325	17,759	840,788	30.50	0.055
June 2022	44,343	1,489,165,981	26,195	1,067,684	37.14	0.072
Total	**477,282**	**15,903,043,285**	**280,658**	**12,336,208**	**37.03**	**0.078**

[a]The information does not cover data on customs declarations in the status of 'Cancellation Request', 'Cancelled' and 'Goods not released' at the customs office of submission.

[b]The declared customs value in cells E.D. 8/6 'Statistical value' of SAD, recalculated in euros at a fixed exchange rate of 1.95583 BGN/EUR.

Source: Reply to request for access to public information No. 32-246281/22.07.2022 to the Bulgarian Customs Agency

consignments is of notable importance, as it only accounts for 0.078 per cent of the total imports for the period. At the same time, the data on the number of processed customs declarations under column H7 unequivocally show that the processing of these consignments requires a lot of administrative customs resources. Their share of just over 37 per cent is substantial and therefore it is necessary to provide Customs not only with appropriate IT solutions, but also with human resources. Although the declaring and processing of customs declarations under the IOSS regime is largely automated, the other two declaration regimes under column H7 require some intervention by customs officials. If we add the need to carry out physical checks on certain consignments and the time for their customs clearance, the necessary resources for this increase significantly. Despite the use of risk analysis as the main method for the selection of consignments, control in terms of security and safety requirements represents a major challenge for any customs system.

The data in Table 2 on the dynamics of the SADs processed for the period 1 July 2021 to 30 June 2022 show relative stability in the number of declarations under column H1 for the 'release for free circulation procedure' (code 40), varying around 40,000 on average per month (Figure 6). For the SADs under column H7, the dynamics are more variable, and even a slight downward trend is observed for the period 1 July 2021 to 30 June 2022.

The main purpose of the new VAT rules on importing low-value consignments into the EU member states is to reduce administrative obstacles for importers and the amount of lost revenue because of fraud. At the same time, the costs of physical examinations of the goods should also be considered, which in certain cases can be greater than the potential VAT revenues. A fact

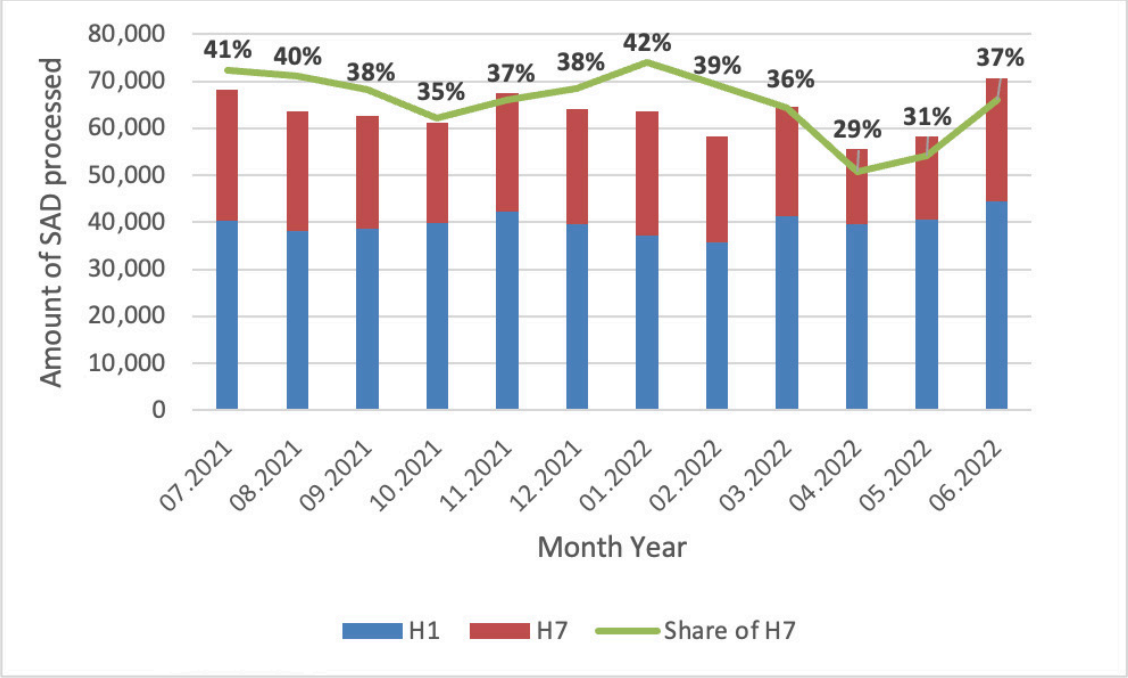

Figure 6. Dynamics of SADs processed by columns H1 and H7 for the period 1 July 2021 to 30 June 2022

that cannot be underestimated is that in most cases the recipients of small consignments are not well acquainted with customs formalities and this leads to additional problems and delays in processing the consignments. This necessitates the development of effective mechanisms to ensure that customs control in the member states is properly implemented.

7. Conclusion

The long-standing problem of fraud in the EU regarding the import VAT on postal and courier consignments has led to a change in the regime for levying this tax in the EU, which came into force on 1 July 2021. The new rules also involve new customs formalities, covering the import of consignments with an intrinsic value of up to EUR150, with three options already used for customs clearance of their import.

Although only one year has passed since the new VAT rules entered into force, three main points can be made:

1. The new EU VAT rules on cross-border e-commerce of low-value consignments have led to several simplifications both for sellers and importers, and for customs authorities, and are aimed at overcoming the long-standing problem of tax evasion when importing such goods. Customs clearance options are introduced, which provide different opportunities and advantages for all stakeholders – sellers, buyers and control authorities.

2. The new rules present Customs with several challenges, which are currently assessed as difficult to overcome. Potential problems such as undervaluation of goods, incorrect tariff classification, smuggling, infringement of intellectual property rights, wrongful collection or

incorrect payment of VAT and refusals to accept consignments by EU recipients should be adequately addressed through risk analysis and the increased use of information technology.

3. Directly applying the European law, the Republic of Bulgaria has adopted the new VAT rules, as over the past year both the customs administration and online users have had to adapt to them. Most Bulgarian users use the special arrangement for declaring their import consignments, which could be because a small number of the electronic platforms and the third country providers they use still have a European IOSS number. At the same time, the relatively large number of processed SADs under column H7 requires additional administrative resources on the part of the Bulgarian customs administration, which would allow the proper implementation of the fiscal and security functions assigned to it.

Note

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References

Amsterdam University of Applied Sciences & Ecommerce Europe. (2022). https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf

Blegen, B. (2020). Re-examining border clearance in the age of e-commerce. *World Customs Journal*, *2*(14), 81–98. https://worldcustomsjournal.org/Archives/Volume%2014%2C%20Number%202%20(Oct%202020)/1902%2001%20WCJ%20v14n2%20Blegen.pdf?_t=1603239

Bowering, G. (2018). Does e-commerce and the growing availability of trade data mean that the customs declaration may no longer be required? *World Customs Journal*, *1*(12), 3–16. https://worldcustomsjournal.org/Archives/Volume%2012%2C%20Number%201%20(Mar%202018)/1846%2001%20WCJ%20v12n1%20Bowering.pdf

Bulgarian E-Commerce Association. (2022). *Passport of the e-commerce industry in Bulgaria 2021*.

Bulgarian State Gazette. (1998). *Customs law. N.15 (06 02 1998 r)*.

Bulgarian State Gazette. (2006). *Value Added Tax law. N.63 (04 08 2006 r)*.

Directorate-General for Taxation and Customs Union. (2020). *Importation and exportation of low value consignments — VAT e-commerce package "guidance for member states and trade."* European Commission. https://vat-one-stop-shop.ec.europa.eu/system/files/2022-01/guidance_on_import_and_export_of_low_value_consignments_en.pdf

Directorate-General for Taxation and Customs Union. (2022). *Report by the Wise Persons Group on the reform of the EU Customs Union*. European Commission. https://taxation-customs.ec.europa.eu/system/files/2022-03/TAX-20-002-Future%20customs-REPORT_BIS_v5%20%28WEB%29.pdf

European Commission. (2017, December 5). *Modernising VAT for e-commerce: question and answer*. https://ec.europa.eu/commission/presscorner/api/files/document/print/en/memo_16_3746/MEMO_16_3746_EN.pdf

European Commission. (2019). Commission implementing decision (EU) 2019/2151 establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code. *Official Journal of the European Union: Legislation L 325*, *62*, 168–182. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2019.325.01.0168.01.ENG&toc=OJ%3AL%3A2019%3A325%3ATOC

European Commission. (2021, June 28). *VAT: New e-commerce rules in the EU will simplify life for traders and introduce more transparency for consumers*. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3098

European Union. (2006). Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. *Official Journal of the European Union: Legislation, L 347*, *49*, 1–118. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0112&from=EN

European Union. (2009). Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty. *Official Journal of the European Union: Legislation, L 324*, *52*, 23. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R1186&from=EN

European Union. (2015). Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code. *Official Journal of the European Union: Legislation, L 343*, *58*, 1–557. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=EN

Eurostat. (2022). *Value of e-commerce sales*. https://ec.europa.eu/eurostat/web/digital-economy-and-society/data/database

Grainger, A. (2008). Customs and trade facilitation: from concepts to implementation. *World Customs Journal*, *1*(2), 17–30. https://worldcustomsjournal.org/Archives/Volume%202,%20Number%201%20(Apr%202008)/03%20customs_and_trade_facilitation_from_concepts_to_imple

Haughton, J. (2008). *Manual on tax analysis and revenue forecasting: outline*. Suffolk University. https://cpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/8/1443/files/2019/06/TaxManual.pdf

Mikuriya, K. (2021). Now is the time for implementation. *WCO News*, *96*, 17–19. https://mag.wcoomd.org/magazine/wco-news-96/now-is-the-time-for-implementation/

Papis-Almansa, M. (2019). VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? *ERA Forum*, *20*(2), 201–223. https://doi.org/10.1007/s12027-019-00575-9

Wang, M. (2017). Establishment of an international legal framework for cross-border electronic commerce rules: Dilemmas and solutions. *World Customs Journal*, *2*(11), 61–76. https://worldcustomsjournal.org/Archives/Volume%2011%2C%20Number%202%20(Sep%202017)/1838%2001%20WCJ%20v11n2%20Wang.pdf

World Customs Organization. (2022). *WCO Framework of Standards on Cross-Border E-Commerce - 2022 edition*. https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf

Zhelev, Z. (2020). The role and importance of excise duty in Bulgaria. *Knowledge - International Journal*, *42*(5), 869–873. https://ikm.mk/ojs/index.php/kij/article/view/628

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ACADEMIC CONTRIBUTIONS

Data Culture, the Obstacle to SMART Customs in the Face of Disruptive Innovations – a Jamaican Perspective

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An immature, underdeveloped data culture limits a digitised strategy (which has been seen as the best approach to treat the complexities of e-commerce and 'fast couriers') and stands in the way of the Jamaica Customs Agency (JCA) developing its capacity as a truly SMART (Secure, Measurable, Automated, Risk management based, Technology driven) administration. A commitment to paper-centric processes, disjointed legacy systems, fear and mistrust of technology, a lack of regard for data integrity and an underdeveloped appreciation for the need for advanced technology that facilitates necessary cooperation and collaboration of internal and external data flows are evident oppositions to data proficiency, and a foothold on e-commerce. JCA's information management and border professionals have shed light on the challenges that disruptive innovations in the form of e-commerce and 'fast couriers' present to border management, and expressly identifies big data as a hopeful strategy to overcome current challenges. However, there is an acceptance of the fact that stakeholders need to develop an appreciation for data and its relevance in modern customs operations, as this is the key to a proactive Customs that can conduct intelligent targeting and make decisions based on evidence.

Current trends in cross-border e-commerce and the legal and technological adaptations that have been necessary in Europe, Africa, Middle East and parts of the Caribbean have been cited as models for policy adjustments that the JCA could consider. In addition to its development of local standards for data management and technology that would foster the appetite of internal stakeholders, the JCA also needs to look to national technocrats for policy provisions to facilitate data use and flows among Border Regulatory Agencies (BRAs). The JCA should also appeal to national technocrats to institute policies related to and provide the requisite technological infrastructure to facilitate big data management locally and cross-border.

1. Introduction

Disruptive innovations bear no specific identification and span the gamut of innovations across industries and or technologies that could potentially or are disrupting the status quo or usual way of doing business. In this instance, disruptive innovations refer to cross-border e-commerce and the new model of couriers.

The swift emergence of e-commerce and courier companies (called 'fast couriers' by some Jamaica Customs Agency [JCA] officials) operating in tandem over recent years, and the degree to which the two, combined, have

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significantly impacted clearance operations and border management in Jamaica, highlights a major shift in the global trading community under the influence of digitisation. The redefinition of the global supply chain from business-to-business (B2B) to business-to-person and person-to-person (Whistl, 2021) has demanded a new approach to customs administrations' methods and strategies for efficient border management and customs operations. In the face of an ever-evolving global environment, SMART (Secure, Measurable, Automated, Risk management based, Technology driven) customs administrations (World Trade Organization & World Customs Organization, 2022) have become increasingly more necessary as disruptive innovations in a digitised global space demand a new, smarter, more robust way of business. A digitised global space demands the development of a coherent environment fitted with the requisite technological knowledge, practices and infrastructure where disruptive innovations, facilitated by digitisation, cannot successfully or for any extended period, upend the strategies of customs administrations, to create major vulnerabilities and risks of catastrophic impact to border security and management. The conventional methods (paper processing and physical inspection) in border management are proving inadequate to the extent that the JCA seems to now be struggling, according to border experts and information services professionals, with control and management of the import clearance details of e-commerce. The evidence is, for instance, not being able to capture information of every individual importer and the details of goods being cleared, as many items pass under the assumption of meeting the *de minimis* value and are, therefore, cleared as bulk/consolidated shipments under couriers' details. This is a reality which highlights the need for new local and external policies and regulatory requirements for the management of cross-border flows.

The purpose of this paper is to look at the response of the JCA and other Border Regulatory Agencies (BRAs) to data (as a tool) and technology, and their perception of the degree of relevance of data, the appropriate and adequate use of the Internet of Things (IoT) (as far as it accommodates data use) in customs clearance processes and border management, particularly as it concerns the management of 'fast couriers' and the clearance of e-commerce cargo. E-commerce has been a major disruptor in the trading and clearance environment and 'disruptive innovation requires enabling technology, an innovative business model, and a coherent value network' (Twin, 2022). As such, all things connected to an innovative idea that is causing disruption will also be likely to change. In the trading environment, Customs must respond readily with policy approaches that could form part of the coherent value network that is necessary for effective customs operations, especially in the face of disruptive innovations; and in so doing, change to meet the demands and treat the challenges created by disruptions to still achieve the mandate. In Jamaica, much is wanting in response to the disruption that e-commerce has triggered. Literature looking at customs administrations' response to e-commerce in the European context and in North America demonstrates that

collaboration in cross-border trade policies combined with local data management policies and instruments that guide the implementation and management of data and technology empowers customs administrations to maintain control of security and general border management by stepping up to the digital level of a modern e-commerce environment (WTO and WCO, 2022). A recognition of the power of data and technology to effectively manage, monitor and measure processes positions Customs for improvement in trade facilitation, efficiency in border security, good risk management, process efficiency, customer satisfaction, and overall effective border management, a level of recognition yet to be attained for the Jamaican situation.

Definitions

- Data culture, for the purposes of this paper, is defined as 'the collective behaviours and beliefs of people who value, practice, and encourage the use of data to improve decision-making' (Tableau, n.d.).
- Persons with data culture challenges are customs officials and other BRAs.

2. Context

At the core of the challenges with cross-border e-commerce, for many customs administrations, Jamaica no less, is data culture. This is confirmed by the unavailability of relevant and sufficient technological infrastructure and the absence of policy frameworks that guide the efficient operations of cross-border trade and data flows in the operations of Customs and other BRAs, which share an intrinsic relationship with the absence of common-place acceptance and use of data for decision-making. Trending strategies in data-sharing platforms, technological policies and cross-border collaborative efforts in the European, American and Asian contexts highlight that there are administrations that have managed to successfully adjust and tackle the complexities of disruptions to regain control of border management, even in relation to the fast-evolving phenomenon, e-commerce. As stated by the WTO and WCO (2022, p. 3):

> Customs authorities have embraced advanced analytical technologies. Around half use some combination of big data, data analytics, artificial intelligence and machine learning. Those who do not currently use them have plans to do so in the future. Many customs authorities see clear benefits from advanced technologies, particularly, regarding risk management and profiling, fraud detection and ensuring greater compliance.

The successes that these administrations boast seem to have been facilitated by the common-place acceptance and use of advanced technological tools and strategies, and the common understanding that big data management, using

automated instruments such as blockchain and distributed ledger technology, must now form part of modern cross-border trade. This common-place understanding has enabled quick responses to instituting solutions to cross-border trade in this new dispensation, much of which has included new and innovative cross-border cooperation and data-sharing throughout the supply chain by using big data instruments.

The Chief Information Officer's (CIO) take on data culture in the JCA resonates the gap in JCA and the need for development:

> We are developing. Immature, but the culture is shifting. Because areas like Risk Management, Post Clearance Audit and Planning and Research have been engaging big data for decision making...but not so much on the operations side. (A Williams, personal communication, 11 October 2022)

Quality data is essential for operational efficiency and effectiveness. However, the quality of data is negatively impacted by an immature data culture on the frontline. Of note – customs best practices, policy design and considerations were instituted in a context where the global supply chain was mostly defined by B2B transactions and person-to-person transactions were conventionally limited to specific types of shipments. Additionally, customer representation to Customs was being facilitated by trained, licensed and otherwise regulated customs brokers. Examination reports existed only as attachments to clearance documents of shipments to which they related. Even with the existence of a digital 'breach system' and audit data pages such as those contained in the Revenue Administration Information System (RAIS), there was no system to collate patterns of discrepancies or any other indicator that could inform risk management decisions, as these systems existed in silos. Otherwise, information was stored in physical file format, disjointed and disaggregated, and the extent of its organisation was limited to the date of processing or release, or similar criteria. The approach to cargo examination was to 'dismantle the haystack' to the degree of personal satisfaction of the examining officer in an effort to find the target two per cent of non-compliance (a legacy which still holds true today). As expressed by the CIO, this underdeveloped data culture has meant throwing more [human] resources into detection and prevention of fraud, which, when realities like e-commerce are considered, is a major operational limitation with major implications for national security.

The United Nations Conference on Trade and Development's (UNCTAD) Automated System for Customs Data (ASYCUDA) was the initiation into a SMART administration for the JCA. Introduced to Jamaica in 2014, an otherwise effective system that had served other administrations well, ASYCUDA has been limited in its potential and capacity by a challenging data culture that ignores the necessity of quality inputs and fails to embrace

and explore all the available features of a system built to enable post audits and risk analysis, as opined by information management professionals in the Information Services Division of the JCA.

Even with ASYCUDA, there are limitations in respect of features being accessed and used to enhance decision-making and to optimise trade facilitation and risk management in the clearance of conventional cargo. Add the complexity of e-commerce and 'fast couriers' and the challenges become glaring. As it concerns regular processing of cargo, the CIO states:

> Data allows you to see patterns and detect realities. Otherwise [we are] very reactive. There is a direct implication on risk management; and not just risk management but also the decisions from leadership in operations... But due to our lack of an appreciation for data relevance, we find instances where data presented is not adequate or is captured out of context... (A Williams, personal communication, 11 October 2022)

JCA is yet to maximise the benefits of ASYCUDA, due in part to an immature data and technological culture. Barbados, for example, was able to attain 24-hour clearance on 60 per cent of import payments in 2020 since implementing ASYCUDA (UNCTAD, 2020). Even with more advanced investment in technology and digitisation in the form of the Jamaica Single Window for Trade (JSWIFT), for instance, Jamaica is yet to attain 24-hour clearance (total exit, where cargo is completely out of the customs area) but is aiming to achieve this goal in 2023. Contributing factors at the national level include challenges in the recognition of the need for a coherent value network within which an automated data processing system like ASYCUDA needs to function for full efficiency. Disaggregation in the strategic goals of government agencies responsible for border management also speaks to the lack of vision and understanding of the need for coherency and cohesiveness in border efforts. This challenges the process and degree of cooperation and coordination, even more so for data collaboration. Also, the JCA's lack of recognition of the need for responsible data interaction and management affects quality data sets and output for decision-making, measurement, analysis and improvement. For example, some evident pitfalls that have affected the efficiency of the system have included but are not limited to, officers omitting to use 'fraud codes' embedded in the system to assist risk management and post audit processes, and to measure compliance. There is also the persistent challenge with quality data inputted in the Inspection Act, a feature of the ASYCUDA system tailored to capture data regarding non-compliances using predetermined codes, necessary for strategic decisions or targeting. However, ASYCUDA has improved trade facilitation by removing a completely manual paper process and enabling traders and freight forwarders to submit the Single Administrative Document (SAD) remotely. Data consciousness at the organisational level, however, has been lacking and the JCA is yet to capitalise on the benefits of automated data to detect fraud and other forms of non-

compliance. This acts to the benefit of importers who are aware of the administration's limitations, and may manipulate the system's constraints to their benefit. As stated by the CIO, 'often, submissions are made with incorrect data to meet submission deadline, and information is later changed' (A Williams, personal communication, 11 October 2022).

Optimal capacity for trade facilitation through automated processes is limited by the lack of availability of a desirable standard in the digital infrastructure, which automated, multi-user systems like ASYCUDA need for consistent service and operation. Requisite attention is not given to the standard of digital networks provided, particularly for government agencies. This includes a lack of appreciation of the need for proper bandwidth and network infrastructure that enables consistent functionality, large load capacity, speedy processing and distribution of data, and general good quality automated services. The direct result of this is frequent down-times of a system like ASYCUDA, which not only creates gaps in the end-to-end processing, but is also forcing Customs to resort to efforts such as manual processing as part of its business continuity plan.

The low appetite for data use and relevance is very apparent in the JCA's slow response to the disruption caused by e-commerce and 'fast couriers.' E-commerce has emerged and evolved rapidly over the past few years. The JCA, like many other customs administrations, was caught off-guard by this new form of person-to-person and business-to-person supply chain model. According to a border protection expert with many years of experience in the JCA:

> It's hard to regulate a fast-growing industry like fast couriers. Unlike [conventional] freight forwarders who are regulated, we have no control over [fast couriers] who are interacting with us on behalf of customers...the vulnerabilities are major! (T Foote, personal communication, 12 October 2022)

Connectivity and open markets via the internet mean that even dangerous goods and goods originating from high-risk locations and suppliers are now accessible. Customs has since had to adjust from processing business mail and the occasional person-to-person package through conventional, well-established couriers such as DHL, FedEx and MailPac, to struggling against upstarts that aim to take advantage of the swelling clearance and delivery market. The challenge to treat glaring new risks presented by unregulated 'couriers' numbering well over 50 in the air cargo operations of Kingston alone is just one part of the problem. To create their own coherent value network in cross-border trade through e-commerce, couriers in Jamaica have set up large warehouses in other countries (primarily the United States, from where much of e-commerce to Jamaica is shipped). This creates a sort of 'phantomisation' of trade and the trader, eluding targeting strategies and rendering strategies such

as 'random selection' (a type of selection process used to choose goods and passengers for inspection, at random) to be very ineffective. According to the JCA's border protection expert:

> From the border perspective there are a lot of levels of risk when dealing with fast couriers. Processing time [for import] is very speedy, and we are unable to do intelligent targeting before-hand because breakdown manifest is not available before wheels down. Also, couriers act on behalf of importers, so Customs does not have information on [potential] persons of interest because goods are under courier names. For export: the relationship between client and freight forwarder is so close that it is the freight forwarder's name on exports, hiding the true exporter, and this is used as a strategy to circumvent targeting. (T Foote, personal communication, 12 October 2022)

Strategies that had been formulated and refined in targeting cross-border trade in the conventional B2B supply chain have been found to be woefully inadequate or not even applicable to modern cross-border flows like e-commerce. E-commerce cargo loads are large, voluminous pallets with several individual small packages and parcels, which prove difficult to search and to determine selection criteria for. For instance, as highlighted by border protection experts, lottery scamming has been cited as one threat that could be easily facilitated by the illusive nature of e-commerce and 'fast couriers,' as lottery scamming paraphernalia are sent as documents, and in the current practice of inspection, documents are not scanned, leaving a freeway for the movement of these illicit items.

Facilitating end-to-end data flow could be a powerful response to the challenges, a solution for modern targeting and a means to gain control over illusive practices in e-commerce. Depending on digital transmission of data from the point of warehousing through to the point of off-loading, the use of modern scanning equipment and data-sharing platforms could be the solution to treating revenue leakage due to vague descriptions, inconsistences in declaration of values, concealment and other fraud tactics. But, to accomplish this the JCA needs to mobilise its stakeholders to be more sensitive to data. According to one of JCA's border protection experts, T Foote, the culture shift may require standardisation of data use and end-to-end flows so that reliable data that is not skewed to stakeholders' interests can be available. E-commerce, in collaboration with 'fast couriers,' involves the heavy use of data and IoT to make the business model successful. As such automated and data driven tools must be Customs' response to vulnerabilities that have roots in digitisation, for both internal cooperation and external flows.

The illusive and overwhelming effects that disruptive innovations like e-commerce have had on customs operations and border management prove that Jamaica Customs, unlike some other administrations in Europe, the Americas and Asia, has not come to the full recognition that solutions are available,

other than the conventional methods of customs management, particularly for cross-border trade. Physical inspections, information chasing, and eyeballing as many parts of the clearance process as possible to identify non-compliance no longer bears much relevance. However, an immature data culture that results in stakeholders submitting arbitrary data and manipulating data submissions to suit their interests; where customs officials are themselves inconsistent and untimely with data submissions and have no data appreciation; where technology is not used accordingly or given due regard (for example, tablets issued to facilitate faster processing) is an obstacle to the vision of big data in a SMART JCA.

3. Policy recommendations

3.1. Data policy

A data policy for the JCA is a great starting point. This could include strategies similar to those used by technology companies that host frequent information huddles as a means of keeping employees up-to-date with current technological trends and applicability. Jamaica Customs has been making strides to develop and embrace a data culture, digitisation and playing its part in the data ecosystem (TradeBeat, 2022). To advance this cause, the JCA could consider instituting a data policy that includes an annual or biannual information seminar on trending data and technological strategies being used or implemented by customs administrations worldwide. This could include information on how these same trends can be applied in the JCA for increased efficiency, which would keep employees actively engaged with data use and management as a necessary part of their day-to-day functions and a normal way of business for the JCA. This data policy should also include data- and technology related performance indicators.

The JCA is on the verge of implementing the national *Data Protection Act (2020)*, which speaks to guidelines on storing, retrieval and dissemination of stakeholders' data. But without its own data policy that brings a wholistic awareness of data use and management, the JCA will still be a long way from functioning as a SMART customs administration. According to OSTHUS (n.d.):

> a data policy contains a set of rules, principles, and guidelines that provide a framework for different areas of data management throughout the enterprise, including but not limited to data governance, data quality, and data architecture.

As such, the approach would not be limited, but would raise awareness in customs officials of the relevance of data in border management and the necessity of developing a healthy data culture in a highly digitised trading context. With such a policy, the JCA would be hard-pressed to conform to its own requirements and make data interface and management a part of its key focus, especially under the watchful surveillance of External Quality Management Auditors. Auditors would be monitoring to ensure JCA's

compliance with its own policies created to comply with the ISO 9001:2015 Quality Management Framework, a certified standard to which the JCA is aspiring.

An organisational data policy would position the JCA to align itself with the WCO's Trade Facilitation Agreement (TFA), and to participate in a growing community of customs administrations that are embracing the reality of big data in customs operations. The TFA, pushing for SMART customs, encourages paperless processes, cross-border collaboration and border control through information sharing. Distributed ledger technology (DLT) and blockchain seem to be the trending strategies being used to manage cross-border flows and stakeholder cooperation. Considering the challenges present in the JCA, it stands to benefit immensely from instituting these technological solutions that promise more reliable and available data. An organisational data policy would help to determine a version of the requisite architecture instrument that would work best for the JCA.

Jamaica could pattern the approach of the European Parliament's Policy Department in investigating adaptations necessary to adjust to cross-border e-commerce. Admitting that the European Union's response has not been as coherent as that of the US and looking at legal and technological adaptations necessary to tackle the challenges of e-commerce has positioned the European Union to construct the collaborative and technological solutions that are best suited to the region (Burri, 2017).

The institution of blockchain and DLT in the JCA could help customs officials to understand and embrace data interface and technology as a common way of doing business. The system would be the only way that cargo (or at least e-commerce) processing is managed with an end-to-end data flow that enhances risk management strategies and fully automates clearance operations, eliminating the need to break down large shipments looking for signs of non-conformance. Of course, this would require legal research and strategies for cross-border cooperation to see how it could best work for the JCA.

Benefits such as immutability of data, as seen in customs administrations such as Argentina and Uruguay, that have moved beyond proof-of-concept with blockchain (WTO and WCO, 2022) would add great value to the JCA's efforts to achieve process efficiency and a more mature data culture. In the United Arab Emirates, an e-commerce blockchain based platform is used to facilitate and track e-commerce within the network of customs administrations (WTO and WCO, 2022). This approach could be instrumental in removing the elusive character of trade and traders who are now experienced with e-commerce in Jamaica. Also, blockchain technology would raise the appetite for data relevance and data quality as the system demands quality data from participating stakeholders. Not only does it require quality data input that will, as a result, give quality output, but traders will not be able to manipulate the system to their benefit as blockchain presents hopes of immutability. The

architecture of blockchain and DLT not only give the hope of automatic cross-border collaboration in e-commerce, but also greater cooperation and compliance in the local trading space.

Concerns regarding blockchain in Jamaica would be the same concerns cited in other customs administrations that have either fully rolled out this system, or are still in their proof-of-concept stage (WTO and WCO, 2022). To begin with, the JCA may face challenges in instituting blockchain technology in the region, with the level of knowledge and the skillsets available, as it remains mostly just a concept for much of the Caribbean. The lack of standardised datasets may challenge the smooth roll-out of blockchain for the JCA, as data relevance has never been a great focus in its culture. However, due to its strict data character, stakeholders would, no doubt, be encouraged to develop capacity and increase efficiency. Existing legacy systems, lack of trust in data-sharing and the absence of government strategy would also be on the list of concerns for the JCA. However, the acknowledgment of these challenges and subsequent guidance from policy instruments such as a data policy and a national technology policy should, together, form a resolution for these challenges.

Jamaica could look also at other jurisdictions that are coordinating cross-border flows through paperless processing. Considering these are Jamaica's two most prominent e-commerce source markets, Jamaica could look at the China-America cross-border cooperation in digital trade initiatives and regulatory changes to facilitate transition to digitised processes. North Africa and the Middle East, South and Central America and Caribbean territories such as Ecuador, Costa Rica, Chile and Colombia could offer perspective in how digital systems could be architectured for Jamaica.

3.2. National technology policy

Considering the national challenges, the JCA would benefit greatly from the development and institution of a policy that addresses data and technology from a national perspective. Private corporate entities have embarked on data analytics and information sharing, on a small scale. But a governmental strategy, which seeks to unify the mission and strategies of agencies participating in border management is a space where the culture of big data and data collaboration is becoming increasingly necessary. With unified purpose, the need for greater cooperation would become more evident among BRAs. Embracing technology and data-sharing would certainly be less challenging, as it would become a requirement or necessity in the function of BRAs.

As the foundational concept, a national strategy is also needed for the quality of technological infrastructure that is offered by suppliers in the market. JCA could benefit from a national strategy and procurement policy that mandates service providers to offer technological services or products that are at world standard. Otherwise, the government should improve its capacity to provide its own technological infrastructure. Frequent down-times rob time and financial resources and contribute to stakeholders' mistrust and apprehension in embracing technology used by government, therefore limiting

their willingness to learn and embrace new technological thrusts and fuelling their aversion to data use and technology. Consequently, a national agenda that treats this challenge can only be of benefit.

To bolster this effort, more research should be undertaken into how a national policy to facilitate data use and cross-border data flows can be developed. European territories have developed such policies geared at facilitating cross-border commerce and data flows. The same could be investigated and tailored to suit the Jamaican context.

3.3. Inclusivity

A data policy for the JCA would be highly inclusive, as all stakeholders across the board would need to be involved in developing a positive data culture for its efficacy. Information sessions should take the format of training and sensitisation, so that even stakeholders who are less aware or are technologically challenged will be sufficiently exposed and given the opportunity to develop their knowledge and expertise in data handling. Culture shift spans the whole range of an organisation, and so, even external stakeholders will form a part of the process, as they stand to benefit from speedier processing and a less manual interface, which saves time and money.

The institution and mastery of the requirements of a local data policy will give Customs the confidence to consider not just public-private data cooperation locally, but also cross-border data flow and collaboration, which is critical for greater efficiency in border control in this era. It has been said that fragmented border management is a '"Westphalian" artifact' (Bersin, n.d., para. 19). Cooperation and collaboration are necessary for modern border management. According to Burri (2017, p. 8):

> In the context of trade and trade policies, the growing importance of data for the digital economy has one crucial implication: Data *must* flow across borders. Many of the economic innovations based on digital technologies do rely on global data flows. Things like the app economy, the outsourcing of many services, the provision of digital products and streaming services, many cloud computing applications or the Internet of Things, would not function under restrictions on the cross-border flow of data. This critical interdependence puts trade policy under pressure and demands clear-cut solutions.

A data policy is critical to the JCA's ability to pivot and re-establish controls in the local execution of customs procedures and to improve the efficiency of cross-border collaboration in a technological climate. At the national level, no one gets left out, and so, formulating a national data policy is to everyone's benefit.

3.4. Cost

Developing a data policy is cost-effective, as officials with the requisite knowledge within the customs agency can be used or trained to develop such a policy at an affordable cost for consultation. Additional costs would include incidentals and minor spend, depending on the format the JCA may choose to adopt. Acquiring and implementing a data-sharing platform is, however, not as simple. The JCA would need to execute the necessary analyses and secure finances to fund such a major project. Proper justification would need to be submitted to government and a process for approval executed.

4. Conclusion

Flynn (2000, p. 57) writes:

> The global economy's move toward more open societies and liberalized economies does not just facilitate the movement for products and workers – it also expedites passages for terrorists, small arms, drugs, illegal immigrants and diseases. The obvious solution to the challenge of filtering the bad from the good might seem to be increased funding for border controls...

With funding, customs administrations may be able to source the physical resources deemed necessary. Without the national and organisational strategies and policies to influence the data culture of customs administrations, however, old ways of doing things, legacy systems and data aversion will still present massive obstacles and vulnerabilities to efforts to function as SMART Customs in a virtually borderless global space.

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References

Bersin, A. (n.d.). *The past and future of borders*. Altana. https://www.altana.ai/blog/first-post

Burri, M. (2017). *Current and emerging trends in disruptive technologies: implications for the present and future of EU's trade policies*. European Parliament Think Tank. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603845/EXPO_STU(2017)603845_EN.pdf

Flynn, S. E. (2000). Beyond border control. *Foreign Affairs*, *79*(6), 57–68. https://doi.org/10.2307/20049967

OSTHUS. (n.d.). *The OSTHUS Glossary: data policy*. http://www.osthus.com/osthus-glossary/data-policy/

Tableau. (n.d.). *Data culture*. https://www.tableau.com/why-tableau/data-culture

The United Nations Conference on Trade and Development. (2020). *UNCTAD annual report 2020*. https://unctad.org/annual-report-2020

TradeBeat. (2022). Scaling up customs digital transformation by embracing data culture and building a data ecosystem. *TradeBeat*, *12*(4), 15. https://www.jacustoms.gov.jm/sites/default/files/docs/Tradebeat/TradeBeat%202022/Customs%20Week%202022%20Digital%20Transformation.pdf

Twin, A. (2022, March 23). *Disruptive innovation*. Investopedia. https://www.investopedia.com/terms/d/disruptive-innovation.asp

Whistl. (2021, April). *What is cross-border e-Commerce?* https://www.whistl.co.uk/news/what-cross-border-e-commerce

World Trade Organization & World Customs Organization. (2022). *The role of advanced technologies in cross-border trade: a customs perspective*. WTO. https://doi.org/10.30875/9789287071002

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ACADEMIC CONTRIBUTIONS

Advancing Women for a Gender-Inclusive Customs

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The necessity and advantages of a gender-inclusive workplace are well recognised around the world. Much work has been done to support and advance women for a gender-inclusive Customs; however, facts and figures still remain low. The challenges faced by female customs officers are not very different from the challenges faced by women in any workplace. Here, the paper highlights the advantages of a gender-inclusive organisation and examines the underlying barriers by focusing on the Southeast Asia region. The paper then develops recommendations for customs administrations facing common challenges in this area. These recommendations, if implemented, should help customs administrations to advance their female officers and reap all the benefits gender equality can offer. This will allow administrations to achieve more gender balance and inclusivity, which will lead to more sustainable and modern customs administrations.

1. Introduction

While issues regarding the low level of female representation in Customs and elsewhere are now evident, the crucial roles that female officers and leaders play in supporting customs modernisation should be highlighted. In 2021 during the online event 'Women in Customs', Dr Kunio Mikuriya, World Customs Organization (WCO) Secretary General, stated that a gender-diverse and inclusive workplace contributes to an innovative and high-performance organisation as various contributions and perspectives from all genders and backgrounds are necessarily needed for growth in Customs (WCO, 2021). This means that customs administrations should advance and include female officers in decision-making if they wish to modernise their organisation innovatively and effectively.

Gender equality is a global issue, and gender inequality in customs administrations exists almost everywhere. A survey conducted by the WCO in 2016 shows that globally, the percentage of female officers and leaders is approximately 36 per cent and 30 per cent, respectively (Törnström, 2018). These figures (Törnström, 2018) range from 8 per cent to 60 per cent based on country and region. The United Nations Office on Drugs and Crime (UNODC) states that the percentage of female officers in law enforcement agencies in Southeast Asia is low, and that the agencies are still largely occupied by men (UNODC, 2021a). According to a study by UNODC, UN Women

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and Interpol (2020), the number of women employed in law enforcement agencies in Southeast Asia is between 6 per cent and 20 per cent, which is very low compared to the global figure.

This paper highlights how advancing and including women enables innovative and effective customs modernisation. It also assesses the rationales behind the low representation of female officers and leaders in Customs by identifying the challenges women face in Southeast Asia in acquiring management positions. The paper explores international best practices and successes in advancing and including more women in customs leadership. Finally, it suggests practical recommendations to support and advance women for a gender-inclusive Customs in Southeast Asia and other administrations around the globe with similar challenges and situations.

The paper involves both qualitative and quantitative methods. Data sources are from existing secondary sources and previous surveys conducted by Hong et al. (2022) and the Royal Melbourne Institute of Technology (RMIT) University Transnational Security Centre (2021). The survey conducted by Hong et al. (2022) provides information on the opinions of female customs officers in Cambodia and Indonesia, while the survey conducted by RMIT University Transnational Security Centre (2021) provides some overview and opinions from female customs officers from many Southeast Asian countries, including Cambodia, Thailand, Philippines, Laos, Vietnam, Indonesia, Laos and Malaysia.

2. A gender-inclusive Customs

2.1. Achieving sustainable development and growth

Gender inclusiveness and equality have been claimed by many international organisations to be an important factor in organisational development. The UN Universal Declaration of Human Rights highlights that gender equality and diversity are the key to achieving sustainability of growth and innovation in all administrations (WCO, 2022). The UN outlines that equal representation of women in decision-making related to politics and economics is one of the objectives in the Sustainable Development Goals (UN, 2022) and one of the priorities in the UN Sustainable Development Agenda for 2030 (UN, 2015). The WCO recognises the necessity of gender equality by placing it as one of the prime concerns in its capacity building agenda to improve the performance of customs administrations (WCO, 2022). In addition, the Organisation for Economic Co-operation and Development (OECD) commits to empower women to recognise their potential to create innovation, employment, economy and fair decision-making (OECD, 2015). The World Trade Organization (WTO) acknowledges the benefits of including both gender perspectives, having gender-responsive policies, and that eliminating constraints for women in trade can lead to sustainable social and economic development (WTO, 2017). Furthermore, the UNODC believes that gender parity in the workplace can increase the organisation's performance in promoting trust, the rule of law, the fight against crime, and in the protection of society and the community. Therefore, workplaces need to review their

personnel regularly to see if their organisation has gender-balanced employees, enabling an adaptive and diverse staff composition (UNODC, UN Women and Interpol, 2020).

Globally, many inspiring leaders in Customs have shared their strong beliefs and emphasised the benefits of gender equality in the development and growth for customs administrations. For example, Commissioner Shane Fitzsimmons (2021), from Resilience New South Wales, states that if customs administrations do not provide opportunities for women officers and leaders to be present at all levels, the administrations will miss 50 per cent of talented people (S. Fitzsimmons, personal communication, 25 August 2021). Mrs Yeo Beng Huay, Chief Information Officer of Singapore Customs, believes that providing the same sets of opportunities both in the workplace and outside the workplace contributes to enhancing productive outcomes and unity at work, which are vital to economic growth and social harmony (Singapore Customs, 2020). Jeremy Douglas, UNODC Regional Representative for Southeast Asia and the Pacific, also emphasises that promoting women officers provides several advantages to the countries in Southeast Asia and provides enforcement agencies with the capability to better respond to the various crime issues in the region (UNODC, 2020).

2.2. Addressing the diverse issues facing Customs

Customs administrations need both genders to solve the different issues they face. Women often have the specific skills and professional qualities that are crucial for administration modernisation and growth, despite the fact that customs administrations are mostly dominated by men (Hall & Oliver, 2013). Firstly, in general, women have advanced interpersonal communication skills, use less excessive force than men, and have outstanding problem-solving abilities with an eye for detail, which makes them effective in addressing certain types of crimes or offences (Fritsvold, n.d.). This means that both male and female officers are desirable to solve the different types of crimes and violations seen by the law enforcement profession, including Customs.

Secondly, female officers can contribute to gaining the public's trust, and reducing corruption – a key aim of the governments in the Southeast Asian region (UNODC, 2020). Women are more easily trusted and able to gather intelligence as they are more approachable and responsive to the needs of female citizens who may be susceptible to fears and sexual harassment by men (UNODC, UN Women and Interpol, 2020).

Thirdly, having a 50:50 gender ratio in the workforce is the best approach to provide the best public services for society that generally comprises 50:50 female:male citizens (UNODC, 2020). Furthermore, without female officers, it is rather difficult to deal with the concerns of other women in the community (UNODC, 2020). In other words, female customs officers and leaders may be able support and address the concerns of women traders where male customs officers may not. European Commission (EC) Director Sabine Henzler

emphasises that without sufficient female officers, customs administrations would have limited practical experience to address women's needs and circumstances (EC, 2021).

2.3. Increasing safety in the workplace

Including more women in Customs and in leadership positions allows women to protect each other and supports the involvement of more women in trade. Female traders will feel safer and more secure if they are surrounded by other women during goods clearance. Female traders have faced issues at customs borders, including limited safety and potential sexual harassment (US Agency for International Development, 2021). Having more female officers will ease the challenges facing female traders. In particular, if the female officers are in leadership roles, they will have more power to enforce policies protecting female officers and traders, which contributes to safety in the workplace overall.

3. What are the challenges facing female officers and leaders?

While the significant positive impact of female officers and leaders has been discussed and acknowledged, women are still underrepresented in Customs. According to an OECD report, the number of women assigned to senior government positions remains low (OECD, 2014). Based on the literature and the survey by Hong et al. (2022), there are several reasons for this, ranging from cultural barriers to physical ability.

3.1. Cultural barriers

Cultural norms seem to affect the current situation of women in Southeast Asia (Friedrich Naumann Foundation, 2020). Firstly, women are still expected to take responsibility for all household tasks (Hong et al., 2022). This means that whether they have a job or not, they remain responsible for caring for the house and managing all the chores. They must ensure that their home is in order before they can start focusing on their work. Therefore, due to these constraints, some female officers stated in the survey by Hong et al. (2022) and in the study by RMIT University Transnational Security Centre (2021) that they find it hard to even think about their professional development. They also mention in both surveys that if they are married, they must take care of their children and/or sometimes the elders of the household, leaving very little room for them to improve themselves professionally.

Secondly, the surveys indicate that it is unlikely that women are expected to be ambitious in the workplace. The culture in Southeast Asia still places an expectation on men to succeed in their work while women support their husband by taking care of the family. This expectation holds women back from following their education and professional ambitions as well as allowing people to question their capability at work (Tan, 2016). The success of women is not expected at the workplace but at home. In addition, societal perspectives based on traditional Asian culture do not encourage women to work in law enforcement as this job is seen to be more suitable for men (UNODC, 2020).

3.2. Gender stereotypes

Gender stereotype is an unconscious bias and one of the challenges women in the workplace face, including in Customs. In general, in both surveys, more women in Southeast Asia express that they have observed this issue than in other regions. Firstly, women are generally viewed as emotional, sensitive people who cannot make the big decisions that require a tough, strong mind (Bauer, 2015). There is often the perception that some positions require certain characteristics that are seen to be inherent to each gender (Silva & Davis, 2020). This means that due to the perceived inherent caring and soft nature of women, they are easily affected by outside factors, so may be perceived by others to not be suited to leadership positions, which require tough, strong minds, like those of men.

Secondly, some survey respondents mention that women's voices are not really heard in meetings. Women are usually included in meetings as secretaries or for logistics arrangements only (Hong et al., 2022). Even though there is a general trend to include women, they are mostly confined to desk and administrative work. Women recruited to law enforcement are normally assigned to administrative jobs rather than decision-making or leadership positions (UNODC, 2021a). A male-dominated organisation is very likely to ignore women's voices and representation; therefore, the decisions are not inclusive, while leadership opportunities for women are rare (United States Agency for International Development, 2021).

Thirdly, there seem to be certain myths about women's capabilities. Some female respondents mention that women are not considered suitable for certain important tasks. This means women sometimes lack support both from men and other women. For example, Colonel Portia Manalad mentions that she faced several challenges, one of which was that she had to prove herself by working twice as hard as men (Schmidt, 2019). This could be a hidden barrier that women may not normally talk about, but they have actually experienced in the workplace, including Customs. A female customs officer, Maria Cristina Fuentes from Philipines Customs, also shared her experience where she was not initially included in customs operations to the same extent as the men; therefore, she had to put a great deal of effort into proving her abilities (Schmidt, 2019). In addition, speaking of leadership roles, most people seem to expect men to be leaders while women serve as supporters or followers. A few survey respondents think that leadership roles require significant effort and the capability to handle pressure, which are unsuitable for women, in their view.

3.3. Lack of confidence

According to the surveys, lack of confidence seems to be one of the main barriers for women in Customs. Firstly, most female officers in Southeast Asia said that they are unwilling to take the same risks as men. Instead, they would prefer to stay in their comfort zones due to fears about many things in their personal life. Secondly, some female survey respondents do not believe that they have the capability or the capacity to follow their dreams. Sandberg (2013) states that women often undervalue themselves and their abilities, while men

seem to overestimate their abilities. Because of this, women seem to miss many promotion opportunities as they are constantly questioning themselves. Without confidence in themselves, women may find it hard to make other people believe in them.

However, issues related to this lack of confidence may stem from cultural norms and gender stereotypes. If people in their homes and workplaces believe women are less capable, this will affect women's confidence in themselves. This lack of confidence may stem from long-held beliefs and not from the women themselves. Therefore, this barrier needs to be addressed if Customs wants to promote women.

3.4. Limited physical ability

Some research and surveys include women's physical ability as a barrier for women in law enforcement, including Customs. Firstly, customs administrations have many offices at borders, which may be isolated and may be regarded as relatively unsafe for women. Due to their perceived limited ability to defend themselves, women are generally not assigned to isolated border posts. More than 60 per cent of survey respondents mention that they are not selected for certain positions due to this barrier (Hong et al., 2022). This alone limits the representation of women at customs offices, which accounts for the majority of customs positions.

Secondly, customs offices at the border require some officers to be on standby 24/7. This kind of job is not ideal for many women due to safety issues. Moreover, many married female officers must return home early to take care of children and family and are not comfortable staying away from home overnight (US Agency for International Development, 2021). UNODC states that such a barrier is one of the main reasons that law enforcement agencies find it hard to advance women leaders (UNODC, UN Women and Interpol, 2020). Law enforcement agencies require their officers to work full-time without interruption, while women may have many responsibilities at home that require much understanding and flexibility in the workplace (UNODC, UN Women and Interpol, 2020). Physical strength is still preferred in law enforcement. Women must act like men if they want to break down these barriers (UNODC, UN Women and Interpol, 2020).

4. What are the best practices and success stories internationally?

Many international organisations, including the WCO, the UN, and others, have developed global policies to support customs administrations to address gender-related issues, while many customs administrations have successfully expanded policies to include and advance women officers and leaders.

The WCO created the Gender Equality Organizational Assessment Tool (GEOAT) to support customs administrations in assessing their current policies and practices to identify issues related to gender equality and resolve

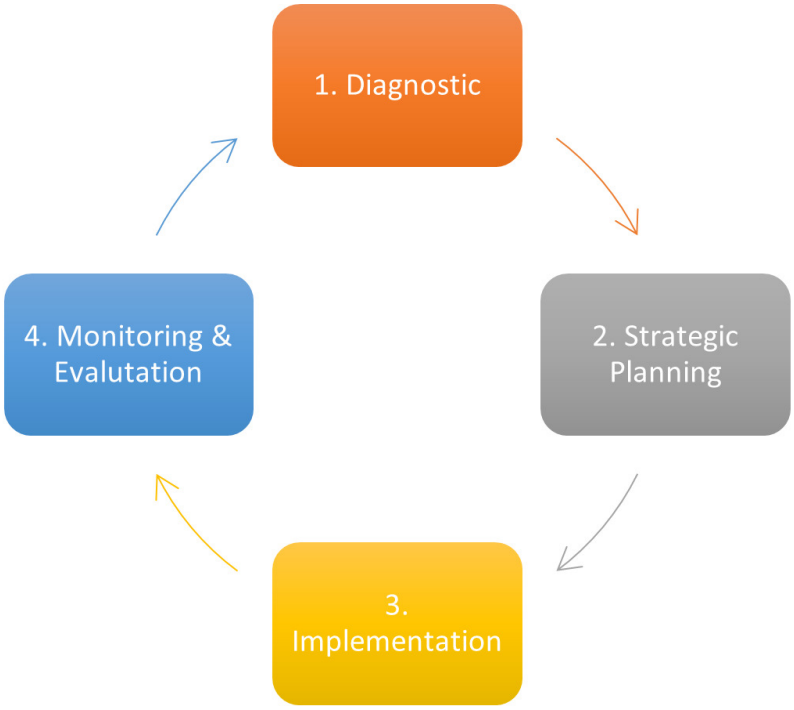

Figure 1. Gender mainstreaming – project cycle management

Source: World Customs Organization, 2019

plans or projects to be included in the transformation plan of their administrations (WCO, 2019). Figure 1 illustrates the project cycle approach to implement gender mainstreaming[1] for Customs reform and modernisation.

The WCO adopted the Virtual Working Group for Gender Equality and Diversity to establish an exchange platform for members to communicate their experiences, activities and discuss the use of GEOAT (WCO, 2021). The WCO calls for a holistic approach in dealing with gender equality and inclusiveness issues by developing internal and external policies (WCO, 2021). Internal policies focus on including women in management and leadership and advancing women in professional development; external policies focus on gender inclusion when collaborating with stakeholders and working at the border (WCO, 2021).

Regarding UN initiatives, the Women's Network of Container Control Programme (CCP) was created in 2015 to support women's representation in the CCP programme and encourage meaningful and new conversations about women in law enforcement (UNODC, 2022). All women working in Port Control Units (PCUs) and Air Cargo Control Units (ACCU) are part of this large network that provides several opportunities for women in Customs (UNODC, 2022). One of the recent innovative successes of this network is the implementation of the CCP Women's Professional Development Programme, with the cooperation of the Australia Border Force (ABF) and RMIT

1 Gender mainstreaming refers to the process of including and considering diverse perspectives from both genders at all stages of policy development and implementation (WCO, 2021).

University (UNODC, 2021b). This programme offers an incredible opportunity for female customs officers to advance their leadership skills, learn customs-related knowledge and network with other female officers and leaders in Customs from 11 countries in South Asia, Southeast Asia and the Pacific (UNODC, 2021b). Based on the programme feedback, participants reported that there has been an increase in their confidence and willingness to be leaders and influencers in their organisation, and they have finished the programme with a new mindset and more substantial capabilities (Dodds et al., 2022). However, the programme is limited to the female customs officers involved with the CCP. Such an innovative programme is a great example to other customs administrations wanting to advance the position of women in their organisations.

Several countries have developed comprehensive policies to promote women in their customs administrations. For example, based on the WCO Compendium on Gender Equality and Diversity in Customs (WCO, 2020), Australia has been doing well in including more female officers and leaders. Behind this success, the Australian government, including the ABF, has launched several activities to support gender equality, including a breastfeeding-friendly workplace, the inclusion of women's representation in every forum and internal boards and committees, and continuously reviewing and upgrading current policies to promote gender inclusiveness and equality based on emerging academic research. Due to this commitment, WCO (2020) highlighted that women officers accounted for 53.3 per cent of board positions in the Home Affairs Portfolio in 2019. Moreover, the Australian Department of Home Affairs has adopted the Staff Advancing Gender Equality (SAGE) Network to promote equal representation of women and men at all levels and encourage new discussion, meaningful changes, and women empowerment via emotional connectivity. In March 2022, the foreign minister of Australia at the time, Marise Payne, also stated that public policy shall include women's contributions and voices, especially in planning to address the pandemic (Minister for Foreign Affairs, 2022).

Another good example is from the New Zealand Customs Service (NZCS), which has put the utmost effort into promoting gender equality (WCO, 2020). The NZCS started by raising awareness of the advantages of including and advancing women in the organisation. When a survey they conducted showed that realisation and acknowledgement of these advantages were established, the NZCS created the Inclusion and Diversity Council and developed a five-year strategic plan from 2014 to 2018. Several activities in the strategic plan led to success. For instance, actions to promote women in leadership roles resulted in an increased number of female leaders, from 24 per cent in 2014 to 32 per cent in 2018. According to the survey conducted by the NZCS, this initiative and its fruitful results have been greatly supported by respondents, who were very pleased and satisfied by the results. Furthermore, in its 2019 to 2021 strategic plan, the NZCS has put more efforts into gender equity to support and promote women further by committing to reaching at least 36.5

per cent of women leaders. The figure illustrates the firm commitment that the NZCS and NZ government have placed on promoting women and the value that women can bring to the organisation.

Many customs administrations in Southeast Asia have launched initiatives to promote existing female officers in their organisations. The administrations have developed gender equality and inclusiveness working groups that work directly to promote and advance women. For example, the General Department of Customs and Excise of Cambodia (GDCE) has established a women's association in Customs to support female officers in overcoming family- or work-related barriers and to ensure that female officers receive the same opportunities as men and are not excluded in any circumstance (GDCE Women's Association, 2021). Similarly, the Philippines Bureau of Customs (BoC) has established a Gender Focal Point System to lead gender policies and plans, and the BoC commits to employ 5 per cent of resources annually for gender-advancing activities (Philippines BoC, 2022). Ms Marilou A Cabigon, Collector of Customs Vice-Chairperson of the Philippines BoC (2022) states that customs administrations need continuous resources to put planning and policies into practice and to ensure sustainable and effective delivery of any gender initiatives.

Worldwide, many female leaders in Customs have shared their top tips behind their success and how they overcame barriers to climb the career ladder. One great example is Mrs Yeo Beng Huy, a Chief Information Officer of Singapore Customs. She stated that the support from family, managers and her team were key to her success in overcoming obstacles along the way (Singapore Customs, 2020). Moreover, being able to work with several other successful female leaders was motivating and inspiring (Singapore Customs, 2020). Similarly, Major Dr Mac Xuan Huong of the Vietnam People's Police Academy states that women are inspired by the examples set by their female mentors and by those women who make them believe that they can achieve their aims (UNODC, 2021). Another great insight is from Deputy Chief Shannon Trump of the Noblesville, Indiana Police Department and Kym Craven, Executive Director of the (US) National Association of Women Law Enforcement Executives, who recommend women choose a favourite mentor who can support and guide them to break through barriers and find ways to achieve their career goals (Fritsvold, n.d.). By receiving the support they need, women do not need to limit themselves and can build the confidence and belief in themselves to make it big in life (Fritsvold, n.d.). Ta Thi Bich Lien and Suchaya Mokkhasen, UNODC Programme Officers, also express similar insight – having women who support other women in the workplace is very significant for gender equality (UNODC, 2021).

5. Recommendations

After acknowledging the necessity to capitalise on diverse genders and backgrounds, this paper has some recommendations to advance women for a more gender-inclusive Customs. It is important to note that adding more female officers in law enforcement, including Customs, is a key step, but it

cannot be the only step for female officers, especially in Southeast Asia, as additional instruments and policies are needed to break the barriers facing women and to promote a secure environment where women can grow, engage and advance in their careers (UNODC, 2020).

5.1. Assessing the current situation and the ways forward

Diagnosing the current situation related to gender equality and inclusiveness is the first key step that all customs administrations should take. Administrations that have not assessed their current status can contact the WCO to ask for assistance in evaluating the current situation regarding gender equality, identifying gaps in the current policies and practices and then developing relevant policies or project planning to address the identified challenges. Knowing their current status and where they need to make changes allows customs administrations to work closely with the WCO, using the essential tools provided by the WCO, to advance women to transform and modernise Customs effectively and successfully.

5.2. Incorporating gender mainstreaming in recruitment and promotion

Customs administrations should include gender mainstreaming in recruitment and promotion. For example, in the recruitment process, customs administrations should use gender inclusive language in the vacancy announcement to encourage both genders, especially women, to apply. Simply including the value statement 'women are encouraged to apply' can help make a tremendous impact on the number of women who will apply (UN Women, 2022). Since women tend to underestimate themselves and lack confidence, such encouragement would support breaking these barriers and changing their mindsets about applying to work in customs administrations. By doing this, customs administrations are likely to receive more qualified women than they otherwise would expect. Regarding staff promotion policies, customs administrations can consider whether they have adequately qualified female leaders. If not, what support do female officers need to become adequately qualified for promotion? When administrations do not have qualified women who deserve a promotion, it may be a red flag that there is a gender issue that needs addressing.

By considering these factors, customs administrations can increase the number of female officers and leaders and improve the organisation's outcomes and performance. When customs administrations have more female leaders, other women are inspired to achieve success like them (US Agency for International Development, 2021). Hong et al. (2022) mention that women cannot become what they cannot see with their own eyes. There must be role models for them to see that it is possible for women to succeed and acquire leadership roles.

5.3. Establishing policies to support women in Customs

Customs administrations need to establish policies that support existing female staff and ensure that those policies are gender-friendly and inclusive.

Customs administrations can consider developing a mentoring program for women. Anyone who wants to support women can volunteer to become a mentor, and women can request a mentor that fits their needs. Mentors can be both men and women as long as they express a clear intention to help women grow. If such a system is in place, many customs leaders may be willing to show and offer their support. A joint UNODC, Interpol and UN Women study indicates that having a mentor and the support of male staff, especially leaders with a lot of power and influence, is essential to women's advancement and promotion in law enforcement (UNODC, UN Women and Interpol, 2020).

Customs administrations can consider adopting gender-inclusive initiatives and ensure the sustainability of those initiatives by having gender diverse decision-making, outlining clear roles and responsibilities that respond to the needs of the trading community (OECD, 2014). Based on the survey results (Hong et al., 2022), respondents from Southeast Asian countries express strong support for such gender-based policies, including male champions, which offer support for women in the workplace.

5.4. Regularly implementing professional development programs for women

The availability of professional development programs for women within the organisation is a key aspect to advancing women and unleashing their potential. Such programs should explore the barriers and challenges of each woman to discover what is happening in their lives and how the organisation can help support them in the workplace. The programs can include motivational speakers who will empower and inspire the female officers to realise their potential and ability, which is necessary for them to set their career goals and work hard to achieve them.

The programs should be offered regularly and be available to all women in the organisation. The programs should be implemented regularly to ensure that new female officers can benefit from them as soon as possible. Women who have shown strong motivation and dramatic growth due to the program can become in-house trainers to train other female officers. Male leaders can also become trainers to support women. In addition, senior female officers or female leaders can share their knowledge and experience with junior female officers, which would highly relevant to them and thus very valuable (UNODC, 2021).

Customs administrations can consider developing such a program on their own or design a program plan and seek support from development partners such as WCO, UNODC, ABF and many other development partners who are passionate about developing and advancing women in customs.

6. Conclusion

Gender equality and diversity in Customs is not only an issue of morality, it is about the need for customs modernisation and sustainable development. It is already well-acknowledged worldwide that gender-inclusive workplaces, including Customs, are undeniably important. While customs administrations

around the globe, including the Southeast Asian region, have implemented several initiatives and activities to support women, global facts and figures remain far from targeted parity. Women in Customs, particularly in Southeast Asia, still face common challenges including cultural norms, gender stereotypes, lack of confidence and perceived limited physical ability. Before customs administrations can reap the benefits that women can bring to the table, they need to adopt new policies to address and remove the barriers that prevent the advancement of women.

It is time to draw more attention to this issue and raise awareness among customs administrations worldwide by highlighting the advantages of including more women in Customs at all levels, discussing the barriers they face, and exploring how customs administrations can help them break these barriers to include them effectively. The successful experiences of inclusive customs administrations can act as role models for best practices. When customs administrations have an in-depth understanding of their current situation and the reasons why they should include and empower more women, they are more likely to establish the policies needed to become modern, inclusive, and more innovative administrations.

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References

Bauer, N. (2015). Emotional, sensitive, and unfit for office? Gender stereotype activation and support female candidates. *International Society of Political Psychology*, *36*(6), 691–708. https://doi.org/10.1111/pops.12186

Dodds, A., Farrington, A., Dowler, P., Carruthers, J., Bond, M., Jensen, A., & Meiser, U. (2022). Get ready for a new mindset on women in customs leadership. *World Customs Journal*, *16*(1), 117–122. https://worldcustomsjournal.org/archive/volume-16-number-1-march-2022/

European Commission. (2021, October 6). *Women in Customs: how gender balance can make customs more resilient, credible, and representative*. https://ec.europa.eu/taxation_customs/news/women-customs-how-gender-balance-can-make-customs-more-resilient-credible-and-representative_en

Friedrich Naumann Foundation. (2020, March 8). *Why women empowerment is crucial in Southeast & East Asia*. https://www.freiheit.org/southeast-and-east-asia/why-women-empowerment-crucial-southeast-east-asia

Fritsvold, E. (n.d.). *Why we need more women working in law enforcement*. University of San Diego. https://onlinedegrees.sandiego.edu/women-in-law-enforcement/

General Department of Customs and Excise of Cambodia Women Association. (2021). *Association Progress Report to Director General*.

Hall, A., & Oliver, J. (2013, June 19). *Helping women cross borders and break barriers in customs administration: a WCO conference*. World Bank. https://blogs.worldbank.org/trade/helping-women-cross-borders-and-break-barriers-customs-administration-wco-conference

Hong, S., Bond, M., Lesu, L., Madhubhashini, M., Lokubalasooriya, S., & Ratnasari, D. (2022). Women in customs leadership: why does it matter? *World Customs Journal*, *16*(1), 125–133. https://worldcustomsjournal.org/archive/volume-16-number-1-march-2022/

Minister for Foreign Affairs (Australia). (2022, March 18). *Inaugural Southeast Asia dialogue of women leaders*. https://www.foreignminister.gov.au/minister/marise-payne/media-release/inaugural-southeast-asia-dialogue-women-leaders

Organisation for Economic Co-operation and Development. (2014). *Women, government and policy making in OECD countries*. https://www.oecd.org/governance/women-government-and-policy-making.htm

Organisation for Economic Co-operation and Development. (2015). *Southeast Asia gender initiative*. https://www.oecd.org/southeast-asia/regional-programme/networks/southeast-asia-gender-initiative.htm

Philippines Bureau of Customs. (2022, March 8). *BOC joins WCO gender equality & diversity network conference*. https://customs.gov.ph/boc-joins-wco-gender-equality-diversity-network-conference/

Royal Melbourne Institute of Technology University Transnational Security Centre. (2021). *Survey Result from Container Control Programme's Women's Professional Development Programme (CCP WPDP)* [Unpublished].

Sandberg, S. (2013). *Lean in: women, work, and the will to lead*. Random House.

Schmidt, A. H. (2019, November 29). *Philippine police and customs officers challenge gender stereotypes*. UN Women Asia and Pacific. https://asiapacific.unwomen.org/en/news-and-events/stories/2020/01/philippine-police-and-customs-officers-challenge-gender-stereotypes

Silva, A., & Davis, G. (2020, April 14). *Gender equality at work: South East Asia's other hurdle*. Investing in Women/Australian Aid. https://investinginwomen.asia/posts/gender-equality-work-south-east-asias-hurdle/

Singapore Customs. (2020, March 9). *Woman in Customs. Status update* [Facebook page]. Facebook. https://www.facebook.com/profile/100064755758546/search/?q=women%20in%20customshttps://mobile.facebook.com/SingaporeCustoms/posts/woman-in-customstomorrows-challenges-are-complex-and-requires-transdisciplinary-/10163391265075651/?locale2=fa_IR&_rdc=1&_rdr

Tan, G. (2016, May 30). *Why women hold the key to South-East Asia's economic success*. World Economic Forum. https://www.weforum.org/agenda/2016/05/women-key-to-east-asia-economic-success/

Törnström, J. (2018). WCO steps up efforts to promote gender equality and diversity. *WCO News*, *86*, 6–7. https://mag.wcoomd.org/uploads/2018/08/WCO_News_86_update.pdf

United Nations. (2015). *Resolution on transforming our world: the 2030 agenda for sustainable development*. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf

United Nations. (2022). *Goal 5: Achieve gender equality and empower all women and girls. UN Sustainable Development Goals*. https://www.un.org/sustainabledevelopment/gender-equality/

United Nations Office on Drugs and Crime. (2020, August 26). *UNODC-UN Women-INTERPOL report on women in law enforcement in the ASEAN region: increasing participation will improve effectiveness*. UNODC Regional Office for Southeast Asia and Pacific. https://www.unodc.org/roseap//en/2020/08/women-law-enforcement-report/story.html

United Nations Office on Drugs and Crime. (2021a). *Setting an example for women in Southeast Asian law enforcement*. https://www.unodc.org/roseap/en/2021/09/southeast-asia-women-law-enforcement/story.html

United Nations Office on Drugs and Crime. (2021b). *The CCP Women's Professional Development Programme (WPDP)*. https://www.unodc.org/unodc/en/ccp/the-ccp-womens-professional-development-programme-wpdp.html

United Nations Office on Drugs and Crime. (2022). *Container Control Programme Women's Network*. https://www.unodc.org/unodc/en/ccp/the-ccp-womens-network.html

United Nations Office on Drugs and Crime, UN Women, & Interpol. (2020). *Women in law enforcement in ASEAN region*. https://www.unodc.org/documents/southeastasiaandpacific//Publications/2020/women_in_law_enforcement_in_the_asean_region_full.pdf

United Nations Women. (2022). *Guidance on creating inclusive vacancy announcements: good practice examples from the UN*. https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/How%20We%20Work/Gender-parity/Gender-parity-Vacancy-announcements-good-practices-en.pdf

United States Agency for International Development. (2021). *Women's economic empowerment and gender equality in trade facilitation: the role of Customs and border services*. https://www.marketlinks.org/sites/default/files/media/file/2021-03/WEEGE%20in%20Trade%20Facilitation%20Factsheet%20%28English%29_2020_12_17_Final_0.pdf

World Customs Organization. (2019). *Gender Equality Organizational Assessment Tool*. http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/capacity-building/activities-and-programmes/gender-equality/gender-equality-assessment-tool.pdf?la=en

World Customs Organization. (2020). *Compendium on gender equality and diversity in Customs*. http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/capacity-building/activities-and-programmes/gender-equality/gender-equality-compendium_en.pdf?la=en

World Customs Organization. (2021, September 24). *Gender equality and inclusion in Customs at the forefront of high-level discussions*. https://www.wcoomd.org/en/media/newsroom/2021/september/gender-equality-and-inclusion-in-customs-at-the-forefront-of-high-level-discussions.aspx

World Customs Organization. (2022). *WCO promotes gender equality and diversity*. http://www.wcoomd.org/en/topics/capacity-building/activities-and-programmes/gender-equality.aspx

World Trade Organization. (2017, December). *Joint declaration on trade and women's economic empowerment on the occasion of the WTO ministerial conference in Buenos Aires*. https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

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ACADEMIC CONTRIBUTIONS

Ukrainian Customs Is Under fire. Functioning of the Territorial Bodies of the State Customs Service During the Russian Invasion

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The affairs of Ukrainian Customs during the Russian Federation's military aggression against Ukraine were heavily impacted from the first days of the declaration of martial law on the territory of Ukraine. The effect of the Russian invasion of Ukraine on the activities of the State Customs Service of Ukraine and its territorial bodies (customs offices) is examined. The advantages and disadvantages of anti-crisis measures introduced by the State Customs Service to overcome the negative consequences of ongoing armed aggression are then explored. Finally, the current organisational and competence aspects of the territorial bodies of the State Customs Service of Ukraine during the armed conflict are emphasised.

1. Introduction

The full-scale aggression launched by the Russian Federation against Ukraine on 24 February 2022 caused, among other issues, significant changes in the customs affairs of Ukraine. In conditions where a large part of the territory of Ukraine is temporarily occupied or turned into a battlefield, and the rest has experienced less severe but still traumatising shocks from military destruction, the country has lost much in economic terms and tries to adapt to a 'new normal'. The importance of the normal functioning of Customs in Ukraine is indisputable. For example, in 2021, the activities of the State Customs Service of Ukraine provided the state budget of Ukraine with 40 per cent of total revenues (The Cabinet of Ministers of Ukraine, 2020). The conflict in Ukraine is expensive and dangerous. The human and economic losses associated with the conflict are enormous and increase daily. According to the report of The National Council for the Recovery of Ukraine from the Consequences of War (2022), direct losses because of hostilities amount to at least USD100 billion as of July 2022. This highlights the critical need for

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strategic and effective customs management in Ukraine to guarantee economic stability during the conflict and the country's recovery in the post-conflict period.

In response to the military aggression of the Russian Federation, the Government of Ukraine has repeatedly resorted to innovations and anti-crisis measures regarding foreign economic activity and customs affairs during the ongoing conflict.

In this paper, we aim to investigate the functioning of customs offices as separate structural units of the State Customs Service during the armed conflict in Ukraine. To do this, we analyse the view formulated by the State Customs Service regarding the distinction between *customs offices that are operating normally* and *customs offices that are temporarily non-operational*. We evaluate the effectiveness of changes to legislation and procedures for the functioning of the State Customs Service in Ukraine during the armed conflict. The paper scrutinises part of the security, law enforcement, control and fiscal functions that were transferred by temporarily non-operational customs offices to customs offices that are operating normally.

2. Methodology

We analyse the consequences of the Russian invasion related to the State Customs Service of Ukraine and the armed conflict's impact on Ukraine's customs industry by examining relevant laws, orders, resolutions and statistics. We also examine the legal acts regulating the activities of the State Customs Service in the conditions of the ongoing armed conflict. This analysis was based on the legal acts of the Tax Code of Ukraine, the Customs Code of Ukraine, orders of the State Customs Service, normative acts of the Cabinet of Ministers of Ukraine and the Ministry of Finance of Ukraine. We critique the advantages and disadvantages of the anti-crisis measures introduced by the State Customs Service to overcome the negative consequences of the ongoing armed aggression of the Russian Federation. We also evaluate the current organisational and competence aspects of the functioning of the territorial bodies of the State Customs Service of Ukraine during the armed conflict. We compare the official statistics of the State Customs Service regarding the replenishment of the state budget at the expense of customs taxes and compare imports/exports for 2021 and 2022.

3. Background

The functioning of Ukraine's customs bodies during the Russian Federation invasion was significantly disrupted. Importantly, from 24 February 2022, significant sections of the customs border of Ukraine with neighbouring countries were closed. These were:

- the section of the border with the Russian Federation, 1,974 km by land
- the section of the border with the Republic of Belarus, 1,084 km by land

Table 1. Analysis of customs revenues in the formation of the Ukrainian State Budget in 2021 and 2022 (in millions of USD unless otherwise specified).

Source of revenue	2021	2022	Deviation	% deviation
Customs duty	1,349,20	203,29	−1,145,91	−84.90
Excise tax	2,657,47	333,93	−2,323,54	−87.43
VAT	13,937,90	2,314,97	−11,622,93	−83.39
Total	**17,944,57**	**2,852,19**	**−15,092,38**	**−84.10**

Source: Compiled by the authors from the State Customs Service of Ukraine (2022a).

- the section of the border with the Transnistrian 'segment' of the Republic of Moldova, 452 km by land
- the maritime section of the border with the Russian Federation, 1,355 km
- 1,056 km along the Black Sea (partially valid, but only under the terms of the 'Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian Ports') (The United Nations, 2022)
- 249 km along the Sea of Azov and 49 km along the Kerch Strait (The Verkhovna Rada of Ukraine, 2010).

Furthermore, the work of the state border and customs infrastructure was suspended. This involved land border checkpoints, entry-exit control points, customs registration points, transport and logistics infrastructure, cargo customs complexes, autoterminals, warehouse infrastructure with special customs status, and duty-free shops.

Therefore, to evaluate the impact of the Russian invasion of Ukraine on the formation of the state budget at the expense of customs taxes (customs duty, excise tax, value-added tax (VAT)), a comparison of these revenues for 2021 and 2022 is presented (Table 1).

According to Table 1, a sharp drop (84.10%) in revenues to the Ukrainian state budget from customs taxes (duty, excise tax and VAT) occurred in 2022 compared to 2021. On the one hand, inflation and the devaluation of the Ukrainian hryvnia contributed to the growth of customs payments, but this did not affect the total amount of customs revenue.

The decrease in revenue to the state budget from customs taxes was also influenced by a reduction in import volumes by 82.33 per cent (Table 2). At the same time, we must realise that customs authorities are not regulators of foreign trade. Their task is the customs clearance of goods and the appropriate response to the international trade trends occurring in the country and the world.

Moreover, during the ongoing conflict, the Government of Ukraine introduced many benefits and exemptions (partial or total) from paying customs taxes, and for three months in 2022, removed all customs taxes. In July 2022, the Ukrainian Government cancelled all tariff preferences for various groups of goods and introduced a simplified procedure for customs clearance

Table 2. Analysis of import and export volumes in 2021 and 2022 (in millions of USD unless otherwise specified).

	2021	2022	Deviation	% deviation
Import	73,322,52	12,950,21	−60,372,31	−82.33
Export	68,237,81	12,925,33	−55,312,48	−81.05
Total	**141,560,33**	**25,875,54**	**−115,684,79**	**−81.69**

Source: Compiled by the authors from the State Customs Service of Ukraine (2022a).

of humanitarian aid. The government then introduced the legal concept of 'critical import'. Under this concept, essential goods were identified as critical imports. Non-tariff regulation measures were not applied to commodity articles that were in the category of 'critical import' goods. Tariff regulation, in general, had a purely preferential regime in a formal (simplified) form.

In addition, the government's decision to reduce the VAT rate on fuel and oil products from February to September of 2022 had a distinct impact on budget revenues from customs taxes (the VAT rate of 20% was reduced to 7%). Because of this decision, the Ukrainian budget was reduced by about USD950 million.

Exempting taxpayers from paying customs taxes for almost all goods imported into the customs territory of Ukraine is entirely inappropriate. According to Article 67 of the Constitution of Ukraine (The Verkhovna Rada of Ukraine, 1996), everyone must pay taxes and fees in accordance with the terms and in the amounts established by law. It should be recalled that in 2015, after the beginning of the 'hybrid war' in Eastern Ukraine, the Ukrainian Parliament did not cancel customs payments for the import of goods. All such payments were paid in full for imported goods to the customs territory of Ukraine, except so-called 'vitally important' goods. Moreover, a tax was adopted – an 'additional import duty' of up to 10 per cent – for all goods except vitally important ones. This tax was introduced for one year and was a specific type of customs duty. However, in 2016, with the stabilisation of the balance of payments in Ukraine, this tax was cancelled (The Verkhovna Rada of Ukraine, 2014). All these deprivations damaged the implementation of the financial indicators by the State Customs Service during the reporting year, which are created every month by the Ukrainian Government to replenish the State Budget of Ukraine. The State Customs Service fulfilled the financial plan for 2022 by only 56.9 per cent, that is, the State Budget of Ukraine fell short by USD8.48 billion. As a result, 43 per cent of the funds were not obtained from the financial plan. According to the financial plan, approximately USD1.64 billion per month of customs payments were planned to be administered by State Customs Service. Nevertheless, this was not achievedat all during the year.

Thus, the leadership of the State Customs Service faced the following questions: how to escape the crisis that has developed around the activities and functioning of the State Customs Service in matters of accounting and administration of customs taxes and how to stabilise and optimise the work of territorial bodies of the State Customs Service. In the following two sections,

we consider the changes introduced by the State Customs Service to the activities of territorial bodies (customs offices) during the armed conflict in Ukraine.

4. Organisation of the functioning of the State Customs Service territorial bodies during the armed conflict

According to the Tax Code of Ukraine (The Verkhovna Rada of Ukraine, 2010), customs bodies are controlling bodies consisting of the Administration of the State Customs Service (the central executive body implementing the state customs policy), customs offices and customs posts. Customs bodies control the process of taxation with customs duty, excise tax, and VAT, which under the legislation are carried out in connection with the import and export of goods to/from the customs territory of Ukraine or the territory of the free customs zone (The Verkhovna Rada of Ukraine, 2012).

The State Customs Service ensures the implementation of the state customs policy, protects the customs interests of Ukraine, creates favourable conditions for the development of foreign economic activity, and maintains the necessary balance between control and simplification of customs procedures and customs formalities. The State Customs Service of Ukraine functions as a single legal entity, and its territorial bodies — customs offices — work as separate structural units. The State Customs Service effectively administers customs taxes and has traditionally provided a significant part of revenues to the state budget of Ukraine. Accordingly, ensuring the uninterrupted functioning of territorial bodies, as separate structural units of the State Customs Service, during the armed conflict on Ukrainian territory is extremely important in light of the complex and fast-moving conditions of the Armed Forces of Ukraine's military operations with the Russian Federation.

According to Order No. 460 (The State Customs Service of Ukraine, 2020), 26 customs offices (territorial bodies, as separate divisions of the State Customs Service) operate in the customs territory of Ukraine: Cherkasy, Chernivtsi, Chernihiv, Dnipro, Donetsk, Energy, Ivano-Frankivsk, Kharkiv, Kherson (including the Kherson region, the Autonomous Republic of Crimea and the city of Sevastopol), Khmelnytsky, Kyiv, Kropyvnytsk, Luhansk, Lviv, Mykolaiv, Odesa, Poltava, Rivne, Sumy, Ternopil, Vinnytsia, Volhynia, Zhytomyr, Zakarpattia, Zaporizhzhya, and the Coordination and Monitoring customs office (the headquarters of the Customs Service of Ukraine).

With the beginning of military aggression by the Russian Federation against Ukraine, part of the territory of the Donetsk, Luhansk, Kherson, Mykolaiv, Zaporizhzhya and Kharkiv regions were (and continue to be) under temporary occupation at various times, or hostilities were (and continue to be) taking place in specific territories of these regions. According to Order No. 188 (The Cabinet of Ministers of Ukraine, 2022), the Government of Ukraine temporarily closed some customs checkpoints across the state border of Ukraine. As a result, the State Customs Service adopted Order No. 113, which suspended the work of some customs offices and their structural subdivisions: Donetsk, Luhansk, Kharkiv and Mykolaiv customs offices and the Customs

Office in the Kherson region. Suspension is a stoppage of work caused by the lack of organisational or technical conditions necessary for work performance, force majeure, or other circumstances (The Verkhovna Rada of Ukraine, 1971).

To ensure the performance of certain functions of customs control and customs clearance in customs offices that are temporarily non-operational until such customs offices are operating normally, the State Customs Service adopted Order No. 328, which determined that:

- Ternopil Customs office performs the functions of customs control and customs clearance of Donetsk customs office
- Khmelnytsky Customs office performs the functions of customs control and customs clearance of Luhansk Customs office
- Dnipro Customs office performs the functions of customs control and customs clearance of Kharkiv Customs office
- Cherkasy Customs office performs the functions of customs control and customs clearance of the Customs office in the Kherson region, the Autonomous Republic of Crimea and the city of Sevastopol
- Poltava Customs office performs the functions of customs control and customs clearance of Mykolaiv Customs.

It should be emphasised that, in addition to the customs offices mentioned above, structural units of other customs offices of the State Customs Service became temporarily non-operational under Order No. 522 (The State Customs Service of Ukraine, 2022c), for example:

- customs posts 'Velika Pysarivka', 'Bachivsk', 'Druzhba', 'Katerynivka', 'Yunakivka', and 'Bilopilla' of the Sumy Customs office
- customs posts 'Novi Yarolovichi', 'Slavutich', 'Senkivka', 'Novgorod-Siverskyi', and 'Snovsk' of the Chernihiv customs office
- customs post 'Yampil' of Vinnytsia Customs office
- customs posts 'Dolsk', 'Domanove', 'Pishcha', 'Kovel', and 'Zabolottia-Khotyslav' of Volhynia Customs office
- customs clearance department No. 1 of the customs post 'Specialised' of the Dnipro Customs office
- customs clearance department 'Kupyansk' of the Energy Customs office
- customs post 'Korosten', 'Ovruch', 'Olevsk', and 'Vystupovichi-automobile' of Zhytomyr Customs office

- customs posts 'Melitopol', 'Berdyansk', and 'Zaporizhia-Airport' of the Zaporizhia Customs office
- customs posts 'Kyiv Airport (Zhulyani)', 'Boryspil', 'Vilcha', 'Vyshneve' customs clearance department No. 2 of the 'Kyiv-central' customs post of the Kyiv Customs office
- customs post 'Lviv Airport' of Lviv Customs office
- customs posts 'Udrytsk', 'Prykladniki', and 'Horodishche', customs clearance department No. 2 of the customs post 'Sarna' of Rivne Customs office.

We would like to highlight that because of hostilities, the situation of ensuring the uninterrupted functioning of territorial bodies as separate structural divisions of the State Customs Service is constantly and rapidly changing. After the offensive actions of the armed forces of Ukraine in the autumn of 2022, a significant part of the Ukrainian territories was liberated from the Russian army. This allowed some customs offices to be unsuspended ensuring their normal operation.

From 5 December 2022, the suspension of the work of Odesa International Airport, 'Kuchurgan' and 'Podilsk' of the Odesa Customs office was terminated. The suspension of the Kharkiv Customs office was also terminated from 1 December 2022, which allowed the Kharkiv Customs office to resume the functions of customs control and customs clearance, which were previously transferred to the Dnipro Customs office (The State Customs Service of Ukraine, 2022d).

Furthermore, the systemic processes mentioned above have contributed to constant changes in the organisational and staff structure of the State Customs Service. For example, Decree No. 372 (The Ministry of Finance of Ukraine, 2022) provides for the implementation of not only optimisation actions according to the structure of subdivisions of customs offices but also the relocation of personnel of the State Customs Service. For example, officials from Customs that are temporarily non-operational are transferred to customs offices that are operating normally. Part of the security, law enforcement, control, and fiscal functions are also being redistributed (temporarily) between customs offices (these functions are released from the competence of customs offices that are temporarily non-operational to designated customs offices that are operating normally).

5. Competences of territorial bodies of the State Customs Service during the armed conflict in Ukraine

As described in the previous section, due to the armed conflict, the State Customs Service was forced to change the organisation of its territorial bodies' activities by dividing them into temporarily non-operational customs offices, and customs offices that continue to operate normally. Therefore, the State

Customs Service transferred most of the security, law enforcement, control and fiscal functions from customs offices that are temporarily non-operational to customs offices that are operating normally.

What are the functions of the customs offices operating normally compared to the customs offices that are temporarily non-operational? The functions are listed in Order No. 328 and include:

1. investigation of the circumstances of non-delivery of goods
2. carrying out work in the implementation of transit procedures
3. organisation of money collection in case of non-fulfilment of customs tax obligations secured by guarantees, interaction with guarantors on such issues
4. ensuring the implementation of measures directed to the carrier, in case of loss or release of goods by them without the permission of the customs body, the obligation to pay customs payments established by law for the import of such goods
5. preparation of reports on the total number of deliveries and non-delivery of shipments of goods at the destination customs
6. deciding to extend the terms in cases defined by Chapter V 'Customs regimes' and Chapter VII 'Storage of goods, commercial vehicles in warehouses of customs bodies and at their disposal of the Customs Code of Ukraine, fulfilment of customs formalities related to the application of customs modes
7. fulfilment of customs formalities related to making changes to completed customs declarations, declaring customs declarations invalid, and issuing additional customs declarations (The State Customs Service of Ukraine, 2022e).

The more critical functions involved with the organisation of customs control and customs clearance are numbers 6 and 7 in the list above.

It should be noted that work undertaken in relation to customs declaration is the most crucial component of these two functions (6 and 7 above), since the declaration is the primary document for the calculation and subsequent payment of customs revenue for imports and the emergence of a tax liability for VAT when exporting goods. The customs declaration forms the basis of determining a VAT 'tax credit'. The right to a VAT 'tax credit' when importing goods arises on the date of payment of the VAT tax liability.

A customs declaration is also the official document in which a person specifies the customs procedure to be applied to the goods, as well as the information provided by law about the goods, the conditions and methods of their movement across the customs border of Ukraine, and the procedure regarding the calculation of customs taxes necessary for the application of this procedure.

If, at the request of declarants, customs offices that are operating normally perform functions 6 and 7 on behalf of customs offices that are temporarily non-operational, they will also ensure compliance with the associated customs requirements (The State Customs Service of Ukraine, 2022b).

Regarding the availability of specific technical capabilities, we note the following. Due to Russian missile attacks, Ukraine is constantly rebuilding its energy infrastructure and capacity. As a result, it is not always possible to undertake customs formalities in cases where such activities rely on automated procedures (The Ministry of Finance of Ukraine, 2012).

In relation to the execution of customs formalities during martial law, we can make the following observations regarding the operation of customs offices that are functioning normally, in place of those that are temporarily non-operational. Goods for export can be cleared by any customs body upon presentation to that body. Depending on the decision of the customs body, customs clearance and release of goods for export may be carried out without the need for the goods to be presented to the customs body where a customs declaration has been submitted in the usual manner. The customs body makes a decision on the release of goods based on a risk analysis within four working hours of receiving the customs declaration.

It is important to note that goods for export are only delivered to the relevant customs control zone if the customs body has made the decision to present them to that body. The customs control zone is determined based on the location of the goods specified in the customs declaration, and only if the customs body has made the corresponding decision.

The presentation of goods to the customs body is carried out upon the declarant's receipt of a notice from the customs body requesting a such presentation, based on the results of risk analysis and/or regulatory legal requirements for customs formalities for export goods.

It is also worth noting that the establishment of customs control zones, including temporary ones, for the performance of customs formalities is solely within the competence of customs bodies (The Ministry of Finance of Ukraine, 2020).

6. Conclusion

The situation in the customs sector of Ukraine in general, and in particular in the territorial bodies of the State Customs Service, has undergone significant changes since the beginning of the full-scale Russian invasion.

The activities of the State Customs Service and its territorial bodies are governed exclusively by the current legislation. However, the relevant powers and functions fail to meet the challenges of today, due to the peculiarities of the armed conflict on the territory of Ukraine, which began on 24 February 2022.

The armed conflict in Ukraine requires the leadership of the State Customs Service to be flexible and prompt in making administrative decisions to minimise damage to the customs affairs and the state as a whole. During the last 12 months of the conflict, the State Customs Service of Ukraine attempted to take anti-crisis measures, such as making changes to the organisation and

scope of the competencies of territorial bodies of the State Customs Service. However, unfortunately, the temporary cancellation of customs duties by the Ukraine Government had a more significant impact on the drop in customs revenues to the budget than the stabilisation measures introduced by the State Customs Service. Therefore, the issue of customs organisation during the military conflict in Ukraine, even under the conditions of the steps already implemented, remains relevant.

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References

The Cabinet of Ministers of Ukraine. (2020). *Про схвалення Прогнозу економічного і соціального розвитку України на 2021–2023 роки [Resolution on approval of the forecast of economic and social development of Ukraine for 2021–2023]* (No. 671). https://zakon.rada.gov.ua/laws/show/671-2020-%D0%BF?lang=en#Text

The Cabinet of Ministers of Ukraine. (2022). *Про тимчасове закриття деяких пунктів пропуску через державний кордон та пунктів контролю [Order on the temporary closure of some checkpoints across the state border and control points]* (No. 188). https://zakon.rada.gov.ua/laws/show/188-2022-%D1%80?lang=en#Text

The Ministry of Finance of Ukraine. (2012). *Про затвердження Порядку створення зон митного контролю [Order on the approval of the procedure for the creation of customs control zones]* (No. 583). https://zakon.rada.gov.ua/laws/show/z0879-12?lang=en#Text

The Ministry of Finance of Ukraine. (2020). *Про затвердження Порядку виконання митних формальностей у разі виходу з ладу автоматизованої системи митного оформлення або єдиної автоматизованої інформаційної системи митних органів [Order on the approval of the procedure for performing customs formalities in the event of failure of the automated system of customs clearance or the unified automated information system of customs bodies]* (No. 508). https://zakon.rada.gov.ua/laws/show/z0998-20?lang=en#Text

The Ministry of Finance of Ukraine. (2022). *Про затвердження Змін до Класифікатора Державної митної служби України, її територіальних органів та їх структурних підрозділів [Order on approval changes to the classifier of the State Customs Service of Ukraine, its territorial bodies and their structural subdivisions]* (No. 372). https://zakon.rada.gov.ua/rada/show/v0372201-22?lang=en#Text

The National Council for the Recovery of Ukraine from the Consequences of the War. (2022). *Draft Ukraine recovery plan. Materials of the 'audit of war damage' working group.* https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/eng/audit-of-war-damage-eng.pdf

The State Customs Service of Ukraine. (2020). *Про утворення територіальних органів Державної митної служби України як відокремлених підрозділів [Order on the formation of territorial bodies of the State Customs Service of Ukraine as separate units]* (No. 460). https://customs.gov.ua/en/documents/pro-utvorennia-teritorialnikh-organiv-derzhavnoyi-mitnoyi-sluzhbi-ukrayini-iak-vidokremlenikh-pidrozdiliv-149

The State Customs Service of Ukraine. (2022a). *BI – Indicators of foreign trade of Ukraine* [Data visualisation tool]. https://bi.customs.gov.ua/uk/trade/payments

The State Customs Service of Ukraine. (2022b). *Letter on coordination of customs formalities* (No. 08-1/17-02/7/6836).

The State Customs Service of Ukraine. (2022c). *Order on establishing changes to the order of the State Customs Service No. 113 of February 24, 2022* (No. 522). Government courier, 84.1897.

The State Customs Service of Ukraine. (2022d). *Order on the establishment of downtime in the work of the territorial bodies of the State Customs Service* (No. 113). Official Bulletin of Ukraine, 74, 2082.

The State Customs Service of Ukraine. (2022e). *Про покладання функцій [Order on assignment of functions]* (No. 328). https://www.mdoffice.com.ua/ua/aSNewsDic.getNews?dat=27072022&num_c=814810

The United Nations. (2022). *Initiative on the safe transportation of grain and foodstuffs from Ukrainian ports*. https://www.un.org/sites/un2.un.org/files/black_sea_grain_initiative_full_text.pdf

The Verkhovna Rada of Ukraine. (1971). *The labour code of Ukraine* (No. 2755–VI). https://zakon.rada.gov.ua/laws/show/322-08?lang=en#Text

The Verkhovna Rada of Ukraine. (1996). *Constitution of Ukraine* (No. 254k/96-BP). https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text

The Verkhovna Rada of Ukraine. (2010). *ПОДАТКОВИЙ КОДЕКС УКРАЇНИ [The tax code of Ukraine]* (No. 2755–VI). https://zakon.rada.gov.ua/laws/show/2755-17?lang=en#Text

The Verkhovna Rada of Ukraine. (2012). *The Customs Code of Ukraine* (No. 4495–VI). https://zakon.rada.gov.ua/laws/show/4495-17?lang=en#Text

The Verkhovna Rada of Ukraine. (2014). *On amendments to the Customs Code of Ukraine regarding stabilization of the balance of payments* (No. 74–VIII). https://zakon.rada.gov.ua/laws/show/74-VIII?lang=en#Text

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Section 2

Practitioner Contributions

Puno Diokno, J. (2023). Strengthening inter-agency cooperation and coordination in the implementation of the Strategic Trade Management Act with a view to enhancing trade facilitation: a Philippine Customs perspective. *World Customs Journal, 17*(1). https://doi.org/10.55596/001c.73210

PRACTITIONER CONTRIBUTIONS

Strengthening Inter-Agency Cooperation and Coordination in the Implementation of the Strategic Trade Management Act With a View to Enhancing Trade Facilitation: A Philippine Customs Perspective

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Keywords: Strategic Trade Management Act, UNSCR 1540, Customs Modernization and Tariff Act, inter-agency cooperation, economic and freeport zones, automated export documentation system

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This paper provides insights into the state of play of inter-agency cooperation and coordination among government agencies in the Philippines involved in the implementation of the *Strategic Trade Management Act*, such as the Philippine Bureau of Customs, the Strategic Trade Management Office, and Investment Promotion Agencies (IPAs), which exercise control and supervision over registered enterprises in the freeport and economic zones in the Philippines. It will identify the challenges faced by customs officers in the facilitation of exports of potentially strategic goods requiring referral to the licensing agency for technical reachback, the complexity of commodity identification, which impacts frontline officers' ability to identify strategic goods, and the non-integration of export declaration systems utilised by exporters in the freeport and economic zones with customs' export declaration system. The paper also outlines recommendations and solutions to the challenges that confront Customs in the Philippines in effectively implementing strategic trade controls and facilitating legitimate trade in a timely manner.

1. Introduction

Customs administrations around the world play a significant role in the collection of revenues, the facilitation of legitimate trade and in ensuring border security. In the context of strategic trade control, the core functions of Customs in border security are emphasised under operative paragraph 3(C) of United Nations Security Council Resolution 1540, obliging states to develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation, when necessary, the illicit trafficking and brokering in Weapons of Mass Destruction (WMD).

Customs plays a crucial role in strategic trade control enforcement due to its unique authority and responsibility for monitoring and controlling cross-border flows of goods, people and conveyances (World Customs Organization, 2019). Utilising these core capabilities to the exclusion of other government authorities, Customs can conduct risk profiling to identify high-risk consignments, detain and eventually seize shipments found to be in violation of customs laws and other regulatory laws.

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The domestic legislation relevant to Customs in the Philippines, the *Customs Modernization and Tariff Act* (CMTA), implements regulatory laws such as Republic Act No. 10697, otherwise known as the *Strategic Trade Management Act* (STMA). In the case of strategic goods requiring authorisation from the Strategic Trade Management Office (STMO, the licensing agency in the Philippines) from the perspective of Customs, these goods are treated as regulated goods. As such, Philippine Customs relies on the STMO to determine whether there is a violation or not. In the absence of a violation, the goods are cleared from Customs. However, in cases in which the goods are found to be potentially subject to strategic trade controls, and thereby requiring a referral to the STMO, the clearance of the goods will be suspended pending STMO's advice.

In 2017, almost two years after the enactment of the STMA, the Implementing Rules and Regulations (IRR) were approved by the National Security Council-Strategic Trade Management Committee providing guidance on the regulatory requirements imposed on exporters of strategic goods in the Philippines. As the lead agency responsible for the facilitation of exports, Customs transacts with various categories of exporters such as regular exporters of locally produced products, Customs Bonded Warehouse exporters and exporters in the economic and freeport zones. In the implementation of the STMA, citing Section 2 (a) of the IRR, the scope and coverage of the law includes any natural or juridical person operating within the Philippines who engages or intends to engage in the export of strategic goods from the Philippines including designated special economic zone and freeport zones.

2. Economic and freeport zones

Of particular interest to Customs are exporters from the economic and freeport zones, which are considered outside customs territory for the purposes of customs duties and taxes. It has been observed that control is more relaxed and there is less Customs involvement inside the economic and freeport zones, which makes it difficult for Customs to monitor the movement of goods (personal observation).

In addition, the declaration system used by registered enterprises in the economic and freeport zones, the *Automated Export Documentation System* (AEDS) is different from the customs declaration system known as the *Automated Export Declaration System* on the E2m (Electronic2mobile). In the former, the system does not employ risk-based selection criteria, and the approval of the export goods in the declaration system rests solely on the discretion of the zone manager whereas in the latter, it is embedded with selectivity criteria based on the parameters and risk profiles determined by the Philippines Customs' Risk Management System.

Moreover, the AEDS only allows a 30-minute window for Customs to notify the zone manager at the zone if an inspection is warranted based on reasonable suspicions that illicit goods are concealed inside the container, or a

derogatory report was received by Customs that needs to be validated. After the lapse of the window period, the container is allowed to exit the gate en route to the port of loading.

These limitations, combined with insufficient integration and utilisation of IT, result in a dearth of requisite data concerning cargoes inside free zones and render customs' risk management-based controls (conducted for the purpose of preserving security and compliance without hindering legitimate cargo flows) virtually useless (Omi, 2019).

3. Memorandum of Agreement for trade facilitation

To effectively implement the STMA in the Philippines, and in keeping with the goal of facilitation of legitimate trade, the STMO, the Philippine Bureau of Customs, and the Investment Promotion Agencies (IPAs) signed a Memorandum of Agreement (MOA) on Trade Facilitation on the Export of Strategic Trade on 17 November 2020.

This MOA paved the way for the creation of a Technical Working Group (TWG) on Trade Facilitation to establish effective coordination and cooperation mechanism to harmonise procedures, formalities, and documentation to facilitate trade and implement strategic trade management, as well as organise and implement Commodity Identification Training (CIT) for frontline officers.

The salient provisions in the MOA pertain to information sharing, risk management, capacity building to support CIT for frontline officers, and reachback mechanisms with a view to enhancing trade facilitation and supporting the export industry in the Philippines.

It is therefore essential that a close working relationship among Customs, STMO and IPAs be established for the effective implementation of the STMA in the Philippines.

4. State of play in the implementation of the STMA

4.1. Information sharing mechanism

Since the signing of the MOA, the STMO regularly updates Customs on approvals and authorisations including pending applications, which are fed into the risk management system to flag exports that may potentially evade strategic trade controls. Through the information-sharing provision in the MOA, the STMO and the Customs Risk Management Office coordinate to update risk profiles and selection criteria on relevant Harmonized System (HS) codes specific to dual-use goods to identify transactions that are high risk and may be non-compliant.

4.2. Training and capacity building

Training and capacity building activities on commodity verification and identification have been conducted for frontline officers at 17 ports of loading in the Philippines to enhance identification of strategic goods. In an ongoing effort to enhance strategic trade control and enforcement, a schedule of training programs was planned for 2022–2023 to benefit customs officers outside customs headquarters who have little or no training on strategic trade

control enforcement. Further, training materials focusing on strategic trade control are currently being developed for inclusion in the Bureau of Customs online learning portal. Through a Train-the-Trainer program, a pool of trainers is undergoing extensive training in preparation for the official opening of a dedicated Customs Institute in the Philippines.

Senior officials and operational personnel have also benefited from the trainings provided by the WCO through its Strategic Trade Control Enforcement (STCE) Program. The STCE Program is the WCO mechanism and toolset through which customs administrations can access training and materials to support their implementation of the customs element of UNSCR 1540 (McColm et al., 2019).

4.3. Reachback

Most outbound cargoes at the Port of Manila that are targeted for reachback support are shipped by registered business enterprises from the economic and freeport zones in the Philippines. These shipments have a separate export declaration system from the customs declaration system principally used by non-registered enterprises and are, therefore, outside the scope of the Philippines Customs Risk Management System.

Generally, these exports are from the semiconductor industries and industries involved in the manufacture of machine tools, automobile components, and other highly specialised equipment.

Relying solely on the export declaration and shipping documents during cargo clearance formalities, customs officers' working knowledge on commodity identification and verification are put to the test. Encountering shipments which are highly technical in nature, customs officers turn to the STMO for reachback support. The coordination on reachback support between Customs and STMO has improved significantly since the inception of the MOA. Receiving timely feedback is important to minimise any delay in facilitating cargo clearance of a shipment referred for reachback. Customs and STMO employ various communication platforms when reachback is needed, in addition to sending electronic mails.

5. Gaps and challenges in the implementation of the STMA at Philippine ports

To facilitate the export of goods at the 17 ports of loading within the territorial jurisdiction of the Philippine Bureau of Customs, trade control examiners are trained to identify goods requiring licences, permits, and clearances from regulatory agencies. Some of these products require licences from the Food and Drug Administration (FDA) and quarantine offices under the Department of Agriculture for plants, aquatic and animal products. Customarily, trade control examiners are familiar with the types of commodities that are routinely shipped at the ports. Trade control examiners are also trained to classify commodities in the ASEAN Harmonized Tariff Nomenclature (AHTN) to check the correctness of the declared tariff classification for a particular export.

In view of the implementation of the STMA as part of the Philippines' commitment to fulfil its obligations under UNSCR 1540 and the capacity building provisions of the said resolution, trade control examiners are expected to have a working knowledge of the legal framework of the STMA, international treaties, sanctions, embargoes, and multilateral export control regimes and undergo intensive CIT. Even for an experienced trade control examiner who has had extensive training and expertise in various aspects of border protection, this presents significant challenges. In the area of strategic trade control and enforcement, it is critically important for trade control examiners to undergo intensive CIT given the highly technical nature of strategic commodities. Familiarity with relevant UN sanctions and embargoes is also essential to properly facilitate legitimate trade in real time and detain suspicious shipments exported without a licence or those with licences that are at high risk of being diverted to a country of concern. A key trade control responsibility for Customs is the enforcement of embargoes and sanctions (WCO, 2019).

Trade control examiners across the Philippines have differing levels of access to training that can support their implementation of strategic trade controls and sanctions. It is imperative that these officers undergo comprehensive CIT to develop a better understanding of the law, particularly the catch-all provision, and to request for reachback support from the STMO, if warranted. Otherwise, without rigorous training and a detailed knowledge of the relevant legislation, trade control examiners may unwittingly allow the movement of sensitive goods within the supply chain.

It is especially challenging for Customs to monitor the movement of strategic goods in the economic and freeport zones in the Philippines. As a matter of procedure, imports of raw materials enter the zones through transit. After manufacturing these raw materials into finished goods, they are then withdrawn from the economic and freeport zones for loading at a seaport or airport.

As defined in the Revised Kyoto Convention (RKC) (WCO, n.d.), a free zone is a part of the territory of a contracting party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory.

Economic zones and freeport zones in the Philippines are treated as free zones pursuant to the definition in the RKC and the customs domestic legislation exempts these goods entered or admitted in the zones from duties and taxes. As of 30 June 2022, there are 1,522 exporting enterprises operating in various economic zones in the Philippines under the control and supervision of the Philippine Economic Zone Authority (PEZA).

There are economic benefits and incentives accorded to registered locator enterprises in the free zones and evidently, the economic growth contributes greatly to the benefit of the country hosting these economic zones. However, there are numerous reports of illicit transactions in the free trade zones. According to CRDF Global (n.d.):

> Beyond the threat to the host country, poorly managed SEZs [Special Economic Zones] also present a threat to international security, especially regarding weapons proliferation. Zones are frequently used as transshipment points by state and non-state actors working to procure goods and materials destined for weapons programs. Proliferators are constantly endeavoring to acquire a long list of "dual-use goods"; that is, goods that have both civil and military applications. (para. 2)

A notable weapons proliferation network was the AQ Khan network (MacCalman, 2016). It took advantage of the vulnerability of free trade zones owing to the fact that there is less customs control and supervision over these transshipment points. This allowed the unimpeded movement of controlled materials and components. Regarding this network, Viski and Michel (2016) write:

> In the many books and articles that are available regarding the Khan network, all note that free trade zones in Dubai were critical in allowing nuclear technology to reach Iran, DPRK [Democratic People's Republic of Korea], Libya, and other states. While the Khan case may be the most famous, a Wisconsin Project timeline noting "UAE [United Arab Emirates] Trans-shipment Milestones" lists at least three dozen cases implicating free zones in the UAE with proliferation cases. Documented cases begin in the 1980s, and increase almost proportionally to the growth of number of zones and expansion in terms of incentives offered by the zones. Some examples include German uranium enrichment components shipped illegally to Pakistan; mustard gas and nerve agent precursors shipped from India to Iran; attempted export of a high-speed oscilloscope from the Netherlands to Pakistan; export of maraging steel from Belgium to Iraq; export of heavy water from Germany to India, all of which involve UAE free zones as trans-shipment points. These were followed by several unveiled cases of Dubai free zones being used by the Khan network. (p. 36)

6. Vulnerabilities in the economic and freeport zones

Philippine Customs does not have access to trade data of all exports coming out of the economic and freeport zones. This is attributable to the fact that the customs declaration system is entirely distinct and separate from the AEDS used by registered locator enterprises in these zones. The non-integration of these two systems presents a significant challenge in terms of risk profiling and targeting of illicit strategic goods. As previously discussed, the AEDS is not integrated with a customs' risk management system that would, under normal circumstances, allow the targeting of potentially strategic goods based on risk indicators and parameters set by the Customs Risk Management Office.

The AEDS is a unique tool that is designed exclusively for registered business enterprises to facilitate the prompt release of their goods in the zone. It is embedded with a bar code that only allows a 30-minute window period in the system for Customs to notify the zone manager if a specific container requires inspection to validate an intelligence report received by Customs. After the lapse of the window period, Customs is precluded from conducting an inspection and the container will be released from zones after scanning the bar code on the export declaration. Thereafter, the container reaches the port of loading to undergo cargo clearance formalities prior to loading on the vessel.

Outbound cargoes are time-sensitive given the commitment of the supplier to its buyer to deliver goods in a timely manner. Acknowledging the role of Customs in facilitating trade in real time, this highlights the trade control examiners' role at the ports of loading as a last line of defence in border security. Effective strategic trade control and enforcement is demonstrated when trade control examiners can identify strategic goods from export declarations and shipping documents by applying their CIT and knowledge on the catch-all provision of the law including relevant sanctions and embargoes. Strategic goods represent only a fraction in the global supply chain. The goal is to be able to facilitate shipments of strategic goods with requisite authorisations, and detect and interdict shipments of illicit strategic goods.

Another gap identified in the AEDS is the lack of familiarity of the zone manager in identifying strategic goods during the lodgment process in the system. Procedurally, the AEDS is managed by a zone manager who has the discretion to allow exports to be lodged in the system under the pre-approved list of goods and regulated goods, which require permits/licences from a specific regulatory agency like the STMO. Strategic goods listed in the National Strategic Goods List (NGSL) that fall under the category of regulated goods and other such items, though not listed in the NSGL, may come within the purview of the catch-all provision of the law. As such, these require authorisation from the STMO. The zone manager should know first-hand if the goods require permits before they approve the export declaration. In the case of strategic goods, the zone manager should be able to identify strategic goods from the list of goods declared in the system or, at the very least, be cognizant of the catch-all provision in the STMA. Once the goods are identified as being strategic, the registered locator enterprise is obligated to submit a licence to the zone manager. If the registered locator enterprise fails to present a licence, it is incumbent upon the zone manager to disapprove the lodgment outright in the AEDS. The role of the zone manager is critical at the lodgment process, without their approval, the export declaration will not proceed in the system and ultimately, strategic goods without proper authorisation from the licensing agency will not be able to leave the port.

7. Case study

A case involving a registered locator enterprise in the economic zone was referred to the STMO citing alleged violation of the catch-all provision of the law. The case stemmed from a confidential intelligence report shared with

the STMO that was later shared with Customs pertaining to a shipment of servo motors bound to a country of concern. Invoking the MOA entered by Customs with STMO and PEZA, a coordinated effort from the agencies successfully located the goods in question.

In this instance, the shipment was yet to leave the warehouse. Due to the timely intervention of the partner agencies involved, the goods remained at the warehouse pending an evaluation and review by the STMO. Subsequently, after a careful and thorough review of the application for authorisation, the STMO denied its application citing as its basis the catch-all provision of the law. Without the cooperation of key government stakeholders following receipt of the intelligence report from a foreign partner, the goods would have left the country and may have been diverted to a country of concern for a prohibited end use.

8. Recommendations to address the implementation challenges of the STMA

This paper has highlighted the challenges faced by Philippine frontline customs officers and the zone managers in the implementation of the law and the non-integration of the two declaration systems making it difficult for Customs to manage exports in the free zones.

The WCO released a document entitled *Practical Guidance on Free Zones* (WCO, 2020) to help customs administrations address risks of illegal activities in free zones. As described by Milton (n.d.):

> While still not legally binding, the WCO Practical Guidance are an important step towards improving governance of free zones. With 183 members, the WCO carries significant weight in global trade, and especially in Customs matters. This guidance, coupled with the abovementioned recommendations from the OECD and the precedent set by the Tobacco Protocol, can be seen as a precursor to mandatory inclusion of Customs in the establishment and operation of free zones all over the world. (para. 3)

It cannot be denied that in every customs organisation there are competing priorities. Some agencies prioritise the interdiction of narcotics, some illegal waste, others IPR infringement. Given that illicit strategic goods represent a small fraction of goods within the global supply chain, in some agencies their detection may not be adequately prioritised in terms of the allocation of resources and capacity building.

The reality on the ground in the Philippines is that most customs officers do not have the relevant and appropriate skills to identify strategic goods. Most officers are not even aware that the STMA is already a law and is being implemented after the IRR were approved by the National Security Council-Strategic Trade Management Committee in 2017.

This lack of awareness of the law can be best addressed through close coordination with the STMO and the Customs' Training Division to work collaboratively on the development of a training curriculum on strategic trade control and enforcement. Training modules should include tabletop exercises on possible scenarios of sanctions, evasion tactics employed by proliferators and other nefarious actors in the supply chain.

The Customs Training Division should conduct rigorous training and deliver Train-the-Trainer programs from the rosters of customs officers. Also, Customs should consider making a request for technical assistance from the WCO through its STCE program for the conduct of training designed for CIT and accreditation of prospective trainers. The development of a refresher course is also highly recommended for those who have previously undertaken training on CIT to highlight recent and evolving updates and amendments on UN sanctions and embargoes.

The TWG on Trade Facilitation has been a useful platform for government stakeholders to identify choke points in the facilitation of goods in the economic and freeport zones, including implementation challenges in the law. During the last TWG meeting, CIT-related capacity building activities for zone managers were identified as priority. The key objective of such capacity building activities is to ensure zone managers can detect suspicious transactions and deter any attempt to circumvent the law during the lodgment process in the AEDS.

It is timely that a CIT be conducted for zone managers and other frontline officers at the freeports in preparation for the imminent implementation by the STMO of *'No STMO Authorization, No Export of Strategic Goods'*[1] starting 1 January 2023. For future training, it would be useful to facilitate an opportunity for CIT for zone managers and frontline officers at freeport zones to work together on tabletop exercises facilitated by the STMO. A joint CIT will be a good opportunity for key frontline officers to foster good working relationships given the imperative of cooperation and coordination among agencies involved in the implementation of Strategic Trade Control (STC).

The issue of separate declaration systems is a matter of policy. It requires mutual agreement among Customs, PEZA and freeport authorities to address the issue of insufficient integration of systems resulting in inaccurate data on cargoes withdrawn from the economic zones. Interestingly, all government stakeholders are on board to push for the integration of both declaration systems. They acknowledge the importance of a uniform declaration system for all stakeholders to plug the loophole on inaccurate data and, more importantly, integrate the risk management system principally for targeting and profiling of high-risk containers. This idea has gained traction and a draft Customs Memorandum Order mandating the interface of both systems has been developed. All concerned government stakeholders have been properly

1 STMO Announcement No. 2022-01.

consulted and have submitted their inputs to the Customs' IT Department and the Project Management Office. Continuous consultations are also under way between government stakeholders and Value-Added Special Providers (VASPs) to ensure that the system is ready for integration. In anticipation of the interface of both systems, one VASP has already conducted an online demonstration of the updated version of the AEDS to ensure smooth transition for users and government clients such as zone managers and key customs officers in Metro Manila. Another planned online demonstration is scheduled to cater to user-clients outside Metro Manila.

The interface of these two separate declaration systems will be beneficial to all stakeholders as there will be improved transparency and accuracy of trade data. More importantly, the integration of both systems will allow Customs to have direct access to the data of all exportations in the economic and freeport zones. The quality of data generated from the system will be extremely useful for the Customs Risk Management Office to create risk profiles for targeting of risky and non-compliant transactions.

9. Conclusion

It is an aspiration of every customs organisation to keep their borders secure and safe by maintaining effective strategic trade control. To achieve this goal, Customs and other relevant key government stakeholders must work together to overcome implementation challenges in the law while ensuring that legitimate trade is facilitated in a timely manner.

The *WCO Practical Guidelines in Free Zones* (WCO, 2020) is a useful publication in which Customs could introduce amendments to its existing policies to combat illicit activities in the economic and freeport zones, specifically focusing on the effective control of strategic and potentially strategic dual-use goods.

A more effective solution to mitigate risks of STMA violations is the integration of both declaration systems used by Customs and economic zones with a unified risk management system. Philippines Customs is poised to roll out the interface of both systems in 2023.

This proactive approach by key government stakeholders in addressing the vulnerabilities in the current export declaration system is a testament of the whole-of-government approach that is needed to achieve an effective STC in the Philippines.

Customs officers, zone managers and freeport zone frontline officers should continuously receive training on CIT through a robust foundational training program and specialised courses to equip them with the relevant skills to target and profile illicit strategic goods.

Finally, given that it has been more than six years since the implementation of the STMA, a self-assessment on the current STC system is warranted to revisit existing policies, identify loopholes and weaknesses in the global supply chain, and, if necessary, to call for a national commitment to develop new policies and strategies to address emerging proliferation threats.

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References

CDRF Global. (n.d.). *Benefits and challenges of Special Economic Zones*. https://www.crdfglobal.org/insights/benefits-and-challenges-special-economic-zones/

MacCalman, M. (2016). A.Q. Khan nuclear smuggling network. *Journal of Strategic Security*, *9*(1), 104–118. https://doi.org/10.5038/1944-0472.9.1.1506

McColm, J., Ghulam Ali, M., Vas, A., Heine, P., & Pal, D. (2019). Where there's a way, there's a will: the World Customs Organization's capacity building in the field of strategic trade control enforcement. *Strategic Trade Review*, *5*(7), 4552. https://strategictraderesearch.org/wp-content/uploads/2019/04/The-World-Customs-Organization's-Capacity-Building-in-the-Field-of-Strategic-Trade-Control-Enforcement.pdf

Milton, M. (n.d.). *World Customs Organization's free zone guidance calls for increased involvement from customs administrations*. CDRF Global. https://www.crdfglobal.org/insights/world-customs-organizations-free-zone-guidance-calls-increased-involvement-customs/

Omi, K. (2019). *"Extraterritoriality" of free zones: the necessity for enhanced Customs involvement* (WCO Research Paper No. 47). World Customs Organization. https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/research/research-paper-series/47_free_zones_customs_involvement_omi_en.pdf

Vinski, A., & Michel, Q. (2016). Free zones and strategic trade controls. *Strategic Trade Review*, *2*(3), 27–41. http://www.str.ulg.ac.be/wp-content/uploads/2016/10/Free-Zones-and-Strategic-Trade-Controls.pdf

World Customs Organization. (n.d.). *The Revised Kyoto Convention*. https://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx

World Customs Organization. (2019). *Strategic Trade Control Enforcement (STCE): implementation guide*. https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/tools-and-instruments/stce-implementation-guide/stce-implementation-guide_en.pdf?db=web

World Customs Organization. (2020). *Practical guidance on free zones*. https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/free-zone/wco-fz-guidance_en.pdf?la=en

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Section 3

Special Reports and Reviews

Veenstra, A. W. (2023). A review of *Customs: Inside Anywhere, Insights Everywhere*. *World Customs Journal, 17*(1). https://doi.org/10.55596/001c.73211

SPECIAL REPORTS AND REVIEWS

A Review of *Customs: Inside Anywhere, Insights Everywhere*

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Customs controls the cross-border movement of goods. As such, customs agencies play an important role in the enforcement of government regulation in international trade. In recent decades, this role of the 'police at the border' has been complemented with a strong focus on the facilitation of trade, supporting the parties that aim to be compliant, and chasing the parties who don't. Smooth logistics with smart enforcement.

This dual role of Customs is based on a deep vision of how customs supervision could and should work, and how the role of Customs can change but stay fit for the future. This vision, in all its depth and breadth, is laid out in this book. Such a book did not exist previously, but it fulfils a need. Customs agencies around the world, as well as companies engaging in the cross-border flow of goods, are witnessing tremendous change. They need to know that the age-old mechanisms of trading across borders, and the supervision of the resulting flows is still flexible and resilient enough to withstand the test of time going forward. This book holds that promise.

Heijmann and Peters structure the book around four parts: the bedrock of customs activities, the vision on Customs – pushing boundaries, building blocks for a changing Customs and part 4: the future.

This book is about Customs, therefore the first part of the book elaborates on its mission. The mission of Customs in Europe is defined in the Union Customs Code as the primary responsible party for the supervision of the European Union's international trade. This means that Customs oversees enforcing the laws that regulate the cross-border movement of goods. This results in four main tasks for any customs agency: taxation, security, safety and facilitation. This part of the book expounds in some detail the intricacies of these four tasks. In particular, the discussion in this part elucidates the scientific views vis-a-vis supervision and its main elements in the customs domain: intervention, correction and intervention. Risk management is discussed as one of the main competencies of a customs agency to balance its roles of enforcement and facilitation. This is fully in line with the accepted state of the art of customs supervision formulated in the WCO SAFE Framework

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of Standards to Secure and Facilitate Global Trade. Risk assessment comes with the need for information. This part therefore also discusses informational requirements for customs agencies in some detail. It ends with the important insight that a solid customs enforcement approach is based on a well-considered balance between the constituent parts of Custom's mission.

The second part of the book elaborates on the vision – called 'Pushing Boundaries' – behind the enforcement approach of Dutch Customs. Apart from a forward-looking and ambitious statement, this title contains, in a nutshell, the core idea behind this vision: boundaries are no longer lines on a map dividing countries, which pinpoint the location of customs interventions. Effective customs agencies check and verify goods movements in many more instances and possibly in many more places than simply at the border at the moment of crossing. This way of thinking enables the facilitation of trade, unhindered logistics, efficient allocation of scarce customs resources, and effective enforcement on those goods flows that are assessed as high-risk.

This section discusses the 'Pushing Boundaries' vision in some detail. While the basic idea is the combination of smart enforcement and smooth logistics, there are many more components: information management, risk assessment, levels of compliance and a layered approach to enforcement, and finally, coordinated border management. Technology plays an important role as well, in autodetecting goods and data. The latter refers to the continuous improvement of selection profiles and risks. All these components can be divided into four constituent elements of the vision: information, risk management, trustworthiness and layered enforcement. These four components are discussed in some detail. The discussion shows repeatedly that the intelligent application of these components enables Customs to fulfil its dual role of law enforcement and trade facilitation.

Part three of the book takes a step back from the vision and considers the developments and events that have prompted the formulation of this vision. While this part is not intended as a history lesson, it does look back at the beginning of the 21st century, to 9/11 as a crucial turning point in the supervision of international trade. This 'big bang' event, as the book calls it, could have stopped world trade, because of all the new measures to control the flow of people and goods, containers, ports, ships, airplanes and global businesses. It did not, and this is in large part due to the inventiveness of customs agencies and regulators to introduce controls, but to also continue to enable trade. From this dual purpose emerges the dual role of Customs. This section elaborates on the development and influences that changed the view on how customs agencies could remain relevant, how trade could be maintained, and how the original mission of Customs could be sustained. Research played no small part in this, as well as the development of new ways in which a customs agency could maintain a dialogue with trade. This section therefore elaborates on many projects, initiatives, discussion groups and educational

initiatives that played a part in shaping, testing and reformulating the central vision described in part two. After part three, the reader not only understands the vision, but also its origins, and how it evolved.

The final part, four, then looks at the future. The vision is not static. The world evolves; therefore, trade develops and so does the role of Customs. Customs is attributed a stronger role in the greening of society. Technology develops and people also change. This has not been lost on regulators, research institutes and customs agencies. This part of the book discusses a Joint Research Centre study that has been conducted on the role of Customs in the EU in 2040, by means of scenario analysis. It then continues to evaluate the current approach to Customs and formulates a view on the way Customs could continue to operate in the future. One of the key ideas discussed is the relative decline of customs duties as a source of income for the EU, and the introduction of a whole host of other regulatory requirements at the border, from the verification of responsible manufacturing to the verification of emission information. This last section then formulates a view on 'Customs Supervision 2.0' that is fit for the future.

A view into this future is the Artificial Customs Intelligence Depository (ACID). This is a neural network that, based on continuous data collection from approved and open sources, makes autonomous, predictive and proactive enforcement decisions. This system may or may not exist in 2040, but components of this system are currently being developed. These components will become elements of the way in which Customs can continue to play its complex, dual role: to enforce and facilitate international trade.

This is a book for everyone who works in Customs or with Customs, and who wants to know how their world will advance. This book contains a vision on Customs that will withstand the test of time.

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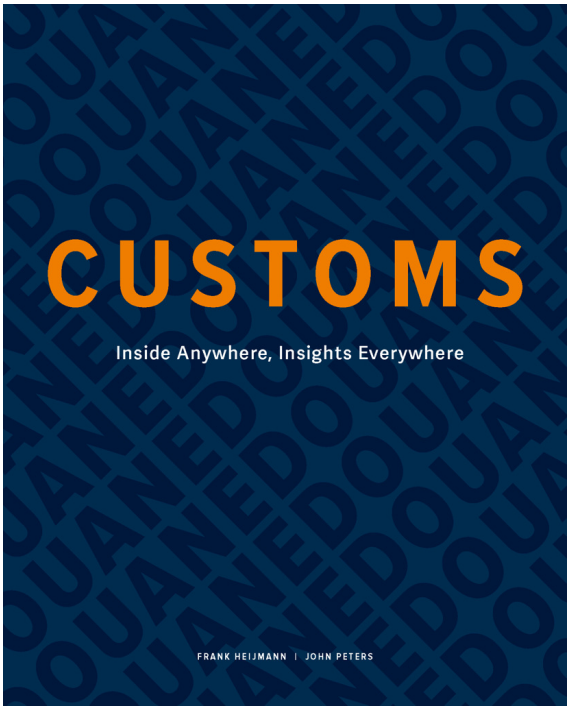

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Section 4

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Original articles (3,000–7,000 words) are original contributions following theoretical and conceptual innovation, development of theories and concepts, methodological perspectives, and rigorous empirical analysis.

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Professor David Widdowson is Chief Executive Officer of the Centre for Customs and Excise Studies at Charles Sturt University, Australia. He is President of the International Network of Customs Universities, a member of the WCO's PICARD Advisory Group and Scientific Board, and a founding director of the Trusted Trade Alliance. David holds a PhD in Public Sector Management and has over 40 years' experience in international trade regulation, including 21 years with the Australian Customs Service. In 2019 he was appointed as a Member of the Order of Australia for significant service to higher education in the field of international trade and customs.

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Rebecca is an editor with the Centre for Customs & Excise Studies (CCES), Charles Sturt University. She is an experienced editor, writer and communicator and is a professional member of the Institute of Professional Editors (IPEd). Rebecca has worked for many years as a research scientist and as an editor, specialising in the life sciences.