

EMERGING ISSUES IN EUROPEAN CUSTOMS LAW

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Abstract

In 1968 the Customs of the six founding Member States of the European Economic Union (EEC) had already been harmonised to such a degree that the customs payable by third countries could be established on the basis of a common customs tariff. Since it was no longer possible to levy customs duties on goods traded between Member States, there existed a customs tariff union between the founding Member States of the modern European Community long before the creation of the European internal market.

However, by itself the creation of a common customs tariff was not enough to realise a customs union as a fundamental characteristic of the European internal market. The EEC Treaty already required customs law to be harmonised in addition to tariffs. For many years rules governing customs law were scattered among a number of Regulations and sometimes differed. However, in 1994 the Community Customs Code (CC) and the Regulation laying down provisions for the implementation of the Community Customs Code created a uniform European Customs Law binding on all Member States. This has now provided a sound basis for achieving uniformity in customs matters of 27 countries.

B. The Customs Code (continued)

II. The structure of the Customs Code (continued)

9. Substantive customs law – the law on customs duties

Substantive customs law, the law on duties, is found in Titles II, VI and VII of the CC. The provisions govern the creation, collection, extinction, waiving and reimbursement of import and export duties in international trade including the provision of security. All provisions concentrate on the collection of customs duties which, according to Art. 4 no. 10 and 11 CC, are regarded as import or export duties. Their creation can be linked to both the entry of goods into economic circulation (import duty) and their leaving economic circulation (export duty). The obligation to pay such duties is referred to as **a customs debt on importation or a customs debt on exportation** (Art. 4 no. 9 CC).

a. Basis for collection

In order to determine the amount of a customs debt, different basic terms are required which form part of the basis of collection of any customs debt. The basic features are laid down in Title II CC: the customs tariff, origin and the customs value of the goods.

The common customs tariff. The customs tariff of the European Communities dictates whether a customs debt is owed, and if so, its amount (Art. 20 (1) CC). The introduction of a common customs tariff of the European Communities in relation to foreign countries had already been declared in Art. 3 (b) of the EC Treaty as forming the basis of the European customs union. For this reason, the first Community customs tariff was created on 1 July 1968 which nowadays forms part of European law on the basis of the Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.⁵²

Art. 20 (3) CC lists the components of the customs tariffs; they are the customs tariff scheme in the form of the Combined Nomenclature (Art. 20 (3) (a) CC), the different rates of duties and customs preferences and autonomous suspensive provisions, which can be used to reduce or cancel customs duties payable when certain goods are imported (Art. 20 (3) (c)–(g) CC). Provisions which specifically regulate the customs tariff are contained in various Regulations and other Community legislation.

The Combined Nomenclature. According to Art. 20 (3) (a) CC, the Combined Nomenclature (CN) represents the tariff scheme which is the basis for the common customs tariff. This nomenclature contains a systematic, hierarchical classification of goods, which are finely classified under different sub-groups at several levels, each of which each can be allocated a special code. Its structure follows the Harmonized System (HS), which, as a global comprehensive directory of goods, is based on the ‘Harmonized System (HS) Commodity Description and Coding System’, which entered into force on 1 January 1988 and is currently applied by 179 states. On the basis of this system, any product in the world can be given a six-figure code. The Combined Nomenclature continues this system at European level and its seventh and eighth digits also correspond to the tariff and statistical requirements of the EC. The applicable CN are published each year in the Official Journal of the EU.

The TARIC. Since the CN was not able to cover the entire customs tariff of the Community, the Community legislator created additional sub-divisions by adding a ninth and tenth digits to the number of goods. This amendment was incorporated into the integrated tariff of the Community (**Tarif Intègrè Communautaire (TARIC)**). The TARIC takes account of other European peculiarities such as anti-dumping measures, customs suspensions and/or customs quotas, and is administered as an informal databank in Brussels. The 10-digit number of the goods must be provided for each importation. In order to take account of national peculiarities such as the turnover tax on imports or excise tax, the Member States may adopt an eleventh digit in the TARIC as a means of further differentiation.

The electronic customs tariff. Nowadays, customs tariffs are mainly dealt with electronically. Information systems based on data processing technology are used which are updated daily by means of data transmission. In Germany, the electronic customs tariff (**Elektronische Zolltarif [EZT]**) was introduced on 1 January 1999 in all systems as a sub-system of the ATLAS Total IT-Concept. The basis of this EZT is the TARIC2 databank of the Commission which is expanded by national sub-headings and measures, and contains all other information of the TARIC administered by the Commission, which is made available to the customs offices of Member States. The EZT does not have any legally binding effect for the traders. Only the relevant provisions have legally-binding effect.⁵³

b. Classifying goods under the customs tariff

Before goods can be allocated their proper number they must be classified under the customs tariff (cf. Art. 20 (6) CC). This classification under a customs tariff largely depends on the material properties of the goods and the use or function of the goods. Different means have been provided in order to classify the goods uniformly. Apart from the comments on the sections and chapters, the heading and sub-headings, and the general provisions, classification rulings, judgments of the first instance of the European Court of Justice and the European Court of Justice as well as explanatory notes, all contribute to the uniform interpretation of the nomenclature. In the explanatory notes to the HS published by the WCO, detailed statements are made concerning, for example, the individual chapters and headings. As administrative

guidelines they have always served as an important aid when applying customs tariffs without binding courts and without the Member States creating their own rules of interpretation.⁵⁴

c. Binding tariff information

In order that the trader may calculate a potential customs debt arising on importation more precisely, binding tariff information is available from the competent customs authority on the printed form in Annex 1b CCIP (Art. 12 (1) CC, Art. 6 (1) CCIP). If preferred, an application may be delivered to the customs authorities of the Member State in which the information is to be used or to the competent customs authorities in the Member State in which the applicant is established (Art. 6 (1) CCIP).⁵⁵ If the applicant has received information, the tariff information shall be binding on all EC customs offices for a period of six years from the date of issue unless it is withdrawn owing to inaccurate or incomplete information (Art. 12 (4) CC) or, subject to the requirements of Art. 12 (5) CC, invalidity intervenes early. If the legal background changes in the meantime, the binding tariff information no longer provides the traders with any protection.⁵⁶

In order that the trader may calculate a potential customs debt arising on importation more precisely, binding tariff information is available from the competent customs authority (Art. 12 (1) CC). An application may be delivered to the customs authorities of the Member State in which the information is to be used or to the competent customs authorities in the Member State in which the applicant is established (Art. 6 (1) CCIP). If the applicant has received information, the tariff information shall be binding on all EC customs offices for a period of six years from the date of issue according to Art. 12 (4) CC unless, subject to the requirements of Art. 12 (5) CC, invalidity intervenes early. Since the binding tariff information is intended to provide a reliable basis of calculation with regard to import duties arising in future, a legal interest in the issue of binding tariff information is required. Should the legal background have changed whilst it was valid, the binding tariff information no longer provides the traders with any protection.

Recently, every trader has been able to obtain online information about binding (European) tariff information which has already been issued.⁵⁷ Issued information is transmitted to the Commission which then stores it on a central databank in order to make the information accessible to the public (Art. 8 (3) CCIP). Owing to the fact that a lot of information is sensitive, publication under Art. 6 (3) (k) CCIP requires the consent of the traders. Confidential information is not published.

d. Rates of duty

The amount of the customs debt can be accurately calculated on the basis of the rates of duty listed in the **common customs tariff**. Standard rates of duty are generally provided for all goods imported (Art. 20 (3) (c) CC), that is, contractual or autonomous rates of duty which are applied in relation to all foreign states. However, autonomous suspensive measures or relief (for example, customs suspensions, quotas or ceilings) and preferential tariff measures when levying the customs debt may have to be taken into account when collecting the customs debt (Art. 20 (3) (d)–(f) CC).

Right to preferential treatment. According to Art. 20 (3) (c)–(f) CC, preferential rates of duty may be applicable to imported goods. This right to preferential treatment applies to a large proportion of imported goods on the basis of the world trade order and can be applied so that there is a zero rate of duty. Taken at face value, customs treatment represents an infringement against the most favoured nation principle which applies in world trade according to Art. I GATT. However, this principle may be overridden by customs unions and free trade areas (Art. XXIV GATT). Therefore, this principle does not apply to the customs union of the European Communities with regard to the right to preferential treatment.

Regarding such customs preferences, Art. 20 (3) (d) and (e) CC distinguish between contractual (Art. 20 (3) (d) CC) and autonomous preferential measures (Art. 20 (3) (e) CC). Whereas **contractual customs preferences** result from international agreements between the EC and certain states (for example, central

and eastern European countries) or groups of states (for example, European Economic Area (EEA) and African, Caribbean and Pacific-Rim states), **autonomous customs preferences** are granted by the EC on the basis of fixed conditions in relation to the importation of goods from certain countries (mainly developing countries).

Preferential treatment may depend on the free movement or origin of the goods. Whether the goods are in free circulation in the integrated area only becomes important concerning the Agreement establishing an Association between the European Economic Community and Turkey.⁵⁸ All other autonomous or contractual preferential measures make the preferential treatment dependent on whether the goods originate in the preferential treatment zone or whether they have preferential parties. In addition, preferential treatment can only be granted if the goods have been properly released for free circulation (Art. 79 CC) and tariff quotas or tariff ceilings are not exceeded. Tariff quotas represent intended relief from duties owing to special legal provisions, which are granted within a certain period, at the end of which the standard rate re-applies. However, in the case of tariff ceilings, the real rate of duty will only re-apply on the basis of an EC ruling (Art. 20 (5) (b) CC).

Preferential origin of goods. The conditions under which goods may be granted preferential origin in a country are contained in Art. 27 CC as part of autonomous customs benefits either under Art. 66–123 CCIP or under the relevant preferential agreement provided that contractual customs benefits have been provided. For this reason, the general system of preferences has been created under Arts. 67–97 CCIP whilst the contractual preferential measures govern the origin of the goods in the relevant origin protocols.

Complete manufacture. All preferential measures provide that the goods will originate from one of the preferential parties if they have been **completely manufactured** there, that is, have been naturalised (for example, Art. 68, 99 CCIP). Even if the preferential measures contain a causal listing of possible operations which lead to a complete manufacture of the goods, nowadays only a few goods are produced in a country owing to the fact that production is based on the division of labour. In most cases, primary materials from another country are used which have been acquired by the manufacturers. If this is the case, then the primary materials must be **sufficiently worked or processed** in order to obtain origin in a preferential zone.⁵⁹

The conditions governing sufficient working or processing have been regulated differently over the course of time. Whereas older autonomous and contractual preferential measures presumed that a sufficient working or processing had been carried out if goods were to be classified under a different heading in the HS (that is, a change of heading had taken place), the modern reformed or recently concluded preferential measures were changed to so-called ‘lists’. Accordingly, a finished product is only granted origin if the conditions contained in the list have been complied with. Besides a change of heading, the measures can also be criteria relating to the value or production. In particular, the explanatory notes (which are placed ahead of the lists (for example, Annex 14 CCIP)) must be observed when using lists.

Minimal treatment. The extent to which there has been an insufficient minimal treatment is also dealt with in all preferential measures (for example, Art. 70 CCIP). The origin of the power and fuel, plant and equipment, and machines and tools used to obtain such products are not taken into account when determining the origin of the products (for example, Art. 75 CCIP). In addition, according to the **territorial principle**, goods of origin which have been worked or processed outside the territory of the preferential party, as a rule also lose the right to preferential treatment (for example, Art. 77 CCIP). Once the goods have left the preference zone they are regarded as foreign products.

Cumulation. The modern division of labour also means that many preferential measures provide that production operations which have been carried out in one or more countries of a preference zone can be added or included (that is, cumulated) when origin is acquired.⁶⁰ A distinction is made between complete and limited cumulation, although the latter is, in turn, to be divided into bilateral and multilateral

cumulation. In particular, **multilateral cumulation** has become important. This allows production operations to be added which have taken place in a foreign country of the same preference zone (for example, ACT, OCTs). The Pan-European cumulation zone, in particular, (Bulgaria, the European Community, European Economic Area including Rumania) has created such an area of production based on the division of labour.

Evidence of preferential treatment. In order to grant the preferential rate of duty, the declarant must enclose the documents necessary to verify the right to preferential arrangements (Art. 218 (1) (c) CCIP). As a rule, this is a formal evidence of preferential treatment whose form depends on the preference zone in question. **Form A** is used for transporting goods as part of APS (Art. 80 (a) CCIP, Annex 17 CCIP), the **movement certificate A.TR.** is used in trade with Turkey according to Art. 5 Decision No. 1/2001 of the EC-Turkey Customs Cooperation Committee⁶¹ and the **movement certificate EUR. 1** (Annex 21 CCIP) as part of other preferential measures (cf. Art. 16 (1) (a) Prot. no. 4 EEA Agreement). However, when trading with certain preferential parties, informal evidence of preferential treatment may be accepted. This usually refers to the declaration of origin on the invoice, which usually can be issued by any ‘authorized exporter’ as well as any other exporter within certain limits (cf. Art. 80 (b) CCIP). If the exporter has not manufactured the primary materials required for the production of the goods, then the exporter must obtain a supplier’s declaration as to the origin of the goods in order to receive verifiable proof of preferential treatment (cf. Art. 27 No. 4 EEA Agreement in conjunction with Annexes V and VI).

Non-preferential origin of goods. Preferential origin is to be strictly distinguished from non-preferential origin, (Art. 22–26 CC and 35–65 CCIP). According to Art. 22 CC, this will only play a role if the determination of the origin of goods serves other commercial policy measures in international trade, that is, not the determination of a preferential rate of duty.

e. The customs value of goods

Before a customs tariff can be applied, the customs value of the goods must be determined. The calculation of the amount depends on the type of the customs duty. As a rule, there are ad valorem tariffs, mixed tariffs and specific tariffs. Modern customs tariffs, such as the common customs tariff, are usually ad valorem tariffs which means that the customs debt can be calculated according to a percentage of the goods’ value.

The different types of calculation. Nowadays, the rules governing customs value are derived from the ‘Agreement on Implementation of Art. VII GATT’, the GATT Customs Valuation Code⁶² which were incorporated in Art. 28–CC. Articles 29, 30 (1) and 31 (1) CC offer six methods of determining the customs value which must be used in the priority given. Only if it is not possible to use the first calculation method do the other methods apply (cf. Art. 30 (1) CC). This means that if it is not possible to calculate the customs value according to the transaction value (Art. 29 CC), the other calculation methods can be used. The methods apply in this order: the value of identical goods, the value of similar goods (Art. 30 (2) (a) CC), the deductive method (Art. 30 (2) (c) CC), the computed value of the goods (Art. 30 (2) (d) CC) and the estimation method (cf. Art. 31 CC), based on an estimation of the goods. The customs value declaration, which must be enclosed according to Art. 218 (1) (b) CCIP, is to be entered on the D.V. 1 form according to the specimen contained in Annex 28 CCIP.

The transaction valuation method. Art. 29 CC deals with the main case of all calculations of customs value. This presumes that the seller and the purchaser aim to conclude a transaction in the customs territory of the Community. Considering the different legal systems of the Contracting Parties of the GATT – Customs Valuation Code, the definition of a contract has to be interpreted broadly. Therefore, it is irrelevant whether the contract concluded is actually a contract of sale, a contract for services rendered (no. 651 BGB) or a contract for services (no. 631 BGB).

Therefore, the transaction value of the goods forms the core of the calculation method. This is the price agreed during the sale for export in the customs territory of the Community and has either been paid or is payable (Art. 29 (1) CC). If it is not possible to separate the tangible imported goods from the intangible components (for example, listening to music on a CD), which can only be used in tandem then, as a rule, the price for both components is the transaction value.⁶³ Depending on the contractual conditions, the transaction value of the goods must be adjusted to take account of additions (Art. 32) and deductions (Art. 33 CC).

Subject to Art. 29 (1) (a)–(d) CC, the transaction method cannot be used. This will be mainly the case if the seller and purchaser are connected (Art. 29 (1) (d)) and the connection has influenced the transaction value (Art. 29 (2) (a) CC). The question whether there is a connection between the seller and purchaser is dealt with in Art. 143 CCIP.

f. The customs debt

Chapter VII of the CC deals with the customs debt in detail. The incurrence, collection, extinction as well as the waiver and refund of the customs debt are dealt with in separate chapters. In addition, a security might also have to be provided.

The import and export customs debt. Articles 201–216 CC and 859 - 867a CCIP govern all aspects relating to how, when and for whom a customs debt might be incurred. Since goods in the customs territory can be imported and exported, a distinction is made between the import and export customs debt (Art. 4 No. 9 CC). The aspects of incurrence are structured uniformly so that para. (1) lays down the requirements for incurrence, para. (2) sets the time of incurrence and para. (3) deals with the identity of the customs debtor. All these criteria require that the goods to be charged customs duties are goods which are subject to import or export duties. This will always be the case if customs duties or agricultural duties are provided and non-tariff relief from duties does not apply to the case in question.⁶⁴

The customs debt which is incurred creates a personal duty of the customs debtor to pay the debt. There are three groups of persons. As a rule, the person acting becomes the customs debtor. This can be the declarant (Art. 201 (3) CC, 209 (3) CC, 211 (3) CC, 216 (3) CC), the smuggler (Art. 202 (3) CC, 210 (3) CC), the person who removes the goods (Art. 203 (3) CC), the person responsible for non-fulfilment of the obligations (Art. 204 (3) CC) and the person who consumes or uses goods in the free zone (Art. 205 (3) CC). In addition, recourse can be had to the participants (Art. 202 (3) second indent CC), who were involved in the withdrawal (Art. 203 (3), second indent CC) or in the consumption or the use of the goods (Art. 205 (3), second indent CC), although they knew or could reasonably have known that they were acting illegally. Furthermore, persons can also be affected who have acquired or had the goods in their possession although they were aware of the facts or should reasonably have known of the facts (Art. 202 (3) CC). Therefore, in almost all cases there will be several possible customs debtors.

Where there are several customs debtors they are jointly and severally liable (Art. 213 CC). Consequently, the customs authorities may demand that each debtor pay the whole debt or only part of the debt, and all debtors remain under the obligation to pay until the whole customs debt has been discharged. The customs office must make a proper choice as to whether (discretion to issue an order) and to what amount (discretion to select) it can proceed against one or more customs debtors. As a rule, proceedings should be initiated against the customs debtor who is closest to the customs debt. This is usually determined according to the order of their listing in the CC.

Liability for the debts of a third party is regulated in the CC as part of the provision of security. This makes provision for the guarantor. According to Art. 195 CC, the guarantor must contractually agree to provide the amount to be secured when the customs debt becomes due. Therefore, the guarantor is also jointly and severally liable without personally becoming a customs debtor.

g. The incurrence of a customs debt on importation

The incurrence of a customs debt on importation according to Art. 201 CC. Art. 201 (1) CC lays down the conditions under which a customs debt on importation may arise. This is usually the case if goods subject to a customs debt on importation are released either for free circulation (Art. 201 (1) (a) CC) or placed under the temporary importation procedure with partial relief from import duties (Art. 201 (1) (b) CC), in order to then freely circulate on the market in the customs territory of the European Communities (cf. Art. Art. 79 sub-para. 2 CC). Although the ECJ has held that the customs debt only arises upon release, its amount is established at the time of acceptance of the customs declaration (Art. 201 (2) ZK).

The incurrence of a customs debt on importation according to Art. 202 CC. In addition, a customs debt on importation may arise according to Art. 202 (1) CC if the goods have been introduced into the customs territory of the Community unlawfully, that is, have been smuggled in. With reference to Art. 38 to 41 CC, the term ‘introduction’ is limited to immediate border entry and covers the entire period until presentation. This particularly refers to the smuggling of imports by bringing the goods into the country by means of unauthorised routes, concealment and silence in relation to certain goods during presentation and the use of ‘declaration free exportation’ (Art. 230–234 CCIP). Only recently, the ECJ decided that the presentation of goods applied to all goods brought into the customs territory of the Community even those hidden or concealed by means of special arrangements. According to Art. 40 CC, the obligation to present goods under Art. 38 CC applies to drivers and co-drivers of a lorry who have brought the goods into the Community customs territory even if the goods were hidden or concealed in the vehicle without their knowledge.⁶⁵ The person who has brought the goods into the Community customs territory without having presented them, is regarded as the debtor pursuant to Art. 202 (3) first indent CC.

The incurrence of a customs debt on importation according to Art. 203 CC. According to Art. 203 (1) CC, import duties are also incurred if goods subject to import duties are removed from customs supervision. Art. 203 (1) CC does not define the term ‘removal’. According to the ECJ, ‘removal’ refers to any act or omission which leads to the competent customs office being prevented even if only temporarily from accessing goods which are subject to customs supervision and carrying out the examinations provided for in Art. 37 (1) CC. It is not necessary that the trader intend to remove the goods from customs supervision.⁶⁶ Since this provision has priority over Art. 204 CC any failures according to Art. 203 (1) CC cannot be remedied by means of the ‘unless’ clause in Art. 204 sub-para. 2 CC according to Art. 859 CCIP. However, the customs debtor can be granted relief according to Art. 212a CC. Typical examples of removal from customs supervisions include the removal of seals and the unloading of goods from an unauthorised place during the transit procedure,⁶⁷ or the removal of goods which were selected at the business premises of the declarant,⁶⁸ or the removal of goods from the customs warehouse and their re-exportation without the required formalities having been observed, insofar as the customs authorities were not able to ensure the customs supervision of these goods.⁶⁹

The incurrence of a customs debt on importation according to Art. 204 CC. Art. 204 (1) CC also regulates the incurrence of a customs debt on importation in the case of failures, which do not constitute a removal according to Art. 203 (1) CC. In accordance with Art. 204 (1) (a) CC, this includes breaches in relation to temporary storage or other customs procedures and the failure to satisfy certain procedural requirements (Art. 204 (1) (b) CC). The duties affected by the breach during temporary storage arise from this instrument and thereby from the provisions made in Arts. 43 to 53 CC. This includes the delivery of a summary declaration (Art. 43–45 CC) and the obligation to assign the goods a customs procedure within a period of in general 20 or in case of transport by sea 45 days (Art. 49 CC). The obligations to be observed during the customs procedure usually arise from the authorisations issued by the customs authorities (Art. 87 (1) CC). Despite these breaches a customs debt does not arise according to Art. 206 (1) CC if the satisfaction of the obligations is impossible owing to force majeure or other extraordinary circumstances.

Should the traders commit failures, they must have had an effect on the proper carrying out of the procedure (Art. 204 sub-para. 2 CC). Art. 859 and Art. 860 CCIP regulate exhaustively and without infringing superior law, the circumstances under which this is not the case so that the incurrence of the customs debt may be remedied according to Art. 204 sub-para. 1 CC and thereby not arise. Accordingly, the failure must not have been motivated by the attempt to remove goods from customs supervision and the traders must not have shown any fraudulent or gross negligence (cf. Art. 859, 1.-2. indent CCIP). The ECJ established the conditions under which the participant acts with gross negligence. Accordingly, three essential criteria are to be used when determining gross negligence: the complexity of provisions, the extent of the business activities, and the care which must be exercised.⁷⁰ In accordance with Art. 859, 3 indent CCIP, all the necessary formalities must have been complied with in order to correct the situation. The customs debtor must prove that all the requirements laid down in Art. 859 CCIP have been complied with (Art. 860 CCIP) if goods have been consumed or used unlawfully in a free zone or customs warehouse, or if they have disappeared, a customs debt is incurred according to Art. 205 (1) CC.

h. The incurrence of a customs debt on exportation

If goods subject to a customs debt on exportation are exported from the customs territory of the Community, a customs debt on exportation can arise subject to the requirements of Art. 209 (1) CC, 210 (1) CC or 211 (1) CC. As with the customs debt on importation, this also covers cases in which a customs declaration is (usually) delivered, goods have been introduced into the customs territory illegally (smuggled exported goods), or mandatory requirements relating to the exportation procedure have not been fulfilled.

i. The collection of the customs debt

The method of collecting customs debts is regulated in Chapter 3 of the CC. This part of the CC only summarises the individual steps of the taxation procedure in Art. 217–232 CC. Accordingly, the customs authorities must first calculate and record (that is, enter into the accounts) the relevant amount of duties of the customs debt (Art. 217 CC). The term ‘entry in the accounts’ means the administrative act by which the import and export duties to be levied by the competent customs authorities are properly determined and not the entry of this amount in the accounts by the customs authorities which can also take place at a later point in time.⁷¹ Rather, the decision pursuant to Art. 4 no. 5 CC is issued at the same time that the debtor is notified of the amount.⁷²

As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with the appropriate procedures. The amount of duty communicated is payable within a maximum period of 10 days (Art. 221 (1), 222 (1) (a) CC). In Germany, this is effected by the issue of a taxation ruling (in accordance with Art. 155 ff. Fiscal Code (Abgabenbenordnung [AO])). In accordance with Art. 223 CC, payment is to be made in cash or by any other means under national law. In Germany, payment can be made by cheque, bank transfer or debit procedure (Art. 224 AO). There is no need to set a payment period according to Art. 222 CC if the trader is entitled to payment facilities. This may take the form of a deferment of payment (Art. 224 ff. CC) or other payment facilities (Art. 229 CC).

Subject to the requirements of Art. 217 (1) sub-paras. (2) and (3) CC, the entry in the accounts can be dispensed with if binding tariff information has been issued (Art. 12 CC) or if the customs debt is only a small amount. If neither of these cases applies, then the entry into the accounts must generally be made within certain periods (Art. 218 CC, Art. 219 CC). A subsequent entry in the accounts is also possible once the authority has established the facts and is able to calculate the relevant amount and determine the customs debtor anew (Art. 220 (1) CC). In certain cases, subsequent entry into the accounts is not required (cf. Art. 220 (2) CC).

As a rule, customs debts on importation or exportation can be levied three years following their incurrence. Communication to the debtor cannot take place once this period has expired unless this period does not apply owing to a legal remedy (Art. 221 (3) CC). In the case of tax evasion, the period

is extended according to the longer national limitation periods applicable to such cases (Art. 214 CC). In order to prevent tax evasion and protect the financial interests of the Community, the European Anti-Fraud Office (OLAF) was created, which is responsible for carrying out investigations together with any other support or co-ordinating measures.

j. The extinction of the customs debt

Art. 233 sub-para. 1 CC lays down the conditions under which a customs debt can be extinguished and lists different cases which are materially diverse. Accordingly, the customs debt will be extinguished by payment of the duties, by limitation, by insolvency or by seizure or confiscation.

k. Remission and repayment of the customs debt

In specific, narrowly defined cases according to Art. 235–242 CC the remission or repayment of import or export duties is possible. **Repayment** means the total or partial refund of import duties or export duties which have been paid; (Art. 235 (a) CC). **Remission** means either a decision to waive all or part of the amount of a customs debt (Art. 235 (b) CC). Both possibilities can also refer to only part of the customs debt (cf. Art. 897 CCIP). In particular, remission or repayment is possible if the duties were not legally owed (Art. 236 CC) or where a customs declaration is invalidated and the duties have been paid (Art. 237 CC), at the time the declaration was made the goods were defective or were damaged before their release or do not comply with the terms of the contract on the basis of which they were imported and are therefore rejected by the importer (Art. 238 CC), or there is a special situation (Art. 239 CC). If the repayment or remission is due to an error, then the original debt will again become payable according to Art. 242 CC.

Repayment or remission according to Art. 236 CC. In particular, import duties can be repaid or remitted according to Art. 236 (1), first alternative CC if the amount was not legally owed when payment was made. This will not only be the case if there has been a typing or calculation error but also if customs relief has not been granted.⁷³ In addition, Art. 889–891 CCIP covers other special cases in which repayment or remission is possible; this will usually be the case if preferential customs treatment or customs relief has not been granted (Art. 889 CCIP) or if a certificate which would lead to a reduced or zero rate of duties has not been taken into account, even if this could be submitted subsequently (Art. 890 CCIP).

Repayment or remission according to Art. 239 CC. According to Art. 239 (1) CC customs debts can be repaid or remitted ‘in cases other’ than those referred to in Art. 236, 237 and 238. Owing to their general function, the provision is regarded as being an equitable provision. The application of this provision is necessarily ruled out if the facts fall within one of the cases contained in Art. 236, 237 and 238 CC, but not all requirements have been fulfilled.⁷⁴

Art. 239 (1), first indent CCIP, lays down all cases which can lead to repayment or remission. In particular, Art. 900 CCIP contains such a catalogue of cases. In such cases there must not be any intent to deceive or obvious negligence (Art. 899, first indent CCIP). As is the case with Art. 859 CCIP, three important criteria are referred to in order to determine obvious negligence: the complexity of the provisions, the extent of the involvement in business, and care to be exercised.⁷⁵

In addition, repayment or remission can be granted by the Commission ‘in special cases’. This will be the case if the competent customs authority believes that the case in question arises owing to infractions by the Commission, that the case is linked to a Community investigation or the duties payable amount to more than 500,000 Euros (cf. Art. 239 (1), second indent CC in connection with Art. 905 CCIP). There is a special case if the trader finds himself in an unusual situation in comparison with other traders in the same field.⁷⁶

C. Outlook

European customs law is being confronted with new challenges arising from globalisation and liberalisation of trade, the growing volume of trade, the necessity of ‘just-in-time’ deliveries and the increasing automation of business and commerce.⁷⁷ At both international and European level, there are many initiatives which contribute to the facilitation of trade by using IT and to the improvement and simplification of customs law.

At international level, **trade facilitation** forms part of the present WTO negotiations following the Doha Ministerial Declaration. At European level these requirements have been transposed by the *e*-Customs Initiative, which forms part of the pan-European *e*-Europe Initiative.⁷⁸ In particular, this initiative includes the efforts of the governments of Member States to offer citizens with all services capable of being provided online as part of the *e*-Government Initiative. In addition, this also intends to reinforce the Single Window Principle. This enables the traders to use a uniform Internet portal and thereby the possibility of simple access to provisions and procedures in one location without the involvement of different customs authorities. The different configuration of information technology in the Member States must no longer operate to restrict trade.

In its ‘Communication on a simple and paperless environment for customs and trade’,⁷⁹ the Commission laid down details as to why it is necessary to modernise and simplify European Customs law and thereby the Customs Code, and how this can be achieved. This communication can be regarded as a basic summary of future amendments to the CC and CCIP.

I. Amendments to the Customs Code

The first amendments to the Customs Code were issued in 2005 by the ‘Customs Code 2005’. They were taken in response to the terrorist attacks of 11 September 2001 in the USA and laid the basis for a fundamental reform of customs law with the aim of introducing security aspects to secure the ‘international supply chain’ and electronic customs clearance for a more effective customs clearance. In order to attain these aims, European customs law now provides for the status of ‘Authorised Economic Operator’ (AEO) and requires the submission of an electronic advance declaration.

1. The Authorised Economic Operator (AEO)

The status of Authorised Economic Operator (AEO) has been incorporated into Art. 5a CC. The creation of this status was one of the central innovations of European customs law introduced as part of the initiative ‘Customs Code 2005’ and represents a core aspect of the guidelines formulated by the WCO in the SAFE Framework. Art. 5a CC merely regulates the admission criteria. The accompanying implementation provisions entered into force in 2006 following extended negotiations and are listed in Art. 14a ff. CCIP. In addition, the European Commission has published a set of guidelines for Authorised Economic Operators.

The status of Authorised Economic Operator – unknown in European customs law before its reform – can now be obtained by anyone located in the customs area of the European Community (Art. 5a (1) CC). In this context, the term ‘economic participant’ refers to any person who pursues an activity regulated by customs law (Art. 1 No. 12 CCIP).

In order to obtain this status, the economic participant must submit an application to the competent customs authority. The customs authority responsible is that of the Member State in which the main accounts of the applicant are maintained (Art. 14d (1) a CCIP). Formally, the application must be made in writing or electronically using the form contained in Annex 1c CCIP. This application must contain all details that are required for the authorisation of the status.

The authorisation requirements, that the economic participant must comply with and satisfy before he

can be certified as an ‘authorised economic participant’, are geared towards the legal consequences of the status that are listed in Art. 5a (2) CC. According to this provision, the legal consequence of the status is that either the economic participant is granted customs simplifications or reduced inspections or both. These legal consequences are documented by different ‘AEO certificates’, that is, ‘customs simplification’ (AEO C), ‘safety and security’ (AEO S) or both together. Economic participants have been able to apply for these certificates since 1 January 2008.

The compulsory authorisation requirements include a record of compliance of customs provisions (Art. 14h CCIP), a satisfactory system of commercial and transport records that permits suitable customs controls (Art. 14i CCIP), proven financial solvency (Art. 14j CCIP) and (if applicable), evidence of appropriate security standards (Art. 14k CCIP). Negotiations are currently being held with different foreign states, particularly the USA, China and Switzerland that should lead to a mutual recognition of the status subject to these requirements being satisfied.

In the European Community, it is not (yet) compulsory to file an application for this status. All customs simplifications held by the economic participant remain in existence regardless of the application and authorisation of the status. However, it must not be overlooked that AEO status is seen in international trade as a seal of quality that companies holding the status require their business partners to hold as well in order to eliminate the risk of unreliability. To a certain extent, therefore, certification is *de facto* compulsory.

Once the status has been authorised, it is recognised in all Member States of the European Community. This results from the fact that authorisation constitutes a customs law decision pursuant to Art. 6 CC that, as a transnational administrative act, produces a cross-border transnational effect. Negotiations and pilot projects are currently being held with different third party countries (including, for example, the USA, China and Switzerland) in order to achieve a mutual international recognition of the status.

2. Preliminary declaration

European Customs law currently provides that a summary declaration must be submitted once the goods have been brought into the Community customs territory. Thereupon, the customs-approved treatment or use of the goods must be declared within 30 days. The provision was amended by the ‘Customs Code 2005’ and reform of the implementation provisions in 2006 and shall be binding on all Member States from 1 July 2009.

The Customs Code now expressly states that a summary declaration must be submitted for all goods brought into the customs territory (Art. 36a (1) CC) and, moreover, *before* the goods are brought into the customs territory of the European Community (Art. 36a (3) CC). The only exemption granted in relation to this requirement applies to goods transported by means of transport passing through the territorial waters or airspace of the customs territory without making a stop in this territory (Art. 36a (1) CC).

In addition, an advanced declaration is not required if a customs declaration is submitted immediately instead and the customs offices accordingly waive the requirement of an advanced declaration (Art. 36c (1) CC). In addition, Art. 181c CCIP contains a list of goods that do not require the submission of an advanced declaration (for example, goods in the personal baggage of travellers).

The purpose of advance declarations is to target goods for inspection at border crossings quickly and efficiently. The data submitted by economic participants is therefore compared with risk-relevant parameters using electronic risk analysis pursuant to Art. 13 (2) CC. Only goods deemed to present no risk are to be placed under the temporary storage procedure (Art. 50 CC). This approach aims to strike a balance between the required customs controls and legitimate trade.

As a rule, the advance declaration is to be submitted electronically using data processing software. It can only be made in writing in exceptional circumstances (Art. 36b (2) CC). These exceptions are contained in Art. 199 (1) CCIP and include, for example, the situation where the IT system of the customs

authorities breaks down.

The advance declaration is to be lodged by the person who brings the goods into customs territory, that is, the person who has brought the goods over the border (Art. 36b (3) CC). However, it is also possible that the person who lodges the advance declaration also acts as the declarant or his representative (Art. 36b (4) CC). The information to be provided in the advance declaration is listed in greater detail in Art. 183 CCIP that states that the declaration must contain the data elements listed in Annex 30a CCIP.

The period within which the advance declaration must be lodged prior to the border crossing of the goods is further defined by the implementation provisions of the CCIP. Accordingly, Art. 184a CCIP lists different time-limits for the various transport routes of goods. These range from 24 hours in maritime transportation to one hour in the case of road traffic. These time-limits do not apply under the circumstances listed in Art. 184b (for example, in the case that international conventions provide for different periods or force majeure).

II. The Modernised Customs Code

The Modernised Customs Code (MCC) was adopted by the Council and the European Parliament on 19 February 2008 and will soon be published in the Official Journal.⁸⁰ The changes to the CCIP which are necessary to enter the MCC into force will be proposed in June 2008 and shall take effect in 2010. If this is the case, the provisions which make the use of information technology in customs possible and which have a transition period of three years, will apply together with the comprehensively reformed rules of customs law. This will facilitate a uniform, wide-ranging reform.

1. Consolidation of procedural rules

Customs law can only be simplified if the special procedural rules are consolidated and reduced. This will happen by consolidating all 13 customs law procedures, which to date are available to the traders, under three types of procedures. These are importation, exportation and the special customs procedures (storage, use, processing). Thereby, the distinction between ‘customs procedures’ and ‘other types of customs-approved treatment or use’ will be dropped, and the term ‘customs procedure with economic impact’ will also be superfluous. The export and re-export procedures will be consolidated into one uniform export procedure.

2. The new structures in the law relating to customs debts

The rules governing customs debts have been criticised for a long time owing to their complexity. The reform of the CC provides that the customs debt arising from a customs declaration, the customs debt based on irregularities and the remedying of irregularities are to be consolidated under one article. The existing remedy contained in Art. 204 CC which does not allow a customs debt to arise if the failure has not had any effect on the procedure is therefore applicable to all cases of incurrance of a customs debt. The cases which are solved by means of the equitable rule in Art. 239 CC will probably decline in number. Furthermore, a provision of security will apply in all Member States and cover all procedures as well as value-added tax and any excise tax.

Endnotes

- 52 Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (Official Journal L 256 of 07/09/1987, p. 1).
- 53 ECJ judgment of 12 July 1989, Case C-161/88, *Friedrich Binder GmbH & Co. KG v. Hauptzollamt Bad Reichenhall*, ECR 1989, 2415 (2438).
- 54 ECJ judgment of 8 December 1970, Case C-14/70, *Deutsche Bakels GmbH v. Oberfinanzdirektion München*, ECR 1970, 1001 (1004); ECJ judgment of 16 June 1994, Case C-35/93, *Develop Dr. Eisbein GmbH & Co. v. Hauptzollamt Stuttgart-West*, ECR 1994, I – 2655 (I – 2656).
- 55 The EC customs authorities which are permitted to receive an application for the issue of binding tariff information can be found in Official Journal C 224, 08/09/2004, p. 2.
- 56 ECJ judgment of 27 April 1978, Case C-90/77, *Hellmut Stimming KG v. Commission of the European Communities*, ECR 1978, 995 (1008); ECJ judgment of 29 January 1998, Case C-315/96, *Lopex Export GmbH v. Hauptzollamt Hamburg-Jonas*, ECR 1998, I – 317 (318).
- 57 Binding European Customs Tariff Information accessible at: www.europa.eu.int/comm/taxation_customs/dds/de/ebticau.htm (accessed on 6 October 2004).
- 58 Official Journal L 35, 13/02/1996, p. 1.
- 59 Witte/Prieß, Zollkodex, Art. 27 ZK p. 9.
- 60 Dorsch/Harings, Zollrecht, Art. 27 ZK p. 60.
- 61 Official Journal L 98, 07/04/2001, p. 31.
- 62 Official Journal L 71, 17/03/1980, p. 107.
- 63 ECJ judgment of 18 April 1991, Case C-79/89, *Brown Boveri & Cie AG v. Hauptzollamt Mannheim*, ECR 1991, I – 1853.
- 64 Witte in Witte/Wolffgang, Lehrbuch des Europäischen Zollrechts, p. 304.
- 65 ECJ judgment of 4 March 2004, *Hauptzollamt Hamburg-Stadt v. Kazimieras Viluckas (C-238/02) and Ricardas Jonusas (C-246/02)*, ECR 2004.
- 66 ECJ judgment of 11 July 2002, C-371/99, *Liberexim BV v. Staatssecretaris van Financiën*, ECR 2002, I – 6227.
- 67 ECJ judgment of 11 July 2002, C-371/99, *Liberexim BV v. Staatssecretaris van Financiën*, ECR 2002, I – 6.227.
- 68 ECJ judgment of 1 February 2002, C-66/99, *D. Wandel GmbH v. Hauptzollamt Bremen*, Slg. 2001, I – 873.
- 69 ECJ judgment of 12 February 2004, C-337/02, *Hammann v. HZA Hamburg-Stadt*, ECR 2004.
- 70 ECJ judgment of 11 November 1999, C-48/98, *Söhl & Söhlke*, ECR 1999, I – 7877.
- 71 ECJ judgment of 8 July 2002, C-203/01, *Fazenda Pública v. Antero & Co.*, O.J. C 274 09/11/2002, p. 16.
- 72 ECJ judgment of 11 October 2001, C-30/00, *William Hinton & Sons Ltd v. Fazenda Pública*, ECR 2001, I – 7511 (7532).
- 73 Witte/Huchatz, Zollkodex, Art. 236 ZK p. 4.
- 74 ECJ judgment of 29 September 2001, C-253/99, *Bacardi GmbH v. Hauptzollamt Bremerhaven*, ECR 2001, I – 6493.
- 75 ECJ judgment of 11 November 1999 C-48/98 *Söhl & Söhlke*, ECR 1999, I – 7877.
- 76 ECJ judgment of 25 February 1999, C-86/97, *Reiner Woltmann v. Hauptzollamt Potsdam*, ECR 1999, I – 1041; ECJ judgment of 7 September 1999, C- 61/98, *De Haan Beheer BV v. Inspecteur de Invoerrechten en Accijnzen te Rotterdam*, ECR 1999, I – 5003 (I – 5005).
- 77 Compare Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee concerning a strategy for the Customs Union, COM (2001) 51 final of 8 February 2001.
- 78 COM(2002) 263 final, p. 10.
- 79 COM(2003) 452 of 24 July 2003.
- 80 Common Position (EC) No. 17/2007 of 15 October 2007 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Regulation of the European Parliament and of the Council laying down the Community Customs Code (Modernised Customs Code), Official Journal C 298 E, 12 December 2007, p. 1)

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