Will the Court of Justice apply its anti-abuse doctrine in customs valuation cases?

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Abstract

The Court of Justice of the European Union (EU) has recently issued two judgments in customs valuation matters where it confirmed the possibility of adding certain amounts to transaction value which were not explicitly mentioned in Art. 32 of the Community Customs Code (Customs Code). The Court of Justice seems to have relied on the concept of abuse, although it did not make clear references to this concept. This article analyses trends in the case law of the Court of Justice to determine whether recent case law can be perceived as an initial stage of a judicial anti-abuse doctrine in customs valuation cases.

1. Introduction

Core provisions regarding customs valuation in the European Union (EU) are included in Art. 28-36 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (Customs Code).[1] They are based on the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (CVC). The former legal act does not refer to the notion of abuse or circumvention in the chapter regarding customs valuation, while in the latter these notions are not used at all. There are further provisions on customs valuation in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[2] (Art. 141-181a) but the notions of abuse and circumventions are not used therein either. Some provisions of Art. 29 of the Customs Code may be perceived as specific anti-abuse clauses aimed at reducing particular risks. These include Art. 29(1)(d) eliminating the possibility of applying the transactional valuation method in the case of transactions between related enterprises where this relationship affected transactional conditions and – in a sense – all prerequisites of applying the transactional method mentioned in Art. 29(1)(a)-(c).

Some traders get involved in transactions which are – from the economic perspective – artificially shaped. These transactions are actually conducted in order to benefit from deficiencies in legislation on customs valuation or the entire EU legal system perceived as a whole. This article analyses trends in the case law of the Court of Justice to find out whether recent case law can be perceived as an initial stage of a judicial anti-abuse doctrine in customs valuation cases.

2. Abuse, circumvention and fraud

Abuse of customs valuation provisions and related provisions within legal systems should be clearly distinguished from fraudulent activities that also occur in the field of customs valuation, where certain businesses may attempt to hide transfers of money from customs administrations and illegally declare customs value lower than required by customs provisions (Han & Ireland 2013, pp. 3-11). Similarly, businesses may try to conceal contracts with exporters and other entities (for example, licensors) to reach the same result. Such activities are clearly against the requirements of law and constitute fraud.

Circumvention means that rules of law are *prima facie* strictly obeyed but the result of such behaviour is contrary to the aim of the law (Zalasiński 2008, p. 159). Circumvention can typically take place in private law where *ius cogens* and *ius dispositivum* rules are distinguished. Circumvention occurs when legal relationships are shaped with the use of *ius dispositivum* in such a way that binding rules of *ius cogens* are *prima facie* legally not applied. Such an understanding of the notion of circumvention could hardly be applied in the sphere of customs law as all its rules are binding and *ius dispositivum* is nonexistent.

Abuse of law or abuse of rights is a notion that resembles the circumvention of law in a sense that a person abusing rights follows the exact wording of legal provisions but does it in a way that contradicts the aim of provisions granting such rights.

Concepts mentioned in this section of the article are not understood in exactly the same manner throughout the EU. Certain differences in delimitations exist. Yet, the Court of Justice in its case law seems to have added another autonomous way of understanding these notions – particularly abuse (Zalasiński 2008, p. 156).

3. Anti-abuse and anti-circumvention clauses in the Customs Code

The Customs Code refers to the notion of abuse in Art. 139 where it states that the customs authorities shall refuse to authorise use of the temporary importation procedure where it is impossible to ensure that the import goods can be identified. However, the customs authorities may authorise use of the temporary importation procedure without ensuring that the goods can be identified where, in view of the nature of the goods or of the operations to be carried out, the absence of identification measures is not liable to give rise to any abuse of the procedure.

According to Art. 133(d) of the Customs Code authorisation for processing under customs control shall be granted only where use of the procedure cannot result in circumvention of the effect of the rules concerning origin and quantitative restrictions applicable to the imported goods.

The notion of circumvention was used in Art. 25 of the Customs Code, under which any processing or working in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its sole object was to circumvent the provisions applicable in the Community to goods from specific countries shall under no circumstances be deemed to confer on the goods thus produced the origin of the country where it is carried out within the meaning of Article 24.

Wording of certain customs provisions is such that one may notice the aim to eliminate abuse or circumvention though none of these notions is used. For instance, under Art. 146(1) the outward processing procedure shall not be open to Community goods whose export gives rise to the granting of export refunds or in respect of which a financial advantage other than such refunds is granted under the common agricultural policy by virtue of the export of the said goods.

This overview of customs provisions shows that the scopes of meaning of notions of abuse and circumvention are unclear. For instance, lack of identification measures in temporary importation may make this procedure more susceptible to fraud rather than mere abuse. The notion of circumvention in origin rules clearly does not correspond to its pure understanding from the sphere of private law. Moreover, this anti-circumvention clause serves as a means of last resort. Even the basic rule regarding origin contained in Art. 24 of the Customs Code is worded in such a way that it is not prone to circumvention or abuse (as it refers to economically justified processing).

4. Going beyond textual interpretation?

Article 32(1) of the Customs Code states: 'In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
    (i) commissions and brokerage, except buying commissions,
    (ii) the cost of containers which are treated as being one, for customs purposes, with the goods in question,
    (iii) the cost of packing, whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
    (i) materials, components, parts and similar items incorporated in the imported goods,
    (ii) tools, dies, moulds and similar items used in the production of the imported goods,
    (iii) materials consumed in the production of the imported goods,
    (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller;

(e) (i) the cost of transport and insurance of the imported goods, and
    (ii) loading and handling charges associated with the transport of the imported goods to the place of introduction into the customs territory of the Community.'

Art. 32(3) of the Customs Code states that no additions shall be made to the price actually paid or payable in determining the customs value except as provided in this article.

One of judgments where the Court of Justice confirmed that a certain amount should be added to the transaction value, although the amount in question could not be easily linked to any provision of Art. 32 of the Customs Code, was the judgment of 16 November 2006 in case C-306/04 *Compaq Computer International Corporation v. Inspecteur der Belastingdienst – Douanedistrict Arnhem* (ECR [2006] I-10991). The facts of the case were as follows. Compaq Computer International Corporation (CCIC), a company established under Netherlands law, was a subsidiary of Compaq Computer Company (CCC), a company established in the United States, sold Compaq data processing equipment in Europe and had, to that end, a distribution centre in the Netherlands. Under a contract between CCC and Microsoft Corporation, Compaq computers might be equipped with software consisting of the MS-Dos and MS Windows operating systems and sold with those systems, in return for a payment of USD31 to Microsoft for every computer equipped with those operating systems. CCC bought laptop computers from two Taiwanese computer manufacturers. As part of this sale, it was agreed that the operating systems would already be installed on the hard drives of the computers when they were delivered. To that end, CCC made these operating systems available free of charge to the manufacturers, who then installed them on those computers. CCC then sold on to CCIC the laptop computers, which were dispatched free on board from Taiwan to the Netherlands. Upon their arrival, CCIC declared the computers for free circulation.

When their customs value was being determined, in accordance with Article 29 of the Customs Code, the selling price between the Taiwanese manufacturers and CCC, which did not include the value of the operating systems, was used. This became the main issue to be solved by the Court of Justice.

It must be noted that during the customs procedure, CCIC declared the transaction value of the first sale, in which CCC was the purchaser and the Taiwanese manufacturers were the sellers, as the customs value of the computers (para. 21 of the judgment C-306/04). According to the Court of Justice in respect of the determination of the customs value in the main case, the Community legislation on customs valuation seeks to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values.[3] The customs value must thus reflect the real economic value of an imported good and, therefore, take into account all of the elements of that good that have economic value (para. 30 of the judgment C-306/04). Software constitutes intangible property. The cost of acquiring such property, when incorporated in an item of goods, must be regarded as an integral part of the price paid or payable for the goods, and hence of the transaction value[4] (para. 31 of the judgment C-306/04). The operating systems at issue in the main proceedings are software that was made available to the Taiwanese manufacturers free of charge by CCC in order for it to be installed on the hard drives of the computers at the time of their manufacture. Furthermore, it is accepted that that software has a unitary economic value of USD 31 which was not included either in the value of the transaction between the Taiwanese manufacturers and CCC or in that of the transaction between CCC and CCIC (para. 32 of the judgment C-306/04). In order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, in accordance with Article 32(1)(b) or (c) of the Customs Code, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable for those computers (para. 37). The same is true when national authorities accept as the transaction value, in accordance with Community law, the price of a sale other than that made by the Community purchaser. In such cases, the term 'buyer' for the purposes of Article 32(1)(b) or (c) of the Customs Code must be understood to mean the buyer who concluded that other sale (para. 38 of the judgment C-306/04).

It is noteworthy that the Court of Justice did not even refer to the exact legal basis of adding the amount in question to the transaction value. It merely referred to sub-paragraph letters (b) or (c). It must be emphasised that the closed catalogue of amounts that can be added to the transaction value is not an autonomous EU rule. This requirement has its ground in Art. 8 of the CVC binding the EU. As Sherman and Glashoff have rightly pointed out: 'The clear-cut mandate of Article 8.4 should not be circumvented by indiscriminate rulings that an excluded item constitutes an indirect payment by the buyer to the seller. A cost which cannot be treated as an addition to the price because of the limitations of Article 8 should not be treated as a part of the price under Article 1' (Sherman & Glashoff 1988, pp. 170-1).

The fact that the CCIC relied on the first sale seems to be deprived of any meaning. No matter whether transaction value is based on the first sale or any subsequent sale – the same requirements apply in regard to amounts to be added to the transaction value.

In the judgment of 12 December 2013 in case C-116/12 *Ioannis Christodoulou, Nikolaos Christodoulou, Afi N Christodoulou AE v. Elliniko Dimosio* (ECLI:EU:C:2013:825) the Court of Justice dealt with legal qualification of a structure where Elliniki Biomikhania Zakharis AE – a company registered in Greece – exported sugar to Bulgaria. Export declarations were made at the request and on behalf of Afi N Christodoulou AE – another company registered in Greece – which paid for them. As the export of white sugar was subsidised, the export price of that sugar was lower than the domestic selling price. Christodoulou specialised in the preparation of fruit, mainly oranges, for the production of fruit juice. It had a factory in the north of Greece. In 2006 the Thessaloniki Customs Control Department (Greece) carried out a post-clearance inspection in order to verify Christodoulou's compliance with the customs regulations on imports of orange juice with added sugar from Bulgaria since January 2002. Both sugar

and orange juice were received in Bulgaria by the same company – Agrima. The products were placed in Bulgaria under the inward processing customs procedure with a view to their re-export without payment of any customs duties. After simply mixing the two products and diluting them with water, the orange juice with added sugar, whose declared country of origin was Bulgaria, was re-exported to Greece, destined for Christodoulou. There was no written agreement between Christodoulou and Agrima.

A few issues on the interpretation of the Customs Code have arisen. The crucial one was whether subsidies on exports of sugar had any impact on the customs value of the final preparation imported from Bulgaria into the EU.

According to the Court of Justice the applicants, under cover of a permanent export and allegedly substantial processing, intended to hide the fact that the goods were in fact inwardly processed. By dint of that practice, they circumvented the application of Article 146(1) of the Customs Code, under which goods giving rise to the granting of export refunds cannot be open to the outward processing procedure (para. 62 of the judgment C-116/12). The Court continued that the scope of EU regulations must not be extended to cover abuse on the part of a trader (para. 63 of the judgment C-116/12).[5] A finding of abuse requires, in the view of the Court of Justice, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved. Secondly, it requires a subjective element to exist in the intention to obtain an advantage from those EU rules by creating artificially the conditions laid down to obtain it. The existence of that subjective element can be established by, inter alia, evidence of collusion between the EU exporter receiving the refunds and the importer of the goods in the non-member country (para. 64 of the judgment C-116/12).[6] The obligation to give back an advantage improperly received by means of an irregular practice does not constitute a penalty, but is simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules were created artificially, thereby rendering the advantage received a payment that was not due and thus justifying the obligation to repay it (para. 66 of the judgment C-116/12).[7] The determination of the transaction value in accordance with Articles 29 and 32 of the Customs Code necessarily takes into account the export refund which the exporter wrongfully benefited from by artificially creating the conditions required to obtain that advantage (para. 68 of the judgment C-116/12).

The Court of Justice has earlier confirmed the possibility of counteracting abuse regarding subsidies in the C-110/99 *Emsland-Stärke* case. There are restrictions on the outward processing procedure stemming from Art. 146(1) of the Customs Code that eliminate to possibility of using this procedure in an abusive manner. Yet, Art. 32 does not provide a legal basis for adding subsidies (received abusively) to the transaction value of goods.

5. Sometimes the wording is decisive …

The content of both judgments focused on in the previous section of this article might give an impression that the Court of Justice tries to interpret and – in a sense – apply provisions in a way that would be reasonable and would not jeopardise the system of law.

This aforementioned hypothesis can hardly be upheld. According to the view of the Court of Justice expressed in the judgment of 23 February 2006 in case C-491/04 *Dollond & Aitchison Ltd v. Commissioners of Customs & Excise* (ECR [2006] I-02129), Art. 29 of the Customs Code must be interpreted as meaning that, in circumstances such as those of the main proceedings, payment for the supply of specified services, such as examination, consultation or aftercare required in connection with contact lenses, and for specified goods, consisting of those lenses, the cleaning solutions and the soaking cases, constitutes as a whole the 'transaction value' within the meaning of Article 29 of the Customs Code and is, therefore, dutiable.

The facts of the case were such that customers paid one fee covering supplies of goods: contact lenses and accompanying liquids (by post) and medical examination allowing them to determine the exact features of the product (contact lenses) they needed. The medical examination occurred at the customers' location. The service was not a cross-border one and was focused entirely on customers and not on goods (unlike the facts of the C-15/99 *Hans Sommer* case). The approach of the Court of Justice was in line with the wording of the Customs Code: the first sentence of Art. 29(3)(a) states that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller of the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. On the other hand, the approach of the Court of Justice definitely led to a rather peculiar situation where customs duties might potentially be levied on services provided to customers in the country of importation, not connected with imported goods, although this clearly departs from the philosophy of customs law which does not subject to economic burden local services in the country of importation that are not connected with goods.

The Court of Justice implicitly departs from the wording of customs provisions to counteract practices that might be considered to be abusive but it does not disregard the text of these provisions to alleviate unreasonable consequences of applying the Customs Code in certain situations.

6. Application of anti-abuse and anti-circumvention clauses

The Court of Justice seems to have adopted a very strict approach towards anti-circumvention clauses expressed in customs law. In its judgment of 13 December 1989 in case C-26/88 *Brother International GmbH v. Hauptzollamt Gießen* (ECR [1989] 04253) the Court held that the anti-circumvention clause in origin rules might only be applied where circumvention had been the sole object of the transfer of assembly from one country to another (para. 29). It is a rather peculiar situation where the Court of Justice is very cautious in applying the anti-circumvention clause but at the same time creates a judicial anti-abuse doctrine that can hardly be reconciled with Art. 32(3) of the Customs Code.

7. Abuse of customs law

Negative connotations of abuse are not as strong as those connected with fraud because abuse is generally legal. A person involved in abusive practices follows the wording of legal provisions (or contractual stipulations) but does it in a way that does not correspond with the aim of these provisions or to be more precise, with the aim of the legislative body that prepared these provisions.

The concept of abuse is therefore very useful in the sphere of private law where two or more persons shape their legal relationships. They create certain stipulations that affect their relationships. These persons are – at least from the legal point of view – equal parties. Certain inequalities have their roots not in the status of the parties under private law but rather in economic reality as the parties' actual potential is not equal.

This is definitely not the case in the sphere of customs law (or more generally: public law) where legal relationships are, with minor exceptions, created unilaterally by the state (or even the EU itself) whose authorities create legal provisions that have to be obeyed and later assess whether these provisions are followed. An addressee of legal provisions is expected to follow the rules expressed therein rather than just follow the general idea that stood behind the creation of these provisions. If such an addressee of a legal provision is able to follow its wording exactly with the effect contrary to the aim of the provisions

that the legislator had in mind in the course of the legislative process, this means that the provisions had been poorly written – which can hardly be seen as a feature that should negatively affect their addressees. The case law on abuse might, thus, even be seen as a measure to eliminate any effects of poor legislation at the EU level (Horsley 2013, p. 964).

In light of the above, fraud is negative both in the spheres of public and private law but the same cannot be said about abuse with regard to public law.

8. Anti-abuse judicial doctrine

One might quite easily claim that the Court of Justice in its judgments in fraud and abuse cases voiced a certain principle of interpretation of EU law under which rights stemming from EU law do not extend to cover fraudulent or abusive parties. It should only be emphasised that this principle of interpretation does not allow any court to go beyond the possible meaning of interpreted provisions. One might wonder whether this is true in the case law of the Court of Justice. For example, Art. 32(3) of the Customs Code has a rather clear meaning and does not leave too much space for incorporating the anti-abuse doctrine to cover amounts other than that expressly mentioned in Art. 32 of the Customs Code. Moreover, the Customs Valuation Code as interpreted by Sherman and Glashoff (1988) seems to constitute a strong hierarchical argument against the introduction of any implicit anti-abuse measures.

On the other hand, one might treat anti-abuse case law of the Court of Justice as based on general principles of law. General principles of EU law are among the sources of EU law. They are defined in the literature as 'an unwritten Community law the particular significance of which is that it has as its primary aim the protection of the rights of the individual' (Toth 2008, p. 86). Depriving individuals of certain rights expressly and precisely granted to them under EU directives (or under national provisions) can hardly be reconciled with the way in which general principles, especially unwritten ones, work. Under Art. 32(3) of the Customs Code individuals have the right to treat all amounts not explicitly mentioned in Art. 32 of that Code as irrelevant for the purposes of customs valuation.

9. Conclusions

Customs valuation is not the only field of law where the anti-abuse doctrine of the Court of Justice – known from, inter alia, subsidy,[8] direct[9] and indirect tax cases[10] – seems to have proliferated. On 4 June 2009 the Court ruled on the circumvention of antidumping provisions in case C-158/08 *Pometon* and its approach was criticised in the literature (Rovetta & Tack 2010, p. 71). This brings about the question of whether the development of judicial anti-abuse doctrine in the field of customs law and in particular customs valuation, may gain momentum. Neither in its judgment in the case C-306/04 *Compaq Computer* nor in C-116/12 *Ioannis Christodoulou* has the Court of Justice referred explicitly to the circumvention or abuse of customs valuation provisions. This shows a significant difference between customs valuation cases and subsidy or tax cases where the Court of Justice has analysed the notion of abuse and ruled on the basis of its anti-abuse doctrine. Yet, it seems to the author that the Court of Justice implicitly attempted to counteract abuse or customs valuation planning.

Application of the anti-abuse doctrine would require amendments to the Customs Valuation Code. One may wonder whether such amendments would actually be desirable. If one takes into account the usual vagueness of such doctrines, they might be difficult to reconcile with the aims of the Customs Valuation Code which include creating a uniform customs valuation system.

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Notes

1 OJ L 302, 19.10.1992, p. 1.

2 OJ L 253, 11.10.1993, p.1.

3 See, judgment of the Court of Justice of 6 June 1990 in case C-11/89 *Unifert Handels GmbH v. Hauptzollamt Münster*, ECR [1990] I-2275, para. 35, and judgment of the Court (Fifth Chamber) of 19 October 2000 in case C-15/99 *Hans Sommer GmbH & Co. KG v. Hauptzollamt Bremen*, ECR [2000] I-8989, para. 25.

4 See, judgment of the Court of Justice of 18 April 1991 in case *Brown Boveri & Cie AG v. Hauptzollamt Mannheim*, ECR [1991] I-1853, para. 21.

5 See, judgment of the Court of Justice of 11 October 1977 in case 125/76 *Entreprise Peter Cremer v. Bundesanstalt für landwirtschaftliche Marktordnung*, ECR [1977] 1593, para. 21, and judgment of the Court of Justice of 11 January 2007 in case *Vonk Dairy Products BV v. Productschap Zuivel*, ECR [2007] I-239, para. 31.

6 See, judgment of the Court of Justice of 14 December 2000 in case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, ECR [2000] ECR I-11569, paras. 52 and 53 and the judgment of the Court of Justice of 21 May 2005 in case C-515/03 *Eichsfelder Schlachtbetrieb GmbH v Hauptzollamt Hamburg-Jonas*, ECR [2005] I-07355, para. 39.

7 See, the judgment in case C-110/99 Emsland-Stärke, para. 56, and j*udgment of the Court of Justice of 4 June 2009 in case C-158/08 Agenzia Dogane Ufficio delle Dogane di Trieste v. Pometon SpA*, ECR [2009] I-04695, para. 28.

8 For instance, the judgment in case C-110/99 Emsland-Stärke.

9 See, for instance, the judgment of the Court of Justice of 12 September 2006 in case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, ECR [2006] I-07995.

10 See, for instance, the judgment of the Court of Justice of 21 February 2006 in case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, ECR [2006] I-01609.

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