

IMPORT PROCEDURES RELATED TO EU FINANCIAL LOSSES

**Claudiu – Constantin TALABĂ¹
Vasile-Cătălin GOLOP²**

ABSTRACT:

GOODS/PRODUCTS THAT ENTER THE EUROPEAN MARKET FROM OUTSIDE THE EU ARE SUBJECT TO COMMUNITY CUSTOMS CONTROLS³ PERFORMED BY MEMBER STATES BEFORE BEING RELEASED FOR FREE CIRCULATION WITHIN THE EUROPEAN UNION. IN A 2017 SPECIAL REPORT, THE EUROPEAN COURT OF AUDITORS (ECA)⁴ EXAMINED WHETHER MEMBER STATES AND THE EUROPEAN COMMISSION ENSURE THE FACT THAT IMPORT PROCEDURES AND LEGISLATION PROTECT THE FINANCIAL INTERESTS OF THE EU. SIGNIFICANT GAPS AND DEFICIENCIES WERE FOUND, THIS GENERATING AN ADVERSE EFFECT TO EU FINANCES AND INDICATING INEFFECTIVE APPLICATION OF CONTROLS. CUSTOMS CONTROLS CAN'T ENSURE THAT THE FINANCIAL INTERESTS OF THE EU ARE PROTECTED UNLESS THEY ARE BASED ON A COMMON SET OF RULES AND ARE APPLIED BY THE MEMBER STATES IN A STANDARDIZED AND HARMONIZED MANNER.

KEYWORDS: IMPORT PROCEDURES, CUSTOMS CONTROLS, FISCAL LEGISLATION, CUSTOMS PROCEDURE 42, VAT.

2018 was the year that marked EU's celebration of the 50th Customs Union anniversary. The term "customs union" refers to the elimination of quotas and customs duties between Member States, at their internal borders, along with establishing common customs duties regarding imports from third countries.

The Common Commercial Policy, together with the Customs Union are exclusive EU competence⁵ areas and constitute the framework for defining most of customs policy and

¹ Police officer – General Inspectorate of Romanian Police – Gorj County Police Inspectorate.

² Police officer – „Al. I. Cuza” Police Academy – Department Director.

³ Customs controls = specific acts/activities performed by customs authorities aiming at ensuring compliance with the legislation in customs matters and other legislative acts regarding the entrance, transit, exit, storage, movement and the end-use of merchandise/goods that are moved between the EU customs territory and territories or countries outside that area.

⁴ The European Court of Auditors, established in 1977, examines the legitimacy and regularity of entries and exits in the European Union and oversees the sound financial management of the EU budget. ECA is composed of one citizen per Member State, appointed by the Council of the European Union with a six-year mandate that can be renewed. Since January 1, 2007, the Court has 28 members.

https://ro.wikipedia.org/wiki/Curtea_European%C4%83_de_Conturi .

⁵ Treaty on the Functioning of the EU (TFEU), art. 3, (OJ C 202, 2016, 47).

adopting customs legislation. However, the implementation of customs legislation is a responsibility that primarily lies with the Member States⁶.

Even with the elimination of European internal borders, goods originated from third countries are submitted to customs controls, along to being subject to any customs duties payment before being released within the EU for free circulation.

The release for free circulation of the imported goods means that they can circulate freely in the EU single market, just like any other product with EU origin⁷.

Therefore, when the goods enter the customs territory of the Union, the customs administration of the importing Member State must require the importer to pay the customs duties applicable to the imported goods or a guarantee to that effect⁸.

CUSTOMS PROCEDURE⁹

When the goods (products/merchandise) are imported into the EU, they are (as a common procedure) released for free circulation, this meaning that import formalities are conducted in order to allow goods to be sold on the Community market under similar procedures applicable to products originated from the EU.

The procedure applicable when goods enter the European market involves a customs declaration¹⁰ (the Single Administrative Document – SAD¹¹). This task is performed, in general, by the person who owns the goods, or has control over them. Also, a legal representative, acting on behalf of the owner of the goods may perform this task.

When goods are physically imported and, at the same time, released for free circulation in the same Member State¹², the fiscal implication related to VAT (chargeable event) occurs in that specific Member State. However, in the case where, after importation, goods are in a transit situation (the final destination being another Member State), the tax obligation regarding the payment of VAT can be suspended. In this latter case, the VAT will be due in the Member State of subsequent destination.

In the case mentioned above, where goods are under a transit regime, the importer of the goods (owner or legal representative) must fill in the SAD, under box number 37, with the “42” code, implying the fact that is an import procedure involving simultaneous release for free circulation, along with home use of goods that are subject to VAT-exempt supplies or transfers to another Member State.

⁶ Treaty on the Functioning of the EU (TFEU), art. 291.

⁷ Regulation No. 952/2013 of the Council and the European Parliament, for the elaboration of Customs Code, 9 October 2013.

⁸ European Court of Auditors, Special report No. 19/2017: Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU. https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf.

⁹ Any of the following mentioned procedures, under which goods (products/merchandise) may be placed in accordance with the Code: export, release for free circulation, special procedures.

¹⁰ The act that a person uses to indicate, under a prescribed form or certain manner, its option regarding the placement of goods/products/merchandise under a given customs procedure, also with mention, where appropriate, of any specific arrangements to be applied.

¹¹ Single Administrative Document – SAD, also known as Form No. C88 in the United Kingdom, is the main customs form that is used in international trade (acquisitions/sales), to or from the European Customs Union. All agents and traders can use the SAD standard form in cases of import, transit, export and community status declarations in situations that involve manual processing. https://en.wikipedia.org/wiki/Single_Administrative_Document.

¹² Member State of importation – the State where goods are released for free circulation after they are imported in the EU.

ABOUT VAT PROCEDURE

The import of goods into another Member State than the one in which the transport or dispatch of the goods ends, is exempt from VAT payment in the Member State where the importation took place¹³. This import VAT exemption is based on the fact that the actual import is followed by an intra-community transfer or supply of goods to another EU Member State.

Indeed, the transfer of goods that are part of his business assets, operated by a taxable person, into another EU Member State, shall be regarded and treated as a supply of goods for consideration.

The “transfer to another Member State” refers to the procedure of dispatch or transport of movable, tangible property by, or on behalf of the taxable person, for the purposes of his business, to a destination situated outside the territory of the Member State in which the property is located, but within the EU Community¹⁴.

What should be stressed out in this context is the fact that EU Member States shall lay down the conditions governing this exemption with a view to ensuring its straightforward and correct application and, also, preventing any tax evasion, avoidance or abuse¹⁵.

CONDITIONS FOR USING THE CUSTOMS PROCEDURE 42 (CP 42)¹⁶

The customs procedure 42 is the regime used by an importer for the purpose of obtaining exemption from VAT when the imported goods are to be transported to another EU Member State, in which case, VAT is due in the Member State of destination. When CP42 is used when operating an import, additional information regarding

When importing under the customs procedure 42, the customs authorities of the EU Member State of destination should request additional information, through mutual assistance, regarding the actual value of the transaction as, in these cases, the final consignee of the goods/products can make a payment (to a Chinese supplier for example) which is considerable higher than the amount shown on the invoice and presented to the customs authorities of the Member State of importation by the customs representative. This may turn, however, into a long process, or a failure may occur because the declared purchaser may differ from the final recipient of the goods, or may be a ghost company (missing trader¹⁷).

If doubts persist, samples can be taken of the imported goods and a security (warranty)¹⁸ can be required to cover any possible loss of customs duties. When implementing the priority control area for underestimation of textiles and footwear imported from Asian countries, the Commission has provided clear guidelines to EU Member States on ways to combat undeclared practices. There are still practical difficulties amongst the above mentioned customs procedures that keep popping up.

After being released for free circulation in the EU importing Member State, the goods (products/merchandise) should be either supplied to a customer, or directly transferred to the

¹³ Directive 2006/112/EG (the VAT Directive), article No. 143 (d).

¹⁴ Directive 2006/112/EG (the VAT Directive), article No. 17.1.

¹⁵ Directive 2006/112/EG (the VAT Directive), article No. 131.

¹⁶ The regime that an importer may use in order to obtain a VAT exemption in the case of importation of goods from third countries (outside the EU) followed by transportation to another Member State. Thus, the related VAT is due in the Member State of final destination.

¹⁷ A VAT purposes registered trader who, with possible fraudulent intentions, purchases, or claims to purchase goods or services without paying the VAT and further supplies these goods/services by invoicing VAT, but without paying the collected VAT to the national tax authority.

¹⁸ In accordance with Article No. 191 of the Customs Code of the European Union and Article No. 244 of the Implementing Regulation of the Customs Code of the European Union

importer in another EU Member State. This supply, or transfer of goods/products stands as an intra-Community transaction that is exempted of VAT payment¹⁹.

The obligations that should be fulfilled by the importer, or its legal tax representative, additionally to the obligations that are imposed on every taxable person, are as follows:

- to be identified, in the importing EU Member State, for VAT purposes, or to appoint a fiscal representative in this matter²⁰;
- either to be identified for VAT purposes, in the EU Member State of destination, where the case of transfers, or to supply the goods (products/merchandise) to a customer duly identified there²¹;
- to submit a recapitulative statement to the tax authorities from the importing EU Member State which should include the intra-Community transfer or supply²².

Article 20 of the Directive 2006/112/EG (the VAT Directive) stipulates the fact that VAT becomes a chargeable event in the Member State where the owner of the goods proceeds with the intra-community acquisition of the products/merchandise, after their arrival²³.

The VAT exemption pursuant to article No. 131 of Directive 2006/112/EG (the VAT Directive), shall apply only with the condition that, at the time of importation, the importer has provided, to the competent authorities of the Member State of importation at least the following information:

- a. his VAT identification number issued in the Member State of importation or the VAT identification number of his tax representative, liable for payment of the VAT, issued in the Member State of importation;
- b. the VAT identification number of the customer to whom the goods are due to be supplied, following article No. 138 1 of the VAT Directive, issued in another Member State, or his own VAT identification number, issued in the Member State in which the dispatch or transport of the goods ends when the goods are subject to a transfer, following article No. 138.2 c of the VAT Directive;
- c. the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

However, Member States have the possibility to provide that evidence referred to in the above mentioned point (c) may be indicated to the competent authorities, or law enforcement agencies, only upon request.

The tax authorities of the EU Member State of importation enter the data (information) from the recapitulative statement into the VIES database, thus providing access to this data to the competent authorities in the Member State of destination.

The customer, in the case of a supply, or the importer, in the case of a transfer, must declare an intra-Community acquisition to the competent authorities in the Member State of destination. This is a taxable event under which the VAT becomes chargeable in this country of final destination.

¹⁹ Directive 2006/112/EG (the VAT Directive), article No. 17, article No. 138.

²⁰ Directive 2006/112/EG (the VAT Directive), article No. 204, article No. 214.

²¹ Directive 2006/112/EG (the VAT Directive), article No. 214.

²² Directive 2006/112/EG (the VAT Directive), article No. 262.

²³ Directive 2006/112/EG (the VAT Directive), article No. 20.

HOW EVASION OF CUSTOMS DUTIES OCCURS

At the time of entry into the customs territory of the Union, the customs authorities of the importing Member State shall require the importer to pay, or to secure any customs duties applicable to the imported goods.

However, importers may deliberately reduce or evade their customs duties liability by, for example, declaring a dissimulated country of origin, undervaluing their goods, or shifting to a lower duty rate classification product.

It is estimated that customs duties represent 14% of the Union`s budget, evasion in this field increasing the customs gap and implying compensation by higher GNI (gross national income) contributions by EU Member States. Thus, the European taxpayers are the ones who ultimately borne the cost for this.

The customs duty liability can be deliberately reduced by the importer through one of the following ways:

- undervaluation (for example when the actual value of the goods is dissimulated by the importer, who declares a lower value for the imported goods; in most cases, this action also involves fake commercial documents that are being presented to the authorities);
- erroneous description of the origin of the goods, where the importer does not declare the true country of origin of the imported goods;
- incorrect tariff classification, placing imported goods in a category for which lower duty rates are applied;
- a method that combines the ones mentioned above.

In addition, importers may abuse the duty-free regime by requesting such relief for ineligible goods.

THE CUSTOMS GAP AND ITS FINANCIAL IMPACT

The obstruction of the payment (evasion) of customs duties contributes to the deficit of the actually collected customs duties, defined in a study carried out by the European Parliament²⁴ as difference between theoretical level of duties related to imports that should be collected and the actual collection level of import duties.

Possible deficits in the collection of customs duties have to be compensated by an increase in the contributions of EU Member States to the GNI (gross national income), ultimately being borne by EU taxpayers.

COMBATING AND TACKLING THE EVASION OF CUSTOMS DUTIES THROUGH INFORMATION EXCHANGE AND PROPER CUSTOMS CONTROLS

Products/goods/merchandise imported into the Community make the subject of customs controls. This controls can`t ensure a smooth functionality of the internal market nor the proper protection of European Union`s financial interests unless they are applied in a uniform and standardized manner by the EU Member States, along with being based on a common set of rules.

²⁴ According to a 2013 study conducted by the Internal Policies General Directorate, within the European Parliament – “From Shadow to Formal Economy: Levelling the Playing field in the Single Market”

Customs controls applied to the import of goods may take place:

- a. Prior to the entry of the goods into the customs territory of the EU or at the place where the unloading is operated (in this cases the checks carried out are referred to as pre-release, or pre-arrival controls);
- b. At the moment of importation of the goods („release controls”);
- c. Once the goods/products/merchandise are released for free circulation, respectively after the importation is operated. In this case, we are talking about post-clearance controls, which may be based either on audits (post-clearance audits), either on specific transactions/operations (other post-clearance controls)

Since the European Union is lacunar in means of risk management frameworks or harmonized control, the prevalence of one of the three above mentioned forms of control, or the combination of any one of them, may come in different variations, from one Member State to another. The existence of less effective controls at the pre-customs or customs clearance stage implies that the residual risks, that may affect the collection of the customs duties owed, should be mitigated at the post-clearance stage.

It is necessary for the customs authorities to exchange information on international trade with law enforcement agencies from other countries so as to ensure compliance with the applicable customs provisions and proper and complete revenue collection. This process is known as a so called „mutual administrative assistance²⁵”.

In terms of information exchanges at EU level, this can take place either between EU Member States, or between the Commission and Member States. Information exchanges also occurs at international level and it involves exchange of data with third countries (outside the EU). EU-level data/information exchanges can operate either under the Mutual Assistance Regulation or, in the case of risk-related information, in the framework of the customs risk management system.

Customs authorities cooperation is materialized in data/information/good practice exchange which takes place through joint actions, training courses, seminars, working visits, project groups, or cross-border operations, all of these being financed by the European Union’s action programs. There are two such major programs that provide funds for

Customs authorities can also cooperate with each other and exchange information and good practice in joint actions, seminars, training courses, project groups, work visits and cross-border operations, all funded through the programs action of the EU. There are two such major programs that provide funds for exchanging data/information and facilitating cooperation between law enforcement agencies (customs authorities), with the aim of protecting the EU’s financial interests. These two programs are: Customs 2013 / Customs 2020 and Hercules II / Hercules III²⁶.

CONCLUSIONS AND RECOMMENDATIONS

In a 2017 special report, the European Court of Auditors²⁷ (ECA) underlined that serious shortcomings and weaknesses were found, related to the customs legal framework, as

²⁵ Any action taken by a customs administration, in collaboration with, or on behalf of another customs administration, aiming for a proper implementation of customs legislation and for the investigation, repression and prevention of customs offenses.

²⁶ https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf.

²⁷ European Court of Auditors, Special report No. 19/2017: Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU.

well as inefficiency in the implementation of customs controls regarding imports, which has a negative impact on the financial interests of the EU.

In the same report it was stipulated that EU Member States do not receive sufficient financial stimulation in order to perform proper customs controls. Main reasoning for this theory revolves around the fact that those performing controls related to customs procedures, yet do not manage to recover EU's revenue, risk financial consequences, where on the other hand, no such consequences are susceptible to those which don't carry out such controls.

EU Member States registered progress towards a uniform application of the customs legislation, but they have different approaches regarding the way/means customs controls tackle undervaluation of goods, misrepresentation of origin, or incorrect tariff classification, as well as with regard to the imposition of customs penalties.

A big challenge that customs authorities have to cope with is striking an equilibrium between the need to carry out customs controls, on the one hand and the need to facilitate trading through faster and more concise import procedures, on the other hand.

The above mentioned conclusion is based on the existence of burdensome customs controls/procedures that may impact/influence the decisions of the traders when choosing an import customs office or another. Also, the ports (airports) where fewer customs controls are carried out may attract greater traffic²⁸.

²⁸ EUROPEAN COURT OF AUDITORS, Special report No 19/2017: Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU. https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf.

REFERENCES

1. Treaty on the Functioning of the EU (TFEU)
2. Regulation No. 952/2013 of the Council and the European Parliament, for the elaboration of Customs Code
3. European Court of Auditors, Special report No. 19/2017: Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU
4. Directive 2006/112/EG (the VAT Directive)
5. https://ro.wikipedia.org/wiki/Curtea_European%C4%83_de_Conturi
6. https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf
7. https://en.wikipedia.org/wiki/Single_Administrative_Document