

# **EU customs law: Division of responsibilities between the EU and Members States**

Michael Lux

Attorney,

michael.lux@customs-law.expert

This presentation simplifies the issues for easier comprehension and can therefore not replace legal analysis.

# Overview

1. Foundations of EU customs law
2. Customs: Legislation, interpretation, administration
3. VAT, excise: Legislation, administration
4. Binding tariff/origin information
5. Appeals
6. Mutual assistance, enforcement, penalties
7. Questions and answers

# 1. Foundations of EU customs law

## **Customs Union**

Art. 28 Treaty on the Functioning of the European Union

- Applies to the exchange of goods generally
- Member States are prohibited from levying customs duties and duties having equivalent effect between them
- Application of a common customs tariff vis-à-vis third countries

## **Internal Market**

Art. 26 Treaty on the Functioning of the European Union

- Area without internal borders
- Abolition of controls and formalities at internal border crossings (but control of persons in non-Schengen countries)
- Free movement of goods, persons, services and capital

# 1. Customs: Legislation (1)

Pillars of EU customs legislation:

- International agreements
  - Preferential: ACP, Mexico, South Africa, South Korea, Mediterranean, Europe
  - Non-preferential: HS, Valuation, TIR, Temporary Admission, Anti-dumping, GATT, WTO, WCO
- Customs Code, customs tariff and implementing provisions
  - General provisions (scope, definitions, rights and obligations, decisions, appeals)
  - Procedural rules (entry, exit, customs procedures, destruction, abandonment)
  - Duty-related provisions (customs tariff, customs value, origin, special relief, guarantees, customs debt)
  - Empowerments for implementing and delegated acts

# 1. Customs: Legislation (2)

- Mutual assistance, administrative cooperation
  - Between Member States (including recovery of duties and taxes)
  - With third countries (normally under an agreement)
- Customs tariff
  - Combined Nomenclature and standard duty rates
  - Special duties (preferences, suspensions, tariff quotas, anti-dumping, countervailing and safeguard duties)

# 1. Customs: Legislation (3)

- Duty relief
  - Private individuals (travellers, transfer of residence, marriage, inheritance, students)
  - Small consignments
  - Goods for educational, scientific, cultural, medical or charitable purposes
  - Transfer of factory
  - Transport material, coffins

## National customs legislation

- Organisational matters
- Enforcement
- Penalties (administrative & criminal)
- NATO troops' goods (not all Member States are party to the NATO agreement; however, the provisions on transit of NATO goods apply to all of them)

# 1. Customs: Interpretation

## EU level

- Classification Regulations
- Explanatory notes, guidelines
- Business process modelling
- Functional and technical specifications
- European Court of Justice (at the request of a national court, a Member State or an EU institution)
- General Court (for decisions taken by the EU Commission)

## National level

- Service instructions
- National courts (who may or must transfer the case to the ECJ)

# 1. Customs: Administration

Principle: Member States are competent for collection but 80% of the customs duties are transferred to the EU budget

Exceptions from administration by Member States:

- Specific decisions of non-recovery, repayment/remission: EU Commission
- Repayment of anti-dumping, countervailing duties: EU Commission
- Such decisions are addressed to the Member State concerned who interacts with the importer (who is, however, entitled to be heard before the EU Commission takes its decision, and to lodge an appeal before the EU Court)

## 2. VAT, excise: Legislation

- EU level:
  - Scope, incurrence of debt (where, when, who), exemptions (e.g. ship and aircraft supplies): Directive 2006/112/EC (VAT), Directive 2008/118/EC (excise duty)
  - Refund of VAT to persons outside the EU: Directive 86/560/EEC
  - Administrative cooperation: Regulation 904/2010 (VAT), Regulation (EU) Nr. 389/2012 (excise duty)
  - Mutual assistance for the recovery of claims (both customs duties and taxes): Directive 2010/24/EU
  - Agreements with non-EU countries on mutual assistance/administrative cooperation
- National level:
  - Details (including import VAT debtor, formalities for import VAT), tax rates (within a specific range), VAT refund

# VAT, Excise: Administration

- Member States are responsible for collection of VAT and excise duties which are national revenue; a part of VAT is transferred to the EU budget (ca. 15 % of the budget); the other sources of the EU budget are: import duties (ca. 13 %), and a contribution based on gross national income (ca. 60 %); the rest being "other income"

# 3. Binding tariff/origin information

- concerns the classification/origin of the goods, not the duty rate
- is issued by Member States' authorities
- is valid in all Member States
- is kept - and accessible to the public - in a EU Commission database (EBTI database)
- ceases to be valid when the underlying law or the interpretation is changed; in the latter case a period of grace is granted for contracts already concluded
- in case of divergent rulings, the EU Commission can request a Member State to withdraw its ruling; as an alternative, a classification/origin Regulation may be adopted (in which case rulings not in line with the Regulation cease to be valid)
- With the UCC also the holder of the information will be bound

# 4. Appeals (1)

- According to Art. 243-246 CC (Art. 44 UCC):
  - an appeal can be lodged both against a decision and against the lack of a decision which has been requested
  - the appeal procedure comprises two steps:
    - normally, the appeal is initially to be lodged before the customs authority which has taken (or not taken) the decision
    - subsequently, the appeal against the customs authority's appeal decision can be lodged before the competent national court (this court may then ask the EU Court of Justice for an interpretation of EU law)
  - the appeal does not suspend the application of the decision concerned, unless the customs authority or the court decides otherwise

## 4. Appeals (2)

- These rules do not apply with regard to penalties and criminal law (national law)
- The details of the appeals procedure (e.g. deadline for an appeal, competent authority, competent courts) are laid down in national legislation

# 5. Mutual assistance, enforcement, penalties

- Member States assist each other and the Commission by:
  - exchanging information, both on request and at their own initiative (Regulation 515/97)
  - recovering claims for customs duties and taxes (Directive 2010/24/EU)
  - organising joint actions (e.g. for detecting smuggling)
  - common training actions (Customs 2020, Fiscalis)
- Mutual assistance can also be agreed with third countries
- Enforcement of customs and tax legislation (e.g. enforcement of payment, confiscation, penalties) falls under the responsibility of Member States

# Questions

1. Which agreements form the basis of the customs legislation of many countries (including the EU and the US)?
2. Is it possible to receive, prior to clearance, legally binding information on the valuation of goods?
3. Why are rules on mutual assistance needed within the EU?
4. Is a direct appeal to the EU courts possible?
5. Are explanatory notes and guidelines issued by the Commission legally binding?
6. Does an appeal suspend the application of a decision to pay import duties?
7. Your questions?

# 7. Answers

1. The following agreements are applied by many countries (including the EU and the US): GATT, WTO, Harmonized System, Valuation, Anti-dumping, Anti-subsidies
2. Currently, binding information is foreseen only with regard to tariff classification and origin
3. Unlike the US, EU customs law is implemented by the customs authorities of the 28 Member States; this requires rules on collaboration
4. A direct appeal to the EU courts is only possible where the EU Commission has taken a decision with a direct effect on an economic operator (e.g. with regard to repayment of anti-dumping duties or a negative decision on a remission claim)
5. Explanatory notes and guidelines are not legally binding. However, if they stay within the scope of the law, they are an important source of interpretation, as they help to secure a uniform interpretation
6. An appeal normally does not suspend the application of the decision to pay import duties. However, the customs authority or court handling the appeal may decide otherwise