

The use of statistical values to combat undervaluation in the European Union

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Agenda

1. Introduction
2. International perspective on the use of statistical values
3. Decisions of the ECJ on the use of statistical values
4. Extent to which statistical values can be used to detect and determine undervaluation
5. Conclusion and outlook

1. Introduction

- Customs gap: 'the difference between customs duties collected in reality, and the amount of customs duties due theoretically'.
- Customs gap in the EU has to do, among others, with undervaluation of imported goods.
- Exact figures unknown, but increasing number of court cases suggests the numbers are high. See also: ECJ case EC vs. UK in which case 2.7 billion EUR were at stake.

2. International perspective on the use of statistical values

- GATT 1947: 'actual value of the imported merchandise'
- WTO Customs Valuation Agreement
 - Transaction value method as a primary and preferred method.
 - Transaction method: price paid or payable for the goods sold for export
 - Conditions to apply the the transaction value method: sale + four conditions

2. International perspective on the use of statistical values

- Decision 6.1 WTO Valuation Committee and Article 17 WTO CVA enable customs authorities to fight undervaluation.
- Balancing act between commercial interest of traders vs. customs authorities having reasons to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value.
- Right to be heard and requirement for customs authorities to motivate their decision.

2. International perspective on the use of statistical values

- **Dispute Settlement Body of the WTO**

- Colombia – Indicative Prices and Restrictions on Ports of Entry
- Indicative prices are used by Colombia as control mechanism and tool to set the amount of a cash deposit guarantee.
- In reality often the final customs value and if lower price was acceptable, traders should actively request for refunds that usually lasted more than 2 years.
- DSB: Breach with hierarchical and sequential order between the valuation methods.

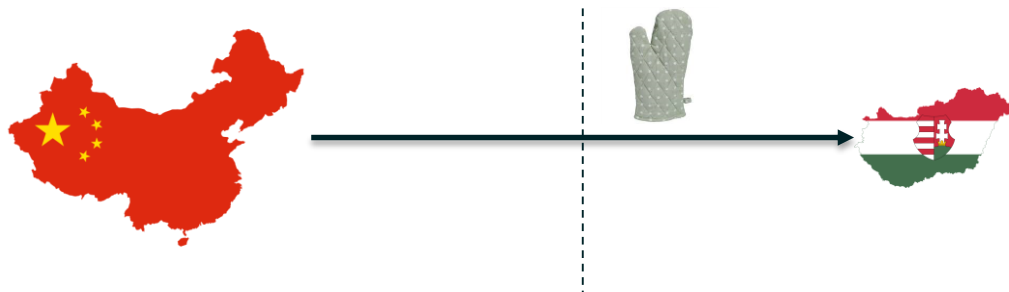
2. International perspective on the use of statistical values

- **Dispute Settlement Body of the WTO**

- Thailand Cigarettes — Customs and Fiscal Measures on Cigarettes from the Philippines
- Thailand is accused by the Philippines for protecting the interests of a state-owned producer of cigarettes by continuously scrutinizing the related-party imports from Philip Morris Thailand.
- DSB: agrees. Customs authorities should examine the circumstances of the sale if they have doubts about the acceptability of the price and take an active role.

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

Facts and circumstances



- EURO 2004 released several Chinese products for free circulation into Hungary based on the sales price established between non-related parties
- Post-clearance examination initiated under article 181a CCIP by the Hungarian Customs authorities resulted in a rejection of the declared customs value

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

What information was provided to the Hungarian Customs Authorities?



1. Commercial invoice
2. Importer's accounting records
3. Proofs of payment
4. Bank certificate

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

Why was the declared customs value rejected?

- The Hungarian Customs Authorities found that the charged prices were exceptionally low in relation to the statistical average values for comparable goods.
- They requested additional information from EURO 2004, but did not receive additional information/documents.
- The Hungarian Customs Authorities rejected the declared value and determined the customs value in accordance with the transaction value of similar goods.

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

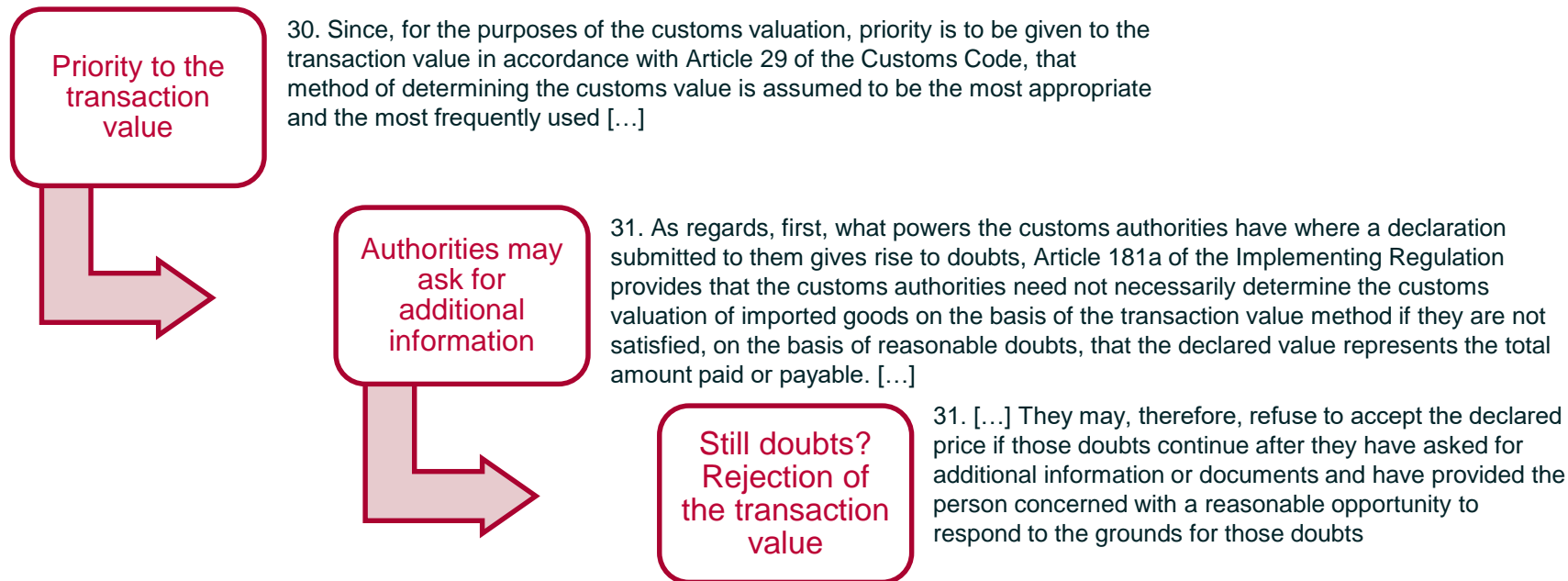
Question to the Court

‘Must Article 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 be interpreted as precluding a practice of a Member State whereby the customs value is determined on the basis of the “transaction value of similar goods” if it is considered that the declared transaction value, in comparison with the statistical average of the purchase prices verified in the context of the importation of similar goods, is unreasonably low and, consequently, incorrect, despite the fact that the customs

authority does not refute or call into question the authenticity of the invoice or the bank transfer certificate produced in order to establish the price actually paid for the imported goods, without the importer having submitted additional evidence to demonstrate the transaction value?’

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

Considerations of the Court (1)



3. Decisions ECJ - C-291/15 EURO 2004, Hungary

Considerations of the Court (2)

38 [...] In the present case, as the European Commission states, it appears that as regards certain goods at issue in the main proceedings the declared price was more than 50% lower than the statistical mean value.

39 In those circumstances, a difference in price, such as that established, appears sufficient to substantiate the customs authority's doubts and its rejection of the declared customs value of the goods at issue.

[...]

41 It should be observed that, for the purposes of the application of Article 181a of the Implementing Regulation, the authenticity of the documents showing the transaction value of the imported goods is not the determining factor but is one of the factors which the customs authorities must take into account.

3. Decisions ECJ - C-291/15 EURO 2004, Hungary

Decision of the Court

Article 181a of 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, as amended by Commission Regulation No 3254/94 of 19 December 1994, must be interpreted as not precluding a customs authority practice, such as that at issue in the main proceedings, whereby the customs value of imported goods is determined on the basis of the transaction value of similar goods, the method in Article 30 of Council Regulation No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, where the declared transaction value is considered to be unreasonably low in comparison with the statistical average of the purchase prices verified in the context of the importation of similar goods and despite the fact that the customs authority does not refute or call into question the authenticity of the invoice or the bank transfer certificate produced in order to establish the price actually paid for the imported goods, without the importer having submitted, in response to a request to that effect from the customs authority, additional evidence to demonstrate the accuracy of the declared transaction value of those goods.

3. Decisions ECJ - C-599/20, UAB 'Baltic Masters'



- Baltic Masters imported into Lithuania.
- Customs Authorities started a post-clearance inspection and took the view that the transaction value declared could not be accepted – since the applicant and the seller had to be treated as being related persons for the purposes of customs valuation. Hence, the Lithuanian Customs Authorities use statistical data from a national database under the **fallback method**.

3. Decisions ECJ - C-599/20, UAB ‘Baltic Masters’

Second question referred for a preliminary ruling

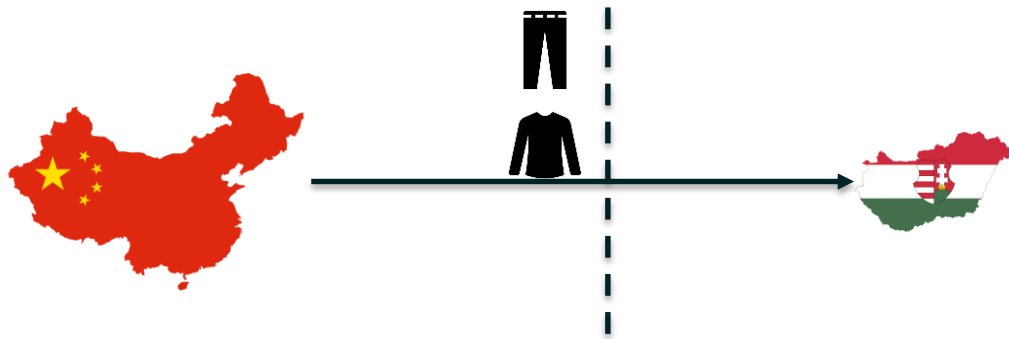
Must Article 31(1) of [Regulation No 2913/92] be interpreted as prohibiting determination of the customs value on the basis of information contained in a national database relating to one customs value of goods which have the same origin and which, although not similar, within the meaning of Article 142(1)(d) of [Regulation No 2454/93], are ascribed to the same TARIC heading?

3. Decisions ECJ - C-599/20, UAB ‘Baltic Masters’

ECJ decision

Article 31(1) of Regulation No 2913/92, as amended by Regulation No 82/97, must be interpreted as not prohibiting the determination of the customs value of imported goods, where it could not be determined in accordance with Articles 29 and 30 of that code, on the basis of information contained in a national database relating to a customs value of goods which have the same origin and which, although not ‘similar’ within the meaning of Article 142(1)(d) of Regulation No 2454/93, as amended by Regulation No 46/1999, are ascribed to the same TARIC code.

3. Decisions ECJ - C-187/21, FLAWKES Kft.



- Customs authorities in Hungary considered the declared values too low.
- Identical or similar goods cannot be identified and information for applying the deducted and computed value method is lacking. Hence, the Hungarian Customs Authorities use statistical data from a national database under the fallback method.

3. Decisions ECJ - C-187/21, FLAWKES Kft.

Questions referred for a preliminary ruling

1. May and must only the values listed in the database created from the customs clearances of the Member State's own customs authority be taken into account as the customs value?
2. If not, is it necessary to approach the customs authorities of other Member States in order to obtain the customs value of similar goods listed in their databases, and/or is it necessary to consult a Community database and obtain the customs values listed in it?
3. May account not be taken of transaction values relating to transactions performed by the applicant for customs clearance himself, even if those values have not been challenged either by the national customs authority or by the national authorities of other Member States?

3. Decisions ECJ - C-1/18, Oribalt Rīga SIA

ECJ decision

- Article 30(2)(a) and (b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that, when determining the customs value in accordance with that provision, **the customs authority of a Member State may confine itself to using information contained in the national database which it compiles and manages, without that customs authority being required, where the information is sufficient for that purpose, to access information held by the customs authorities of other Member States or by the EU services and institutions**, without prejudice, if that is not the case, to the possibility for that customs authority to make a request to those authorities or to those services and institutions in order to obtain additional data for the purposes of that determination.

3. Decisions ECJ - C-1/18, Oribalt Rīga SIA

ECJ decision

- Article 30(2)(a) and (b) of Regulation No 2913/92 must be interpreted as meaning that the customs authority of a Member State may exclude, when determining the customs value, transaction values relating to other transactions entered into by the applicant for customs clearance, even if those values have not been challenged either by that customs authority or by the customs authorities of other Member States, provided that (i) for transaction values relating to imports into that Member State, that authority first calls them into question pursuant to Article 78(1) and (2) of Regulation No 2913/92, within the time limits imposed by Article 221 thereof and following the procedure laid down in Article 181a of 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, as amended by Commission Regulation (EC) No 3254/94 of 19 December 1994, and (ii) for transaction values relating to imports into other Member States, that customs authority sets out the grounds for that exclusion in accordance with Article 6(3) of Regulation No 2913/92 by reference to factors affecting their plausibility.

3. Decisions ECJ - C-770/21, OGL-Food



- Imports of courgettes into Bulgaria by OGL-Food Trade Lebensmittelvertrieb GmbH.
- The Bulgarian Customs Authorities disputed the declared value as the resale price was lower, but despite the facts that the customs value corresponded with the value stated on the commercial invoice.

3. Decisions ECJ - C-770/21, OGL-Food

What information was provided to the Bulgarian Customs Authorities?



1. Purchase invoice for the goods
2. Transport invoice
3. International bill of lading
4. Sales invoice for the goods at the first level of trade
5. Delivery notes
6. Confirmations of receipt of deliveries
7. Reference calculations for the formation of the selling price on the basis of the acquisition price, extracts from import and sales accounts
8. VAT returns for the tax periods January to April 2019
9. Purchase and sales ledgers, etc.

3. Decisions ECJ - C-770/21, OGL-Food

Reasons of the customs authorities

- The same product on the market in the Republic of Turkey had a standard import value of EUR 53.80 per 100 kg. The importer was required to prove that the high price declared by it was not inflated in order to avoid payment of customs duties. In order to prove the legitimacy of the higher price of the goods, it could, for example, have submitted documents showing that the product is categorised as organic or was of a special quality.
- In verifying the veracity of the declared customs value, account was taken of the information that the product is sold at a loss after importation.

3. Decisions ECJ - C-770/21, OGL-Food

Fourth question referred for a preliminary ruling

In the circumstances of the main proceedings, does it follow [...], and [...] EURO 2004. Hungary, C-291/15, EU:C:2016:455, that the customs value in the importation of vegetables from third countries may not be determined on the basis of the declared transaction value where:

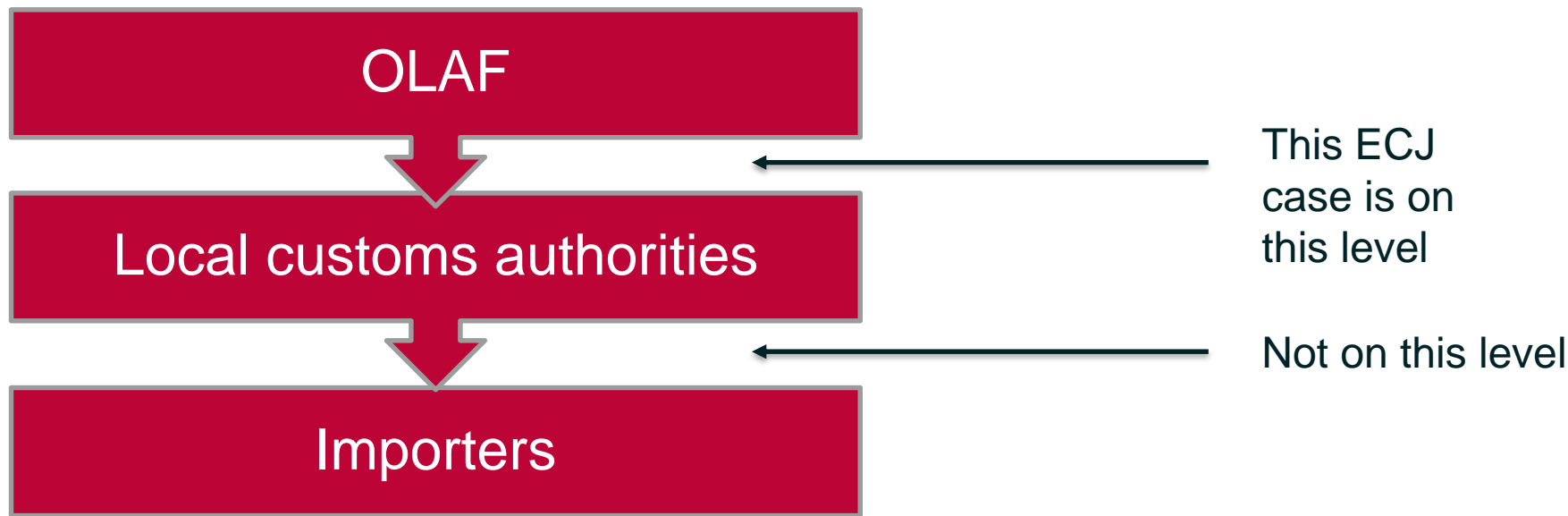
- the transaction value declared is significantly higher than the standard import value determined by the Commission for the same product for the purpose of applying import duties in the vegetable sector;
- the customs authority does not dispute or otherwise question the authenticity of the invoice and the proof of payment of the price of the product, presented as evidence of the import price actually paid;
- the importer, despite being requested to do so by the customs authority, has not provided a contract or other equivalent document as proof of the price payable for the product when sold for export to the customs territory of the European Union, including additional evidence for the determination of the economic elements of the product justifying the higher value when purchased from the exporter, for an organic product or a particularly high level of quality of the specific lot of vegetables?

3. Decisions ECJ - C-213/19, European Commission vs. UK



- Imports of apparel products into the UK by fraudsters
- OLAF started an investigation and took the position that the UK had failed to fulfil its obligations under EU law by failing to apply effective customs control measures in relation to imports of certain textiles and footwear from China
- Amounts at stake: 2.7 billion EUR

3. Decisions ECJ - C-213/19, European Commission vs. UK



3. Decisions ECJ - C-213/19, European Commission vs. UK

How undervaluation should be determined according to the Commission

- Use of 'cleaned average price' ('CAP'), on the basis of the monthly import prices of the relevant products from China taken from Comext, a reference database for detailed statistics on international trade in goods that is managed by Eurostat, over a period of 48 months;
- An average is calculated for the entire European Union based on the arithmetical average, that is to say, a non-weighted average, of the CAPs of all the Member States. In calculating that arithmetical average values that are unusually high or low, are excluded;
- a value corresponding to 50% of the CAP is calculated, which constitutes the 'lowest acceptable price' ('LAP');
- Imports with a value below LAP the import present a significant risk of undervaluation and should be subject to customs controls before clearance

3. Decisions ECJ - C-213/19, European Commission vs. UK

Decision of the Court

UK failed to meet its obligations under TFEU, CCC and UCC (amongst others...):

- The UK did not carry out customs controls based on risk analysis *before* clearance of the goods concerned;
- In consequence of the inadequacy of those controls, the amounts of customs duty and of own resources actually due in respect of the relevant imports were not effectively and comprehensively collected and made available to the Commission by the UK;
- The method endorsed by the Commission to establish undervaluation (CAP and LAP) is accepted by the Court mostly;
- Although the VAT Directive was breached no actual loss of VAT revenue (so only customs duties are payable by the UK)

3. Decisions ECJ - C-213/19, European Commission vs. UK

Reaction of OLAF

OLAF Director-General Ville Itälä said: *“I warmly welcome the ruling of European Court of Justice in this extremely important case. The judgement validates the investigative work that OLAF has carried out in this area over many years, as part of our remit to protect the EU budget. I am especially proud of the endorsement by the Court of the methodology that we developed to fight against undervaluation. As a result, we can now expect that this tool becomes a reference for all national customs authorities in the fight against undervaluation of textiles and footwear, which attacks the EU budget whilst greatly damaging the competitiveness of European industry and consumer trust.”*

4. Extent to which statistical values can be used to detect undervaluation and to determine customs values

- Statistical values can be used to detect undervaluation and can in some instances even be used to determine the customs values.
- Conditions for applying statistical values are set low (compare ECJ Baltic Masters).
- Still debate about what information is sufficient in case customs authorities have doubts about the accuracy of the declared transaction values (EURO 2004, OGL-Food).
- Customs authorities do not need to take an active role according to ECJ, while DBS advocates an active role.

5. Conclusion and outlook

- Increased scrutiny coming from EU Member States on traders
- Departure from transaction value? Moving back to the Brussels Valuation Definition? Also a broader trend. See also scrutiny on convergence between TP-CV in EU (ECJ Hamamatsu) and recent developments in UK.
- Wrong direction?

Thank you for your attention!

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