



VAT AND CUSTOMS CONTROLS IN E-COMMERCE

International and European Tax Law (LL.M.)
Customs and International Trade

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1 Chapter One – Background and methodology

1.1 Introduction

In the recent years, illicit trade and fraudulent behaviour are not only commonly observed in the offline world but have also spread to the e-commerce sector globally, especially with regards to the European Union ('EU'). Fraud and evasion with respect to the levy of value-added tax ('VAT') and customs duties are facilitated by the complexity of the current system and often exploit customs duties and VAT exemptions.

At present, small consignments imported into the EU that are worth less than €22 are exempt from both VAT and customs duties. With around 150 million small consignment parcels imported VAT-free into the EU each year, this system is open to massive fraud and abuse.¹ According to the European Anti-Fraud Office ('OLAF'), "customs fraud can take a variety of forms such as undervaluation, where fraudsters declare lower value for a good upon import, misdeclaration of goods to benefit from less tariffs, or smuggling".² The described fraudulent behaviour is especially common with high-value goods such as smartphones and tablets, which are consistently undervalued or wrongly described in the customs declarations, in order to benefit from the exemption.³ Moreover, these activities create major distortions for EU businesses,⁴ which, unlike non-EU businesses, are liable to apply VAT on every importation and thus are put at a clear disadvantage.⁵

One of the most common channels for receiving small consignments is through online purchases. It is estimated that Member States currently lose €5 billion VAT revenues annually due to non-compliance from cross-border e-commerce,⁶ as well as the VAT foregone from the VAT exemption for the importation of small consignments.⁷ This is expected to rise to €7 billion by the end of 2020.⁸ It is also estimated that up to €25 billion of non-EU trade is not VAT compliant.⁹

To tackle these problems, the EU legislator has adopted a variety of new rules concerning the e-commerce supply chains originating from third countries, commonly referred to as the VAT e-commerce package.¹⁰ These rules will become effective as of 1 July 2021 and are aimed at promoting a level playing field for e-commerce entrepreneurs and combating fraud and evasion. Amongst others, the VAT e-commerce package includes the abolishment of the VAT exemption for low-value consignments and creation of liability for other actors in the supply chain. The package also fosters greater cooperation and coordination by Member State administrations leading to a more efficient and effective audit regime, especially with respect to proper implementation of the customs procedures.

¹ KPMG, E-commerce: new VAT rules coming up, 2019, p. 3

² European Commission, Senior customs officials discuss next steps in combating customs fraud, Press Release 14/2019

³ KPMG, E-commerce: new VAT rules coming up, 2019, p. 3

⁴ Ibid.

⁵ European Commission, Commission Proposes New Tax Rules to Support E-Commerce and Online Businesses in the EU

⁶ European Commission, Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final, p. 2

⁷ European Commission, Modernising VAT for e-commerce: Question and Answer

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

In the EU, customs authorities are the ones that carry out supervision, verification and risk assessment of all goods that enter the customs territory of the Union. These authorities are also the ones expected to combat cross-border fraud as they collect all the levies due upon importation, including customs duties and VAT. Although throughout the last twenty years, the role, functions and organisation of the customs authorities changed significantly,¹¹ especially with respect to the use of information and communication technologies,¹² the authorities still mainly rely on risk analysis, exchange of information and the internal control mechanisms of the business itself. In practice, it is virtually impossible for the authorities to check each and every consignment and to provide effective control.¹³ The problem was deepened as some Member States have allowed themselves to even further loosen their customs controls, creating an imbalanced system.¹⁴ Therefore, the current customs legislation forbids anti-competitive practices when carrying out customs controls and encourages standardisation and harmonisation of the controls.¹⁵

Despite having all Member States committed “on paper” to achieving this goal, there are a number of remaining unresolved issues, which are especially recurrent with respect to VAT and customs controls of e-commerce imports. These issues, their background and possible solutions are examined in the current thesis.

1.2 Research questions

In the light of what has been discussed above, the following research questions were formulated and are used as a foundation for my thesis:

1. Following positive EU VAT and customs laws, what are the current VAT and customs control mechanisms for distance sales of non-EU goods in the context of e-commerce and to what extent are these mechanisms (i.e. rules) in line with the principles of neutrality, effectiveness, simplicity and prohibition of fraud?
2. As of 2021, what will the VAT and customs control mechanisms be for distance sales of non-EU goods in the context of e-commerce, and to what extent are these mechanisms (i.e. rules) in line with the principles of neutrality, effectiveness, simplicity and prohibition of fraud?
3. With regard to the principles of neutrality, effectiveness, simplicity and prohibition of fraud, what should the VAT and customs control mechanisms be for distance sales of non-EU goods in the context of e-commerce?

1.3 Research limitations

Considering that the aforementioned research questions focus on VAT and customs controls in the process of goods originating from third countries and third territories entering the customs territory of the Union, certain research limitations are noted.

¹¹ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 67

¹² Recital 17 of the UCC; Also, Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 67-68

¹³ Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 221

¹⁴ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 26

¹⁵ Recital 19 of the UCC

For example, the thesis does not discuss the cases where the transfer of rights on the goods takes place exclusively electronically (e.g. in the case of purchase of an e-book). The reason is that such instances do not give rise to customs debt. Indeed, although not a clear-cut case in terms of identifying the applicable rules,¹⁶ obtaining intangible goods does not lead to the incurring of customs duties. Traditionally, such goods fall under the scope of the General Agreement on Trade in Services ('GATS')¹⁷ as they do not cross the physical border and thus are not subject to the rules of importation in the context of international commerce. Moreover, for EU VAT purposes, these products are considered as services.¹⁸

To that end, the facilitated use of One Stop Shop by suppliers of e-services,¹⁹ which is foreseen by the VAT e-commerce package, is clearly outside the scope of my research. The same is valid for all the new measures introduced to support start-ups and micro-businesses, such as the yearly VAT threshold of €10,000 for intra-EU distance sales. In summary, these rules provide that cross-border sales under the threshold, to other countries within the EU, are treated as domestic sales with VAT paid to the selling (online) company's own tax administration.²⁰

Finally, the thesis does not touch upon the role of the customs controls for purposes other than collecting levies (non-fiscal measures), such as the fight against terrorism and criminal activities,²¹ health requirements or agricultural policies supervision, intellectual property protection, compliance with environmental standards and protection of cultural heritage.²²

1.4 Research justification

The volume of e-commerce supplies of goods entering the customs territory of the EU is of immense importance since it allows the Union to better position itself as a player on the international trade arena. As pointed out by the World Customs Organisation ('WCO'), e-commerce has become a game changer and policy makers should acknowledge how it impacts the already existing patterns, and consider how to ensure out-of-the-box solutions to tackle the main issues it brings.²³

First, my thesis aims to explore the most notable problems of illicit trade and other fraudulent activities in the context of e-commerce and the existing customs and import VAT Union rules. Without claiming to provide an exhaustive list of relevant issues, the thesis highlights a number of recurring cases of non-compliance with the established regime. Similar to the EU legislator, WCO has also identified the "efficiency of clearance and delivery of low value and small parcels" as one of the main issues of customs controls.²⁴ In this regard, the main focus of this thesis are the problems (i.e. fraudulent activity) caused by the large quantities of low-value goods obtained through e-commerce and crossing

¹⁶ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 49

¹⁷ General Agreement on Trade in Services adopted by the World Trade Organisation in 1994

¹⁸ For e-books see Judgment of 5 March 2015, *Commission / France* (C-479/13) ECLI:EU:C:2015:141 and Judgment of 5 March 2015, *Commission / Luxembourg* (C-502/13) ECLI:EU:C:2015:143

¹⁹ European Commission, Modernising VAT for e-commerce: Question and Answer

²⁰ Ibid.

²¹ As also enshrined in the SAFE framework, developed by the World Customs Organisation, which provides for safety and security measures to be taken by the customs authorities.

²² The last two measures stem from CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora, also known as the Washington Convention), adopted by the EU through a series of regulations.

²³ WCO, Cross-Border E-Commerce

²⁴ Ibid.

the border of the Union. On a side note, I briefly discuss the cases of abuse of the so called “customs procedure 42” (‘CP 42’),²⁵ which could also occur in the course of e-commerce.

Second goal of my thesis is to examine the currently existing VAT and customs control mechanisms stipulated in the EU and international legislation and assess to what extent they effectively tackle fraud and evasion in the context of e-commerce, while at the same time not hampering international trade flows. I give insight into what are the main changes proposed by the VAT e-commerce package and other future initiatives and in particular, what is their impact on the VAT and customs controls. On the top of that, the existing and forthcoming VAT and customs controls rules are assessed against the requirements of the following benchmark principles – neutrality, effectiveness, simplicity and prohibition of fraud.

Finally, the thesis attempts to provide recommendations on how the VAT and customs control mechanisms should be designed in order to meet the standards set by the benchmarks.

1.5 Methodology

Overall, I draw conclusions based on the data derived from literature review and, wherever appropriate, case-law examination. I analyse the relevant legislative and doctrinal sources and present the main conclusions of the Court of Justice of the European Union (‘CJEU’), especially with regards to the normative benchmarks. Alongside, I also examine relevant findings presented in reports and studies produced by institutional bodies at international and EU level, such as the WCO, the World Trade Organisation (‘WTO’), the Organisation of Economic Cooperation and Development (‘OECD’), the European Commission (‘the Commission’), the European Court of Auditors (‘ECA’), as well as by independent researchers.

From a methodological perspective, the thesis relies on multiple layers of research.

First, a *descriptive research* is carried out so that the thesis can explore the current problems with VAT and customs controls in the context of e-commerce and the changes introduced by the VAT e-commerce package and other initiatives.

Second, a *normative research* is used in order to test the existing and future VAT and customs control mechanisms against the normative benchmarks (i.e. the principles of neutrality, effectiveness, simplicity and prohibition of fraud).

Third, through the means of *explorative research*, a conclusion is drawn on the proper design of the VAT and customs control mechanisms in the light of the aforementioned legal principles. In order to reach this conclusion, a *comparative research* is conducted by juxtaposing the EU legislation with a number of international standards.

1.6 Research structure and outline

The thesis is structured as follows:

- Chapter 1 provides general background information about the VAT and customs controls in the field of e-commerce, presents the research questions, justifies them, and delineates them

²⁵ To be further discussed in Section 3.2.1

from other research topics. It also introduces the chosen research methodology and explains how the latter is applied to the research questions.

- Chapter 2 outlines the research framework by elaboration on the positive law that is analysed in the thesis, lists the relevant instruments that are intended to facilitate the research process and provides the author's understanding on the examined notions and concepts. The chapter further explains the normative benchmarks against which the current and future rules of VAT and customs controls in the field of e-commerce will be tested - the principles of neutrality, effectiveness, simplicity and prohibition of fraud.
- Chapter 3 provides an overview of noteworthy cases of e-commerce fraud identified by the existing mechanisms of VAT and customs controls. Particular focus is placed on low-value consignments and the effect of their volumes and most common related irregularities on the commercial turnover and supply chain. Discussed is also the abuse of CP 42.
- Chapter 4 elaborates on the current VAT and customs control mechanisms stipulated in the VAT and customs legislation. The presentation is made in the light of applicable international standards. The chapter also provides an assessment to what extent are the current rules in line with the principles of neutrality, effectiveness, simplicity and prohibition of fraud.
- Chapter 5 presents the changes brought by the VAT e-commerce package, relevant for the VAT and customs controls. The new rules are assessed against the principles of neutrality, effectiveness, simplicity and prohibition of fraud. Once again, the evaluation is made in the context of relevant international initiatives. Other recent endeavours of the Commission expected to take effect in near future are briefly discussed at the end of Chapter 5.
- Chapter 6 draws conclusions based on what has been established in the previous chapters, thus directly answering to Research Questions 1 and 2. It also makes recommendations on how the VAT and customs control mechanisms should be designed in order to meet the normative benchmarks, which in effect gives an answer to Research Question 3.

2 Chapter Two – Research framework

For the purposes of the thesis, I have analysed a number of *positive laws* (statutes and case-law) and *soft law* instruments that apply at EU and international level. The legislative framework is used to derive the meaning of all concepts and notions needed to answer the research questions described in Section 1.2 and is assessed against the selected *normative benchmarks*.

2.1 Primary elements of positive law and soft law

Customs control mechanisms maintained by the customs authorities of the EU Member States stem from the general obligations contained in the **Union Customs Code** ('UCC').²⁶ In particular, Article 3 and Recital 16 UCC serve as a legal basis for the new mission of the customs authorities, which is to "contribute to fair and open trade, to the implementation of the external aspects of the internal market, of the common trade policy and of the other common Union policies having a bearing on trade, and to overall supply chain security."²⁷ Customs authorities are expected to work towards this mission in cooperation, as provided for in **Regulation 515/97**,²⁸ which was last amended in 2015 in order to be fully in line with the objectives set in the UCC.

Conceptually, the leading role of the customs controls has international dimensions since it is a result of various initiatives of the WCO. Notable is the **Revised Kyoto Convention**²⁹ which aims at facilitating the international trade and improving effectiveness of the controls imposed by the customs authorities. The Convention was enhanced by two other WCO instruments - the **SAFE Framework**³⁰ and the **Immediate Release Guidelines**.³¹ The SAFE framework places as its main priority the trade facilitation and security through applying modern customs control processes and mechanisms.³² The Immediate Release Guidelines on the other hand are intended to "assist both Customs and Trade with expediting the clearance of large number of small or negligible value goods across borders that were primarily being carried by courier and express mail services".³³ It is worth noting that the latest update of the Guidelines aims in particular to "provide specific guidance to both Customs and Trade on expediting the release/clearance of increasing volumes of low-value and small E-Commerce shipments/parcels".³⁴

Indeed, one of the main challenges for the customs controls are the large amounts of small consignments made through e-commerce channels and originating in third countries.³⁵ In the EU, there is a regime of exemption from import VAT and customs duties for goods of intrinsic value of up to

²⁶ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code

²⁷ Article 3 of the UCC

²⁸ Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters

²⁹ International Convention on the simplification and harmonization of Customs procedures, also known as the Revised Kyoto Convention, entered into force in 2006

³⁰ WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, adopted 2005 and last amended in 2018

³¹ WCO, Immediate Release Guidelines, adopted in 1990 and last amended in 2018

³² Hossain, S. S. Revised Kyoto Convention: The Best Practice Guide for Customs. Global Trade and Customs Journal Volume 3, Issue 11/12 (Kluwer Law International 2008), p. 387

³³ WCO, Immediate Release Guidelines

³⁴ Ibid.

³⁵ WCO, Study Report on E-commerce, p. 18-19

€22.³⁶ Although often used in practice and even extended by the CJEU to cover grouped consignments with a combined intrinsic value exceeding the threshold,³⁷ the low-consignment regime will soon be abolished by the upcoming **VAT e-commerce package**.³⁸ The package introduces a number of changes in the VAT and customs legislation aimed at responding to the variety of challenges raised by e-commerce. The changes were intended to enter into force on 1 January 2021, but the deadline was postponed to 1 July 2021 due to the COVID-19 pandemic.³⁹

Among other things, through the VAT e-commerce package, the Commission amended the main cooperation instrument for VAT fraud prevention - **Regulation 904/2010**.⁴⁰ This amendment was not a coincidence as the package places in its main priorities the goal to “facilitate cross-border trade, combat VAT fraud and ensure fair competition for EU businesses.”⁴¹ In fact, Regulation 904/2010 was amended several times, out of which two more instances are of relevance to the thesis. First, the amendment made by Regulation 2018/1541,⁴² which *inter alia* deals with the non-compliance with CP 42,⁴³ introduced by Article 143(1)(d) of Directive 2006/112/EC (‘VAT Directive’).⁴⁴ Second, the amendments enacted by Regulation 2020/283,⁴⁵ which aims to tackle precisely cross-border VAT fraud in the scope of e-commerce. Regulation 2020/283 will however come into force only on 1 January 2024.⁴⁶

Another source of particular importance for the thesis is the **2019 Special Report of the ECA** on the challenges faced by the collection of VAT and customs duties in the scope of e-commerce.⁴⁷ For full understanding, regard should be given to the Special Report’s Background Paper⁴⁸ and the ECA’s Special Report on import procedures from 2017.⁴⁹ The 2019 Special Report examines “whether the European Commission has established a sound regulatory and control framework on e-commerce with regard to the collection of VAT and customs duties, and whether Member States’ control measures help ensure the complete collection of VAT and customs duties in respect of e-commerce.”⁵⁰ The report lists and explains a number of deficiencies of the currently existing system, part of which arguably will not be resolved by the new rules entering into force on 1 July 2021.

Finally, in order to put the VAT e-commerce package in international perspective, the thesis assesses the EU measures in the light of the WCO e-commerce package, which includes the **WCO Cross-Border E-Commerce Framework of Standards**, accompanied by a number of documents supporting its

³⁶ See Section 3.1.1

³⁷ Judgment of 2 July 2009, *Har Vaessen Douane Service* (C-7/08, ECR 2009 p. I-5581) ECLI:EU:C:2009:417

³⁸ See Section 5.2.1

³⁹ European Commission, Modernising VAT for cross-border e-commerce

⁴⁰ Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax

⁴¹ European Commission, Modernising VAT for cross-border e-commerce

⁴² Council Regulation (EU) 2018/1541 of 2 October 2018 amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax

⁴³ Recital 4 of Regulation 2018/1541

⁴⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

⁴⁵ Council Regulation (EU) 2020/283 of 18 February 2020 amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud

⁴⁶ Article 2 of Regulation 2020/283

⁴⁷ ECA, Special Report no 12/2019, E-commerce: many of the challenges of collecting VAT and customs duties remain to be resolved (pursuant to Article 287(4), second subparagraph, TFEU), 2019

⁴⁸ ECA, Background paper, Collection of VAT and customs duties on cross-border e-commerce, 2018

⁴⁹ ECA, Special Report no 19/2017, Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU (pursuant to Article 287(4), second subparagraph, TFEU), 2017

⁵⁰ ECA Special Report no 12/2019, p. 4

implementation. The Framework sets fundamental standards for the effective management of cross-border e-commerce from both facilitation and control perspectives,⁵¹ along the key principles identified and adopted in the WCO Luxor Resolution⁵² on Cross-Border E-Commerce.⁵³ To gain more nuanced understanding of the WCO e-commerce package, the thesis also draws reference to the **WCO Study Report on E-Commerce**, which outlines WCO “Members’ current practices and ongoing and/or future initiatives on cross-border low value e-commerce”.⁵⁴

2.2 Description of the concepts used

For the purposes of clarity, the concepts that are to be discussed in the thesis are explained in the following paragraphs.

2.1.1 VAT and customs controls

The WCO Glossary of International Customs Terms defines ‘customs control’ as “measures applied by the Customs to ensure compliance with Customs law”.⁵⁵ In the UCC, the EU legislator expanded on this definition by providing that customs controls are “specific acts performed by the customs authorities in order to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure.”⁵⁶ In particular, EU customs controls must follow the new mission objectives listed in Article 3 of the UCC⁵⁷ and should be in line with the safety and security standards set in Chapter 6 of the Revised Kyoto Convention.⁵⁸

With regards to VAT controls, there is no available legal definition. Taking inspiration from the WCO Glossary’s definition of ‘customs control’, VAT control could be defined as “measures applied by authorities to ensure compliance with VAT laws”. This definition is broader and takes into consideration that both customs and tax authorities could be involved in establishing and maintaining VAT controls.

⁵¹ WCO Cross-Border E-Commerce Framework of Standards, 2018 p. 9. The standards relate to areas, such as the legal framework and use of advance electronic data, risk management for facilitation and control, simplified clearance procedure, models of revenue collection and others.

⁵² WCO Luxor Resolution on the guiding principles for cross-border e-commerce, 2017

⁵³ WCO Cross-Border E-Commerce Framework of Standards, p. 3

⁵⁴ WCO, Cross-Border E-commerce

⁵⁵ The definition cross-references to General Annex, Chapters 2 and 6 of the Revised Kyoto Convention; WCO, Glossary of International Customs Terms, p. 9

⁵⁶ Article 5(3) of the UCC

⁵⁷ (a) protecting the financial interests of the Union and its Member States;

(b) protecting the Union from unfair and illegal trade while supporting legitimate business activity;

(c) ensuring the security and safety of the Union and its residents, and the protection of the environment, where appropriate in close cooperation with other authorities; and

(d) maintaining a proper balance between customs controls and facilitation of legitimate trade.

⁵⁸ For example, the control should be limited to ensuring compliance with customs law; the customs control should be applied through risk management; customs control should be audit-based; customs administration should seek to cooperate with other customs administrations and the trade by concluding mutual agreements and memoranda of understanding; customs authorities should use IT solutions and e-commerce etc.

To that end, Regulation 904/2010 may also be considered as a source for guidance since it defines the main parameters of administrative cooperation in the course of VAT controls, such as rapid information exchange and automated access to information.⁵⁹

2.1.2 E-commerce

WCO clarifies in its e-commerce package that there are various views, approaches and perspectives on the definition of e-commerce.⁶⁰ Some see it mainly through the eyes of the business,⁶¹ while others contemplate it from the perspective of the administration.⁶² Both at national level and at the level of the international organisations, the definitions “include elements such as the use of information and communication technologies and the Internet as a means of communication, initiation of transactions, movement across borders from one economy to another, and electronic payment.”⁶³ According to the WCO⁶⁴ and the academia,⁶⁵ for customs control purposes, e-commerce includes:

- Online ordering, sale, communication and, if applicable, payment,
- Cross-border transactions/shipments,
- Physical (tangible) goods, and
- Destined to consumer/buyer (commercial and non-commercial).

From EU VAT perspective, the e-commerce sales usually take place through the mechanism of distance sale of goods, where goods are dispatched or transported to a consumer (non-taxable person), between two Member States or from a third country. Currently, the VAT Directive does not provide a definition for “distance sale of goods”, although it stipulates some of its main features. For example, there are established rules for determining the place of supply of an intra-EU distance sale of goods.⁶⁶ The CJEU also helped clarifying the term by stating for instance that in a distance sale of goods “the

⁵⁹ Recital 11 of Regulation 904/2010

⁶⁰ WCO Cross-Border E-Commerce Framework of Standards, p. 7.

⁶¹ The WTO defines e-commerce in its Work Programme on Electronic Commerce as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”. See WTO, Agreement and Electronic Commerce, WTO Doc.WT/GC/W/90, 1998. In the same sense is the definition provided by the OECD and Eurostat - “the sale or purchase of goods or services, whether between businesses, households, individuals or private organizations, through electronic transactions conducted via the internet or other computer-mediated (online communication) networks”. See ECA Special Report no 12/2019, p. 7

⁶² The Kyoto Convention ICT Guidelines define e-commerce the following way: “The process of electronically exchanging information to facilitate the trade of goods and services. An essential component of this process is the integration of business procedures with the appropriate technologies.” See WCO, Kyoto Convention - General Annex Guidelines - Chapter 7 Application of Information and Communication Technology, Version 7 2014, p. 120

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Antov, M.: The impact of E-Commerce on the basic functions of customs control in the EU Member States, Conference paper (WCO PICARD 2019), p. 2

⁶⁶ Pursuant to Article 33 and 34 of the VAT Directive, if a taxable person is selling under the “per-country” threshold of €35,000 to a non-taxable person in another Member State, he may charge and collect VAT at the place of origin. On the other hand, if a taxable person is selling to a non-taxable person in another Member State for more than the threshold (from €35,000 to €100,000, depending on that Member State), he should register for VAT purposes there and charge VAT, following the destination principle. This regime has been established in order to spare compliance costs for small-size business with few cross-border supplies and at the same time avoid distortion of competition caused by the general regime, where VAT is due always in the place of origin (Article 32 of the VAT Directive). Otherwise, sellers will always dispatch or transport goods from Member States with low VAT rate. See Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 190

role of the supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of the goods”.⁶⁷ However, the VAT e-commerce package introduced definitions for both distance sale of goods within the EU and distance sale of goods imported from outside the EU.⁶⁸ The latter is of utmost importance for the purposes of the thesis, as it covers e-commerce supplies of goods originating in non-EU countries.

2.2 Normative benchmarks

The following sections aim to expand on each of the normative components of the research questions.

2.2.1 Principles of neutrality. Correlation with principle of simplicity and principle of effectiveness

The **principle of neutrality** stems from the preamble of the VAT Directive⁶⁹ and is a concept intrinsic to EU VAT law. The CJEU considers it a fundamental principle for the common system of VAT,⁷⁰ although not primary law,⁷¹ and the doctrine splits the principle into two aspects – economic and legal.⁷²

The *economic* aspect also known as the principle of ‘system neutrality’ requires that the VAT should be exactly proportionate to the price of goods and services.⁷³ This has been stipulated by statutory law⁷⁴ and by the CJEU, who has referred on many occasions to the system neutrality principle when interpreting the EU VAT law.⁷⁵ Two main rules may be derived from the system neutrality.⁷⁶

- EU VAT law should not result in business decisions for concentration of production or distribution in the supply chain;
- EU VAT law should not lead to cascading VAT, resulting in double or non-taxation.

The *legal aspect* of the principle of neutrality reflects the general EU principle of equal treatment,⁷⁷ but also safeguards the objectives of the neutrality of competition.⁷⁸ In other words, it ensures that

⁶⁷ Judgment of 18 June 2020, *KrakVet Marek Batko* (C-276/18) ECLI:EU:C:2020:485, para. 63

⁶⁸ See Section 5.2.1

⁶⁹ Point 5 of the VAT Directive refers to “highest degree of neutrality” and point 7 – of “neutrality in competition”

⁷⁰ Judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, ECR 2000 p. I-6973) ECLI:EU:C:2000:469

⁷¹ Judgment of 19 July 2012, *Deutsche Bank* (C-44/11, Publié au Recueil numérique) ECLI:EU:C:2012:484

⁷² Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 36

⁷³ *Ibid.*

⁷⁴ Article 1(2) of the VAT Directive and Recital 8 to the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes

⁷⁵ For example in Judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, ECR 2000 p. I-6973) ECLI:EU:C:2000:469; Judgment of 29 April 2004, *Faxworld* (C-137/02, ECR 2004 p. I-5547) ECLI:EU:C:2004:267; Judgment of 29 October 2009, *SKF* (C-29/08, ECR 2009 p. I-10413) ECLI:EU:C:2009:665

⁷⁶ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 36-37; Nellen, F.J.G.: *Information Asymmetries in EU VAT* (Datawyse / Universitaire Pers Maastricht 2017), p. 80

⁷⁷ For example, Judgment of 8 June 2006, *L.u.p.* (C-106/05, ECR 2006 p. I-5123) ECLI:EU:C:2006:380, para. 48; Judgment of 10 April 2008, *Marks & Spencer* (C-309/06, ECR 2008 p. I-2283) ECLI:EU:C:2008:211, para. 49; Judgment of 10 July 2008, *Koninklijke Ahold* (C-484/06, ECR 2008 p. I-5097) ECLI:EU:C:2008:394, para. 36; Judgment of 18 December 2008, *Royal Bank of Scotland* (C-488/07, ECR 2008 p. I-10409) ECLI:EU:C:2008:750, para. 27

⁷⁸ Point 7 of the preamble of the VAT Directive

similar goods and services (but also taxable transactions) are treated equally for VAT purposes.⁷⁹ The principle of (legal) neutrality/neutrality of competition is intrinsically connected with the neutrality of the legal form,⁸⁰ but also with the principle of simplicity of the system.⁸¹

The **principle of simplicity** is a general principle typical for tax policy design not only at EU level but internationally. Its understanding, according to the doctrine⁸², is threefold:

- *Policy simplicity* – simple tax design and relevant definitions;
- *Form simplicity* – clearly defined tax laws so that they could be understood well by all stakeholders;
- *Action simplicity* – simple compliance and administration of tax. It requires that the costs for tax enforcement and administration are reduced to minimum.

The principle of simplicity is also related to the **principle of effectiveness**, which is a general principle of EU law enshrined by the CJEU. The Court has ruled on multiple occasions that Member States must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.⁸³ As elaborated by AG Jääskinen, the “principle of effectiveness, or effective judicial protection, obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.”⁸⁴

In the context of EU VAT law, the CJEU has frequently examined both simplicity and effectiveness.⁸⁵ In some cases, the Court has explicitly mentioned effectiveness⁸⁶ whereas in others, it has expressed simplicity and effectiveness in a similar manner.⁸⁷ In fact, the doctrine often, either mentions that both principles are connected,⁸⁸ or it refers to one single principle of legal simplicity and effectiveness, which requires the application of VAT to be as simple and uncomplicated as possible.⁸⁹

⁷⁹ Judgment of 22 May 2008, *Ampliscientifica and Amplifin* (C-162/07, ECR 2008 p. I-4019) ECLI:EU:C:2008:301, para. 25

⁸⁰ Judgment of 29 March 2012, *BLM* (C-436/10, Publié au Recueil numérique) ECLI:EU:C:2012:185, para. 26

⁸¹ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 38

⁸² De Silva, B.: *The Impact of Tax Treaties and EU Law on Group Taxation Regimes* (Kluwer Law International 2016), p. 3.02; Harris, P.: *Corporate Shareholder/Income Taxation and Allocation of Taxing Rights Between Countries* (IBFD 1997), p. 8-10

⁸³ For example, Judgment of 20 September 2001, *Courage and Crehan* (C-453/99, ECR 2001 p. I-6297) ECLI:EU:C:2001:465, para 29; Judgment of 13 July 2006, *Manfredi* (C-295/04 to C-298/04, ECR 2006 p. I-6619) ECLI:EU:C:2006:461, paragraph 62; and Judgment of 30 May 2013, *Jörös* (C-397/11) ECLI:EU:C:2013:340, para. 29

⁸⁴ Opinion of Mr Advocate General Jääskinen of 7 February 2013, *Donau Chemie and others* (C-536/11) ECLI:EU:C:2013:67, para. 3

⁸⁵ For example, Judgment of 5 October 1995, *Aprile / Amministrazione delle Finanze dello Stato* (C-125/94, ECR 1995 p. I-2919) ECLI:EU:C:1995:309, para 18, Judgment of 10 July 2008, *Koninklijke Ahold* (C-484/06, ECR 2008 p. I-5097) ECLI:EU:C:2008:394, para. 39

⁸⁶ Judgment of 11 April 2013, *Rusedespred* (C-138/12) ECLI:EU:C:2013:233, para. 30

⁸⁷ Judgement of 8 May 2013, *Petroma Transports and others* (C-271/12) ECLI:EU:C:2013:297, Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, Publié au Recueil numérique) ECLI:EU:C:2012:458

⁸⁸ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 38

⁸⁹ Nellen, F.J.G.: *Information Asymmetries in EU VAT* (Datawyse / Universitaire Pers Maastricht 2017), p. 88

Taken in correlation with the principle of (legal) neutrality/neutrality of competition, simplicity and effectiveness require that small enterprises cannot be placed in disadvantageous position compared to big organised (often international) companies due to the complexity of the system.⁹⁰

Finally, it is worth noting an important international aspect of the principle of neutrality, namely the aspect of ‘*external neutrality*’. The latter entails that goods and services supplied to a customer in another country should leave the country of the supplier VAT-free.⁹¹ This notion ensures the fulfillment of the economic aspect of neutrality (the VAT paid is not a cost to the business), its legal aspect (similar goods and services are taxed equally) as well as the neutrality of competition (goods and services purchased cross-border and locally carry the same burden of VAT).⁹² In fact, there is also a clear correlation with the EU customs legislation, since the import⁹³ and export⁹⁴ of goods for VAT purposes are considered as direct expressions of the ‘*external neutrality*’.⁹⁵ Under the EU VAT rules, the goods must be fully relieved from the burden of the VAT once they enter/exit the customs territory of the Union.⁹⁶

2.2.2 Principle of prohibition of fraud

In general, the CJEU has never referred to the prohibition of fraud as a ‘principle’, however, given its importance, the doctrine has adopted the views that it should be referred to as ‘**principle of prohibition of fraud**’.⁹⁷

What has been established in the settled case-law of the CJEU is that EU VAT law cannot be relied on for abusive and fraudulent ends.⁹⁸ This means that if a taxable person commits a fraud, he or she cannot rely on the advantages foreseen in the VAT legislation, for example, right to deduction of incurred VAT or exemption.⁹⁹

The same understanding is maintained also in the customs legislation of the Union. For example, Recital 11 of the UCC draws reference to Commission Communication of 9 August 2004 entitled “Protecting the Communities’ financial interests - Fight against fraud - Action Plan for 2004-2005” and its Recital 15 is clear that “facilitation of legitimate trade and the fight against fraud require simple,

⁹⁰ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 38. Although the author refers only to the VAT system, I consider that there are no obstacles for the conclusion to apply also to customs law.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Article 30 of the VAT Directive

⁹⁴ Article 148 of the VAT Directive

⁹⁵ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 38

⁹⁶ Ibid.

⁹⁷ Ibid p. 42

⁹⁸ Judgment of 12 May 1998, *Kefalas and others / Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon* (C-367/96, ECR 1998 p. I-2843) ECLI:EU:C:1998:222, para. 20; Judgment of 23 March 2000, *Diamantis* (C-373/97, ECR 2000 p. I-1705) ECLI:EU:C:2000:150, para. 33; Judgment of 3 March 2005, *Fini H* (C-32/03, ECR 2005 p. I-1599) ECLI:EU:C:2005:128, para 32; See also Van Doesum, A. J. Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 42 and Pistone P. *Anti-Avoidance Rules in Lang, M. and Lejeune, I. (eds), Improving VAT/GST – Designing a Simple and Fraud-Proof Tax System* (IBFD 2014), p. 591-602

⁹⁹ For example, Judgment of 7 December 2010, *Criminal proceedings against R.* (C-285/09, ECR 2010 p. I-12605) ECLI:EU:C:2010:742; Judgment of 18 December 2014, *Schoenimport "Italmoda" Mariano Previti* (C-131/13, C-163/13, C-164/13) ECLI:EU:C:2014:2455, joined with *Turbu.com* (C-163/13) and *Turbu.com Mobile Phone's* (C-164/13)

rapid and standard customs procedures and processes.” Furthermore, more comprehensive provisions addressing fraud are foreseen in several specific situations described in the UCC.¹⁰⁰ In addition, OLAF’s Joint Customs Operations, often coordinated with the WCO,¹⁰¹ aim to tackle various forms of illicit trade, such as smuggling, counterfeiting and undervaluation.¹⁰² In general, it could be said that there is a strong relationship between the customs Union, the own resources derived from customs duties and the need to protect the customs duty regime from fraud.¹⁰³

It should also be underlined that the principle of prohibition of fraud is not restricted to persons carrying out the fraudulent transactions themselves.¹⁰⁴ Subject to this principle is also a person that knew or should have known that, by the transaction relied on as a basis for the right concerned, he or she was participating in fraud committed in the context of chain of supplies.¹⁰⁵ For EU VAT purposes, this conclusion is derived from the respective CJEU case-law¹⁰⁶ and for the purposes of EU customs law, it may be inferred by analogy from Article 79(4), second subparagraph of the UCC, which defines who would be the customs debtor in the case of non-compliance with the conditions for placing non-Union goods under a customs procedure.¹⁰⁷

¹⁰⁰ For example, pursuant to Article 22(6)(e) of the UCC, the applicant’s right to be heard is waived if such information would prejudice investigations initiated for the purpose of combating fraud; Pursuant to Article 96(1)(b) of the UCC, in the context of special procedures or temporary storage, the European Commission may decide to temporarily prohibit recourse of the comprehensive guarantee referred to in Article 95 of the UCC, in respect of goods which have been identified as being subject to large-scale fraud; As a positive impact, Article 124(7) of the UCC provides that the customs debt shall be extinguished with regard to the person whose behaviour did not involve any attempt at deception and who contributed to the fight against fraud.

¹⁰¹ For example, Annual Reports on the protection of the EU’s financial interests 2006 SEC (2007) 930 and SEC (2007) 938, para. 3.3

¹⁰² For example, Operation SNAKE was aimed at dealing with undervaluation of products from China.

¹⁰³ Lyons, T.: *EU Customs Law* (Oxford University Press 2018), para 3.1.1.4

¹⁰⁴ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: *Fundamentals of EU VAT Law* (Kluwer Law International 2016), p. 43

¹⁰⁵ *Ibid.*

¹⁰⁶ Judgment of 18 December 2014, *Schoenimport "Italmoda" Mariano Previti* (C-131/13, C-163/13, C-164/13) ECLI:EU:C:2014:2455, joined with *Turbu.com* (C-163/13) and *Turbu.com Mobile Phone’s* (C-164/13)

¹⁰⁷ “Where a customs declaration in respect of one of the customs procedures referred to in point (c) of paragraph 1 is drawn up, and any information required under the customs legislation relating to the conditions governing the placing of the goods under that customs procedure is given to the customs authorities, which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the customs declaration and who knew, or who ought reasonably to have known, that such information was false shall also be a debtor.”

3 Chapter Three – Noteworthy cases of e-commerce fraud

In the current chapter, I am going to examine the most common cases of VAT and customs fraud, involving goods originating in third countries and distributed through e-commerce channels. For purposes of clarity, I have limited myself to two groups of activities – fraud with low-value consignments and fraud with CP 42. In fact, undervaluation and abuse of CP 42 have been noted as two of the main forms of e-commerce fraud also by OLAF, who gathered evidence from 25 Member States' investigative experiences.¹⁰⁸

3.1 E-commerce fraud with low-value goods

3.1.1 General framework

At present and until the entry into force of the VAT e-commerce package, the EU legislation provides several exemptions with respect to low-value consignments.

Regarding VAT, Member States are obliged to exempt importation of goods with negligible value. Such value is left to be defined by the Member States, as long as it is within the range of €10 and €22.¹⁰⁹ Considering that most of the Member States had chosen to adhere to the maximum of €22,¹¹⁰ this would be the threshold accepted as relevant for the purposes of the thesis. The applicable legislation¹¹¹ refers to “total value”, which is to be understood as the intrinsic value¹¹² of the goods, increased by any handling¹¹³ and transport costs.¹¹⁴ Nevertheless, differences in the interpretation have been found in some Member States.¹¹⁵

Regarding customs duties, again, goods with negligible value are exempt. However, in this case, the threshold is set at €150 of intrinsic value.¹¹⁶

According to the doctrine, these rules establish the *de minimis* regime in the EU, which ensures that any consignment of value of up to €22 is imported VAT and customs duties free.¹¹⁷ Moreover, goods

¹⁰⁸ ECA Special Report no 12/2019, p. 43

¹⁰⁹ Article 23 of Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods

¹¹⁰ European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 8

¹¹¹ Directive 2009/132/EC and Article 143(1)(b) of the VAT Directive

¹¹² Although there is no legal definition available, this is generally understood to be the actual value of the goods, excluding transport and insurance costs.

¹¹³ E.g. insurance, packaging

¹¹⁴ European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 41

¹¹⁵ For example, Ireland and Germany consider that the total value may include transport costs, and Austria that the total value covers only the value of the goods, excluding transport costs. See ECA Special Report no 12/2019, p. 41

¹¹⁶ Article 23 of Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty

¹¹⁷ Pope, S., Sowiński, C. and Taelman, I. Import value de minimis level in selected economies as cause of undervaluation of imported goods Volume 8 Number 2 World Customs Journal 75-90, 2014, p. 78

of such value are deemed to be declared for release for free circulation simply by their presentation¹¹⁸ to the customs authorities, provided that the necessary data is accepted.¹¹⁹

However, the *de minimis* regime does not exhaust all the exemptions of low-value consignments available under the EU VAT and customs law. There is also a special regime for goods sent from one private individual to another as gifts, i.e. exchanged in a non-commercial setting. Such goods with total value not exceeding €45, and after answering to certain conditions,¹²⁰ are exempt from both VAT¹²¹ and customs duties.¹²² Overview of the applicable thresholds is provided in the table below:

Table 1: Threshold for the low-value consignment relief¹²³

Low value consignment relief			
B2C	Euro 0 - 22	Euro 22 - 150	> Euro 150
	no VAT, no CD	VAT, no CD	VAT, CD
P2P	Euro 0 - 45	> Euro 45	
	no VAT, no CD	VAT, CD	

All low-value consignment reliefs discussed above are applicable also to purchases of goods online from third countries.

3.1.2 Mis-declaration and splitting of low-value consignments

Although facilitating trade, due to rapid growth in the volumes of shipments of low-value goods each year,¹²⁴ the reliefs are often subject to fraud. As pointed out by the OECD, “at the time when most current low-value import reliefs were introduced, internet shopping did not exist and the level of imports benefitting from the relief was relatively small”.¹²⁵ According to the ECA, non-compliance with the low-value consignment regime, in the context of e-commerce, can take three main forms: i) undervaluation of goods; ii) wrong declaration of non-eligible goods either as eligible for the

¹¹⁸ Article 139 of the UCC

¹¹⁹ Article 141(5) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (UCC DA)

¹²⁰ To be of an occasional nature; to be of personal/family use of the consignee and not of commercial purpose; to be sent without consideration

¹²¹ Article 1 of Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries (codified version) and Article 143(1)(b) of the VAT Directive

¹²² Articles 25 and 26 of Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty

¹²³ ECA Special Report no 12/2019, p. 29

¹²⁴ The European Commission estimates that between 1999 and 2013, the total annual volumes of small consignment receipts originating from outside the EU have grown from 29.78 million to 114.85 million, a percentage increase of 286% for the entire period. The Commission explains that this is most likely caused by the impact of e-commerce. See European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 37

¹²⁵ OECD, Addressing the Tax Challenges of the Digital Economy, OECD/G20 Base Erosion and Profit Shifting Project, 2014, p. 134

commercial low-value consignment relief or as gifts¹²⁶ and iii) splitting of consignments in order for their value to be under the threshold.¹²⁷ Each of these three acts will be discussed separately.

Undervaluation is defined by the ECA as a situation, where “the importer declares a value of imported goods which is lower than the actual value, often accompanied by the presentation of fake commercial documents”.¹²⁸ Undervaluation is massively exploited within the EU and causes substantial loss of VAT that is being collected.¹²⁹ An example could be given with Belgium and the UK.¹³⁰ In Belgium, postal parcels of goods, ordered from online shops, are systematically declared with a value below €22, although the amount actually paid is much higher.¹³¹ For the UK, the ECA points out that the widespread undervaluation concerns goods imported from the Far East and the USA, and that the price declared is usually 10 - 100 times lower than the correct valuation.¹³² Overall, the ECA concludes that the systematic undervaluation is “potentially encouraged” by the VAT and customs duties exemptions of low-value consignments.¹³³ This understanding has been challenged by the doctrine. For instance, Pope et al claim that, although there is a general trend to undervalue every good received in the EU, no link could be found between the low-value consignment regime and the undervaluation practices.¹³⁴

Similarly to undervaluation, **wrong declaration** relates to situations where goods have been declared as if they are entitled to benefit from the low-value consignment relief. For example, due to loopholes in the customs system, goods are declared with an intrinsic value higher than €150, but still are accepted by the customs authorities as eligible for the exemption from customs duties.¹³⁵ A variation of this could be simply declaring the goods as gifts, in order to benefit from the VAT and customs duties exemption for imports of non-commercial character. In the past, this was the case with delivering international low-value parcels to the UK via the Channel Islands.¹³⁶

Splitting of consignments has not been elaborated in the literature,¹³⁷ since it is self-explanatory – a consignment is divided in parts, each of which having a value falling under the necessary threshold and benefiting from the relief. This type of fraud is characterised by the doctrine with high interest from the business and low complexity.¹³⁸ However, this practice is of less relevance, especially after the *Har Vaessen* case, where the CJEU ruled out that grouped consignments of goods of individual negligible value, but with a combined value above the threshold for exemption from customs duties, are eligible

¹²⁶ ECA Special Report no 19/2017, p. 53

¹²⁷ ECA Special Report no 12/2019, p. 29

¹²⁸ ECA Special Report no 19/2017, p. 14

¹²⁹ The estimated loss from undervaluation amounts to €4 billion. See European Commission, Development of Cross-border E-commerce through Parcel Delivery, Final report 2019, p. 231

¹³⁰ At the time when the ECA was conducting the research necessary for Special Report no 19/2017 and Special Report no 12/2019, the UK was still a Member State of the EU.

¹³¹ De Standaard, Cel Cybersquad spoorde al 858 frauderende webshops op

¹³² ECA Special Report no 19/2017, p. 53

¹³³ ECA Special Report no 12/2019, p. 12

¹³⁴ Pope, S., Sowiński, C. and Taelman, I. Import value de minimis level in selected economies as cause of undervaluation of imported goods Volume 8 Number 2 World Customs Journal 75-90, 2014, p. 74

¹³⁵ ECA Special Report no 19/2017, p. 53

¹³⁶ Previously, 75% of the non-EU parcels entering the UK were estimated to originate in the Channel Islands, which are part of the EU customs territory, but pursuant to Article 6(1)(e) of the VAT Directive, are treated as non-EU territory for VAT purposes. This practice ended in 2012, when the non-commercial low-value exemption was removed for goods entering the UK from the Channel Islands. See European Commission, VAT Aspects of Cross-border E-Commerce – Options for Modernization, Final report 2015, p. 63

¹³⁷ Although it has been recognised by the Commission. See, for example, European Commission, 30th Annual Report on the Protection of the European Union’s financial interests, Fight against fraud, 2018, p. 47

¹³⁸ Van der Hel-van Dijk, E.C.J.M. and Griffioen, M. A.: Online Platforms: A Marketplace for Tax Fraud?, EU VAT Note, INTERTAX, Volume 47, Issue 4 (Kluwer Law International 2019), p. 397

to benefit from the relief, provided that each parcel of the grouped consignment is addressed individually to a consignee within the EU.¹³⁹

The Commission also discusses the different forms of non-compliance with the low-value consignment rules and groups undervaluation and wrong declaration under the term '*mis-declaration*'.¹⁴⁰ The latter description will be used in the remaining of the thesis. According to the Commission, mis-declaration is considered as one of the main reasons for the VAT gap.¹⁴¹ This is further supported by an independent study reporting that in 2016, 65% of the consignments sent by non-EU taxable persons via post, were non-compliant.¹⁴²

3.2 E-commerce fraud with customs procedure 42

3.2.1 General framework

CP 42 is a regime stemming from Article 143(1)(d) of the VAT Directive, which an importer uses in order to obtain a VAT exemption in the Member State of importation when the imported goods are about to be transported onward to another Member State via an intra-Community supply.¹⁴³ VAT is then charged in the Member State of destination and remitted by the final recipient. Few important clarifications of this regime have been provided by the CJEU. In *Enteco Baltic* and *Vetsch Int. Transporte*, the Court explained that the importer cannot be denied the exemption, as long as all the material conditions of CP 42 are fulfilled, even in the case where the goods were handed over to a final recipient different from the one mentioned in the import declaration¹⁴⁴ or the final recipient was engaged in fraudulent activities.¹⁴⁵ However, in both cases, the CJEU was clear that the customs authorities are obliged to deny the exemption, if it is proven that the importer himself knew or should have known that he was participating in a fraud.¹⁴⁶

3.2.2 Abuse of customs procedure 42

Although an important facilitation for the business,¹⁴⁷ CP 42 is prone to frequent abuse by fraudsters. This has been recognised by both the ECA and the Commission, who for several years have made recommendations to both tax and customs administrations how to tackle the problem.¹⁴⁸ When the

¹³⁹ Judgment of 2 July 2009, *Har Vaessen Douane Service* (C-7/08, ECR 2009 p. I-5581) ECLI:EU:C:2009:417

¹⁴⁰ European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 41

¹⁴¹ *Ibid.*

¹⁴² Basalisco, B., Wahl, J. and Okholm, H. E-commerce Imports Into Europe: VAT and Customs Treatment, Copenhagen Economics, 2016; Also in Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

¹⁴³ ECA Special Report no 19/2017, p. 37

¹⁴⁴ Judgment of 20 June 2018, *Enteco Baltic* (C-108/17, *Publié au Recueil numérique*) ECLI:EU:C:2018:473, para. 61

¹⁴⁵ Judgment of 14 February 2019, *Vetsch Int. Transporte* (C-531/17) ECLI:EU:C:2019:114, para. 43

¹⁴⁶ Judgment of 20 June 2018, *Enteco Baltic* (C-108/17, *Publié au Recueil numérique*) ECLI:EU:C:2018:473, para. 100; Judgment of 14 February 2019, *Vetsch Int. Transporte* (C-531/17) ECLI:EU:C:2019:114, para. 43

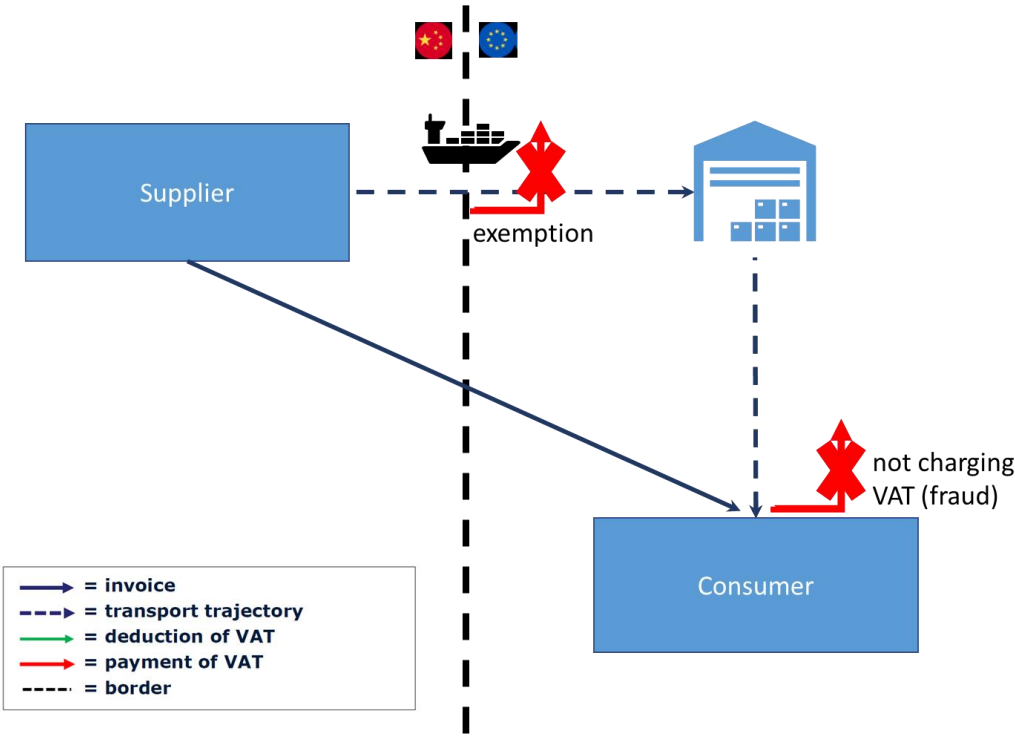
¹⁴⁷ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 23

¹⁴⁸ ECA Special Report no 19/2017, p. 9

ECA examined seven Member States, it established that the losses caused by the abuse of CP 42 in 2009 amount to 29 % of the VAT applicable on the taxable amount of the imports concerned.¹⁴⁹

In the context of e-commerce, the ECA found that the abuse of CP 42 often takes place when imported goods are stored in an EU warehouse until “purchased by and delivered to the consumer on behalf of the non-EU supplier without accounting for VAT for this delivery”.¹⁵⁰ For instance this practice manifests in the so-called “fulfilment house fraud”, where non-EU fraudulent online sellers (for example, from China) ship group consignments to fulfilment houses within the EU, usually by means of cheap transport. The goods are exempt from import VAT under CP42 (or simply low-value consignment relief, if they are under the applicable threshold) and then, once the EU customer orders online, they are dispatched from these fulfilment houses VAT-free, as if they had been sent from outside the EU (see the figure below). Furthermore, there is an additional benefit for the online sellers, as they can offer the goods at lower prices and with fast delivery to the customer.¹⁵¹ Such fraud is often flagged to the authorities by local businesses placed in disadvantageous position.¹⁵²

Figure 1: Example of “fulfilment house fraud”



CP 42 could also be abused for the purposes of undervaluation. As pointed out by the Commission during an inspection carried out in Slovakia in December 2016, “the main risk of undervaluation was detected in imports covered by CP 42 where the importer is usually located in another Member State”.¹⁵³ In such cases, the final recipient of the imported goods makes a payment to the non-EU

¹⁴⁹ ECA, Special Report no 13/2011, Does the control of customs procedure 42 prevent and detect VAT evasion?, Executive summary, (pursuant to Article 287(4), second subparagraph, TFEU), 2011, p. 22

¹⁵⁰ ECA Special Report no 12/2019, p. 42

¹⁵¹ European Commission, Development of Cross-border E-commerce through Parcel Delivery, Final report 2019, p. 231

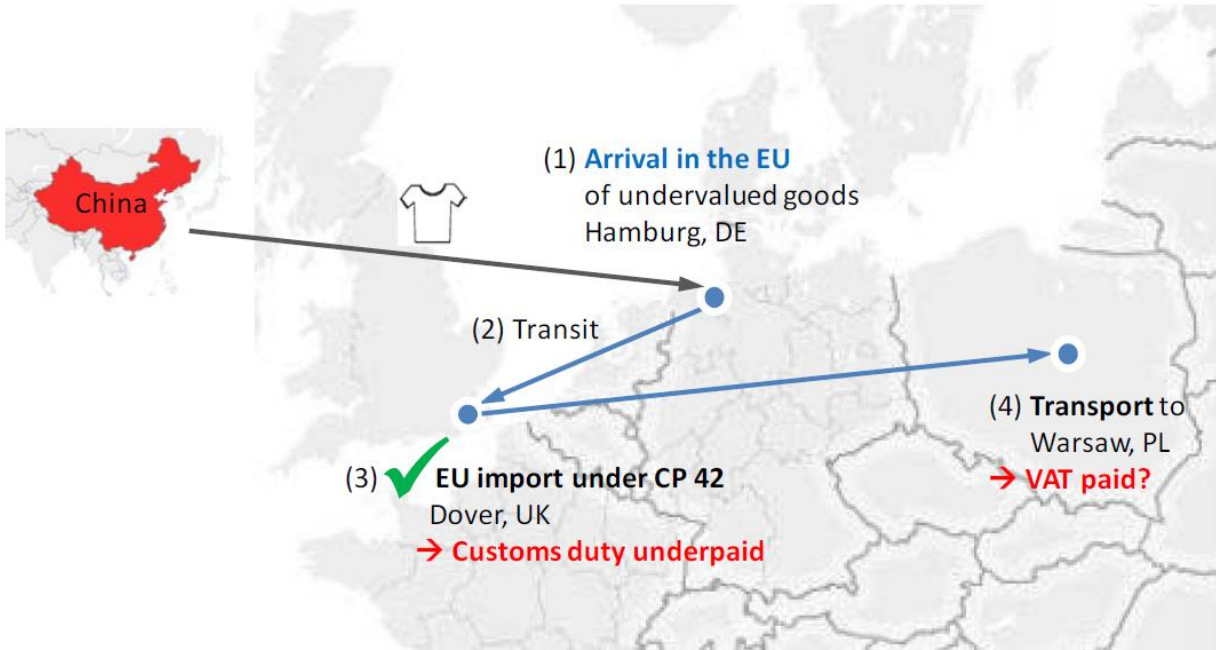
¹⁵² For example, see Petition, Stop the £billion VAT Fraud on eBay & Amazon by Chinese, NON EU & UK businesses

¹⁵³ ECA Special Report no 19/2017, p. 51

supplier that is much higher than the invoice value indicated to the customs authorities of the Member State of importation.¹⁵⁴

A fraud combining abuse of CP 42 and undervaluation was observed in Operation OCTOPUS,¹⁵⁵ which was carried out in 2016 by the French customs authorities in cooperation with OLAF. The fraudulent scheme took place mainly in the UK, where the goods were sent after initially arriving in Germany. The fraudsters exploited certain deficiencies of the customs controls in the UK¹⁵⁶ to release in free circulation in the EU significantly undervalued (5 to 10 times¹⁵⁷) Chinese textiles and footwear.¹⁵⁸ The fraud was further aggravated by the fact the VAT was not paid in the Member States of destination (Poland and Slovakia).¹⁵⁹ An illustration of how the fraud was carried out is provided in the figure below.

Figure 2: Abuse of CP 42 for importing undervalued goods from China to the EU¹⁶⁰



¹⁵⁴ Ibid., p. 38

¹⁵⁵ European Commission, La douane et l’OLAF présentent les résultats de l’opération OCTOPUS, Press Release No 19/2016

¹⁵⁶ For example, the UK did not apply proper risk management procedures and did not request a guarantee for the release of goods declared with a potentially undervalued customs value. See ECA Special Report no 19/2017, p. 40

¹⁵⁷ European Commission, La douane et l’OLAF présentent les résultats de l’opération OCTOPUS, Press Release No 19/2016

¹⁵⁸ ECA Special Report no 19/2017, p. 41

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

4 Chapter Four – Current VAT and customs control mechanisms

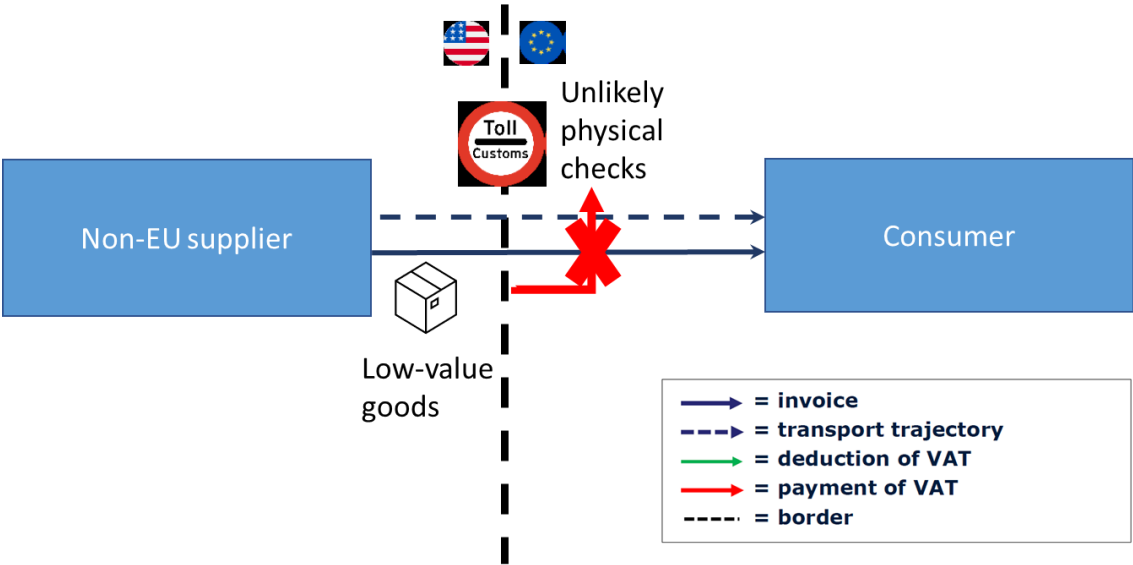
In the following paragraphs I will present the main VAT and customs control rules and their consistency with the principles of neutrality, effectiveness, simplicity and prohibition of fraud.

4.1 Current customs controls

4.1.1 General framework

All non-EU goods entering the Union, including the ones obtained through e-commerce channels, should be subject to customs controls.¹⁶¹ Since these goods are often of low value and are received through postal and courier services, they are rarely physically checked by the customs authorities¹⁶² (see the figure below). Nevertheless, these authorities are the ones who bear the ultimate responsibility for monitoring the compliance of the importer and for setting up appropriate risk management framework.¹⁶³

Figure 3: Classic supply chain of low-value consignments



In general, customs authorities are expected to operate as one single unit, bound by common legal requirements and identical control procedures.¹⁶⁴ To that end, controls follow the policy of the Union and are intended to satisfy the interests of all Member States.¹⁶⁵

¹⁶¹ In this sense, see also Standard 6.1 of the Revised Kyoto Convention

¹⁶² See also Table 3 for the frequency of physical checks

¹⁶³ ECA Special Report no 12/2019, p. 29

¹⁶⁴ Antov, M.: The impact of E-Commerce on the basic functions of customs control in the EU Member States, Conference paper (WCO PICARD 2019), p. 4; Also this was the objective of the Customs 2013 initiative, as indicated in ECA Special Report no 19/2017, p. 36 and 37

¹⁶⁵ Antov, M.: The impact of E-Commerce on the basic functions of customs control in the EU Member States, Conference paper (WCO PICARD 2019), p. 4

According to the UCC, the authorities “may carry out any customs controls they deem necessary”,¹⁶⁶ which creates a very wide margin of discretion, sometimes even extending the controls to persons other than the declarant.¹⁶⁷ An indicative list of actions is explicitly stipulated in statutory law.¹⁶⁸ Despite their broad range of powers, customs authorities should conduct controls in line with certain internationally defined standards.¹⁶⁹ For example, the authorities must ensure preserving the integrity of each consignment through a seal integrity programme,¹⁷⁰ from the moment of loading of the goods to the time of their release.¹⁷¹ Moreover, the integrity of the consignment and its monitoring along the supply chain has to be assisted by voluntary use of technologies, facilitated by the customs authorities.¹⁷²

In order to ensure the legality of the trading practices, the EU legislation allows the goods to be subject to customs controls both at the moment when they cross the border and later on.¹⁷³ Thus, customs controls are carried out not only before or at the time of release of the goods, but also after the release (post-release control).¹⁷⁴ In fact, customs authorities can check if the customs debt determined for the economic operator is at the appropriate level or to establish if there might be some other customs debt left undetermined, by going back through 3 years of data.¹⁷⁵ As pointed out by OLAF, although the controls before or during release are “indispensable for addressing undervaluation and the detection of new types or patterns of fraud or irregularities”, post-release controls often tackle non-fraudulent irregularities.¹⁷⁶ Post-release controls can be carried out at a variety of premises and can include a wide range of checks.¹⁷⁷

¹⁶⁶ Article 46(1) of the UCC

¹⁶⁷ For example, customs authorities may require an applicant for AEO status to send to them the tax identification numbers concerning solely the natural persons who are in charge of the applicant or who exercise control over its management and those who are in charge of the applicant’s customs matters. See Judgment of 16 January 2019, *Deutsche Post* (C-496/17, Publié au Recueil numérique) ECLI:EU:C:2019:26

¹⁶⁸ Pursuant to Article 46(1) of the UCC, customs controls may include “examining goods, taking samples, verifying the accuracy and completeness of the information given in a declaration or notification and the existence, authenticity, accuracy and validity of documents, examining the accounts of economic operators and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons and carrying out official enquiries and other similar acts.”

¹⁶⁹ ECA Special Report no 12/2019, p. 40

¹⁷⁰ WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, p. 8 referring to the Guidelines to Chapter 6 of the General Annex to the Revised Kyoto Convention

¹⁷¹ WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, p. 7

¹⁷² WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, p. 8

¹⁷³ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 265-266

¹⁷⁴ Article 48 of the UCC

¹⁷⁵ Terra, B. and Jansen C.: Introduction to the Union Customs Law (IBFD 2018), p. 37

¹⁷⁶ European Commission, 30th Annual Report on the Protection of the European Union’s financial interests, Fight against fraud, 2018, p. 34.

¹⁷⁷ Article 48 of the UCC provides that for the purposes of post-release controls, “the customs authorities may verify the accuracy and completeness of the information given in a customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification, and the existence, authenticity, accuracy and validity of any supporting document and may examine the accounts of the declarant and other records relating to the operations in respect of the goods in question or to prior or subsequent commercial operations involving those goods [...]. Those authorities may also examine such goods and/or take samples where it is still possible for them to do so. Such controls may be carried out at the premises of the holder of the goods or of the holder's representative, of any other person directly or indirectly involved in those operations in a business capacity or of any other person in possession of those documents and data for business purposes.”

4.1.2 Risk management

When carrying out customs controls, including post-release, the authorities are obliged to perform risk analysis.¹⁷⁸ This obligation is waived when the authorities conduct “random checks”,¹⁷⁹ however, such checks fall within the legal definition of ‘risk management’.¹⁸⁰ Indeed, there is a statutory obligation for the authorities in any case to carry out customs controls within a common risk management framework.¹⁸¹ The requirement for establishing such framework also has multilayered international dimension.¹⁸² As pointed out by the WCO, the connection between risk assessment and customs controls “is an ongoing and shared process commencing at the time when goods are being prepared for export by the exporter and, through ongoing verification of consignment integrity, avoiding unnecessary duplication of controls.”¹⁸³

The UCC explains the purpose of the common risk management framework¹⁸⁴ and provides an indicative list of activities which should be covered by the framework.¹⁸⁵ It is also stipulated that the framework has to be based upon:¹⁸⁶

- *the exchange of risk information and risk analysis results between customs administrations*¹⁸⁷ – such communication is carried out when the risks are assessed as being significant and requiring customs control.¹⁸⁸ The results of the control should either establish that the event triggering the risks has occurred or that the threat presents a high risk elsewhere in the Union;
- *establishing common risk criteria and standards*¹⁸⁹ that include the description of the risks, the factors or indicators of risk to be used to select goods or economic operators for customs control, the nature and the duration of customs controls. The Commission has established common financial risk criteria and standards through an Implementing Decision under Article

¹⁷⁸ Article 46(2) of the UCC. For the risk analysis, the authorities should use “electronic data-processing techniques, with the purpose of identifying and evaluating the risks and developing the necessary counter-measures, on the basis of criteria developed at national, Union and, where available, international level.” The obligation to perform risk analysis also stems from Standard 6.8 of the Revised Kyoto Convention.

¹⁷⁹ Article 46(2) of the UCC. However, this exception is not present in Standard 6.8 of the Revised Kyoto Convention.

¹⁸⁰ Article 5(25) of the UCC provides that ““risk management” means the systematic identification of risk, including through random checks, and the implementation of all measures necessary for limiting exposure to risk.”

¹⁸¹ Article 46(3) of the UCC

¹⁸² Standard 6.3 of the Revised Kyoto Convention; Standard 4 of WCO, SAFE framework of Standards to Secure and Facilitate Global Trade; WCO, Immediate Release Guidelines, p. 3

¹⁸³ WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, p. 7

¹⁸⁴ According to Article 46(4) of the UCC, the authorities “shall undertake risk management to differentiate between the levels of risk associated with goods subject to customs control or supervision and to determine whether the goods will be subject to specific customs controls, and if so, where.”

¹⁸⁵ Pursuant to Article 46(4) of the UCC, such activities could be “collecting data and information, analysing and assessing risk, prescribing and taking action and regularly monitoring and reviewing that process and its outcomes, based on international, Union and national sources and strategies.”

¹⁸⁶ Article 46(3) of the UCC

¹⁸⁷ Article 46(5) of the UCC

¹⁸⁸ Risk-related information is exchanged between customs offices through the online Risk Information Form (RIF). See European Commission, Customs Risk Management Framework (CRMF)

¹⁸⁹ Article 46(7) of the UCC

50(1) of the UCC.¹⁹⁰ As highlighted by the ECA, these criteria are partially in line with the criteria set by the WCO.¹⁹¹

- *establishing control measures*¹⁹² - although not provided in the legislation, in practice, customs authorities employ control measures, such as X-ray scanners, radiation portal, sniffer dogs, and random selection for examination.¹⁹³
- *establishing priority control areas* that cover particular customs procedures, types of goods, traffic routes, modes of transport or economic operators which are subject to increased levels of risk analysis and customs controls during a certain period.¹⁹⁴

Moreover, when defining the common risk criteria and standards, the control measures and the priority control areas, the customs authorities should take into account the proportionality to the risk, the urgency of the necessary application of the control and the probable impact on trade flow, on individual Member States and on control resources.¹⁹⁵

4.1.3 Administrative cooperation in customs

Customs controls can also be carried out in cooperation¹⁹⁶ within the Union, as well as with non-EU customs authorities.¹⁹⁷ This is particularly important when there is a high influx of large quantities of low-value goods arriving through e-commerce channels, simultaneously crossing the EU border in different Member States. In fact, the roots of customs cooperation go back to the Lisbon Treaty.¹⁹⁸

4.1.3.1 Customs cooperation within the EU

There are various types of cooperation within the EU, both between the Member States (horizontal) and with the Commission (vertical).¹⁹⁹

¹⁹⁰ The common financial risk criteria and standards “are a set of rules that allow the Member States customs clearance systems to systematically identify (or, “flag electronically”), transactions that present a potential financial risk and that require further scrutiny and/or control action.” They “encompass the majority of known financial risks and contribute to a more consistent approach to customs controls.” Similar criteria for safety and security have also been developed through another Commission’s Implementing Decision. Both sets of criteria are only available to customs risk management experts in the Member States and not to the public. See, European Commission, Customs Risk Management Framework (CRMF)

¹⁹¹ Only the criteria that could be implemented in the Member States’ risk management systems. See ECA Special Report no 12/2019, p. 40 and WCO Customs Risk Management Compendium, Postal/Express Consignments Risk Indicators and Manual, Volume 2

¹⁹² Article 46(3) of the UCC

¹⁹³ WCO, Study Report on E-commerce, p. 18

¹⁹⁴ Article 46(8) of the UCC

¹⁹⁵ Article 46(6) of the UCC

¹⁹⁶ Article 47 of the UCC

¹⁹⁷ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 270

¹⁹⁸ Article 33 of the Treaty of the Functioning of the EU (TFEU) stipulates that the European Parliament and the Council should take “measures to in order to strengthen customs cooperation between the Member States and between the latter and the Commission”.

¹⁹⁹ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 270

4.1.3.1.1 Horizontal cooperation

Regulation 515/97 provides that all activities and strategies for horizontal cooperation in customs matters are coordinated by the Committee for Mutual Assistance,²⁰⁰ chaired by the Commission and including representatives of the Member States.²⁰¹ The procedures for cooperation could be upon request²⁰² or spontaneous.²⁰³ The information collected by the authority that received the request, or provides spontaneous assistance, constitutes admissible evidence for administrative and judicial proceedings in the Member State of the requesting authority.²⁰⁴ In any case, an action carried out in the Member State of the requested authority should follow the rules of that Member State and should be exclusively performed by the staff of that authority.²⁰⁵

4.1.3.1.2 Vertical cooperation

Under Regulation 515/97, Member States communicate relevant information to the Commission²⁰⁶ and vice versa.²⁰⁷ To that end, assistance is also provided by OLAF, who plays central role in combating fraud and conducting administrative investigations, in order to protect the financial interests of the EU.²⁰⁸ However, OLAF lacks coercive powers, therefore the actual control measures remain to be taken

²⁰⁰ Article 43a of Regulation 515/97

²⁰¹ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 272

²⁰² Article 4 of Regulation 515/97 et seq. Apart from the general obligations of the requested authority to transmit information enabling the other authority to ensure compliance with the customs legislation (Article 4), to transmit any attestation, document or certified true copy of a document (Article 5), or make available any information in its possession (Article 8), there are a number of other obligations. For example, the requested authority should notify the addressee or have it notified of all instruments or decisions which emanate from the administrative authorities, while observing the rules in force in the Member State in which it is based (Article 6); should keep a special watch on persons, on places where the goods are stored, on the movement of those goods and on the means of transport used (Article 7); should make the appropriate administrative enquiries concerning breaches of the customs or agricultural legislation (Article 9) etc.

²⁰³ Article 13 of Regulation 515/97 et seq. Apart from the general obligations of the requested authority to provide assistance to the other authority (Article 13) and to communicate any information in its possession, in particular reports and other documents or certified true copies or extracts thereof (Article 14(b)), there are also other obligations. The requested authority should keep the special watch provided for in Article 7 and should immediately send all relevant information concerning breaches of customs or agricultural legislation, and in particular concerning the goods involved and new ways and means of carrying out operations that constitute or appear to constitute a breach (Article 15(1)).

²⁰⁴ Article 12 (in case of request) and Article 16 (in case of spontaneous assistance) of Regulation 515/97. However, they cannot be included in judicial proceedings if explicitly stated by the requested authority at the time of communication of the information.

²⁰⁵ This stems from Article 9(2) of Regulation 515/97, stating in particular that: "Administrative enquiries shall at all times be carried out by staff of the requested authority. The applicant authority's staff may not, of their own initiative, assume powers of inspection conferred on officials of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out." See also Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 273

²⁰⁶ For example, Article 17(1), 18(1) of Regulation 515/97

²⁰⁷ For example, Article 17(2), 18(4) of Regulation 515/97

²⁰⁸ Armella, S.: EU Customs Code (Bocconi University Press 2017), p. 275. See also Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the

by the “national law enforcement officers”,²⁰⁹ including the customs authorities. Finally, it should be mentioned that the exchanged information under mutual assistance on customs matters is contained in electronic databases, which are constantly updated.²¹⁰ In fact, without implementing the necessary IT measures, Member States would not meet the standards set by the Commission, the WCO and the WTO.²¹¹ The central database for customs cooperation²¹² could be accessed in each Member State and from the Commission.²¹³

4.1.3.2 Customs cooperation with non-EU authorities

As already mentioned, EU customs authorities may also cooperate with authorities from non-EU (third) countries. International customs cooperation has been recognised as a priority by the Revised Kyoto Convention²¹⁴ and WTO’s Trade Facilitation Agreement,²¹⁵ and has also been promoted by recent initiatives of the WCO.²¹⁶ Moreover, the EU and the Member States themselves have concluded international agreements for mutual administrative cooperation in customs matters with various third countries.²¹⁷ These agreements are the main precondition for application of the relevant provisions of Regulation 515/97 for cooperation with third countries.²¹⁸ Such cooperation can consist of exchange of information²¹⁹ or other actions²²⁰ and can take the form of assistance upon request (by a Member State or by the Commission) or spontaneous assistance.²²¹ The Commission can also organise EU missions for administrative and investigative cooperation in third countries, in coordination and close cooperation with the customs authorities of the Member States.²²² Both the information obtained

European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 and description of Operation OCTOPUS in Section 3.2.2

²⁰⁹ European Parliament, Working Document on Investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, 2018, p. 3

²¹⁰ Customs Information System (‘CIS’) (Article 23 of Regulation 515/97 et seq); Customs files identification database (‘FIDE’) (Article 41a of Regulation 515/97 et seq); Container Status Messages (‘CSM directory’) (Article 18a(4) of Regulation 515/97 et seq); Con Traffic (a system that includes information on the movement of the global container traffic)

²¹¹ Antov, M.: The role of information technologies in the development of customs control in the Republic of Bulgaria, *World Customs Journal* Volume 11, Number 2, September 2017, p. 107

²¹² The aim of this database – CIS – is “to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation by making information available more rapidly and thereby increasing the effectiveness of the cooperation and control procedures of the competent authorities” (Article 23(2) of Regulation 515/97)

²¹³ Article 29 of Regulation 515/97

²¹⁴ Standard 6.7, General Annex/Chapter 6 of the Revised Kyoto Convention

²¹⁵ Article 12 of the WTO Trade Facilitation Agreement, entered into force in 2017

²¹⁶ WCO, SAFE framework of Standards to Secure and Facilitate Global Trade, p. 6

²¹⁷ Armella, S.: *EU Customs Code* (Bocconi University Press 2017), p. 278 and 280

²¹⁸ Article 19 et seq of Regulation 515/97

²¹⁹ Also acknowledged by the CJEU in Judgment of 15 December 2011, *Afasia Knits Deutschland* (C-409/10, ECR 2011 p. I-13331) ECLI:EU:C:2011:843, para. 31 et seq

²²⁰ For example, mutual notifications of customs value, tariff classifications, origin; implementation of prohibitions or restrictions; surveillance of persons, premises, means of transport; mutual assistance in confiscating, mobilising or seizing goods and collection of customs duties etc. See Armella, S.: *EU Customs Code* (Bocconi University Press 2017), p. 279.

²²¹ Armella, S.: *EU Customs Code* (Bocconi University Press 2017), p. 279

²²² Article 20 of Regulation 515/97

through such missions and the one transmitted by non-EU customs authorities can be used as evidence in administrative and judicial proceedings in the Member State of the requesting authority.²²³

4.2 Current VAT controls

4.2.1 General framework

Customs authorities are the ones that are responsible for collecting import VAT. The means they use to ensure compliance with the VAT legislation are no different from the aforementioned ways of carrying out customs controls.

Tax authorities are also involved in import VAT controls. Although not explicitly provided in the legislation, the Commission has indicated that, in the context of e-commerce, tax authorities carry out VAT controls by mainly relying on preventive measures, general auditing and control procedures.²²⁴ Tax authorities occasionally “use technological tools, such as web trawling and data analytics, and the collection of additional information from other businesses (e.g. account holders, financial institutions or postal operators)”.²²⁵ In particular, when dealing with low-value consignments originating in third countries, tax authorities primarily resort to sampling and risk profiling.²²⁶ Some tax authorities perform risk based controls that are carried out in a designated import hub, to which low-value consignments are directed.²²⁷

4.2.2 Administrative cooperation in VAT

For the purposes of import VAT controls, both customs and tax authorities work in administrative cooperation under the rules of Regulation 904/2010. In fact, even the WCO has called for close cooperation between customs and tax authorities, in particular, to face the challenges raised by large volumes of low-value consignments and cross-border e-commerce shipments.²²⁸ Similar to customs controls, the VAT controls can also take place within the Union or with non-EU competent authorities.

²²³ Article 21 of Regulation 515/97

²²⁴ European Commission, VAT Aspects of Cross-border E-Commerce – Options for Modernization, Final report 2015, p. 80

²²⁵ Ibid.

²²⁶ Ibid., p. 64

²²⁷ Ibid.

²²⁸ WCO Cross-Border E-Commerce Framework of Standards, p. 13. General cooperation between customs authorities and other cross-border regulatory agencies is provided as a concept in the Revised Kyoto Convention and the SAFE Framework of standards and Coordinated Border Management. See WCO, Immediate Release Guidelines, p. 13

4.2.2.1 VAT cooperation within the EU

Three EU cooperation tools under Regulation 904/2010 are of particular relevance for the purposes of the thesis and need to be discussed in detail.

4.2.2.1.1 Exchange of information

The exchange of information, as pointed out by the ECA, is crucial for collecting VAT²²⁹ and could take two forms – upon request²³⁰ and without prior request.²³¹ The exchange which is done without prior request, could either be automatic²³² or spontaneous.²³³ Normally, the exchange of information should be carried out by using electronic means as far as possible.²³⁴ The request for exchange of information “may contain a reasoned request for a specific administrative enquiry”,²³⁵ which by definition includes all controls, checks and related actions to ensure compliance with the VAT legislation.²³⁶

4.2.2.1.2 Simultaneous control

Under Regulation 904/2010, Member States can conduct simultaneous (multilateral) controls,²³⁷ if they consider it more effective than controls carried out by only one Member State.²³⁸ Simultaneous control is important for the effective monitoring of VAT in the context of cross-border transactions.²³⁹ Regulation 904/2010 lays down rules on how simultaneous control is initiated and what are the necessary requirements.²⁴⁰ Moreover, Regulation 2018/1541 brought an important change to

²²⁹ ECA Special Report no 12/2019, p. 18

²³⁰ Article 7 et seq of Regulation 904/2010. The requested authority has the general obligation to “communicate any pertinent information it obtains or has in its possession as well as the results of administrative enquiries, in the form of reports, statements and any other documents, or certified true copies or extracts thereof.” (Article 9(1))

²³¹ Article 13 et seq of Regulation 904/2010. Member States are obliged to forward information without prior request in the following three situations: “(a) where taxation is deemed to take place in the Member State of destination and the information provided by the Member State of origin is necessary for the effectiveness of the control system of the Member State of destination; (b) where a Member State has grounds to believe that a breach of VAT legislation has been committed or is likely to have been committed in the other Member State; (c) where there is a risk of tax loss in the other Member State.” (Article 13(1))

²³² Article 14 of Regulation 904/2010. Automatic exchange requires determination of the categories of information to be exchanged, the frequency of the automatic exchange and the necessary practical arrangements. (Article 14(1))

²³³ Article 15 of Regulation 904/2010. Any relevant information not forwarded automatically may be sent to another competent authority if the sending authority considers that useful.

²³⁴ Article 51 of Regulation 904/2010

²³⁵ Article 7(4) of Regulation 904/2010

²³⁶ Article 2(k) of Regulation 904/2010

²³⁷ Article 2(r) of Regulation 904/2010 defines “simultaneous control” as “coordinated checks on the tax situation of a taxable person or related taxable persons, organised by two or more participating Member States with common or complementary interests.”

²³⁸ Article 29 of Regulation 904/2010

²³⁹ Recital 15 of Regulation 904/2010

²⁴⁰ Article 30 of Regulation 904/2010. For example, the Member State seeking to initiate simultaneous control should identify independently the taxable persons which it intends to propose for such control. It should also

Regulation 904/2010 by allowing Member States to carry out joint audits.²⁴¹ Where the competent authorities of at least two Member States consider that an administrative enquiry is required and submit a common reasoned request to a third Member State, containing indications or evidence of risks of VAT evasion or fraud, the requested authority is obliged (with certain exceptions) to participate in the audit.²⁴²

4.2.2.1.3 Eurofisc

The Eurofisc decentralised²⁴³ network is a cooperation tool, aimed at assisting tax and customs officials in exchanging, processing and analysing targeted information of cross-border VAT fraud and coordinating the follow-up process.²⁴⁴ Eurofisc is an early-warning system²⁴⁵ via which the authorities communicate regarding suspicious activities, which were detected through risk analysis carried out in their Member States.²⁴⁶ The network currently covers five working fields, each dealing with a different type of fraud.²⁴⁷ Of relevance for this thesis are Working Field 3 on the abuse of CP42, Working Field 4 “VAT Observatory”²⁴⁸ and, especially, Working Field 5 on e-commerce. Although all Member States take part in Eurofisc, they can decide in which working fields they would like to participate.²⁴⁹

4.2.2.2 VAT cooperation with non-EU authorities

Regulation 904/2010 provides that if a competent authority of a Member State receives from a third country information of interest for other Member States, it may pass it on to that other Member States, as long as this is permitted by the assistance arrangements with the third country.²⁵⁰ Reciprocally, the competent authorities of the Member States may also communicate information to a third country, but only under certain conditions.²⁵¹ Information could be also exchanged under

notify the Member State about it and provide a reasoned opinion, specifying the time limits during which the simultaneous control should be conducted (Article 30(1)).

²⁴¹ Recital 7 of Regulation 2018/1541 stipulates the following: “In order to strengthen the capacity of tax authorities to check cross-border supplies, there should be administrative enquiries carried out jointly enabling officials from two or more Member States to form a single team and actively take part in an administrative enquiry carried out jointly.” As a consequence, Articles 7(4a) and 28(2a) were inserted in Regulation 904/2010.

²⁴² Article 7(4a) of Regulation 904/2010. See also ECA Special Report no 12/2019, p. 25

²⁴³ It does not have a legal personality.

²⁴⁴ Article 33(1) of Regulation 904/2010

²⁴⁵ Article 33(2) of Regulation 904/2010

²⁴⁶ Sokanovic, L., Missing trader fraud as part of organised crime in the EU, Economic and Social Development, 22nd International Scientific Conference on Economic and Social Development – The Legal Challenges of Modern World, Book of Proceedings, 2017, p. 163 and 164.

²⁴⁷ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 34

²⁴⁸ Working Field 4 “identifies and examines new risks, trends, and fraud developments; it does not proceed to the exchange of data on specific economic operators”. See European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 34

²⁴⁹ European Parliament, Eurofisc, TAX3 - Special committee on financial crimes, tax evasion and tax avoidance, Hearing on “VAT fraud”, p. 1

²⁵⁰ Article 50(1) of Regulation 904/2010

²⁵¹ Article 50(2) of Regulation 904/2010. The conditions are “(a) the competent authority of the Member State from which the information originates has consented to that communication; and (b) the third country concerned has given an undertaking to provide the cooperation required to gather evidence of the irregular nature of transactions which appear to contravene VAT legislation.”

multilateral international instruments, such as the OECD's Convention on Mutual Administrative Assistance.²⁵²

4.3 Benchmark test of current control mechanisms

In the following paragraphs, the controls discussed above will be assessed against the principles of neutrality, effectiveness, simplicity and prohibition of fraud.

4.3.1 Consistency with principle of neutrality

In order to understand the compatibility of the current VAT and customs control regime with the principle of neutrality, assessment should be made in the light of the principle's main aspects – economic (system neutrality) and legal (legal neutrality/neutrality of competition).²⁵³ Both elements are covered by the concept of 'external neutrality',²⁵⁴ which is pivotal for the importation of goods into the EU. The issues at odds with neutrality, which are discussed below, are reinforced by the differences in the control mechanisms applied in the Member States.²⁵⁵

'External neutrality' requires that the VAT applied on all imported goods should be equal to the VAT on all supplies within the Union.²⁵⁶ The current *de minimis* regime is incompatible with this requirement, as low-value goods remain untaxed upon importation and upon consumption. Non-taxation is contrary, in particular, to **system neutrality**.²⁵⁷ It should be noted that having goods that are to be consumed in the EU not taxed at all, also compromises the destination principle,²⁵⁸ which is essential for the legal nature of VAT.²⁵⁹

On the same note, OECD highlights that low-value consignment regimes in the context of e-commerce stimulate suppliers to "locate or relocate to an offshore jurisdiction in order to sell their low value goods free of VAT."²⁶⁰ Moreover, businesses tend to choose Member States of importation with domestic legislations that are more prone to exploitation, in order to (illegally) benefit the low-value consignment exemption. Such influence on the business decisions further breaches the system neutrality principle, pursuant to which EU VAT law should not create incentive for businesses to concentrate their operations in the supply chain.²⁶¹

²⁵² OECD, The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol

²⁵³ See Section 2.2.1

²⁵⁴ Ibid.

²⁵⁵ ECA Special Report no 19/2017, p. 36. The ECA refers only to customs controls, but there is no reason for this conclusion not to apply also to VAT controls.

²⁵⁶ Terra, B.J.M. and Kajus, J.: Introduction to European VAT (Recast), Commentaries on European VAT Directives, (IBFD 2018), p. 132

²⁵⁷ See Section 2.2.1

²⁵⁸ The 'destination principle' provides that goods are taxed with the VAT rate applicable in the Member State of consumption. See ECA Special Report no 12/2019, p. 9

²⁵⁹ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: Fundamentals of EU VAT Law (Kluwer Law International 2016), p. 508

²⁶⁰ OECD, Addressing the Tax Challenges of the Digital Economy, BEPS Action 1: Final report 2015, p. 120

²⁶¹ See Section 2.2.1

In addition, contrary to Directive 2009/132/EC²⁶² and the exceptions provided therein,²⁶³ the low-value consignment rules are highly likely to give competitive advantage to non-EU suppliers over EU suppliers. This is due to the fact that non-EU suppliers do not have to register for VAT purposes and EU suppliers have to generally apply VAT on each supply of goods taking place within the EU. Moreover, in the cases where non-EU suppliers have to charge VAT, they can further reduce their liability through undervaluation and “with very little risk of being caught”.²⁶⁴ Overall, not applying VAT on goods originating in third countries would result in the non-EU suppliers becoming more attractive to EU consumers, especially to those situated in Member States bordering with third countries.²⁶⁵ Placing EU suppliers in disadvantageous position jeopardizes ‘external neutrality’,²⁶⁶ in particular with respect to **neutrality of competition**.

4.3.2 Consistency with principle of effectiveness

First of all, in order for the VAT and customs controls to be considered effective, they have to be **in line with the applicable international standards**. Such are the Immediate Release Guidelines, which were developed by the WCO precisely to “enable Customs to combine immediate release with relevant and appropriate controls”.²⁶⁷ In its recent report, the ECA found that the current EU controls follow the Guidelines.²⁶⁸ On the other hand, the ECA also discovered that the authorities are not provided with enough explanations on how to implement the common financial risk criteria and standards, in the light of the indicators set by the WCO.²⁶⁹

The ECA further flagged that Member States **exchange insufficient information** on e-commerce among each other²⁷⁰ and with third countries,²⁷¹ both in tax and in customs matters. Similarly, in a study from 2015, the Commission found that “there is room for improvement, such as better use of administrative cooperation between EU Member States and with non-EU countries.”²⁷² Although back then, the tax and customs authorities reported that they are starting to make use of the administrative cooperation tools with non-EU customs authorities, including those under the OECD’s Convention on Mutual Administrative Assistance,²⁷³ this practice was not maintained in the following years (see the table below).

²⁶² Recital 5 of Directive 2009/132/EC provides that the “exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the market.”

²⁶³ Article 24 of Directive 2009/132/EC excludes excise products from the low-value consignment exemption and Article 23 of Directive 2009/132/EC provides that Member States may opt to exclude from the exemption goods which have been imported on mail order.

²⁶⁴ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

²⁶⁵ European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 51-56

²⁶⁶ Van Doesum, A. J., Van Kesteren, H.W.M. and Van Norden, G.J.: Fundamentals of EU VAT Law (Kluwer Law International 2016), p. 508

²⁶⁷ WCO Immediate Release Guidelines, paragraph 1.3

²⁶⁸ ECA Special Report no 12/2019, p. 41

²⁶⁹ Ibid.

²⁷⁰ Ibid., p. 23

²⁷¹ Ibid., p. 17

²⁷² European Commission, VAT Aspects of Cross-border E-Commerce – Options for Modernization, Final report 2015, p. 80

²⁷³ Ibid., p. 64-65

Table 2: Exchanges of information related to e-commerce in the Member States examined by the ECA²⁷⁴

Total exchanges of info under administrative cooperation (AC) for e-commerce						
Member State	Ireland	Sweden	Netherlands	Austria	Germany	Total
Period	1.1.2015 to 31.3.2018	1.1.2015 to 31.3.2018	1.1.2015 to 31.3.2018	1.1.2015 to 31.5.2018	1.1.2015 to 30.9.2018	
Requests info sent	3	8	NK	146	25	182
Requests info received	11	1	3	0	28	43
Spontaneous info sent	NK	NK	26	NK	31	57
Spontaneous info received	NK	14	NK	8	2	24
Total exchanges of info	14	23	29	154	86	306
Legend:						
NK = Not known						

In some cases, the lack of cooperation was due to deficiencies in the e-forms used,²⁷⁵ while in others - due to reluctance caused by the low chances of receiving a reply from third countries.²⁷⁶ Currently, all Member States have signed the OECD's Convention on Mutual Administrative Assistance, but none of them appears to have used it for the purposes of e-commerce.²⁷⁷ The ECA also discovered that Member States do not consider useful exchanging information through Eurofisc, Working Field 5 on e-commerce, and do not provide feedback on the network, although they are expected to do so.²⁷⁸ According to the Court of Auditors, in December 2017, 480 fraud signals were shared by four Member States under this working field, however, feedback was provided only to one of these signals.²⁷⁹ It should be mentioned that an attempt to improve exchanging of information and detecting of fraudsters through Eurofisc was made with the introduction of the transactional network analysis (TNA),²⁸⁰ nevertheless, for the moment this new tool is only available for combatting intra-Community VAT fraud.²⁸¹

Another effectiveness issue worth mentioning are the **weaknesses of compliance controls** on cross-border e-commerce. When testing several Member States, the ECA flagged this problem with respect to both tax²⁸² and customs²⁸³ authorities. Moreover, the Court of Auditors noticed that the simultaneous controls carried out by these States under Regulation 904/2010, including joint audits, are ineffective²⁸⁴ and insufficient.²⁸⁵ The Commission raised similar concerns regarding compliance controls, along with the need for "further development and use of technological tools" for import procedures.²⁸⁶ In fact, it seems that the tax and customs authorities themselves consider that "the existing measures are not sufficiently effective".²⁸⁷ The Commission further established that the effectiveness of compliance controls is hampered by the lack of necessary resources for the

²⁷⁴ ECA Special Report no 12/2019, p. 23

²⁷⁵ Ibid.

²⁷⁶ As it is the case, for example, with China. See ECA Special Report no 19/2017, p. 28

²⁷⁷ ECA Special Report no 12/2019, p. 17

²⁷⁸ Ibid., p. 25

²⁷⁹ Ibid.

²⁸⁰ The purposes of the TNA is to extract unknown and potentially useful data from known data and to store it for later processing. The extracted implicit data, being previously illegible, is made legible for Eurofisc members.

²⁸¹ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 34

²⁸² ECA Special Report no 12/2019., p. 26

²⁸³ Ibid., p. 29

²⁸⁴ Ibid., p. 24

²⁸⁵ "[...]since 2014, 284 multilateral controls have been carried out, of which six can be considered as more specifically related to e-commerce, involving VAT and direct taxes". See ECA Special Report no 12/2019, p. 24

²⁸⁶ European Commission, VAT Aspects of Cross-border E-Commerce – Options for Modernization, Final report 2015, p. 80

²⁸⁷ Ibid., p. 64-65

administration,²⁸⁸ although when interviewed, the authorities reported that “that extra resources directed towards identifying non-compliance would have a limited effect on reducing or preventing non-compliance where sellers are from non-EU countries”.²⁸⁹ In addition, what is worth noting is that the lack of adequate compliance controls results in reducing the effectiveness of collection of VAT²⁹⁰ and customs duties. When studying the matter, scholars have identified significant differences in levying VAT and import duties depending on the type of carrier performing the shipment.²⁹¹

Furthermore, some practical **loopholes in the risk management framework** of customs controls have been identified.²⁹² For instance, not carrying out pre-arrival controls,²⁹³ customs officers overriding controls suggested by the risk management system,²⁹⁴ post-release controls not being conducted in the case of CP42²⁹⁵ and insufficient checks of low-value consignments.²⁹⁶

Finally, it should be noted that frequency and effectiveness of the different types of customs controls are assessed in the Customs Union Performance yearly report.²⁹⁷ The challenges of e-commerce have been explicitly taken into account in the latest report.²⁹⁸

4.3.3 Consistency with principle of simplicity

It is important to highlight that the current low-value consignment regime is considered exposed to non-compliance, precisely because of its **general complexity**.²⁹⁹

On the other hand, it could also be argued that since goods with intrinsic value of up to €22 may now be considered declared only with their presentation,³⁰⁰ the current rules reduce the administrative burden for tax and customs authorities. Such opinion was dismissed by the Commission, who concluded that the “current **administrative burden** associated with VAT on cross-border online transactions may represent a barrier to the growth of e-commerce in the EU.”³⁰¹

²⁸⁸ Ibid., p. 64

²⁸⁹ Ibid., p. 64-65

²⁹⁰ OECD recognised this as one of the major challenges of the digital economy. See OECD, *Addressing the Tax Challenges of the Digital Economy*, BEPS Action 1: Final report 2015, p. 16

²⁹¹ Basalisco, B., Wahl, J. and Okholm, H. *E-commerce Imports Into Europe: VAT and Customs Treatment*, Copenhagen Economics, 2016, p. 3-4

²⁹² ECA Special Report no 19/2017, p. 47

²⁹³ Ibid., p. 48

²⁹⁴ Ibid.

²⁹⁵ Ibid., p. 51

²⁹⁶ Ibid., p. 52

²⁹⁷ Ibid., p. 47

²⁹⁸ European Commission, DG Taxation and Customs Union, *Annual Activity Report 2019*

²⁹⁹ European Commission, *Impact Assessment, Accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers and Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud*, SWD(2018) 488 final, p. 21

³⁰⁰ Article 141(5) of the UCC DA

³⁰¹ European Commission, *VAT Aspects of Cross-border E-Commerce – Options for Modernization*, Final report 2015, p. 80

4.3.4 Consistency with principle of prohibition of fraud

When conducting a study in 2015, the Commission established that **mis-declaration** and the adverse effect associated with it, are caused by the low frequency of checks performed by the customs authorities.³⁰² In fact, there are significant differences in the frequency of verifications carried out by the customs offices in the various Member States (see the table below).³⁰³

Table 3: Estimated verification ratio based on practical experience by courier firms and postal services, 2015³⁰⁴

Country codes	Estimated ratio of (paper and physical) verification checks performed by the customs administration	Ratio of (paper and physical) verification checks indicated by the customs administrations questioned for the purposes of the Commission's study
AT	4,5%	
BE	2 - 15%	2%
BG	10 - 15%	
HR	N/A	
CY	N/A	
CZ	3 - 6%	N/A
DK	2,0%	N/A
EE	N/A	
FI	2,0%	
FR	1,8%	
DE	5,0%	N/A
EL	N/A	N/A
HU	5 - 10%	
IE	N/A	
IT	2,5%	
LV	1 - 2%	
LT	5 - 10%	
LU	5 - 10 %	
MT	3,0%	
NL	2,0%	1,2%
PL	5,0%	
PT	7 - 10 %	
RO	N/A	N/A
ES	1,0%	
SK	6,5%	
SI	N/A	
SE	N/A	

³⁰² European Commission, Assessment of the application and impact of the VAT exemption for importation of small consignments, Specific Contract No7 TAXUD/2013/DE/334, Final report 2015, p. 23

³⁰³ Ibid.

³⁰⁴ Ibid., Annex J. Originally, the table contains also data on the UK, which has been excluded for the purposes of the thesis, since UK departed from the EU on 31 January 2020.

In 2017, the ECA also recognised that insufficient verifications with respect to low-value consignments³⁰⁵ along with lack of uniform application of the controls³⁰⁶ lead to more cases of mis-declaration. Therefore, the ECA suggested a number of useful practices³⁰⁷ for the Member States to increase the level of customs controls³⁰⁷ and tackle the fraud. However, in 2019, it was established that they were only partially taken on board.³⁰⁸

Currently, although some Member States carry out ex-post controls to verify compliance with the low-value consignment rules, “the customs electronic clearance systems are not able to prevent the importation of goods that are ineligible” for relief.³⁰⁹ What further raises concerns is that some courier companies, which often hold licenses for authorised economic operators (‘AEOs’)³¹⁰, also engage in fraud with the low-value consignment regime, despite their obligation to have internal controls that should prevent and detect irregularities.³¹¹

Regarding the **abuse of CP 42**, the main factor, which the scheme relies on, is the insufficient communication and administrative cooperation between the customs authorities of the Member State of importation and the Member State of destination. Normally, when the abuse of CP42 is combined with undervaluation, the authorities of the Member State of importation should request additional information on the actual value paid by the final recipient, from the authorities of the Member States of destination.³¹² However, this could be “time consuming or unsuccessful because the declared acquirer can be different to the final recipient of the goods or be a missing trader³¹³”.³¹⁴

The lack of communication proves particularly problematic in the cases where the final recipient appoints a customs representative³¹⁵ in the Member State of importation to carry out the import under CP 42. Very often, the customs authorities of the Member State of importation do not request from the authorities of the Member State of destination information, such as accounting records, bank accounts, etc. of the final recipient.³¹⁶ This means that the customs authorities of the Member State of destination are not aware of the imports made, as there is no obligation for the authorities of the Member State of importation to notify them.³¹⁷ Therefore, as recognised by both the ECA and the

³⁰⁵ ECA Special Report no 19/2017, p. 51

³⁰⁶ *Ibid.*, p. 36 and 37

³⁰⁷ To “(b)introduce checks in their customs electronic release systems to block the acceptance of import declarations applying for a duty relief for low-value consignments of goods with declared intrinsic value higher than €150 or for commercial consignments (B2C) declared as gifts (P2P); (c) verify ex-post traders’ compliance with customs duty relief for low-value consignments, including authorised economic operators (AEOs); (d) set-up investigation plans to tackle abuse of these reliefs on e-commerce trade of goods with non-EU countries”. See ECA Special Report no 19/2017, Recommendation 9, p. 58

³⁰⁸ ECA Special Report no 12/2019, p. 31-32

³⁰⁹ *Ibid.*

³¹⁰ “An AEO is a reliable trader who benefits from fewer physical and document-based controls at clearance”. This definition is provided in ECA Special Report no 19/2017, p. 49. An AEO has to meet the criteria listed in Article 39 of the UCC.

³¹¹ ECA Special Report no 12/2019, p. 32

³¹² ECA Special Report no 19/2017, p. 38

³¹³ “A trader registered for VAT purposes who, potentially with a fraudulent interest, acquires or purports to acquire goods or services without paying VAT and supplies them with VAT, but does not remit the VAT collected to the national tax authority”. The definition is provided in ECA Special Report no 19/2017, Glossary, p. 58

³¹⁴ ECA Special Report no 19/2017, p. 38

³¹⁵ Pursuant to Article 5(6) of the UCC, ‘customs representative’ is “any person appointed by another person to carry out the acts and formalities required under the customs legislation in his or her dealings with customs authorities”

³¹⁶ ECA Special Report no 19/2017, p. 51

³¹⁷ *Ibid.*

Commission, any controls after release of the goods, aimed at countering abuse of CP 42, would be difficult to perform.³¹⁸

Based on the above and taking into consideration what has been discussed in Chapter 3, the current regime seems prone to exploitation by fraudsters, **thus incompatible with the principle of prohibition of fraud**. Moreover, it can be said that the existing fraud not only causes economic losses and undermines the cohesion and coherence of the tax systems, but also creates a general feeling of unfairness in the compliant businesses and therefore, encourages them to engage in fraud.³¹⁹

³¹⁸ Ibid.

³¹⁹ De la Feria, R.: Tax fraud and the rule of law, Oxford University Center for Business Taxation, Working Paper 18/02, 2018

5 Chapter Five – Upcoming changes of VAT and customs controls in e-commerce

5.1 General background of the VAT e-commerce package

The growing number of e-commerce transactions calls Member States to adapt their existing control mechanisms “to strike the right balance between trade facilitation/simplification and protecting the EU’s financial interests”.³²⁰ Such balance is among the main objectives of the customs authorities’ new mission³²¹ and is provided in the standards set by recent WCO initiatives on e-commerce.³²² Indeed, Member States should create a “flexible combination of different controls”,³²³ in order to properly counter fraudsters and at the same time, prevent customs authorities from obstructing the development of the e-commerce economic models. For that reason, and as a part of the Digital Single Market Strategy, the Commission has put forward the VAT e-commerce package, which was adopted on 5 December 2017.³²⁴

Undoubtedly, one of the most important changes introduced by the package is the creation of a new import regime, which abolishes the exemption for low-value consignments and creates liability for new actors. Since the customs duty’s rules remain unimpacted, the new procedure is further discussed mainly with respect to VAT controls.

5.2 New import regime

The new import regime is established by Directive 2017/2455,³²⁵ in force as of 1 July 2021,³²⁶ which provides that the existing low-value consignment regime should be adapted “taking into account the principle of taxation at destination, the need to protect Member States’ tax revenue, to create a level playing field for the businesses concerned and to minimise the burdens on them.”³²⁷ Indeed, during the preparatory works, the Commission concluded that the current rules are too complex, which

³²⁰ European Commission, 30th Annual Report on the Protection of the European Union’s financial interests, Fight against fraud, 2018, p. 47

³²¹ Article 3(a) and (d) of the UCC

³²² For instance according to Standard 4 of the WCO Cross-Border E-Commerce Framework of Standards, customs authorities “should use data analytics and screening methodologies in conjunction with non-intrusive inspection equipment, across all modes of transportation and operators, as part of risk management, with a view to facilitating cross-border E-Commerce flows and strengthening Customs controls.” See WCO Cross-Border E-Commerce Framework of Standards, p. 12

³²³ European Commission, 30th Annual Report on the Protection of the European Union’s financial interests, Fight against fraud, 2018, p. 47

³²⁴ Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 202

³²⁵ Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods

³²⁶ Council Decision (EU) 2020/1109 of 20 July 2020 amending Directives (EU) 2017/2455 and (EU) 2019/1995 as regards the dates of transposition and application in response to the COVID-19 pandemic

³²⁷ Recital 6 of Directive 2017/2455

makes them open to abuse, providing competitive advantage to non-EU suppliers and creating difficulties for the EU consumers to fully understand where the goods are coming from.³²⁸

5.2.1 Abolition of the low-value consignment exemption and fall back procedure

As a fundamental step in the creation of the new regime, Directive 2017/2455 abolishes the low-value consignment exemption³²⁹ – a change that has been widely discussed by the academia³³⁰ long before its adoption. Some scholars have even suggested that instead of abolishing the exemption, Member States should use the existing abuse of law doctrine³³¹ or simply exclude from the exemption grouped consignments of low-value goods, which are above the threshold.³³²

Directive 2017/2455 also includes in the VAT Directive a definition of ‘distance sale of goods imported from third territories or third countries’, and the conditions for such sale to occur.³³³ Wherever the sale covers goods not subject to excise duty, which have intrinsic value of up to €150, non-EU suppliers would be allowed (but not required) to register to a One Stop Shop special scheme in one Member State, and to declare and pay the VAT on a monthly basis.³³⁴ One of the conditions to register, is appointing a tax representative in the EU to be held liable for VAT purposes.³³⁵ By presenting the One Stop Shop registration number to customs, the import would be exempt and the VAT will be due in the Member State where the transport ends³³⁶ (see the figure below).

³²⁸ European Commission, Impact assessment Accompanying the document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for cross-border B2C e-Commerce SWD(2016) 379 final, p. 14-15

³²⁹ Article 3 of Directive 2017/2455 repeals Title IV of Directive 2009/132/EC

³³⁰ See on various occasions in Section 5.5

³³¹ According to the CJEU, an abusive practice requires that the transactions concerned result in the accrual of a tax advantage the grant of which would be contrary to the purpose of the provisions of the VAT Directive and it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice. See Judgment of 21 February 2006, *Halifax and others* (C-255/02, ECR 2006 p. I-1609) ECLI:EU:C:2006:121

³³² Van De Leur, M.: Closing a VAT Gap at the EU Border?, European Union, Column, International VAT Monitor November/December 2011, p. 385-386

³³³ New Article 14(4)(2) of the VAT Directive provides that “‘distance sales of goods imported from third territories or third countries’ means supplies of goods dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, from a third territory or third country, to a customer in a Member State, where the following conditions are met:

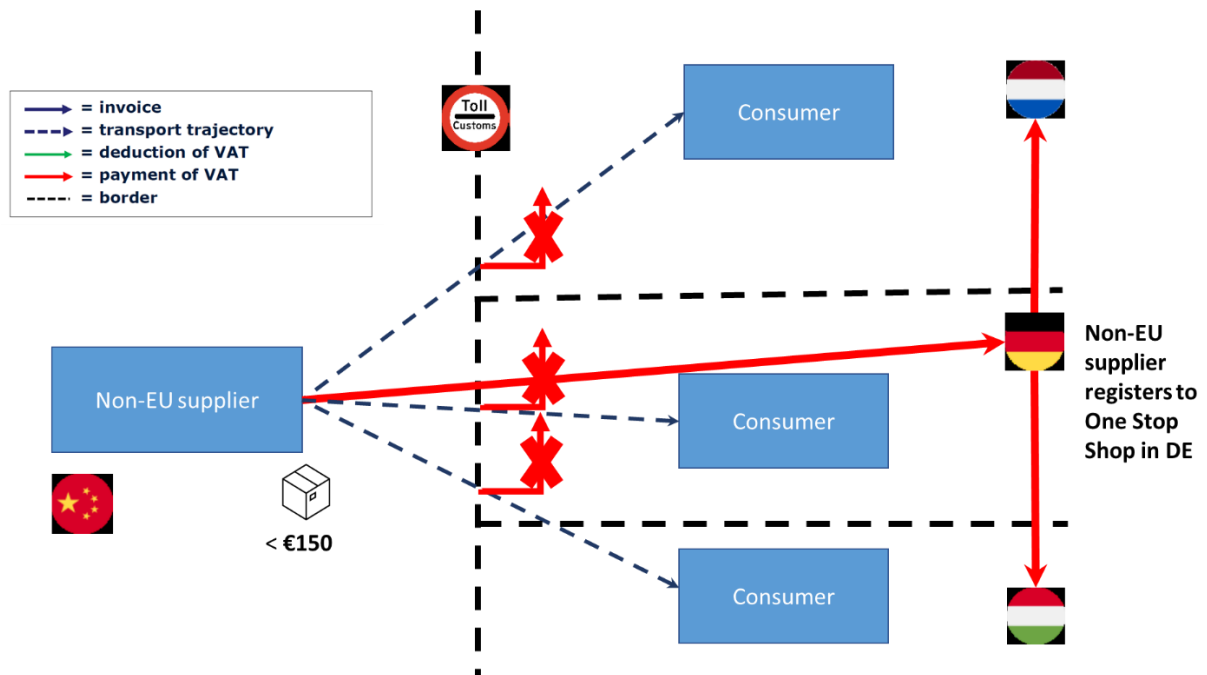
- (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;
- (b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.’;”

³³⁴ New Article 369l et seq of the VAT Directive

³³⁵ New Article 369m of the VAT Directive. See also European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 32

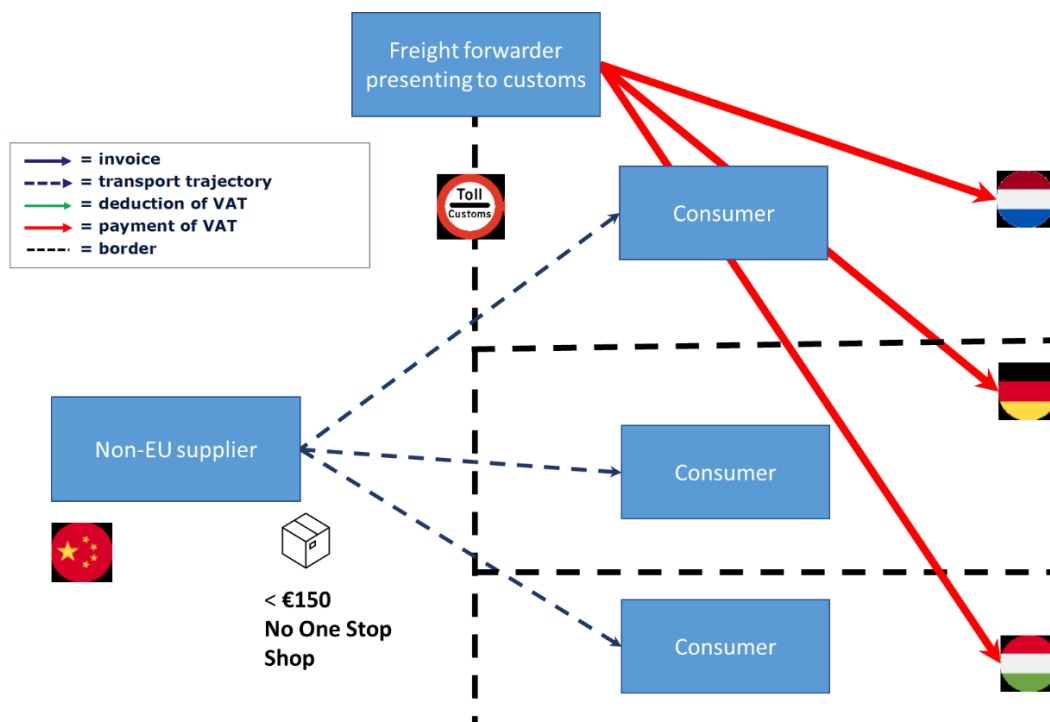
³³⁶ New Article 33(b) and (c); Article 143(1)(ca) of the VAT Directive

Figure 4: New import regime in case of One Stop Shop registration



If the non-EU supplier does not register to the One Stop Shop, the 'person presenting the goods to customs' is considered liable for collecting and remitting VAT in all the Member States where the consumers are located,³³⁷ by rule of a fall back procedure (see the figure below). In practice, the freight forwarder (e.g. postal operator, carrier, transporter) would be considered to be that liable person.³³⁸

Figure 5: New import regime in case of the fall back procedure (freight forwarder liability)



³³⁷ New Article 369y of the VAT Directive

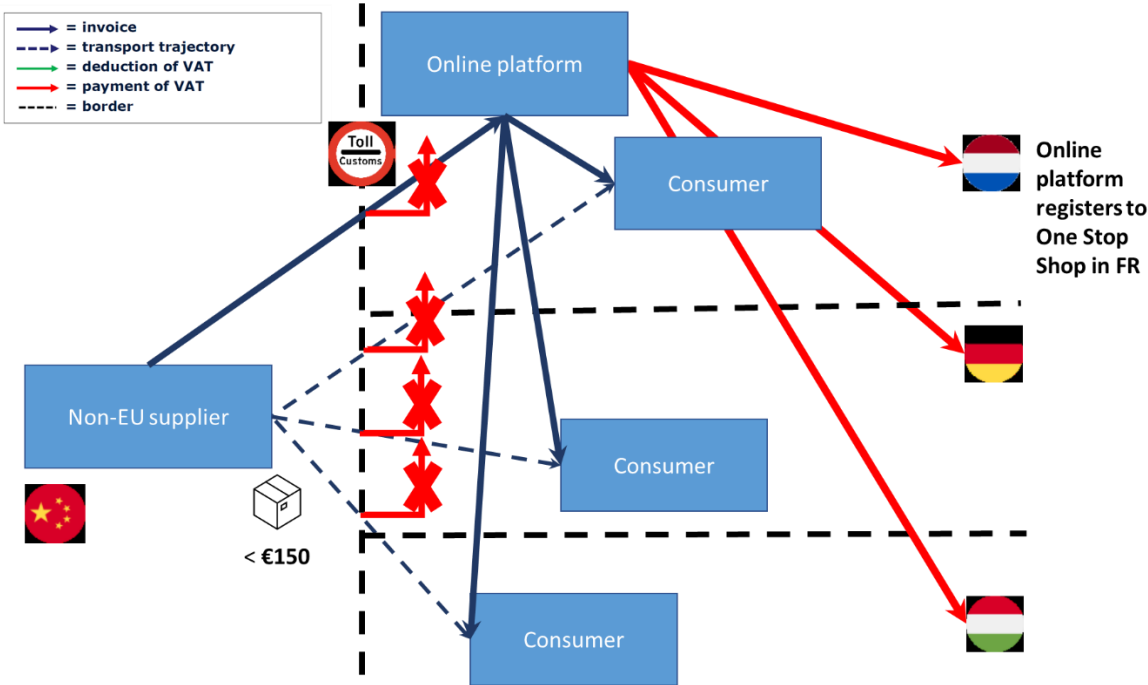
³³⁸ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

The current VAT procedure will remain unchanged for goods above the €150 threshold.³³⁹

5.2.2 Platform liability

Under the new regime, if a distance sale of goods imported from third countries or third territories is facilitated by an online platform (e.g. Amazon, eBay – usually, their EU domains), the platform becomes the deemed importer and supplier to the EU customer³⁴⁰ and should obtain a One Stop Shop number (otherwise, the fall back procedure applies).³⁴¹ The deemed supply from the non-EU supplier to the platform, as well as the imports in the EU, are exempt (see the figure below). Normally, the platform is liable when the payment from the consumer is accepted, although some scholars believe that this procedure may also cover situations where payments are processed directly between supplier and customer and are not received by the platform.³⁴²

Figure 6: New import regime in case of platform facilitation



³³⁹ Ibid.

³⁴⁰ New Article 14a(1) of the VAT Directive states: “Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself”.

³⁴¹ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

³⁴² Merkx, M. and Janssen, A.: A New Weapon in the Fight against E-Commerce VAT Fraud: Information from Payment Service Providers, International VAT Monitor 11/12 2019 (Kluwer Law International 2019), p. 238

5.3 Changes in controls

The new import regime was met with substantial reluctance from the customs authorities.³⁴³ One reason could be that the new rules will require a lot more parcels to be cleared,³⁴⁴ thus increasing the administrative burden and challenging the authorities' capacity. Another reason might be the technological adjustments required by the new regime³⁴⁵ as they are likely to cause problems related to insufficiently adequate telecommunications infrastructure or resources and expertise limitations of the customs authorities.³⁴⁶ In any case, there are several notable changes with respect to VAT and customs controls in the context of e-commerce, which will be discussed in the next paragraphs.

5.3.1 Customs controls changes

The VAT e-commerce package did not significantly amend the control regime from customs perspective. Most importantly, with the entry into force of the new rules, the possibility to declare goods of value up to €22 by simply presenting them to customs authorities will be abolished.³⁴⁷ As a consequence, importers will have to submit a customs declaration "even if there is no obligation to collect VAT on those goods and a relief from customs duty applies".³⁴⁸ This change will be introduced directly in the UCC DA and will come into effect along with Directive 2017/24551 in July 2021.³⁴⁹

5.3.2 VAT controls changes

Due to the fact that distance sale of goods now falls within the scope of the One Stop Shop, it is expected that there will be a considerable increase in the number of transactions to be reported for VAT purposes.³⁵⁰ Furthermore, customs authorities will be required to effectively identify the low-value goods, for which VAT has to be paid under the new import regime.³⁵¹ To tackle these challenges, Regulation 2017/2454³⁵² was adopted to amend Regulation 904/2010, while detailed rules were

³⁴³ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 186

³⁴⁴ European Commission, Impact assessment Accompanying the document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for cross-border B2C e-Commerce SWD(2016) 379 final, p. 31

³⁴⁵ See Section 5.3.3

³⁴⁶ WCO, Kyoto Convention - General Annex Guidelines - Chapter 7 Application of Information and Communication Technology, Version 7 2014, p. 118

³⁴⁷ Article 1 of Commission Delegated Regulation (EU) 2019/1143 of 14 March 2019 amending Delegated Regulation (EU) 2015/2446 as regards the declaration of certain low-value consignments

³⁴⁸ Recital 3 of Delegated Regulation 2019/1143

³⁴⁹ New Article 143a of the UCC DA.

³⁵⁰ Recital 3 of Regulation 2017/2454

³⁵¹ Recital 4 of Regulation 2017/2454

³⁵² Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax

provided in Implementing Regulation 2020/194.³⁵³ As recently stipulated in statutory law, Regulation 2017/2454 will also enter into force on 1 July 2021.³⁵⁴

5.3.2.1 Change I: Exchange of information

One of the main features of the distance sale scheme is that it requires exchange of information and transfer of money between the Member State where a non-EU supplier has registered to One Stop Shop (Member State of identification) and the place of final destination (Member State(s) of consumption).³⁵⁵ To facilitate the process of communicating the information of the VAT return and the VAT payment itself, Regulation 2017/2454 extends the deadline for transmitting such information/amount from the Member State of identification to the Member State(s) of consumption by 10 days.³⁵⁶ As a consequence, the transfer would be able to occur at the latest 20 days after the end of the month during which the return³⁵⁷/payment³⁵⁸ was received by the Member State of identification. In comparison, the already existing special scheme for non-EU suppliers of e-services requires that the VAT return/payment is transmitted at the latest 10 days after the end of the month during which the return³⁵⁹/payment³⁶⁰ was received.

It should also be mentioned that the information transferred under the One Stop Shop scheme should always be sent by using electronic means³⁶¹ and, in particular, the Common Communication Network/Common System Interface ('CCN/CSI').³⁶² Both Directive 2017/2455 and Regulation 2017/2454 require "Member States to adapt their IT system for registration and for declaration and payment of the VAT".³⁶³ The electronic interface is of particular importance for the exchange of certain information, such as exclusion from the One Stop Shop scheme, voluntary cessation or change of the Member State of identification.³⁶⁴ This data should be transmitted in an uniform manner and without delay, so that Member States can monitor the available special schemes and combat fraud.³⁶⁵

³⁵³ Commission Implementing Regulation (EU) 2020/194 of 12 February 2020 laying down detailed rules for the application of Council Regulation (EU) No 904/2010 as regards the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of good

³⁵⁴ Council Regulation (EU) 2020/1108 of 20 July 2020 amending Regulation (EU) 2017/2454 as regards the dates of application in response to the COVID-19 pandemic

³⁵⁵ Recital 2 of Regulation 2017/2454

³⁵⁶ Recital 3 of Regulation 2017/2454. See for instance new Article 47b(2) and 47c(2) of Regulation 904/2010

³⁵⁷ New Article 47d(2) of Regulation 904/2010

³⁵⁸ New Article 47f(1) of Regulation 904/2010

³⁵⁹ Article 45(2) of Regulation 904/2010

³⁶⁰ Article 46(1) of Regulation 904/2010

³⁶¹ New Article 1(1)(4) and Article 47b et seq of Regulation 904/2010

³⁶² Article 3 of Implementing Regulation 2020/194

³⁶³ Recital 16 of Directive 2017/2455 and Recital 8 of Regulation 2017/2454

³⁶⁴ Recital 4 of Implementing Regulation 2020/194. The moment when these events occur and the related obligations are laid down in Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods. This regulation, being part of the VAT e-commerce package, also enters into force on 1 July 2021, following Council Implementing Regulation (EU) 2020/1112 of 20 July 2020 amending Implementing Regulation (EU) 2019/2026 as regards the dates of application in response to the COVID-19 pandemic.

³⁶⁵ Ibid.

5.3.2.2 Change II: Compliance controls

Regulation 2017/2454 introduces certain amendments in terms of compliance controls on transactions and taxable persons, first of which stating that customs authorities will have to receive in advance the identification number under which VAT is paid, so that they could perform electronic verification of the number's validity upon importation.³⁶⁶ Furthermore, the taxable persons may be subject to checks by the Member State of identification and all Member State(s) of consumption.³⁶⁷ The competent authorities may request records³⁶⁸ and carry out administrative enquiries³⁶⁹ on the suppliers or their representatives.

The request for records also stems from Directive 2017/2455, requiring all persons registered to One Stop Shop to keep sufficiently detailed records to enable the tax or customs authorities to verify the correctness of VAT.³⁷⁰ Interestingly, this obligation has been extended to all online platforms facilitating supplies of goods and services to a final consumer in the EU, irrespective if they are registered to the One Shop Stop scheme or not.³⁷¹

In terms of administrative enquiries, it has to be mentioned that, regardless if the enquiry has been conducted upon own decision or upon request from a Member State of consumption, the Member State of identification should inform in advance about the enquiry the competent authorities of all the other Member States.³⁷²

5.4 New control-related initiatives after the VAT e-commerce package

It is fair to say that the ambition of the Commission to counter e-commerce fraud does not end with the VAT e-commerce package. Regulation 2020/283 amending Regulation 904/2010 equips the tax authorities with brand new tools, in particular with respect to VAT controls conducted by the Member State(s) of consumption.³⁷³ Pursuant to the new Regulation, the tax authorities will no longer rely mostly on records held by the business, but will “collect, store and transmit information provided by the payment services providers”, with access for Eurofisc liaison officials “to that information when it is connected to an investigation into suspected VAT fraud or in order to detect VAT fraud”.³⁷⁴ Moreover, a central electronic system of payment information (‘CESOP’) will be established, to which the authorities will transfer all the collected VAT relevant payment information and which will “store, aggregate and analyse [this information], in relation to individual payees”.³⁷⁵ In the same line of reasoning, Directive 2020/284³⁷⁶ amending the VAT Directive was adopted for increasing the cooperation between tax authorities and payment service providers with a view to counter e-

³⁶⁶ Recital 4 of Regulation 2017/2454. See also new Article 47h of Regulation 904/2010

³⁶⁷ Recital 5 of Regulation 2017/2454

³⁶⁸ New Article 47i of Regulation 904/2010

³⁶⁹ New Article 47j of Regulation 904/2010

³⁷⁰ New Article 369zb(3) of the VAT Directive

³⁷¹ New Article 242a of the VAT Directive

³⁷² New Article 47j of Regulation 904/2010

³⁷³ Recital 2 of Regulation 2020/283

³⁷⁴ Recital 5 of Regulation 2020/283

³⁷⁵ Recital 7 of Regulation 2020/283

³⁷⁶ Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers

commerce VAT fraud. Both the Directive and the Regulation will enter into force on 1 January 2024 and it remains to be seen if they will effectively contribute to the fight against e-commerce fraud.

5.5 Benchmark test of upcoming changes

In the next paragraphs, the legislative changes relevant for VAT and customs controls in e-commerce will be assessed against the principles of neutrality, effectiveness, simplicity and prohibition of fraud.

5.5.1 Consistency with principle of neutrality

The Commission introduced the VAT e-commerce package precisely to tackle the anti-competitive rules of the current regime,³⁷⁷ which are incompatible with the legal aspect of the principle of neutrality. In fact, Directive 2017/2455 explicitly provides that avoiding distortion of competition is one of the primary reasons for removing the low-value consignment exemption.³⁷⁸ Nevertheless, some risks still remain. For instance, although **partially creating a level playing field**, the Directive does not abolish the non-commercial low-value exemption for “gifts”, thus not resolving potential competition issues arising from it. Moreover, even under the new regime, non-EU suppliers can still be in advantageous position by undervaluing the goods – an issue that, surprisingly, has not been addressed by the VAT e-commerce package.³⁷⁹

Finally, it should be mentioned that the new import regime will create a possibility for **double taxation when importing goods of intrinsic value exceeding €150**. After the changes brought by Directive 2017/2455, such goods cannot be imported by using the One Shop Stop scheme and do not benefit from the exemption,³⁸⁰ under the assumption that the consumer acts as an importer. Thus, distance sellers of imported goods acting in good faith or their representatives would have to pay VAT upon importation. However, according to the new rules, VAT is also due in the Member State where the transport ends.³⁸¹ Thus, double taxation would occur, which is at odds with system neutrality. Since VAT and customs controls support this regime, they are also considered part of the problem.

5.5.2 Consistency with principle of effectiveness

Overall, it can be said that the **lack of effective compliance controls** is unlikely to be resolved by the VAT e-commerce package.³⁸² In fact, under the new regime, the Member State of identification seems to have little incentive to carry out controls, as the VAT will be ultimately collected in the Member

³⁷⁷ This has been pointed out by the Commission as one of the three “main reasons to act”. The other two are the loss of tax revenue and the high compliance costs for the business. See European Commission, Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final, p. 2

³⁷⁸ Recital 11 of Directive 2017/2455

³⁷⁹ ECA Special Report no 12/2019, p. 43. See also Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

³⁸⁰ New Article 143(1)(ca) of the VAT Directive

³⁸¹ New Article 33(b) of the VAT Directive

³⁸² Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 214

State(s) of consumption.³⁸³ The latter, on the other hand, would have little opportunity to conduct verifications,³⁸⁴ which is reinforced by the fact that controls, in general, are expected to become even more time and resource consuming in the future.³⁸⁵ This conclusion is particularly true on two instances.

First, it is unclear how would customs authorities verify the validity of the One Stop Shop registration number in order to grant exemption. Normally, the number should be included in the customs declaration, since the VAT is due at the end of each month. As pointed out in the doctrine, checking the validity of the number against VIES³⁸⁶ would be cumbersome and relying on automation solutions will be unrealistic, as they are still not in place.³⁸⁷

Second, it cannot be estimated if the authorities would effectively verify whether non-EU suppliers are compliant in their One Stop Shop returns.³⁸⁸ To facilitate the verification process, Regulation 2017/2455 added a new obligation for the Member States to issue listings of imports on monthly basis, as well as value declarations.³⁸⁹ These listings are intended to be used for assessment of the level of compliance through comparison with the information from the One Stop Shop returns.³⁹⁰ However, such comparison would be effective only if the authorities are checking whether the values entered in the import declaration are accurate.³⁹¹ Considering that the authorities would already be busy with the One Stop Shop number validity check, they possibly would not have time to verify the import declarations.³⁹² Moreover, since the declaration and payment of VAT happens on monthly basis, the comparison would be irrelevant in situations where the One Stop Shop return and the customs declaration are filed in different months.³⁹³

Nevertheless, it should be acknowledged that steps towards **more effective VAT-related administrative cooperation** between the authorities have been taken with the changes introduced by Regulation 2017/2454 and the new cooperation mechanisms established by Regulation 2020/283.³⁹⁴ However, they enter into force, respectively, in 2021 and in 2024, therefore it is still unclear whether the Member States' tax and customs authorities will make an actual use of them.

³⁸³ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 20

³⁸⁴ Ibid.

³⁸⁵ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 194

³⁸⁶ VIES (VAT Information Exchange System) is an electronic mean of validating VAT-identification numbers of economic operators registered in the European Union for cross border transactions on goods or services. See European Commission, VIES, FAQ

³⁸⁷ Moreover, they will not be implemented by 2021. See Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

³⁸⁸ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

³⁸⁹ New Article 17(1) of Regulation 904/2010

³⁹⁰ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

³⁹¹ Ibid.

³⁹² Ibid., p. 193

³⁹³ Ibid.

³⁹⁴ See Sections 5.3.2 and 5.4

5.5.3 Consistency with principle of simplicity

Instead of bringing more clarity to the already complex regime, it has been estimated that the VAT e-commerce package will **add to the complexity** by providing different ways of collecting VAT by several actors.³⁹⁵ As of next year, the remitting of VAT will depend not only on the intrinsic value of the goods, but also on the choice of the supplier or the person presenting the goods to customs to register to One Stop Shop.³⁹⁶

In the cases where the supplier has chosen to register to One Stop Shop, it is unclear how long would the verification process of the registration number take and how would this impact the smoothness of the import process.³⁹⁷ In addition, whether or not registered for the special scheme, importers will be always required to submit a customs declaration.³⁹⁸ Thus, it is expected that the VAT e-commerce package will **increase significantly the already existing administrative burden** for both businesses and administration.³⁹⁹

5.5.4 Consistency with principle of prohibition of fraud

Undoubtedly, the changes brought by the VAT e-commerce package demonstrate the intention of the Commission to counter existing e-commerce fraud. Under the upcoming rules, **the chances to hold someone liable and recover foregone VAT in case of irregularities will increase significantly**. The new import regime extends the liability for VAT purposes to new actors - freight forwarders via a fall back procedure and online platforms facilitating distance sales of goods, by means of a deeming provision. As a consequence, VAT can be effectively collected from EU-established persons in the cases where a non-EU supplier of low-value goods has chosen not to register to the One Stop Shop scheme or has decided to sell goods through an online platform.

Despite these clearly positive steps, it has been acknowledged by both the doctrine⁴⁰⁰ and the ECA⁴⁰¹ that **neither mis-declaration, nor abuse of CP 42 would be effectively resolved by the VAT e-commerce package**. For instance when liable via the fall back procedure, freight forwarders would collect VAT based on the information provided by the non-EU suppliers, thus making undervaluation

³⁹⁵ Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 214

³⁹⁶ Ibid.

³⁹⁷ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192

³⁹⁸ New Article 141(5) of the UCC DA as amended by Delegated Regulation 2019/1143

³⁹⁹ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 192; Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 211

⁴⁰⁰ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193; Van der Hel-van Dijk, E.C.J.M. and Griffioen, M. A.: Online Platforms: A Marketplace for Tax Fraud?, EU VAT Note, INTERTAX, Volume 47, Issue 4 (Kluwer Law International 2019), p. 401; Merx, M. and Janssen, A.: A New Weapon in the Fight against E-Commerce VAT Fraud: Information from Payment Service Providers, International VAT Monitor 11/12 2019 (Kluwer Law International 2019), p. 231; Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 222

⁴⁰¹ ECA Special Report no 12/2019, p. 43

still possible.⁴⁰² As already discussed, a very large percentage of parcels entering the EU is non-compliant⁴⁰³ and it is apparent that freight forwarders do not possess the necessary internal controls to detect fraud. Unfortunately, it is unclear if the freight forwarders would have the financial and human resources to resolve the issue in the future⁴⁰⁴ and if the expected electronic system developments following from the UCC⁴⁰⁵ would provide the sought solution.⁴⁰⁶ Moreover, abolishing the low-value consignment exemption is expected to make splitting of consignments and shipping them from non-EU countries no longer lucrative, thus stimulating also this type of fraud.⁴⁰⁷ Finally, the new rules are likely to create new forms of avoidance and fraud “for instance making use of the exemption on importation without the actual payment of VAT through” the One Stop Shop.⁴⁰⁸

The **reasons for the expected inability of the new regime to effectively counter fraud** could also be different. Some scholars consider that under the upcoming rules, authorities will continue to have very limited information on distance sales, thus facing difficulties to prevent fraud and to manage VAT e-commerce, in general.⁴⁰⁹ Others point out that the procedure, which is needed to tackle, in particular, undervaluation is of too specific nature and would create extra administrative burden.⁴¹⁰ Furthermore, it is found surprising and only treating “the symptoms of the problem” that the VAT e-commerce package still relies mainly on ex-post physical checks carried out by the authorities, rather than suggesting a long lasting solution.⁴¹¹ Very often, the person checked is not present in the Member State where the audit is carried out (including in the case of joint audits) and the problem is further aggravated by the limited capacity of the authorities. In addition, it has to be mentioned that the VAT e-commerce package seems not to address the general lack of uniform application of VAT and customs controls, which is one of the main factors prejudicing prohibition of fraud.

⁴⁰² Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

⁴⁰³ See Section 3.1.2

⁴⁰⁴ The Commission did not provide any figures on the expected impact of the fall back procedure. For example, they are absent from the Impact Assessment, Accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers and Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, SWD(2018) 488 final. According to the Impact Assessment, it is difficult to make estimations, since this would depend on the type of operator. The doctrine criticised this approach. See Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

⁴⁰⁵ More precisely, the security related obligation for both postal operators and couriers to provide advanced information to the EU customs by 2021.

⁴⁰⁶ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193 referring to European Commission, Impact Assessment, Accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers and Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, SWD(2018) 488 final.

⁴⁰⁷ Van der Hel-van Dijk, E.C.J.M. and Griffioen, M. A.: Online Platforms: A Marketplace for Tax Fraud?, EU VAT Note, INTERTAX, Volume 47, Issue 4 (Kluwer Law International 2019), p. 398

⁴⁰⁸ Papis-Almansa, M.: VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field? (ERA Forum 2019) 20:201-223, p. 214

⁴⁰⁹ Ibid., p. 401

⁴¹⁰ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

⁴¹¹ Van der Hel-van Dijk, E.C.J.M. and Griffioen, M. A.: Online Platforms: A Marketplace for Tax Fraud?, EU VAT Note, INTERTAX, Volume 47, Issue 4 (Kluwer Law International 2019), p. 401

Another concern that could be raised is with regards to the **misuse of the One Stop Stop registration number in situations where an online platform facilitates the sale**. In such cases, the supplier will benefit from the exemption only if he includes in the customs declaration the One Stop Shop number of the platform.⁴¹² In practice, nothing seems to prevent the supplier from inserting this number when sending goods directly (without using the platform) to the EU customer or allowing someone else to do so.⁴¹³ The VAT e-commerce package appears not to regulate what would be the platform's liability in case of misuse of its One Stop Shop number and there is no information on this in the preparatory works either.⁴¹⁴ Also, it is not clear how the authorities are supposed to spot such a fraud.

⁴¹² Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 194

⁴¹³ Ibid.

⁴¹⁴ In fact, the deeming provision for platform responsibility was not itself part of the Commission's proposal. No concerns were raised by the Member States either. See Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 194

6 Chapter Six - Conclusions and recommendations

Based on what has been discussed in my thesis, an overall conclusion can be made that the currently existing VAT and customs controls have to still be adapted to the realities of e-commerce. The VAT e-commerce package does not seem to bring the needed solutions and to a certain extent creates more challenges that have to be addressed. In this respect, the following answers to the research questions defined in Section 1.2 could be given.

6.1 Research question I: Current VAT and customs controls

Following positive EU VAT and customs law, what are the current VAT and customs control mechanisms for distance sales of non-EU goods in the context of e-commerce and to what extent are these mechanisms (i.e. rules) in line with the principles of neutrality, effectiveness, simplicity and prohibition of fraud?

Upon importation, the EU VAT and customs rules provide a broad range of VAT and customs control mechanisms. Mainly they are performed by the customs authorities alone or in cooperation with EU or non-EU competent authorities (customs, tax or other) and the Commission.

For the purposes of collecting customs duties, the authorities may conduct nearly limitless verifications in the form of examination and sampling of the goods, checking declarations and related documents, inspecting luggage and means of transport and other similar actions. The control could be carried before, during and after release of the goods for the customs procedure, for which they are declared. Furthermore, customs controls should be carried out through a risk management framework, within the parameters defined in statutory law.

From VAT perspective, the positive law provides an elaborate set of tools for administrative cooperation between competent authorities. In this respect, all controls, checks and related actions for ensuring compliance with the VAT legislation are included in the so called “administrative enquiries” made between Member States. In terms of particular cooperation tools, notable are the exchange of information between Member States primarily through electronic means, the possibility for carrying out simultaneous controls in several Member States, including by conducting joint audits and finally, sharing, processing and analysing targeted fraud-related information through the Eurofisc decentralised network.

After carrying out the test against the normative benchmarks, it was established that the current controls are:

- A) **Inconsistent with the principle of neutrality** as they exist in the framework of the low-value consignment exemption regime, which itself is incompatible with ‘external neutrality’. In particular, it leads to non-taxation, which breaches system neutrality and it creates a competitive advantage for non-EU suppliers, thus going against neutrality of competition.
- B) **Inconsistent with the principle of effectiveness**, since, although in line with the relevant international standards, the existing VAT and customs controls do not effectively tackle the challenges raised by e-commerce. Substantial drawbacks were identified in terms of compliance controls from both VAT and customs perspective. In particular, the large number of low-value consignments prevents sufficient physical checks to be carried out by the

authorities, who clearly lack the time and resources to improve in this direction. Moreover, the authorities do not make good use of the available tools for exchange of information, including Eurofisc, and do not carry out enough simultaneous controls. Further weaknesses have been identified in implementing the risk management framework.

- C) **Inconsistent with the principle of simplicity** as the current import regime is characterised with general complexity and causes significant administrative burden to both businesses and competent authorities.

- D) **Inconsistent with the principle of prohibition of fraud** as currently, there are numerous cases of undetected mis-declaration (undervaluation and wrong declaration) and splitting of consignments of goods with intrinsic value above the legally defined exemption thresholds. The electronic systems used for customs clearance are also not considered adapted to prevent these types of fraud. What is also observed are well-developed schemes for abuse of CP42, often in combination with undervaluation, which appear resistant to post-release control from the customs authorities. Finally, neither VAT nor customs controls seem to be carried out in a uniform manner and with the necessary frequency, which significantly prejudices the principle of prohibition of fraud.

6.2 Research question II: Upcoming changes of VAT and control mechanisms

As of 2021, what will the VAT and customs control mechanisms be for distance sales of non-EU goods in the context of e-commerce, and to what extent are these mechanisms (i.e. rules) in line with the principles of neutrality, effectiveness, simplicity and prohibition of fraud?

As of 1 July 2021, the VAT e-commerce package will bring a number of changes, which will mainly impact VAT controls and will partially influence customs controls.

As regards the latter, the package will abolish the possibility for declaring goods of intrinsic value below €22 simply by presenting them to customs. This means that importers have to submit a customs declaration for each and every consignment, which has to be verified by the customs authorities.

With respect to VAT controls, the customs authorities will have to check if the low-value goods are eligible for the new One Shop Stop scheme for distance sale of goods imported from third countries or third territories. For that reason, the new framework extends the deadline for exchanging information between the Member State of identification and the Member State(s) of consumption with 10 days. The VAT e-commerce package fosters further use of electronic interface, especially for the transmission of certain types of information. The new rules also put forward changes in the compliance controls regime, such as obtaining in advance the VAT identification number by the customs authorities, requesting records and making administrative enquiries by both the Member State of identification and all Member State(s) of consumption.

Finally, it was concluded that beyond the VAT e-commerce package, the Commission took new initiatives towards expanding the existing VAT control mechanisms, which will come into effect in 2024. These rules are intended to counter e-commerce fraud and will create certain obligations for payment service providers to collect and transmit information to the tax authorities. The VAT-related information gathered by the payment service providers will be processed through the electronic system CESOP.

After carrying out the normative benchmark test, it was established that the changes related to VAT and customs controls, which will come into effect as of 2021, are:

- A) **Largely consistent with the principle of neutrality** as the import VAT exemption for consignments worth less than €22 was abolished by the VAT e-commerce package precisely to counter anti-competitive behaviour. Although taking the right steps towards creating a level playing field, the new rules did not address the exemption for importing low-value goods sent as “gifts” and did not resolve the undervaluation practices, which can both cause distortion of competition. Moreover, importing goods of intrinsic value above €150 could lead to double taxation (upon importation and at destination) which breaches system neutrality.
- B) **Inconsistent with the principle of effectiveness** as VAT and customs controls after the changes will become even more time and resource consuming. In particular, it is unclear whether customs authorities would have the capacity to check the validity of the One Stop Shop registration number and how would they detect non-compliant returns of non-EU suppliers. With respect to the latter, comparing the returns with the monthly listings of imports and value declarations issued by the Member States also appears ineffective. Nevertheless, the VAT-related administrative cooperation under the new rules has potential to improve, but it is unknown if the authorities would make an actual use of the available new tools.
- C) **Inconsistent with the principle of simplicity** as the new import regime seems even more complex and increasing the administrative burden. In particular, there is a risk that the verification process of the One Shop Stop registration might prove lengthy and impact the smoothness of the importation process.
- D) **Largely consistent with the principle of prohibition of fraud** as the VAT e-commerce package extends liability to new actors – the freight forwarders through a fall pack procedure and the online platforms facilitating distance sales of goods through a deeming provision – which raises significantly the chances that in case of irregularity, VAT will be collected. Nonetheless, the already existing types of fraud (mis-declaration, splitting of consignments and abuse of CP42) have not been addressed at all by the package. The new regime might even create new types of fraud, such as using One Stop Shop exemption without the actual payment of VAT or misuse of the One Stop Shop number in situations where an online platform facilitates the e-commerce sale. The VAT and customs controls seem unable to cope with these issues since the authorities are likely to continue receiving very limited information on distance sales (including of goods imported from third countries or third territories) and to experience capacity limitations. Furthermore, relying too much on ex-post physical checks has proven ineffective up until now and there are no indications that the VAT e-commerce package will take a different approach. Lastly, nothing would prevent the VAT and customs controls to continue being applied in an insufficient and non-uniform manner.

6.3 Research question III: Recommendations

With regard to the principles of neutrality, effectiveness, simplicity and prohibition of fraud, what should the VAT and customs control mechanisms be for distance sales of non-EU goods in the context of e-commerce?

Based on the conclusions made, it is fair to say that the VAT e-commerce package addressed only to a very limited extent the existing problems related to VAT and customs controls. On the top of that, it

raised new concerns with respect to neutrality, effectiveness, simplicity and prohibition of fraud. Therefore, the following recommendations could be made.

6.3.1 Recommendations to promote neutrality

Although some positive steps have been taken towards resolving the existing distortion of competition, the Commission should still take action to **address the advantages caused by the non-commercial import exemption regime and the still existing fraudulent practices.**

Moreover, it would make sense to **extend the One Stop Shop scheme to goods of intrinsic value above €150**, so that it ensures that the importation is taxed only once. This could happen perhaps by applying the threshold requirements of the intra-EU distance sale regime⁴¹⁵ to distance sales of goods imported from third countries or third territories. Then, by analogy, goods entering the Union will be taxed either upon importation or at destination, depending on whether their intrinsic value exceeds the threshold or not.

6.3.2 Recommendations to promote effectiveness

It is fair to say that customs authorities should be better equipped with cooperation and technological tools in order to effectively monitor the import flows of low-value goods through the One Shop Stop system.

One way of improving the control effectiveness is to **reduce the costs for the administration.** According to the OECD, the costs on collecting VAT have to be kept proportionate to the collected VAT.⁴¹⁶ An independent study from 2014 found that raising the *de minimis* value from €22 to €80 would ensure that the revenue collected by the customs authorities will exceed the total costs of the administration and the business.⁴¹⁷ However, considering that the final version of the VAT e-commerce package chose a different threshold and procedure, it is clear that the proposed solution is not acceptable for the Member States. On the other hand, the doctrine concluded that abolishing the exemption in combination with the fall back procedure is not a cost-effective solution either.⁴¹⁸

Another step in the right direction seems to be **increasing the capacity of the competent authorities** in order to perform more and effective checks. In fact, increasing the audit activity with respect to non-EU distance sellers registered to One Stop Shop is one of the main recommendations made by the ECA towards improving the effectiveness of the VAT controls in the context of e-commerce.⁴¹⁹ On the other hand, it has been established in a study for the European Parliament that more frequent verifications usually lead to less imports in a Member State, thus creating a risk of tax dumping.⁴²⁰

⁴¹⁵ Threshold of €10,000 of annual sales. See new Article 59c of the VAT Directive

⁴¹⁶ OECD, Addressing the Tax Challenges of the Digital Economy, BEPS Action 1: Final report 2015, p. 184

⁴¹⁷ Hintsa, J., Mohanty, S., Tsikolenko, V., Ivens, B., Leischnig, A., Kähäri, P., Hameri, AP., and Cadot, O.: The import VAT and duty de-minimis in the European Union – Where should they be and what will be the impact?, Cross-border Research Association, Lausanne, Switzerland – in co-operation with HEC University of Lausanne and University of Bamberg, Final report 2014, p. 2

⁴¹⁸ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 193

⁴¹⁹ ECA Special Report no 12/2019, p. 47

⁴²⁰ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 25

According to the ECA, what will also make a change is **improving administrative cooperation**⁴²¹ between customs authorities and other competent authorities (customs and tax) within and outside the EU. Among others, this covers mutual assistance for recovery of VAT in the context of e-commerce.⁴²² One way of improving cooperation is through making the measures used more fit for their purpose or prioritising cooperation in order to ensure compliance with the distance sale rules.⁴²³ A study for the European Parliament recommends that Member States should exchange information as quickly as possible (no later than 3 months) and via electronic means, both on request and automatically, in order to combat VAT fraud, other breaches of VAT law and risks of tax loss.⁴²⁴ It also advises for frequent use of the VIES database, simultaneous controls and information sharing through the Eurofisc network.⁴²⁵ With respect to the latter, Member States should provide timely feedback on fraud signals received under Working Field 5 on e-commerce.⁴²⁶

In order to guarantee more effective VAT and customs controls, all these cooperation tools have to be promoted among the competent authorities, so that they can actually use them in practice. In this respect, the ECA recommends that the Member States' administrative cooperation central liaison offices should have a separate coordination function for distance sales.⁴²⁷

Finally, it is noteworthy that an opportunity for tax and customs authorities will arise if they **cooperate with online platforms**, even in the cases where they are not liable for VAT purposes. Since such platforms usually contain information on the tax liability of their users, it could substantially improve VAT controls in e-commerce to oblige the platforms to verify compliance of the persons supplying goods through their interfaces and/or to share relevant information on the tax liability of their customers⁴²⁸

6.3.3 Recommendations to promote simplicity

As already established, the rules introduced by the VAT e-commerce package are complex enough. Therefore, future VAT and customs controls have to be characterised at least with **low administrative burden for both businesses and administration**. In this respect, the EU legislator may consider reinstating the possibility for declaring goods with intrinsic value below certain threshold (most likely €150) by simply presenting them to the customs authorities. Perhaps, in the context of the new One Stop Shop scheme, such rule would not hamper e-commerce.

Another idea could be to **promote the increased use of electronic systems by the customs authorities for exchange of information and recovery of levies**. Only that way the authorities can achieve their mission for striking a balance between facilitating the trade and carrying out controls.⁴²⁹

⁴²¹ ECA Special Report no 12/2019, p. 47

⁴²² Ibid., p. 48

⁴²³ An argument that could be made from the testimony of the tax authorities interviewed for a Commission's study from 2015. See European Commission, VAT Aspects of Cross-border E-Commerce – Options for Modernization, Final report 2015, p. 60

⁴²⁴ European Parliament, VAT fraud: economic impact, challenges and policy issues, Study requested by the TAX3 Committee, PE 626.076 – October 2018, p. 29

⁴²⁵ Ibid.

⁴²⁶ ECA Special Report no 12/2019, p. 46

⁴²⁷ Ibid., p. 47

⁴²⁸ Van der Hel-van Dijk, E.C.J.M. and Griffioen, M. A.: Online Platforms: A Marketplace for Tax Fraud?, EU VAT Note, INTERTAX, Volume 47, Issue 4 (Kluwer Law International 2019), p. 401

⁴²⁹ ECA Special Report no 19/2017, p. 14

6.3.4 Recommendations to promote prohibition of fraud

First and foremost, the Commission should consider taking legislative efforts to ensure **more harmonised application of VAT and customs controls**. Although already broad enough, the controls cannot effectively prohibit fraud if they do not follow a standard approach defined at EU level. To that end, the ECA suggests including the WCO Postal/Express Consignments Risk Indicators in the customs authorities' guidance for implementing the financial risk criteria and providing clear definitions of terms, which are essential for the new import regime, such as "intrinsic value", "value" and "total value".⁴³⁰

Furthermore, since 2018 OLAF has been calling Member States to enhance their customs controls, particularly to prevent fraudsters from exploiting the low-value consignment reliefs in the framework of e-commerce.⁴³¹ Some of the recommended measures in this direction are **improving the electronic customs declaration systems** to not automatically apply the customs duties relief on goods with declared intrinsic value above the €150 threshold, on consignments falsely declared as gifts or simply ineligible for relief; enhancing the systems to detect mis-declaration of goods by means of risk profiles or randomly; **specific control measures to prevent artificial splitting of consignments**; and **ex-post controls on supplier's compliance** with the relief, including if he is an AEO.⁴³² Since the customs duties regime remains unchanged for the future, these recommendations stand valid.

Regarding VAT controls, it can be said that the new import regime introduced by the VAT e-commerce package leaves the system open to revenue leakage, disproportionate risks and legal uncertainty.⁴³³ Now, with the One Stop Shop scheme covering distance sales of goods, the Commission should quickly propose measures against potential abuse.⁴³⁴ Such include **improving the cooperation between authorities in the context of the new system**. According to the doctrine, administrative cooperation via One Stop Shop is indispensable at EU level and it has been even suggested that a step further should be taken to create "a supranational body in charge of collecting and redistributing the VAT among the Member States, in full transparency and with the possibility to monitor the flows and cross-verify the data in the most efficient way".⁴³⁵

On the other hand, cooperation with third countries through One Stop Shop is considered "unrealistic", since the VAT e-commerce package relies mainly on non-EU businesses (often engaging in fraudulent practices) to collect VAT, without enforcing compliance.⁴³⁶ Moreover, including online platforms in this process raises practical issues⁴³⁷ and new types of fraud. Therefore, it is advisable to shift the regime to a new model or improve the monitoring and collection of VAT through technological means.⁴³⁸

⁴³⁰ ECA Special Report no 12/2019, p. 49

⁴³¹ European Commission, 30th Annual Report on the Protection of the European Union's financial interests, Fight against fraud, 2018, p. 48

⁴³² Ibid.

⁴³³ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 194

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ ECA Special Report no 12/2019, p. 46

⁴³⁷ Ibid.

⁴³⁸ Ibid. and p. 49

However, such new model could only be a product of a multi-disciplinary research, conducted by, to the very least, experts in the field of law, economics and IT.⁴³⁹

⁴³⁹ Lamensch, M.: Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One, EC Tax Review 2018-4 (Kluwer Law International 2018), p. 195

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