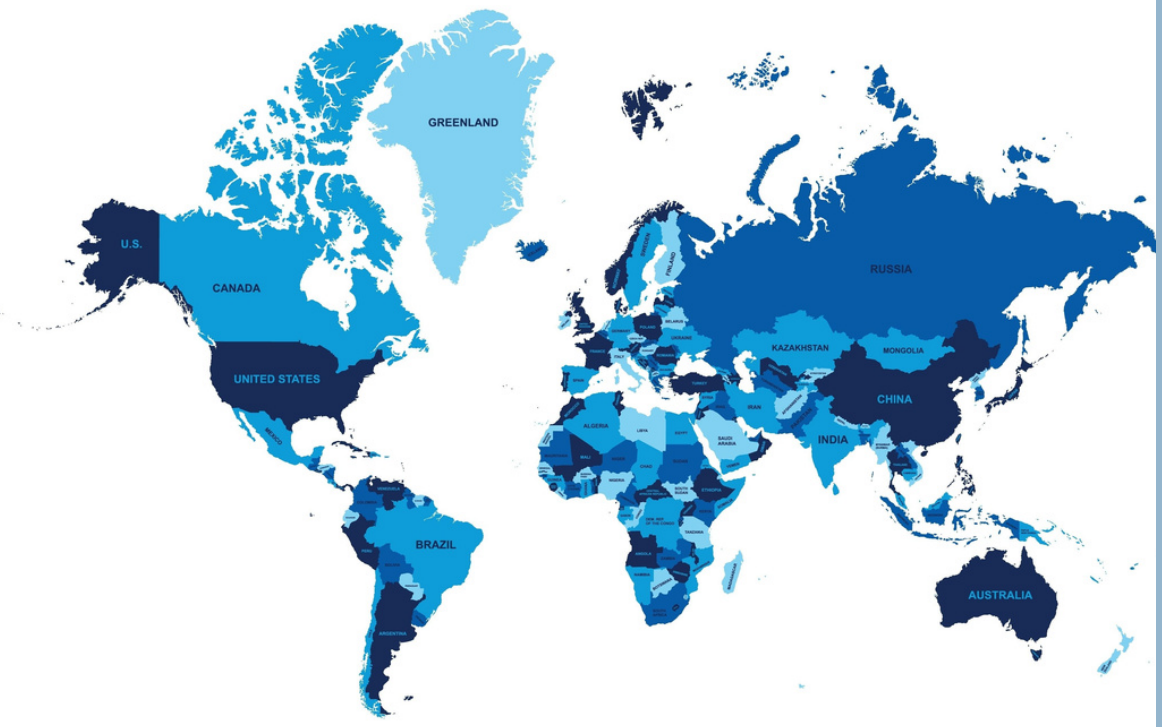
CUSTOMS TODAY



AMNESTY EXTENDED TO CUSTOMS DISPUTES

Definition of pending disputes extended to disputes with the **Customs Agency**. The news, introduced by the **Budget Law 2023**, allows the facilitated settlement of disputes concerning excise duties and games. Customs duties and import VAT remain excluded

(continues on page 2).

OLAF INVESTIGATIONS: DESK-BASED RECTIFICATION OF ORIGIN REJECTED

The Customs Agency cannot challenge the origin of imported goods solely on the basis of an **Olaf** "desk" investigation. If the investigation by the European Anti-Fraud Office is based solely on a cross-reference of statistical data, the dispute of **customs origin** is unlawful and Customs cannot demand the payment of anti-dumping duty. This is the principle expressed by the Veneto Court of Second Instance of Tax Justice, which held that an Olaf Report inherent in a wide range of producers is not sufficient to challenge the origin of the goods, since **a timely investigation into the disputed transactions is necessary** (Tax Court. II degree of Veneto, Nov. 23, 2022, No. 1361).

In the case examined by the Veneto court, an Italian company had imported **seamless steel pipes** declared to be of Indian origin, which, according to the Customs, were instead of Chinese origin, resulting in the application of an **antidumping duty** amounting to 71.9% of the value of the products.

However, the Customs Agency did not provide

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any evidence to prove the Chinese origin of the imported goods, merely basing its dispute on an Olaf investigation covering thousands of transactions and numerous European importers, now known to the many companies importing steel pipes from India.

The judgment in question states that the **Customs Administration must provide adequate evidence**, referring to the specific disputed transactions, companies, places of production and flows of the imported goods.

This ruling reiterates a principle already affirmed by the **Court of Cassation** in another precedent obtained by our Firm, according to which Olaf investigations can substantiate a customs assessment only if they relate to the transactions disputed by the Customs Agency (Cass., sec. V, July 31, 2020, no. 16469). Therefore, it is necessary to verify, on a case-by-case basis, whether Olaf's findings are sufficient to justify an adjustment to the origin of imported products.

In the case examined, according to the judges, Olaf conducted a "desk" analysis on the basis of general data, concerning all imports of steel pipes from China to India, without however comparing the **statistical data** compiled with the actual data.

> **Stop desk corrections: Customs has the burden of proving disputed origin**

According to the Court's findings, the absence of a physical verification at the manufacturer's establishment does not allow to verify the origin of the of the contested goods. It should be noted that, in the case examined by the Venetian Court, the **European Commission** had carried out an investigation of the same Indian pipe manufacturing companies, conducting a specific **on-the-spot inspection activity** at the factories to ascertain the activities concretely carried out and the level of processing of the product, confirming the Indian origin of the disputed products (EU Implementing Reg. No. 2017/2093).

The investigation on the individual concrete case was deemed more reliable than the "desk-based" verification, which in this case was limited to a cross-check of statistical data, without any direct assessment of the actual data.

AMNESTY OF DISPUTES EXTENDED TO CONTROVERSIES WITH THE CUSTOMS AGENCY

Definition of pending disputes extended to controversies with the **Excise, Customs and Monopolies Agency**. The news, introduced by the Budget Law for 2023 (Law No. 197 of Dec. 29, 2022), allows the facilitated closure of numerous disputes concerning excise duties and games, so far excluded from fiscal peace.

Remaining outside the facilitated settlement of pending disputes are proceedings concerning, even in part, customs duties, as own resources of the European Union, and import VAT, although the latter represents instead a tax of a domestic nature.

Among the main innovations introduced by the Budget Law is the extension of the **facilitated**

definition initially planned only for tax disputes in which the Revenue Agency is a party also to disputes in which the Excise, Customs and Monopolies Agency is also a party (paragraph 186).

The inclusion of customs represents an absolute novelty in the history of facilitated closure of tax disputes.

This extension is significant because allows the facilitated conclusion of the numerous disputes concerning excise duties and games until now excluded from fiscal peace.

There are several jurisprudential strands that characterize the **energy taxation** sector: from facilitations for fuels used in maritime navigation and in recreational boating to industrial production and road haulage.

There are also numerous special regimes, provided for the movement and suspension of excisable products, warehouses, and international transfers.

Less frequent, though often very significant from an economic point of view, are **disputes related to gaming and betting**, administered by the Customs Agency.

Tax disputes on excise duties and games can now be defined, according to the terms provided by the financial law and with significant reductions for operators who have already obtained positive judgements, either at first or second instance.

Excluded, on the other hand, from the definition of pending litigation are proceedings concerning **customs duties**, as EU own resources and **VAT on importation**, even if the latter represents a tax of internal nature and not an EU tax (paragraph 193).

While for customs duties, facilitated closure would lead to the violation of commitments undertaken at EU level, import VAT, on the other hand, remains incomprehensibly out of the definition of disputes.

As is well known, **the EU Customs Code** (EU Reg. 952/2013) clearly defines the prerequisites that characterize the customs debt as the obligation to pay the amount of duty on importation (Art. 5 point 18). VAT paid at customs does not fall into this definition.

In this regard, the EU Court of Justice has clarified that VAT due upon importation, although being liquidated and collected in a manner similar to customs duties, does not represent a 'duty' in the proper sense, but **is part of internal consumption taxes** (judgments May 5, 1982, C-15/81, Gaston Schul and February 25 1988, C-299/86, Drexl). The Court of Cassation is also now oriented in excluding VAT from the perimeter of the European Union's own resources, for which the facilitated definition is not actionable (Court of Court of Cassation, July 27 2022, no. 23526), a thesis also recently confirmed by the Revenue Agency (principle of law September 29, 2021, n. 13/2021).

It is necessary, therefore, to ask whether it would not be more correct, as part of the settlement of pending disputes, to open the way also for definition of disputes involving VAT on importation, for which the exclusion now now seems completely unjustified.

A further issue of great interest concerns **penalties on customs duties**. Penalties, in fact, do not represent EU resources and are not the subject of harmonized legislation, but are regulated by the Consolidated Text on Customs Law (Presidential Decree 43/1973). Disputes with the Excise, Customs and Monopolies Agency involving only penalties could meet the conditions required for the definition.

BANGLADESH: NO MORE DOUBTS ABOUT THE ORIGIN OF TEXTILE PRODUCTS

È It is unlawful the rectification of the origin of **textile products imported from Bangladesh**, as such imports can no longer be considered 'suspicious'. This was established by the Tax Court of First Instance of La Spezia, in its judgment No. 366 of November 24, 2022, which, recalling a notice to importers issued by the European Commission, clarified that there is no longer any "well-founded doubt" about the veracity of the **certificates of origin** issued by the authorities of Bangladesh (Notice to Importers 2022/C 166/06, dated April 20, 2022).

In the case examined by the judge of La Spezia, the Customs Agency had contested the origin of imported textile products, excluding the application of the duty relief provided for **Spg countries** and demanding the payment of a duty equal to 12% of the value of the goods. The objection of the Office was based solely on a 2008 "Notice to Importers' (2008/C 41/06), in which the EU Commission had informed European traders of the existence of 'well-founded suspicions' concerning the origin of products classified in chapters 61 and 62 of the Harmonised System, namely clothes and knitted clothing accessories and other clothes and clothing accessories other than knitted ones. The European Commission had assumed that these products were only from Bangladesh but that, from the point of view of customs origin, they did not incorporate the substantial conditions to be considered as originating in Bangladesh. In fact, it would have turned out that a percentage of "Form A" certificates of origin were "false or issued on the basis of fraudulent or misleading information".

Following the publication of this notice the Customs Agency initiated numerous investigations into the origin of products imported from Bangladesh, contesting the content of the **certificates of origin** issued by the competent foreign authorities.

As acknowledged by the Tax Court of First Instance of La Spezia, with the new 'notice to importers' of April 20, 2022, the European Union has surpassed the previous 2008 notice, recognizing that "the reasonable doubts" on which the previous notice to operators was based "are no longer supported by any evidence demonstrating the persistence of the underlying risks".

NEW PROOF OF ORIGIN FOR IMPORT/EXPORT WITH SINGAPORE

The proof of **preferential origin** changes in trade with **Singapore**. From January 1, 2023, exporting companies will have to use the **Rex system** in order to benefit from zero duty provided by the Free Trade Agreement. This was established by the Customs Committee of the EU-Singapore Agreement, which replaced the authorized exporter's proof of origin

with that of the **registered exporter** (Decision 1/2022). To allow a smooth transition to the new system, a **transitional period** is planned, until March 31, 2023, during which the Customs Authorities of Singapore will continue to accept declarations of origin from European authorized exporters.

The origin of products represents an important issue for Italian exports. To date, the European Union has concluded 42 Free Trade Agreements with 74 non-EU countries. In many, the figure of the registered exporter Rex is provided as a means of proof of origin. This system allows **self-certification of the preferential origin** of goods directly on the invoice, with a significant streamlining of procedures compared to the traditional certification by Customs.

Established by the EU Commission in 2017, the Rex database is used in the SPG area and in trade with overseas countries (PTOM), and is also provided for in the most recent Agreements concluded with Canada, Japan, Vietnam, the United Kingdom, the Eastern and Southern African States (ESA), Ghana, Ivory Coast and now also with Singapore.

It should be noted that some countries have chosen to adopt Rex also for **exports** to the EU. This is the case of Ivory Coast, Zimbabwe and Madagascar, which made Rex mandatory from January 1, 2023. In a Jan. 2 notice, the Cutoms Agency announced that also for **imports from Singapore**, from January 1, 2023, the origin declaration will have to be provided by a registered exporter. From January, it is no longer possible to enclose a Form A certificate to imports from SPG countries, as Rex is now mandatory.

NINTH PACKAGE: NEW RESTRICTIONS ON TRADE WITH RUSSIA

With the ninth sanctions package, import and export bans on numerous products are expanded.

EU Regulation 2022/2474 introduced new restrictions on the export of **almost-dual use** products that could contribute to Russia's technological and military buildup. The new restrictions cover camouflage equipment, chemical and biological equipment, riot control agents, and electronic components for use in Russian military systems (Annex VII EU Reg. 833/2014).

Export bans also extend to certain products and technologies used in the aviation and aerospace industry, such as aircraft engines and their parts or **drone engines** (all. XI EU Reg. 833/2014). Also banned from export are **drone toys**, generators, laptops, hard drives and computer components, night vision and radionavigation equipment, camera equipment and lenses (all. XXIII EU Reg. 833/2014). On import, the ninth round of

sanctions introduced new bans on **steel and steel products**. These restrictions, however, will not be operational until September 30, 2023.

It should be noted that the new regulation introduces an important exemption to import and export bans, with the aim of facilitating the **divestment** of EU operators from the Russian market. Until September 30, 2023, in fact, national authorities may **allow** the sale, supply, transfer or import of banned products that were located in Russia when the restrictions came into force. LNational authorities must verify that such products are not intended for a military end user and have no military end use. Authorization may be granted only if the imported goods are owned by an EU national, a legal person registered or incorporated in the EU, or otherwise owned or under the exclusive or joint control of an EU legal person.

Thus, the ninth package allows circumventing the prohibition on the purchase, import from Russia or transfer to the Union, directly or indirectly, of the goods listed in Annex XXI, EU Reg. 833 /2014, by stipulating that the competent authorities may authorize the import of the restricted goods if the company demonstrates that such activity is necessary to **divest or liquidate business activities in Russia** (Art. 12b, EU Reg. 833/2014).

NON-DUTYABLE ROYALTIES IF THERE IS ONLY QUALITY CONTROL

Mere **quality control** of products is not decisive for for royalties to be dazable. This is the principle affirmed by the Tax Court of First Instance of La Spezia, with judgment 16 September 2022, no. 277, in its Sept. 16, 2022, No. 277 ruling, according to which royalties should not be included in the customs value if the licensor exercises control over the imported product and not over the producer.

As is well known, **the Union Customs Code** (EU Reg. 952/2013, Cdu) provides that the royalties must be included in the custom value of imported products only if: i) they are not already included in the price; ii) they relate to the goods being valued; and iii) the buyer is required to pay them, directly or indirectly, as a "condition of the sale" (Art. 71, Cdu). The latter requirement is fulfilled when the licensee exercises control over the producer, namely when the licensor is able to exercise, in law or in fact, a "power of constraint or direction" over the supplier.

The ruling under review reaffirmed that if **the control only concerns the quality** of the

product, royalties should not be included in the customs value. In fact, in the opinion of the La Spezia judges, "quality control" is not suitable for integrating a link between the licensor and non-EU suppliers, since its purpose is to protect the image and quality of the products marked by the licensed trademark.

Such provisions are normally included in licence agreements with the aim of ensuring that the manufacturer complies with **safety standards** and does not incur a violation of workers' rights and the environment, to protect commercial reputation, which is also ensured today by the ethical profile of the brand.

Since no automatism operates with regard to the dutiability of royalties, it is therefore necessary to verify, on a case-by-case basis, whether the conditions identified by the Cdu are satisfied. This operation requires **a careful examination of contractual relations**. According to the judges of La Spezia, this check does not occur in presence of two contractual relationships that are distinct and independent from each other, one relating to the transfer of the trademark (between licensor and licensee) and the other relating to the production of the goods (between licensee and foreign supplier).

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Customs Today - January 2023 / number 1
Customs Today is a tax magazine edited by **Studio Legale Armella & Associati**, lawyers with expertise in tax law and international trade. Studio Armella & Associati provides consultancy in customs matters. Contact us for any further information

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