The customs risk in the European Union: We avoid it, we postpone it, or we confront it!

By Stanislas Roquebert & Gaspard de Bellescize

Notice to importing/exporting companies in the European Union (including non-European companies): to put it in a nutshell, mastering European Union customs law is an issue (always!) and a lever for optimization (always!).

The customs law of the European Union is organised:

- On the one hand (**EU Level**), in a corpus of three texts (the Customs Code of the Union, its delegated regulations and its implementing regulations), directly applicable in the 27 Member States: **common regulations and laws at stake**;
- On the other hand (**National level**), in the different specific legislations of each Member State: **control and litigation**.

Customs law is therefore systematically Community and national, a source of complexity for companies importing/exporting in the European Union.

The lack of knowledge of a customs provision by a company (misdeclaration of the value, origin or tariff heading, for example), will lead to:

- A **possible adjustment of customs duties of the same amount** (the tax rate is the same throughout the EU - this is the common external tariff);

- BUT, to sa**nctions that will be different** depending on the country concerned:
  - **the period at risk** is not the same: for example, the customs audit limitation period is three years in Germany compared to five years in France;
  - the penalties (fines) are not the same (in some Member States, it is a percentage of the duties involved, while in others it is the value of the goods that are the subject of fraud, up to three times the value of the rights in some cases in France);
  - the **qualification of offences** is not the same (in some Member States, a customs offence is automatically also a "**criminal**" offence, regardless of the absence of intent to defraud at the investigation stage);
  - Customs can be a "prosecuting authority", summoning the company and its manager before the criminal courts: in some Member States, **bad faith is presumed** (unlike most criminal law regimes) and acquittal requires proof of lack of intent: reversal of the burden of proof!

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A "black" picture of the Union's customs litigation, to be tempered immediately by the very many mechanisms that make it possible (**in the hands of specialists in the field, provided they intervene as soon as possible!) to avoid payment of the debt**, to obtain an acquittal in the event of proceedings or **to avoid any proceedings** by way of settlement.

"Anticipate the risk":

- carry out compliance audits upstream;
- use customs rulings relating to the origin, value and type of goods;
- contractualize Customs management with a "customs" service provider;
- create subsidiaries rather than branches (idea of a "shell" company);
- perform a flow mapping;
- optimize sourcing by avoiding high-risk countries or by choosing countries benefiting from Free Trade Agreements (no customs duties);
- do not forget the "tax" aspect of import VAT management!

"Deflect the risk":

- possible warranty claim against a co-contractor (e.g. breach of the duty to advise);
- possible recourse against the Customs Administration itself (hypothesis of an enforceable position);
- Check?

"Face the risk":

- be advised from the start of a customs control;
- weigh the pros and cons of the possibility of a settlement;
- properly negotiate the settlement;
- challenge the existence of the debt or, in the alternative, request its reduction;
- provide proof of good faith;
- challenge the legality of national customs law in relation to Union law;
- win ... or come out on top!

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