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## **Customs representation and responsibility: vat implication on importation and exportation**

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*EVERYONE IS RESPONSIBLE FOR EVERYTHING IN FRONT OF EVERYONE.*  
(FJODOR DOSTOJEVSKIJ)

## Abstract

The first of May 2016, the Union Customs Code, Regulation (EU) No 952/2013 of the European Parliament and of The Council of 9 October 2013 laying down the Union Customs Code entered into force. The purpose of the measure is the simplification and complete digitalization of customs clearance processes. In this area it is important to realize that the competitiveness of businesses and their growth is determined by the correct planning of the times, costs and customs procedures adopted.

The general objectives of the new UCC are: streamlining and modernizing customs legislation; reduction of administrative burdens and costs by economic operators, digitalization the customs context; standardize the control systems between the different member states MS, strengthen the figure of the Authorized Economic Operator AEO, the latter is clearly outlined by the new UCC, which allows to certify, in all other MS, customs reliability and security of the economic operators.

The importance of the responsibility of the parties analyzed in this study, in terms of representation, highlights how the parties involved in the customs system also reflect the VAT directives, often differently. Also the link between the incurrence of a customs debt and of the Value Added Tax on the importation where there is a nature parallelism ad dependence as they arise from the importation of goods into the territory of the Union. This is the result of Article 71 (1) of the VAT Directive<sup>1</sup> that depend on the article 77 of the UCC with difference responsibilities for the person in charge for the importation.

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<sup>1</sup> EU Directive 2006/112/EC of 28 November 2006

## Abbreviation list

ACN	Air Cargo Netherlands
AEO	Authorized Economic Operator
AEOC	Authorized Economic Operator Customs simplifications
AEOS	Authorized Economic Operator Security and safety
AG	Advocate General
AWB	Air waybill
B/L	Bill of Lading
CCC	Community Customs Code, C.R.(EEC) No 2913/92 of 12 October 1992
DA	Delegated Act Union Customs Code, 2446 of 28 July 2015
EC	European Commission
ECJ	European Court of Justice
EU	European Union
FIATA	Freight Forwarders Associations
GATT	The General Agreement on Tariffs and Trade
IATA	International Air Transport Association
IA	Implementing Act Union Customs Code
ICS	Intra-Community supply
MS	Member States
SAD	Single administrative document
TIR	Transport International Routier
UCC	Union Customs Code, Regulation (EU) No 952/2013
VAT	Value Added Tax
WTO	World Trade Organization

## 1. Introduction

### 1.1 Background

The import VAT and customs duty have a parallel nature as both arise from a situation of a transaction that constitutes an importation of goods into the territory of the Community, and furthermore, the following integration of those goods into the economic channels of the MS. This parallel nature has its origin on the article 71 (1) of the Vat Directive, which authorizes MS to link the chargeable event of import VAT with the incurrence of customs duties.<sup>2</sup>

The consequence of the Article 71 (1) of VAT Directive, here specifically speaking of the second sentence of paragraph 1, may automatically give rise for VAT on imported goods that are liable to pay customs duties.

With regard to the incurrence of customs debt specially Article 203 (unlawful removal) and Article 204 (non- fulfilment) under the CCC and now replaced by Article 77 of the UCC, in which the main objective of those two Articles is to prevent non-Union goods subject to supervisions procedures of being entered into the customs territory of the EU without being declared by the competent authority.<sup>3</sup> The Articles give arise to both customs debt and import value added taxes.

There is a difference between them in regard to the incurrence of a customs debt, it also follows the responsibility of the people who are obliged to pay VAT and customs duties

### 1.2. Aim and research

The aim of this thesis is to show and describe the responsibilities of subjects that are in charge in customs and VAT in the contest of import and export of goods in the B2B framework.

Which extent the incurrence of VAT is parallel with the incurrence of the customs debt?

This study will be used, in the company where I currently work, to implement the internal processes of the company and the policies with the partners that deal with logistics and customs declarations towards the company itself. This study will be useful to better understand the responsibilities of the company and those of the suppliers, the relationships with the customs and tax authorities and those that are the risks incurred by the subjects involved, in order to work in a compliant environment.

### 1.3 Outline

This thesis has been divided into six chapters where the purpose of the second and third chapters is to describe the entity involved in the customs transactions and the correlation with the taxable persons for the VAT purpose under the responsibilities profile. The fourth chapter regulates the matter of customs duty and vat under the import and export profile. The impact of the principle of neutrality will be dealt with in the fifth chapter in connection with the right to deduct input VAT in respect to the transactions described. In the sixth and last chapter of this thesis a conclusion will be put forth to sum up previously discussed topics from the preceding chapters and the results of the research with the link between EU customs legislation and the VAT Directive.

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<sup>2</sup> See the second sentence of Article 71 (1) of the VAT Directive 2006/112.

<sup>3</sup> Hans- Michael Wolfgang and Talke Ovie, Emerging Issues in European Customs Law, World Customs Journal, page 9.

## 2. Entity involved in customs transactions

The entities involved in the big chain of the customs are many and different as well as their responsibilities. There are no more or less important entities, but all play a fundamental role in the chain of customs representation. In this study I will analyze the customs representation, the AEO and then forward them in their responsibility with an outline of the role and responsibility of the customs authority<sup>4</sup>.

Customs has been responsible for implementing a wide range of border management policies also it has changed significantly in recent times, and what may represent core business for one administration may fall outside the sphere of responsibility of another. This is reflective of the changing environment in which customs authorities operate, and the corresponding changes in government priorities. The WTO and other international bodies are responding through the development of global standards that recognize the changing nature of border management<sup>5</sup>.

The responsibilities of customs administrations, until the UCC came into force, varied from country to country, and have been often the subject of regular review and modification to ensure their ongoing relevance in a constantly changing world. The figure of the customs authority, that has changed in the time, goes from traditional responsibilities at the point of importation and exportation such as collecting duties on international trade commodities, collections of others forms of tax as the vat and excise duties, to responsibilities that apparently go beyond the traditional customs sphere, such as collaborate and maintain relationships with others government ministries as health, environment, agriculture, immigration. In many developing and least developed countries, import duties and related taxes represent a significant proportion of the national revenue. For this reason, the main focus for their customs authority is, understandably, revenue collection. In developed countries, on the other hand, with relatively little reliance on imports as a source of government revenue, there is an increasing focus on border protection, with particular emphasis on the enforcement of import and export prohibitions and restrictions, including those arising from Free Trade Agreements. The role of the customs authority can often be gleaned from the manner in which administrative responsibilities are structured. For example, where revenue collection is the main focus, the customs administration generally forms part of the Treasury or Finance portfolio. Similarly, those administrations that are primarily seen to play a border protection role are likely to be aligned with other agencies that have a border management focus. Often the core business to one may fall outside the sphere of responsibility of another Customs authorities, and this is simply a reflection of differing government priorities, the way in which a particular country manages the business of government and the manner in which the associated administrative arrangements are established. In this regard, even some of the more traditionally core customs activities are occasionally the primary domain of another government agency. For example, in Hong Kong, due to its free port status, tariff classification and valuation are more relevant to the Census and Statistics Department than to the Customs and Excise Department<sup>6</sup>.

### 2.1 Customs representation

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<sup>4</sup> "Customs authorities" UCC 952/2013, art. 5 (1): *"means the customs administrations of the MS responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislations"*.

<sup>5</sup> David Widdowson, World Customs Journal, *'THE CHANGING ROLE OF CUSTOMS: EVOLUTION OR REVOLUTION?'* p.31, vol.1

<sup>6</sup> David Widdowson, World Customs Journal, *'THE CHANGING ROLE OF CUSTOMS: EVOLUTION OR REVOLUTION?'* p.31, vol.1

In the frame of a commercial relation and in the context of the customs representation, the operator will by mean of a mandate entrust an external service provider with the performing of such formal customs related operations and declarations and will therefore decide whether he wants this customs representation to be conducted it to be under the direct or under the indirect mode of representation<sup>7</sup>. So need of the power of attorney that inform the Customs authorities about certain elements that enables the Customs to exactly know which (legal/natural) person has been mandated by the operator to perform his customs related operations and declarations and what is the exact perimeter and extent of the powers mandated to such person in this context.

The customs representation defines the responsibilities towards customs as regards the customs debt. In so far as one international trade operator (exporter/ importer) delegates the customs activities to a customs broker, in the case of indirect representation, both parties could be involved for the payment of the customs debt (Customs duties).

In the direct representation, the representative, usually the customs broker, acts in the name and on behalf of another person, usually the importer. The importer is the sole responsible. In the indirect representation, the representative, usually the customs broker, acts in his own name and on behalf of another person, usually the importer. In such a case the customs broker is jointly liable with the importer, customs debt.

Parties are free to define the content of such delegation. Even if VAT and customs duties at stake are usually incurred during the import phase, the representative mode concerns both import and export activities also, if the customs broker has declared under his own deferment account, such broker will guarantee the customs debt till the moment the customs debt is paid for. For the joint liability means that customs may reassess one or /and the other party for the total amount of the customs debt.

A formal delegation is not legally required to operate in direct representation since a simple letter by the operator to the customs broker asking him, without any specification about the mode of representation, to clear his goods legally constitutes a mandate enabling the broker to operate in direct representation.

The case is different in an indirect representation legal environment where the operator subcontracts the customs declaration process to a broker and requires/imposes, as per the wording of the contract, the “indirect representation” operational mode.

This clearly has the advantage to be a very strong incentive for the customs broker to increase and maintain the quality of his services to the operator and to remain very vigilant as to what he does and declares. In other terms, when the customs broker of an operator operates under direct customs representation, the liability is wholly and only on the shoulders of the operator. One must nevertheless keep in mind that such legal “protection” resulting from the mode of indirect representation remains somehow theoretical in the sense that for the Customs authorities the ultimate responsible person is the exporter/consignor owner of the goods who may, afterwards, revert to the customs broker for joint responsibility.

## **2.2 Authorized economic Operator**

The EU has been legally established the AEO program through security amendments to the CCC in 2008<sup>8</sup>. It has been introduced not only for safety and security authorisations, but also for customs simplifications and a combination of the two authorisations that held at the same time give result in a total of three different authorisations. The AEO status is granted to credible and solvent economic operators whose organization, infrastructure and applied

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<sup>7</sup> article 18(1)UCC

<sup>8</sup> European Parliament and Council Regulation (EC) No 450/2008



security of IT systems and places for goods storage, or means of transport respectively, provide safety of locations and goods and protect against unauthorized access. The AEO status is related to the possibility to use the simplifications set forth by the UCC and other EU regulations and the simplifications with respect to customs control.

With the UCC, as mentioned entered into force from 1st May 2016, the most significant change from the point of view of an economic operator is adding a new criterion for the entity applying for the AEOC authorisation: the standard of competence or professional qualifications. Customs officials examine the professional competence of persons responsible for key operations from the point of view of the AEO. The criterion for the compliance with the law are also changed through the extension of tax law regulations and the absence of conviction for a serious criminal offence related to the business operations of the applicant.

The section 4 ON THE ART. 38 of the UCC establish the types of AEO authorisations and the criteria that must be met to be granted the status of AEO. There are two types of AEO authorisations identified in Article 38(2)UCC:

- a. "that of an authorised economic operator for customs simplifications, which shall enable the holder to benefit from certain simplifications in accordance with the customs legislation; or*
- b. that of an authorised economic operator for security and safety that shall entitle the holder to facilitations relating to security and safety."*

Both authorizations (AEOC and AEOS) may be held at the same time by one operator, resulting in an AEO-Full authorization<sup>9</sup>.

The criteria and conditions that an entity applying for AEO status shall meet are specified in Art. 39 of the UCC and they include:

- a) compliance with legal regulations, the lack of serious violation or repeated violations of the provisions of the customs law and tax regulations, including absence of conviction for a serious criminal offence related to the business operations of the applicant;
- b) relevant system of register management, demonstration by the applicant that he/she has a high level of control of its operations and movement of goods ensured by the management system of the commercial register and, where appropriate, the transport register, which allows for conducting proper customs controls;
- c) financial solvency, solvency that is deemed to be proven when the applicant has a good financial standing that allows the applicant to fulfil the obligations, according to the type of conducted business operations;
- d) standards of competences or professional qualifications, in relation to the authorization referred to in Art. 38(2)(a), applies to AEOC, compliance with practical standards with respect to competences or professional qualifications directly related to the conducted business activity;
- e) security and safety standards, with regard to the authorization referred to in Art. 38(2)(b), applies to AEOS, relevant security and safety standards which are considered to be met if the applicant demonstrates that maintains adequate measures to ensure security and safety of the international supply chain, including in the area relating to physical integrity and access control, logistics processes, processes related to handling of specific types of goods, in the area relating to the personnel and in the area of identification of business partners.

The aforementioned criteria constitute an extension of the conditions of holding a privileged status. Nevertheless, the benefits of holding a certificate are so important that it is worth going through the verification process. As a result of that, the economic operator benefits

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<sup>9</sup> UCC 952/2013, art.38(3)

from simplifications provided for in the UCC (centralized clearance, self-assessment, and clearance without presentation of goods to the customs authorities). Due to the centralized clearance, the economic operator is able to perform physical clearance of goods across the EU. The AEO has also entitled to submit a lower security in case of using, e.g. special procedures. Additionally, if the AEO applies for an authorization for a special procedure (e.g. inward processing) or for managing a temporary storage facility, pursuant to the new regulations it can be assumed that certain conditions for obtaining these authorizations have been met and do not need to be re-examined.

However the benefits of AEO status are several as regulated by article 47UCC, there are fewer physical checks, there is the priority treatment if selected for customs control and there is the choice of location for customs control.

The combination of the two operators, as described above, gives rise to the AEO-Full authorization:

*“Easier admittance to customs simplifications; fewer physical and document-based controls for both safety and security and related to other customs legislation; prior notification in case of selection for physical controls related to safety and security; prior notification in case of selection for customs controls related to other customs legislation; possibility to request a specific place for customs controls; indirect benefits, and mutual recognition with third countries.”<sup>10</sup>*

## 2.3 Documents and responsibilities

The prime responsibility of Customs is the collection of revenues and the protection of national economy and society<sup>11</sup>.

Customs are competent in the field of customs duties, excise duties and VAT on imports, and are expected to provide transparency and predictability for those involved in international trade, utilize automated systems and risk management techniques, implement appropriated international standards, cooperate with trade bodies and other authorities to prevent and combat the illegal importation. Customs can be defined as the body responsible for the application of laws to collect the applicable charges (as customs duties and VAT) concerning on importation of goods, determine the sanctions under their domestic regulations and control the illegal goods, which might be introduced into the EU.

For an importer or exporter there are particular responsibility to submit and collect accurate documentation, and assist with the correct information about the consignment, for example documentation of origin. The main documents that come under customs transactions are described below and examined.

### 2.3.1 Commercial Invoice<sup>12</sup>

The commercial invoice is a record or evidence of the transaction between the exporter and the importer. Once the goods are available, the exporter issues a commercial invoice to the importer in order to charge him for the goods. The commercial invoice contains the basic information on the transaction and it is always required for customs clearance. Although some entries specific to the export-import trade are added, it is similar to an ordinary sales invoice. The minimum data generally included are the following<sup>13</sup>:

<sup>10</sup> European Commission, ‘Authorised Economic Operator (AEO)’ (European Commission, 2017)

<sup>11</sup> Customs Compendium. *The global information and intelligence strategy*. Brussels, World Customs Organization 2005 p.12.

<sup>12</sup> <http://trade.ec.europa.eu/tradehelp/documents-customs-clearance>

<sup>13</sup> EU Directive 2006/112/EC of 28 November 2006, sec. 4 “Content of invoices”, art.226

- Information on the exporter and the importer (name and address)
- Date of issue
- Invoice number
- Description of the goods (name, quality, etc.)
- Unit of measure
- Quantity of goods
- Unit value
- Total item value
- Total invoice value and currency of payment. The equivalent amount must be indicated in a currency freely convertible to Euro or other legal tender in the importing Member State
- The terms of payment (method and date of payment, discounts, etc.)
- The terms of delivery according to the appropriate Incoterm
- Means of transport

No specific form is required. The commercial invoice is to be prepared by the exporter according to standard business practice and it must be submitted in the original along with at least one copy. In general, there is no need for the invoice to be signed. In practice, both the original and the copy of the commercial invoice are often signed. The commercial invoice may be prepared in any language.

### 2.3.2 Customs Value Declaration

The Customs Value Declaration is a document, which must be presented to the customs authorities where the value of the imported goods exceeds EUR 20 000. The Customs Value Declaration must be drawn up conforming to form DV 1<sup>14</sup>. The main purpose of this requirement is to assess the value of the transaction in order to fix the customs value (taxable value) to apply the tariff duties. The customs value corresponds to the value of the goods including all the costs incurred (e.g.: commercial price, transport, insurance) until the first point of entry in the European Union. The usual method to establish the Customs value is using the transaction value (the price paid or payable for the imported goods). In certain cases the transaction value of the imported goods may be subject to an adjustment, which involves additions or deductions. For instance:

- commissions or royalties may need to be added to the price;
- the internal transport (from the entry point within EU's the customs territory to the final destination in that territory) must be deducted.

### 2.3.3 Freight Documents (Transport Documentation)

Depending on the means of transport used, the following documents are to be filled in and presented to the customs authorities of the importing MS upon importation in order for the goods to be released for free circulation: Bill of Lading; FIATA Bill of Lading; Road Waybill (CMR); Air Waybill (AWB); Rail Waybill (CIM); ATA Carnet; TIR Carnet.

#### *Bill of Lading*

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<sup>14</sup> Whose specimen is laid down in Annex 8 to Regulation (EU) 2016/341 (OJ L-69 15/03/2016) (CELEX 32016R0341) known as UCC Transitional Delegated Act. This form must be presented with the Single Administrative Document (SAD).

The Bill of Lading (B/L) is a document issued by the shipping company to the operating shipper, which acknowledges that the goods have been received on board. In this way the Bill of Lading serves as proof of receipt of the goods by the carrier obliging him to deliver the goods to the consignee. It contains the details of the goods, the vessel and the port of destination. It evidences the contract of carriage and conveys title to the goods, meaning that the bearer of the Bill of Lading is the owner of the goods. The Bill of Lading may be a negotiable document. A number of different types of bills of lading can be used. "Clean Bills of Lading" state that the goods have been received in an apparent good order and condition. "Unclean or Dirty Bills of Lading" indicate that the goods are damaged or in bad order, in this case, the financing bank may refuse to accept the consignor's documents.

#### *FIATA Bill of Lading*

The FIATA Bill of Lading is a document designed to be used as a multimodal or combined transport document with negotiable status, which has been developed by the International Federation of Freight Forwarders Associations (FIATA).

#### *Road Waybill (CMR)*

The road waybill is a document containing the details of the international transportation of goods by road, set out by the Convention for the Contract of the International Carriage of Goods by Road 1956 (the CMR Convention). It enables the consignor to have the goods at his disposal during transportation. It must be issued in quadruplicate and signed by the consignor and the carrier. The first copy is intended for the consignor; the second remains in the possession of the carrier; the third accompanies the goods and is delivered to the consignee and the fourth one must be signed and stamped by the consignee and then returned to the consignor. Usually, a CMR is issued for each vehicle. The CMR note is not a document of title and is non-negotiable.

#### *Air Waybill (AWB)*

The air waybill is a document, which serves as a proof of the transport contract between the consignor and the carrier's company. It is issued by the carrier's agent and falls under the provisions of the Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage by Air, 12 October 1929). A single air waybill may be used for multiple shipments of goods; it contains three originals and several extra copies. One original is kept by each of the parties involved in the transport (the consignor, the consignee and the carrier). The copies may be required at the airport of departure/destination, for the delivery and in some cases, for further freight carriers. The air waybill is a freight bill, which evidences a contract of carriage and proves receipt of goods. A specific type of Air Waybill is the one used by all carriers belonging to the IATA; a bill called the IATA Standard Air Waybill. It embodies standard conditions associated to those set out in the Warsaw Convention.

#### *Rail Waybill (CIM)*

The rail waybill (CIM) is a document required for the transportation of goods by rail. It is regulated by the Convention concerning International Carriage by Rail 1980 (COTIF-CIM). The CIM is issued by the carrier in five copies, the original accompanies the goods, the duplicate of the original is kept by the consignor and the three remaining copies by the carrier for internal purposes. It is considered the rail transport contract.

### *ATA Carnet<sup>15</sup>*

ATA (Admission Temporaries/Temporary Admission) carnets are international customs documents issued by the chambers of commerce in the majority of the industrialized world to allow the temporary importation of goods, free of customs duties and taxes. ATA carnets can be issued for the following categories of goods: commercial samples, professional equipment and goods for presentation or use at trade fairs, shows, exhibitions and the like.

### *TIR Carnet<sup>16</sup>*

TIR carnets are customs transit documents used for the international transport of goods, a part of which has to be made by road. They allow the transport of goods under a procedure called the TIR procedure, laid down in the 1975 TIR Convention, signed under the auspices of the United Nations Economic Commission for Europe.

The TIR system requires the goods to travel in secure vehicles or containers, all duties and taxes at risk throughout the journey to be covered by an internationally valid guarantee, the goods to be accompanied by a TIR carnet, and customs control measures in the country of departure to be accepted by the countries of transit and destination.

### *Freight Insurance*

The insurance is an agreement by which the insured is indemnified in the event of damages caused by a risk covered in the policy. Insurance is all-important in the transport of goods because of their exposure to more common risks during handling, storing, loading or transporting cargo, but also to other rare risks, such as riots, strikes or terrorism. There is a difference between the goods transport insurance and the carrier's responsibility insurance. The covered risks, fixed compensation and indemnity of the contract of transport insurance are left to the holder's choice. Nevertheless, the hauler's responsibility insurance is determined by different regulations. Depending on the means of transport, indemnity is limited by the weight and value of the goods and is only given in case the transporter has been unable to evade responsibility.

The insurance invoice is required for customs clearance only when the relevant data do not appear in the commercial invoice indicating the premium paid to insure the merchandise.

The standard extent of the transporter's responsibility is laid down in the following international conventions:

*Road freight:* International transport of goods by road is governed by the Convention for the Contract of the International Carriage of Goods by Road (CMR Convention) signed in Geneva in 1956. Under this Convention, the road hauler is not responsible for losses of or damages to the goods if he proves that they arise from: the merchandise's own defect(s); force majeure; a fault by the loader or consignee. There is no EU regulation regarding indemnifications for road freight.

*The rail carrier:* International transport of goods by rail is regulated by the Convention concerning Intercarriage by Rail (CIM Convention), signed in Bern in 1980. The rail carrier is

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<sup>15</sup> <http://www.iccwbo.org/ata/id2924/index.html>

<sup>16</sup> <http://www.unece.org/trans/bcf/tir/welcome.html>

not responsible for losses of or damages to the goods if he proves that they arise as above for the road freight.

*The shipping company:* The 1968 International Convention on Bill of Lading, better known as "The Hague Rules" or the "Brussels Convention" dictates the marine carrier's responsibilities when transporting international goods. The shipping company is not responsible for losses of, or damage to, the goods if it proves that they arise from: the merchandise's own defects and loss in weight during transport; a nautical mistake by the crew; a fire; if the ship is not seaworthy; force majeure; strikes or a lock-out; a mistake by the loader; hidden defects on board the ship, which went unnoticed during rigorous inspection; an attempt to save lives or goods at sea.

*The air carrier:* The 1929 Warsaw Convention as well as the Montreal draft Treaty of 1975 determines that the air carrier is not responsible for damages or loss of goods if it is proved that: the carrier and associates took all the measures necessary to avoid the damage or that it was impossible for them to be taken (force majeure); the losses arise from a pilotage or navigation mistake; the injured party was the cause of the damage or contributed to it. The air carrier can state specific reservations at the time of receiving the cargo. These reservations will be written on the air consignment note (ACN) (air transport contract) and will be used as evidence. However, airlines will normally refuse dubious packages or those not corresponding to the ACN.

*Packing List:* The packing list (P/L) is a commercial document accompanying the commercial invoice and the transport documents. It provides information on the imported items and the packaging details of each shipment (weight, dimensions, handling issues, etc.) It is required for customs clearance as an inventory of the incoming cargo.

*Customs Import Declaration (SAD):* All goods imported into the EU must be declared to the customs authorities of the respective Member State using the Single Administrative Document (SAD)<sup>17</sup>. The SAD may be presented either by: using an approved computerized system linked to Customs authorities; or lodging it with the designated Customs Office premises. The main information that shall be declared is:

- Identifying data of the parties involved in the operation (importer, exporter, representative, etc.)
- Identifying data of the goods (Taric code, weight, units), location and packaging
- Information referred to the means of transport
- Data about country of origin, country of export and destination
- Commercial and financial information (Incoterms, invoice value, invoice currency, exchange rate, insurance etc.)
- List of documents associated to the SAD (Import licenses, inspection certificates, document of origin, transport document, commercial invoice etc.)
- Declaration and method of payment of import taxes (tariff duties, VAT, Excises, etc)

The SAD set consists of eight copies; the operator completes all or part of the sheets depending on the type of operation.

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<sup>17</sup> Is the common import declaration form for all the MS, laid down in the UCC (OJ L-269 10/10/2013) and the UCC DA adopted in Commission Delegated Regulation No 2016/341 (OJ L-69 15/03/2016)

*Documents associated to the SAD:* according to the operation and the nature of the imported goods, additional documents shall be declared with the SAD and shall be presented together with it. The most important documents are:

- Documentary proof of origin, normally used to apply a tariff preferential treatment
- Certificate confirming the special nature of the product
- Transport Document
- Commercial Invoice
- Customs Value Declaration
- Inspections Certificates (Health, Veterinary, Plant Health certificates)
- Import Licenses
- Community Surveillance Document
- Cites Certificate
- Documents to support a claim of a tariff quota
- Documents required for Excise purposes
- Evidence to support a claim to VAT relief

### 3. Taxable person in VAT

The Value added Tax is mainly governed by the EU directive 2006/112 but also by the directives: 2008/9 on VAT refunds to taxable persons established in another MS; 86/560 on VAT refunds to taxable persons established outside the EU; 2007/74 on the exemption from VAT for goods imported by travelers from third countries; 2009/132 on the exemption from VAT on the final importation of certain goods; 2006/79 on the exemption from VAT on the importation of non-commercial consignments. The VAT is a consumption tax assessed on the value added to goods and service and is collected fractionally, via a system of partial payments by taxable persons. This mechanism ensures that the tax is neutral regardless of how many transactions are involved.

The article 9 (1) of the EU Directive 2006/112 provides a broad concept of establishes that: *“Taxable person shall mean any person who independently, carries out in any place any economic activity, whatever the purpose or results of that activity”*. To understand the concept of “taxable person”, in this chapter I will analyze the concept of “any person”; “independently” and “economic activity”. In the article we can see that the concept of taxable person for the VAT is broader than in other taxes like the income or corporate taxes, and it is not limited to those persons operating commercially.

The VAT Directive makes use of the term “taxable person” who performs “economic activities”. The activity consists on offering goods and services being essential in this concept the existence of an interaction of the person with an external market. A taxable person is any person who independently carries out a business in the EU or elsewhere. It includes persons who are exempt from VAT as well as flat-rate (unregistered) farmers. Important is that the person takes part in the course of trade. The definition of taxable persons it is a broad concept that it’s encompasses every person or entity engaged in an economic activity regardless the legal status of that person and it includes both natural and juridical persons regardless their purpose and the results of the activity and that who performing taxable transactions in the territory of a Member State, these persons, are subject to VAT.

Art. 10 of the EU Directive 2006/112 provides that the economic activity be conducted “independently”. This implies that all relationships of contractual dependence as a contract between employee and employer are not understood under the scope of taxable person. The notion “economic activity” The concept of taxable person is substantially linked to the performance of economic activities. For this reason, the notion of economic activity allows to

further determine the scope of entrepreneurship for the VAT<sup>18</sup>. For the purpose of this essay it is of importance to differentiate economic and non-economic activities.

### 3.1 Obligation of taxable person

In the system of the value added taxation the taxpayers pay taxes after the added value to the goods or services by themselves. In principle the taxpayer can deduct the apportionment of VAT of his acquisitions from the amount of the - in the purchase price - collected (output) tax by the supply of goods. As governed by Title XI of Vat directive 2006/112, the obligation is to pay as well governed by the article 193: *“VAT shall be payable by any taxable person carrying out a taxable supply of goods or services”*.

The supply of goods and services for consideration within the domestic territory by a taxable person acting as such; the intra-Community acquisition of goods for consideration within the domestic territory; and the importation of goods shall be subject to VAT.

The obligations of taxable persons should be harmonized as far as possible so as to ensure the necessary safeguards for the collection of VAT in a uniform manner in all the MS.

Alongside the obligation to pay VAT there are also the obligations defined as "administrative obligations", always governed by Title XI of the European Directive 2006/112, such as the identification of the taxpayer: *“Every taxable person shall state when his activity as a taxable person commences, changes or ceases”*<sup>19</sup>. Furthermore every taxable person shall ensure that an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party, supplies of goods or services which he has made to another taxable person or to a non-taxable legal person; any payment on account made to him before one of the supplies of goods; any payment on account made to him by another taxable person or non-taxable legal person before the provision of services was completed<sup>20</sup>. The

administrative obligations continue with the keeping accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities this implies to maintain the specific obligations relating to the storage of all invoices<sup>21</sup>.

Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions<sup>22</sup>.

Every taxable person identified for VAT purposes shall submit a recapitulative statement of the acquirers identified for VAT purposes to whom he has supplied goods in accordance with the conditions specified in Article 138(1) and (2) (c), and of the persons identified for VAT purposes to whom he has supplied goods which were supplied to him by way of intra-Community acquisitions referred to in Article 42<sup>23</sup>.

### 3.2 Supply by intermediaries

According to the article 24 of the Vat Directive, a supply of services means any transaction which doesn't constitute a supply of goods. Supplies of goods are positively listed in the art.

<sup>18</sup> [https://ec.europa.eu/taxation\\_customs/business/vat/eu-vat-rules-topic/taxable-persons-under-eu-vat-rules\\_en](https://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/taxable-persons-under-eu-vat-rules_en)

<sup>19</sup> EU Directive 2006/112/EC of 28 November 2006, art, 213

<sup>20</sup> EU Directive 2006/112/EC of 28 November 2006, art, 220

<sup>21</sup> EU Directive 2006/112/EC of 28 November 2006, art, 244

<sup>22</sup> EU Directive 2006/112/EC of 28 November 2006, art, 250

<sup>23</sup> EU Directive 2006/112/EC of 28 November 2006, art, 262



14 to 19 of the VAT Directive. None of these encompass intermediation supplies except for article 14(2)c, according to which the transfer of goods pursuant to a contract under which commission is payable on purchase or sale is regarded as a supply of goods. Accordingly the commission service is disregarded for VAT purpose, thus implying that the commissionaire is deemed to have purchased the goods himself and subsequently sold them to the customer. As such there are two separate supplies (sales) for VAT purpose, and not a single sale and the supply of an intermediation. According to “*Terra & Kajus*” this situation is commonly referred to as the commissionair acting as an undisclosed agent.<sup>24</sup> It could be discussed whether art. 14(2) c applies solely to agents who act in the name and on behalf of a principal. Moreover, the wording doesn’t seem to distinguish between whether or not the commissionair acts in his own name or in the name of someone else, it merely refers contracts under which commission is payable. Likewise, no distinction is drawn with respect to whether or not the commissionair acts on his own behalf or on behalf of someone else. It should be stressed that a taxable person acting in his own name and on his own behalf lacks the characteristics of a commissionair, as this person is simply the purchaser and subsequently the seller.<sup>25</sup> Depend solely upon whether the transfer of goods under which commission is payable take place.

The article 28 of the VAT Directive limits the scope of intermediation supplies for VAT purposes in the sense that supplies made in the name of the intermediary, but on behalf of a principal, are not deemed to be a distinct supply of intermediation, but a supply of the underling services. Accordingly, it follows from the wording of article 28 of the VAT Directive that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

#### **4. Customs duty and VAT: import and export**

After analysing the entities involved in the two spheres, customs and VAT, object of study of this thesis, their responsibilities remaining on standard situations and without analysing specific situations, in this chapter I will treat the two spheres, customs and vat, and I will analyse these in the case of import and export. In this chapter we will understand how the two spheres are linked to each other but at the same time the two cases remain detached from each other and governed by different codes.

The VAT Consolidation Act provides that the provisions of the Customs Consolidation Act 1876 and other law in force in the MS relating to customs applies, with such exemptions and modifications as may be specified in Regulations, to Import VAT as if it were a duty of customs. Therefore the mechanisms for collecting VAT on imports generally parallel the arrangements for collecting Customs duty (e.g. the Import VAT is collected with the Customs duty on the basis of an import declaration). In addition, as a general rule, the VAT treatment will follow the Customs duty treatment (e.g. where the goods are placed under a customs regime where Customs duty is not payable (say inward processing) then Import VAT will also not be payable). However, this is not an absolute rule and there are situations where the Customs and Import VAT treatment diverges.<sup>26</sup>

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<sup>24</sup> Terra & Kajus in “Introduction to European VAT-2010”, section 10.2.1.4

<sup>25</sup> Claus Bohn Jespersen in “Intermediation of Insurance and Financial Services in European VAT” p. 248

<sup>26</sup> Customs Procedures Branch Corporate Affairs & Customs Division, 2016

## 4.1 Customs duty import and the new UCC

The word 'importation' commonly refers to the bringing of goods into the customs territory. However this term is not used to describe the customs procedure relating to the clearance of goods brought into the customs territory of the Community.

The procedure allowing third country goods to circulate freely throughout the EU in the same way as goods made in the EU is called release for free circulation.

From a customs point of view the release for free circulation changes the status of non-Union goods to Union goods and entails the completion of all formalities laid down for importation. The Article 23 EC Treaty stipulates free circulation for Union goods throughout the EU. This principle applies not only to goods made in the Union but also to imported goods which have been released for free circulation after payment of the import duties to which they are liable. A customs debt on import shall be incurred through the placing of non-Union goods liable to import duty under either of the following customs procedures: release for free circulation, including under the end-use provisions; and temporary admission with partial relief from import duty.<sup>27</sup>

Release for free circulation thus confers on non-Union goods the status of Union goods.<sup>28</sup> Article 201 (2) UCC (CC) clarifies that release for free circulation entails:

*“Release for free circulation shall entail the following:*

- (a) the collection of any import duty due;*
- (b) the collection, as appropriate, of other charges, as provided for under relevant provisions in force relating to the collection of those charges;*
- (c) the application of commercial policy measures and prohibitions and restrictions insofar as they do not have to be applied at an earlier stage; and*
- (d) completion of the other formalities laid down in respect of the import of the goods.”*

Importing goods from EU member states is known as Intra-Community acquisition of goods. There are no longer fiscal borders within the EU except for excise goods, special goods such as tobacco, alcoholic products, mineral oils. Products from MS can be transported within the EU without any customs formalities.

The arrangements where the VAT treatment follows the customs duty treatment are as follows:<sup>29</sup>

- a) arrangements for temporary importation with total exemption from Customs duty,
- b) external transit arrangements,
- c) temporary storage arrangements,
- d) customs warehousing arrangements,
- e) inward processing arrangements,
- f) arrangements for the admission of goods into territorial waters in connection with drilling or production platforms,
- g) outward processing arrangements.

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<sup>27</sup> Art 77 UCC

<sup>28</sup> Ex art. 77 of CCC COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 *“Release for free circulation shall confer on non-Community goods the customs status of Community goods. It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due”.*

<sup>29</sup> VAT Regulations 2010 (SI 639/10), Regulation 14(3)

Other arrangements relating to customs concerning the suspension of Customs duties, reduction in Customs duties or repayment or remission of Customs duties do not apply to Import VAT.<sup>30</sup> An example would be where the goods qualify for nonpayment of Customs duty because they are for use in a private aircraft - the End-Use Authorization relieves them of Customs duty, but Import VAT remains payable. However, an End-use Authorization to cover goods under paragraph f) above would relieve both Customs duty and Import VAT.

## 4.2 Customs duty export and the new UCC

Regarding customs duties on export goods, there is a distinction between countries inside the EU and countries outside the EU. As already mentioned above, there are no internal borders between EU member states. When supplying goods to a customer in another EU member state, this is no longer officially called an export. It is now referred to as an intra-Community supply (ICS). The authorities may check the administration. The invoice should meet certain requirements and shipments of goods are usually accompanied by a document such as a waybill. Also when the exporter ships goods to countries outside the EU, he needs to deal with both the tax authorities and the customs authorities. In many cases it is possible to invoice the goods exported to companies with a 0% VAT.

The CC-DA shows a different definition of 'exporter' than the CCC. As opposed to the CCC, the UCC has a general 'exporter' definition which is mentioned right at the beginning of the UCC-DA:

*'exporter' means:*

*(a) the person established in the customs territory of the Union who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union,*

*(b) the private individual carrying the goods to be exported where these goods are contained in the private individual's personal baggage,*

*(c) in other cases, the person established in the customs territory of the Union who has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union.<sup>31</sup>*

Under the UCC, it seems that it is the purpose that the exporter is always an EU established entity. Even though the phrase under (c) suggests otherwise and should cover all "other cases", this definition seems to contain a gap. Part (a) first mentions the situation where there is an export contract. According to part (c) of the definition, in cases other than mentioned in part (a) and (b), the person established in the EU who has the power to determine that the goods are brought to a destination outside the EU, is the exporter. This part could apply if an EU established person for instance leases or donates goods, or transfers its own stock to a non-EU destination, instead of selling the goods.

## 4.3 VAT import

The concept of importation has been described in different ways, for example from the art 30 of VAT directive 2006/112 (I will describe above), and the Article 5 (23) of the UCC states that:

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<sup>30</sup> Ibi

<sup>31</sup> Art. 1 TAXUD/A2/FOR/2016/017 REV1-EN, Brussels, 14 December 2016.

*“Union goods” means goods imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation.<sup>32</sup>*

Union goods introduced into a Member State from another Member State of the European Union are still often loosely referred to as “import”. However, since the introduction of the single market, Union goods brought into a Member State from another Member States are treated in VAT terms as intra-Community acquisitions or supplies of goods within the State.

When goods are moved from a non-EU MS to an EU MS, not only Customs rules are applicable but also the VAT rules. Usually the VAT rules on the importations are in line with the UCC. The importations are subject to the VAT<sup>33</sup>, as mentioned in article 30 of the EU VAT Directive:

*“Importation of goods shall mean the entry into the Community of goods which are not in free circulation within the meaning of article 24 of the Treaty. In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community, shall be regarded as importation of goods.”*

The time in which the payment of the VAT is realized, it is manifested with the importation that is when the good arrives in the EU territory.<sup>34</sup>

An importation in the Customs territory often coincide with an importation in the VAT territory (and import VAT is due). The latter is happening for goods from “third territories” and as such defined in article 6 of the EU VAT Directive. Often this discordance can happen with the overseas territory as Guadalupe, Martinique, French Guinea, Reunion... that are part of the EU territory and they are considered part of the customs area but not regulated by the VAT directive.

A derogation from article 60<sup>35</sup> of the EU VAT directive is mentioned in article 61 of the EU VAT directive where, upon entry into the Community, the goods which are not in free circulation are:

- presented to customs and where applicable placed in temporary storage;
- placed:
  - in a free zone or free warehouse;
  - under customs warehousing arrangements or inward processing relief;
  - under temporary importation arrangements with total exemption from import duty;
  - under external transit arrangements.

In these situations the place of importation of goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

In respect of the importation of goods, the taxable amount to calculate the value of import VAT is in line with the UCC and is determined in accordance with the Community provisions in force.<sup>36</sup> The taxable amount shall include: *taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied, incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member*

<sup>32</sup> Union Customs Code, Regulation (EU) No 952/2013 of the European Parliament.

<sup>33</sup> Art. 2 (1) d, Vat directive 2006/112/EC

<sup>34</sup> Art. 70, vat directive 2006/112/EC: *“The chargeable event shall occur and VAT shall become chargeable when the goods are imported.”*

<sup>35</sup> Art. 60, vat directive 2006/112/EC: *“The place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community.”*

<sup>36</sup> Art. 85 VAT

*State of importation as well as those resulting from transport to another place of destination within the Community.*

#### 4.4 VAT export

An exportation of goods takes place when goods are dispatched or transported from the territory of an EU country to a place outside the EU.

The exportation to EU countries are technically called intra-Community transactions, this means that the transaction with third countries are exportation and the VAT directive is in line with the UCC. If it is an intra community exportation, the rules on Export VAT depend on whether that business is VAT registered. The VAT is not chargeable if the business has a valid VAT number.

The transactions that involve exportation (or are treated as doing so) are exempted but with the right to deduct, so that EU exporters are not penalized by having to reflect the VAT they have incurred in the price of their export goods. The transactions that EU Member States must exempt are listed in *Article 146 VAT Directive*:

- a) *“the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;*
- b) *the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fueling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;*
- c) *the supply of goods to approved bodies which export them out of the Community as part of their humanitarian, charitable or teaching activities outside the Community;*
- d) *the supply of services consisting in work on movable property acquired or imported for the purpose of undergoing such work within the Community, and dispatched or transported out of the Community by the supplier, by the customer if not established within their respective territory or on behalf of either of them;*
- e) *the supply of services, including transport and ancillary transactions, but excluding the supply of services exempted in accordance with Articles 132 and 135, where these are directly connected with the exportation or importation of goods covered by Article 61 and Article 157(1)(a).”<sup>37</sup>*

#### 5. Right to deduct vat

The right to deduct input VAT arises when the deductible VAT becomes chargeable according to Article 167 of VAT Directive. This right is set out in Article 168 of VAT, in which it allows a taxable person to deduct the VAT due or paid in respect of his supplies, when the tax invoiced to him on goods and services that were supplied, acquired or imported by him. Article 168 of VAT Directive set out the conditions that limit the right of deduction on goods and services that are used for the purposes of taxed transactions.

In regard to the exempt activities or the use of the goods and services in private use, that do not fulfil the requirement set out in Article 168, no deduction of input VAT will be allowed,

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<sup>37</sup> Art. 146 Vat directive

except if this tax constitute general costs used for the purpose of the overall economic activities.<sup>38</sup>

VAT due or paid on the following transactions can be deducted:

- Domestic supplies of goods or services and transactions treated as such;
- Intra-EU acquisitions of goods and transactions treated as such;
- Importation of goods.

Only VAT due on goods or services used for the following activities can be deducted:

- the taxed transactions of the taxable person;
- certain exempt transactions;
- transactions carried out abroad if the same transactions would give rise to VAT deduction domestically;
- cross-border supplies of new means of transport;
- certain exempt financial transactions with customers established outside the EU.

Although the general principle is that the input VAT on purchases and acquisitions that go directly towards the making of an exempt supply is not deductible, there is a broad range of exempt transactions the input VAT associated with which is nevertheless deductible. In many cases, this is because VAT is collected in some other part of the chain. So, for example, an intra-EU supply may be exempt but the corresponding intra-EU acquisition will be taxed. These exemptions with the right to deduct are of eight different kinds.<sup>39</sup>

- Intra-EU supplies
- Triangular transactions
- Exportation
- International transport
- International bodies, embassies etc
- Customs warehousing etc.
- Tax warehouses etc.
- Optional exemptions linked to export

## 6. Conclusion

The responsibilities presented and analysed are different and often bind and intertwine with each other. Everything is always under the control of the customs and tax authorities basis on their responsibilities. Often in the relationship between customs duty and Vat, the prevalence falls on the customs and then the Vat rules are applied, for example in the context of imports about the occurrence of a customs debt art. 77 UCC<sup>40</sup> where the customs debt is incurred when the customs declaration is accepted and the debtor is the declarant, only after that the vat is applicable. “Only” because if we analyse article 71 of vat directive in condition of temporary storage, free zone, customs deposit... the vat is exempt:

<sup>38</sup> Ben Terra – Julie Kajus, A Guide to the European VAT Directiv. Chapter 17, Deduction, page 855 and 856, E-book

<sup>39</sup> Art. 169 (b) vat directive 2006/112

<sup>40</sup> Art. 77 UCC: “a customs debt on import shall be incurred through the placing of non-Union goods liable to import duty under either of the following customs procedures: (a) release for free circulation, including under the end-use provisions; (b) temporary admission with partial relief from import duty. A customs debt shall be incurred at the time of acceptance of the customs declaration.”

*“Where, on entry into the Community, goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations. However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable. Where imported goods are not subject to any of the duties referred to in article 71, the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties.”*

Also an important point is the communication between the parties involved, for example in the case of indirect representation, the ultimate responsible person is the exporter/consignor. Also to be compliant the exporter/importer is responsible to issue and check the correct documentation as analyzed in the chapter 2.3. also because in most cases, as we have seen in a B2B situation, the importer and/or exporter are the persons to which the main responsibilities fall.

A good compliance between the parties involved in the importation and exportation of goods it is really important, it is important to have in place a good polices that describe the responsibilities of the parties, who is in charge in what in line with the European law.

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