

ECJ cases on undervaluation

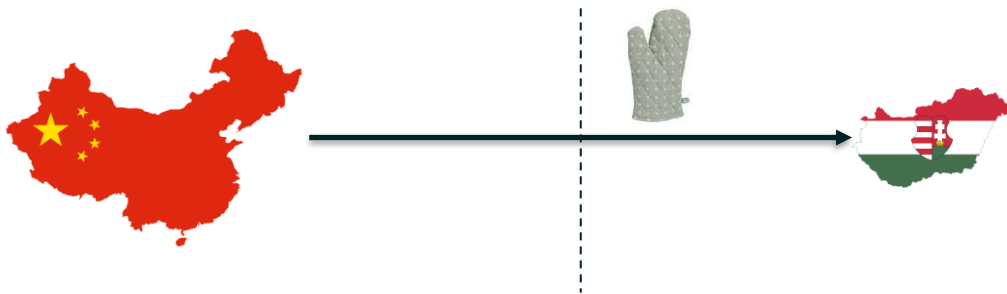
Erasmus University Rotterdam, 31 March 2022
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Agenda

1. C-291/15 EURO 2004, Hungary
2. C-1/18, Oribalt Rīga SIA
3. C-599/20, UAB 'Baltic Masters'
4. C-187/21, FLAWKES Kft.
5. C-770/21, OGL-Food Trade Lebensmittelvertrieb GmbH
6. C-213/19, European Commission vs. UK
7. Concluding remarks

1. C-291/15 EURO 2004, Hungary

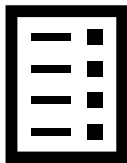
Facts and circumstances



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

1. C-291/15 EURO 2004, Hungary

What information was provided to the Hungarian Customs Authorities?



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

1. C-291/15 EURO 2004, Hungary

Why was the declared customs value rejected?

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

1. C-291/15 EURO 2004, Hungary

Question to the Court

‘Must Article 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 be interpreted as precluding a practice of a Member State whereby the customs value is determined on the basis of the “transaction value of similar goods” if it is considered that the declared transaction value, in comparison with the statistical average of the purchase prices verified in the context of the importation of similar goods, is unreasonably low and, consequently, incorrect, despite the fact that the customs authority does not refute or call into question the authenticity of the invoice or the bank transfer certificate produced in order to establish the price actually paid for the imported goods, without the importer having submitted additional evidence to demonstrate the transaction value?’

1. C-291/15 EURO 2004, Hungary

Considerations of the Court (1)

Priority to the transaction value



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graph TD; A[Priority to the transaction value] --> B[Authorities may ask for additional information]; B --> C[Still doubts? Rejection of the transaction value];
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30. Since, for the purposes of the customs valuation, priority is to be given to the transaction value in accordance with Article 29 of the Customs Code, that method of determining the customs value is assumed to be the most appropriate and the most frequently used [...]

Authorities may ask for additional information

31. As regards, first, what powers the customs authorities have where a declaration submitted to them gives rise to doubts, Article 181a of the Implementing Regulation provides that the customs authorities need not necessarily determine the customs valuation of imported goods on the basis of the transaction value method if they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable. [...]

Still doubts?
Rejection of the transaction value

31. [...] They may, therefore, refuse to accept the declared price if those doubts continue after they have asked for additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts

1. C-291/15 EURO 2004, Hungary

Considerations of the Court (2)

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

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

[...]

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

1. C-291/15 EURO 2004, Hungary

Decision of the Court

Article 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation No 3254/94 of 19 December 1994, must be interpreted as not precluding a customs authority practice, such as that at issue in the main proceedings, whereby the customs value of imported goods is determined on the basis of the transaction value of similar goods, the method in Article 30 of Council Regulation No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, where the declared transaction value is considered to be unreasonably low in comparison with the statistical average of the purchase prices verified in the context of the importation of similar goods and despite the fact that the customs authority does not refute or call into question the authenticity of the invoice or the bank transfer certificate produced in order to establish the price actually paid for the imported goods, without the importer having submitted, in response to a request to that effect from the customs authority, additional evidence to demonstrate the accuracy of the declared transaction value of those goods.

2. C-1/18, Oribalt Rīga SIA



- Ranbaxy Laboratories ships laboratory equipment to Latvia.
- Oribalt Rīga provides Ranbaxy Laboratories with consignment services in Latvia and releases the goods for free circulation on behalf of Ranbaxy Laboratories.
- The customs value was determined based on pro forma invoices drawn up by Ranbaxy Laboratories for customs purposes.
- The imported goods are only sold after import and, once the goods had been sold, Ranbaxy Laboratories issues Oribalt Rīga with new invoices for the goods sold, also taking into account discounts.

2. C-1/18, Oribalt Rīga SIA

Customs valuation approach

- Customs value cannot be determined based on the initial invoices under the transaction value method.
- Latvian Customs Authorities want to use the deducted valuation method, because they lack information about identical or similar goods.
- Oribalt argues that the Latvian authorities should and could obtain the information necessary to be able to determine the customs value on the basis of the transaction value of identical or similar goods.

2. C-1/18, Oribalt Rīga SIA

Conclusion of the Advocate-General

- Where a customs authority does not have at its disposal the necessary expertise and information to undertake that assessment with respect to the goods to be valued, several courses of action are possible:
 - i. the customs authority may request any further documents and information from the declarant as it considers necessary in establishing the customs value under any of the valuation methods in Articles 30 and 31 of the CCC;
 - ii. the customs authority may request any document or information of any person directly or indirectly involved in the operations concerned for the purposes of trade in goods;
 - iii. the customs authority may make a request for administrative assistance from other customs authorities in the EU Member States in order to obtain the necessary information; or
 - iv. the customs authority may request analyses or expert reports on the goods to be valued at the expense of the declarant.

2. C-1/18, Oribalt Rīga SIA

Decision of the Court on the definition of ‘similar goods’

In the light of the foregoing, the answer to the first question is that Article 30(2)(b) of the Customs Code must be interpreted as meaning that when the customs value of goods, such as the medicinal products at issue, is calculated by applying the deductive method laid down in that provision, the competent national customs authority must, in order to identify ‘similar goods’, take into consideration any relevant factor, such as the composition of those goods, their substitutability in the light of their effects and their commercial interchangeability, thus conducting a factual assessment which takes into account any factor that may have an impact on the real economic value of those goods, including the market position of the imported goods and of their manufacturer.

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



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

3. C-599/20, UAB ‘Baltic Masters’

Second question referred for a preliminary ruling

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

3. C-599/20, UAB ‘Baltic Masters’

Conclusion of the Advocate-General

74. [...] The referring court notes that the transaction taken as the reference was the only case of exports from Malaysia under the same TARIC code recorded in the national database in 2010.
77. Although the shipment used as reference did not necessarily concern ‘identical goods’ or ‘similar goods’, within the meaning of Article 30(2)(a) and (b) of Regulation No 2913/92, the fact that both shipments concerned goods classified under the same TARIC code is indicative of a reasonable degree of commonality between those goods. In my view, such commonality may well be sufficient when some goods are valued under Article 31 of Regulation No 2913/92, if no other characteristics of the products in question are known. In practice, the authorities applied the method of determination of the customs value on the basis of the transaction value of similar goods, interpreting the concept of ‘similar goods’ in a flexible manner.

3. C-599/20, UAB ‘Baltic Masters’

Conclusion of the Advocate-General

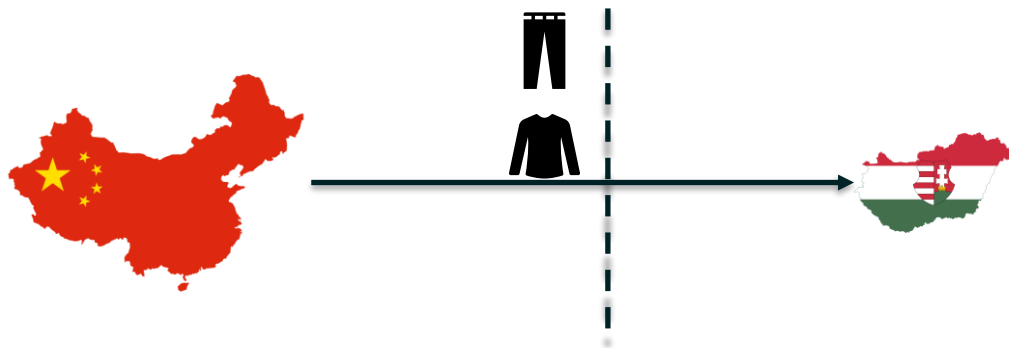
79. It is true that the relevant TARIC code used in the present case is residual and generic. However, the attribution of the specific TARIC code by the customs authorities was based on the information provided by the importer itself. In this regard, it must be borne in mind that the system of EU customs valuation is based on the premises that the information necessary for the application of customs rules to goods is mainly determined on the basis of the information provided by the declarant, and not on the basis of the customs authorities’ findings. **More generally, self-assessment of the liabilities in relation to the goods covered by a declaration submitted to the customs authorities is generally considered to be one of the principles underpinning the EU legislation in this field.** In this context, the role of the authorities is mostly confined to checking and verifying the declarations and, if necessary, rectifying them. **The authorities cannot be expected to carry out time-consuming tasks in order to ‘do the job’ of the declarants and re-calculate their dues on the basis of information and data that is not readily available.**

3. C-599/20, UAB ‘Baltic Masters’

Conclusion of the Advocate-General

82. That said, **I agree with Baltic Master that the examination of EU-wide data, relating to imports of the relevant goods in the relevant period, would have been preferable**. It is, however, for the referring court to ascertain whether any such data was available and, if so, whether that data may cast doubt on the customs authorities’ findings.

4. C-187/21, FLAWKES Kft.



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

4. C-187/21, FLAWKES Kft.

Questions referred for a preliminary ruling

1. Must Article 30(2)(a) and (b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code be interpreted as meaning that only the values listed in the database created from the customs clearances of the Member State's own customs authority may and must be taken into account as the customs value?
2. If the first question is answered in the negative, is it necessary, for the purposes of determining the customs value in accordance with Article 30(2)(a) and (b), to approach the customs authorities of other Member States in order to obtain the customs value of similar goods listed in their databases, and/or is it necessary to consult a Community database and obtain the customs values listed in it?

4. C-187/21, FLAWKES Kft.

Questions referred for a preliminary ruling

3. May Article 30(2)(a) and (b) of Regulation No 2913/92 be interpreted as meaning that, for the purposes of determining the customs value, account may not be taken of transaction values relating to transactions performed by the applicant for customs clearance himself, even if those values have not been challenged either by the national customs authority or by the national authorities of other Member States?
4. Must the requirement of 'at or about the same time', laid down in Article 30(2)(a) and (b) of Regulation No 2913/92, be interpreted as meaning that it may be limited to a period of +/- 45 days before and after customs clearance?

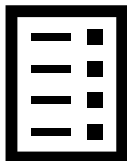
5. C-770/21, OGL-Food Trade Lebensmittelvertrieb GmbH



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

5. C-770/21, OGL-Food Trade Lebensmittelvertrieb GmbH

What information was provided to the Bulgarian Customs Authorities?



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

5. C-770/21, OGL-Food Trade Lebensmittelvertrieb GmbH

Reasons of the customs authorities

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

5. C-770/21, OGL-Food Trade Lebensmittelvertrieb GmbH

Fourth question referred for a preliminary ruling

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

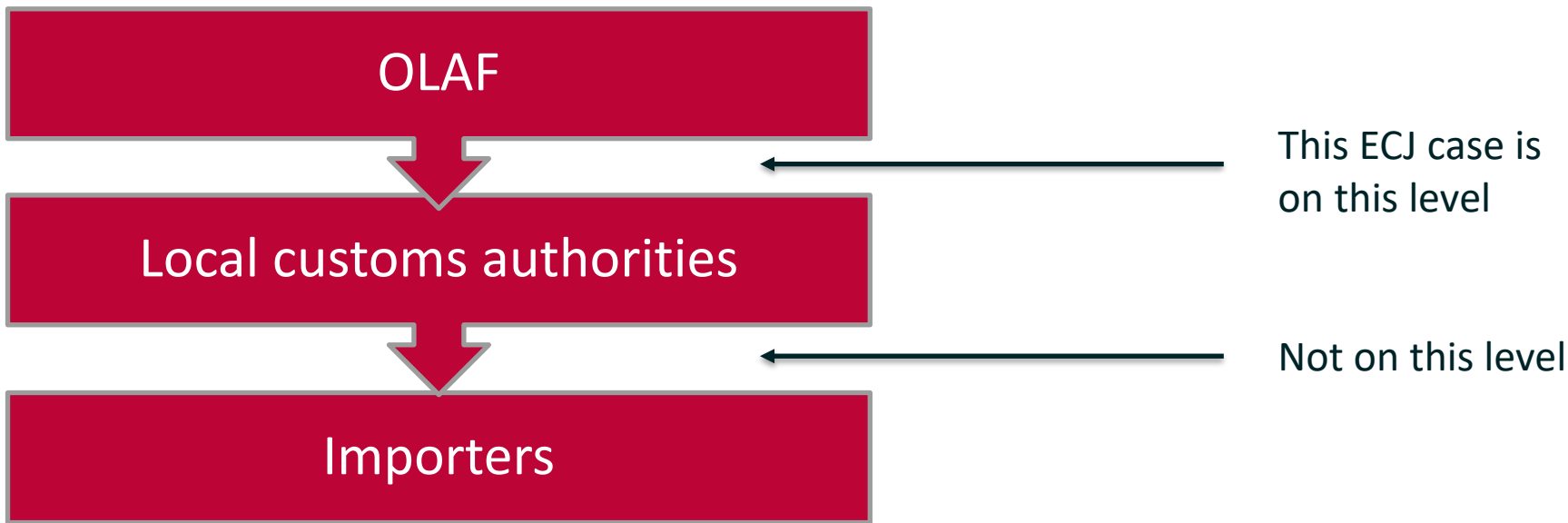
- the transaction value declared is significantly higher than the standard import value determined by the Commission for the same product for the purpose of applying import duties in the vegetable sector;
- the customs authority does not dispute or otherwise question the authenticity of the invoice and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

6. C-213/19, European Commission vs. UK



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

6. C-213/19, European Commission vs. UK



6. C-213/19, European Commission vs. UK

How undervaluation should be determined according to the Commission

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

6. C-213/19, European Commission vs. UK

Decision of the Court

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

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

6. C-213/19, European Commission vs. UK

Reaction of OLAF

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

7. Concluding remarks

- Still debate about what information is sufficient in case customs authorities have doubts about the accuracy of the declared transaction values (EURO 2004, OGL-Food).
- The use of statistical values derived from databases seems to be possible for detecting undervaluation (EURO 2004 / EC vs. UK) and in particular cases statistical values can be used as customs value. However, still debate about:
 - EU vs national databases;
 - Comparability of the statistical values;
 - Own transaction value data vs. statistical values.
- Will there be impact of EC vs. UK on the acceptability of related-party transactions (transfer pricing)?

Thank you for your attention!

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