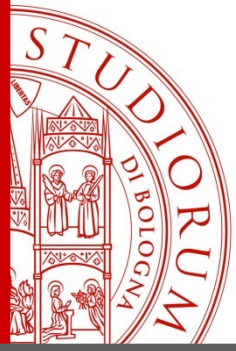


THEORETICAL ISSUES ON THE INTERPLAYS BETWEEN CUSTOMS VALUE AND TRANSFER PRICING

*Valencia, November 26°, 2021
First ECCE Seminar*

Prof. Giangiacomo D'Angelo

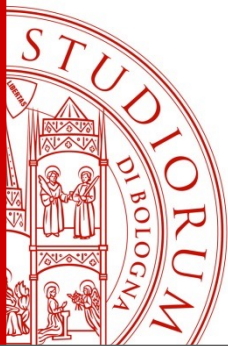


Transactions between related parties

Transactions between related parties, across the national borders, are very common in international trade.

Both Income tax law and Customs law provide for *ad hoc* valuation methods for these transactions, but...

...for **different rationales** and **competing purposes**



Rationale of the rules on Transfer Pricing

In income tax, Transfer Pricing is a legal tool for allocating among States the fair share of profits.

Purpose: Preventing
arbitrage and artificial
shifting of the profits to be
taxed.



Rationale of the Customs Values for transactions between related parties

Due to the lack of competing interests between the parties, the transaction value of import in EU may be lowered, to diminish the customs duties.

Purpose: Avoiding undervaluation of import goods.



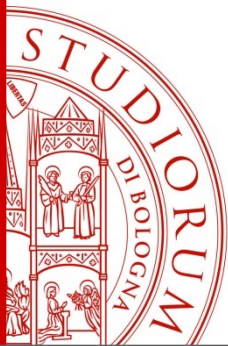


The approach in determining the value is different

Customs Value: hierarchical approach, strict methods, stated by UCC to evaluate import goods.

Transfer Pricing: more discretionary approach.
Preference for the most appropriate approach in the concrete case.

OECD guidelines are not legally binding in every country.



Timing of evaluation for Customs Duties and for Income Tax

Valuation of inventory for TP (normally) is yearly adjustable: it is possible to adjust the invoiced value during a tax period (one year)

CV relies on an instant evaluation: CV is declared and detected at the import time.

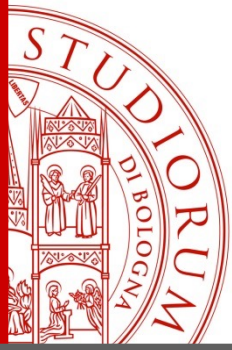


Further separateness in EU: rules on CV and TP are on different level

In the EU, the rules governing customs duties and direct taxation are on different normative levels.

Customs Duties -> EU law

Income Tax -> National law

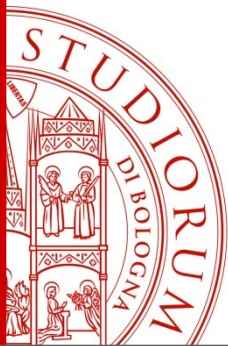


The mutual autonomy of customs and income tax legislation

The position of the ECJ date back to early judgments and it builds upon the autonomy of EU law.

ECJ C-65/79 *Renè Chatain (Sandoz)* case.

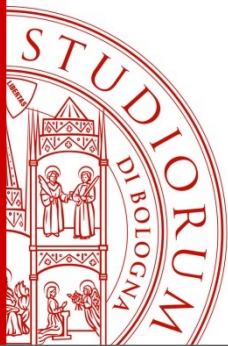
Adjustment of import's value according to European Customs Law cannot be used by MS for national purposes, others than levy custom duties.



Income Tax & Customs Duties are parallel worlds



... but sometimes parallel
worlds overlap...

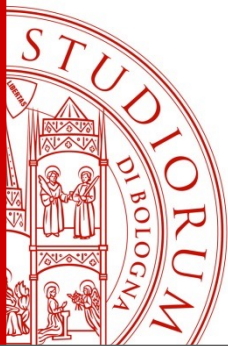


Different paths But leading to similar results

In practical terms the two evaluation results are often very similar.

Both CV and TP resort to the *arm's length* principle.

Customs and tax authorities, *relying on administrative internal rules*, tend to reach out the same evaluation results.



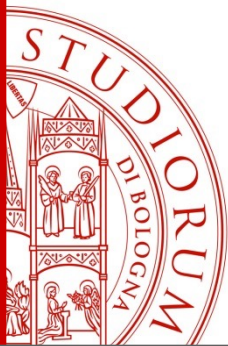
So, what's wrong ?

- Alignment cannot be considered for granted in every case (administrative practices matter);
- Timing of evaluation is unaligned, and this may lead to mismatching (i.e. retroactive adjustment of CV may not be admitted).
- Dealing with two sets of rules (and, often, two fiscal authorities) procedure is time and resources consuming;



What's at stake, from legal point of view?

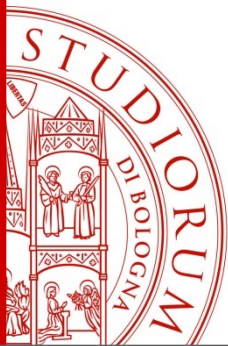
- Certainty of Law;
 - Avoiding contradictions in the overall tax system.
- Principle of Proportionality;
 - Prohibition of unnecessary procedures.



A further rising interplay Transfer Pricing for tackling customs frauds

May Transfer Pricing evaluation be used to detect customs frauds ?

C-291/15 *EURO 2004. Hungary*, the ECJ allowed CV adjustments according to the «similar products» method, even without calling into question the authenticity of the invoices, of the bank transfers and other documents...



An ideal solution: A legal link between TP and CV

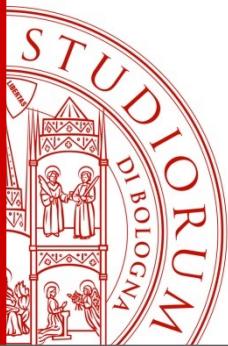
The US approach:

Sec. 1059 A - IRC – When import between related parties occurs, the CV is a maximum for the valuation of inventory, for income tax purposes.

A national approach:

The value settled (agreed) for first (often the CV) is binding on the other (*estoppel*, or *bona fide* principle)

(*Coca Cola* case, Tribunal Supremo 2009, 30° November)



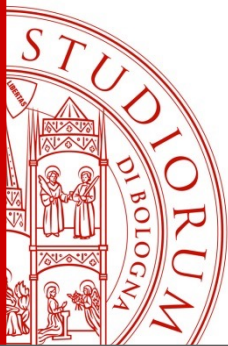
Is it possible a legal link in the EU ?

In principle, but...

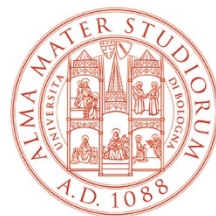
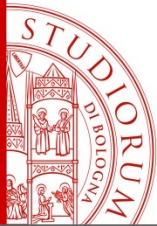
- The link should be contained in a EU act regulating income tax law... (probably a EU Directive)

For Direct Taxation unanimity is required.

- The estoppel safeguard should be endorsed also by the ECJ... (and ECJ is for the authonomy of CV!)



Not an easy puzzle to solve...

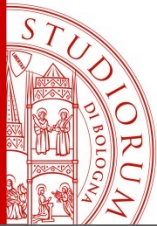


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Thank you

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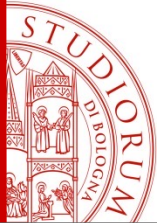
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CUSTOMS VALUE AND TRANSFER PRICING: THE RELEVANT EVALUATION RULES

Valencia, November 26°, 2021
First ECCE Seminar

Doct. Federico Tarini

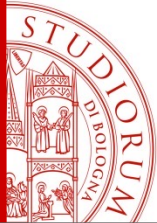


Different paths, leading to similar results

In practical terms the two evaluation results are often very similar.

Both CV and TP evaluation resort to the *arm's length* principle to evaluate the transactions between related parties.

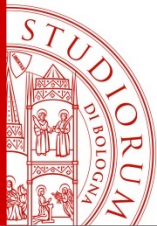
Customs and tax authorities, following administrative internal rules, tend to consider the same principles for evaluating the goods.



Customs Value

Based primarily on the transaction value – Art. 70 UCC;

Alternative methods must be applied if the relationship between the buyer and seller did influence the price – Art. 70 (3)(d) UCC;



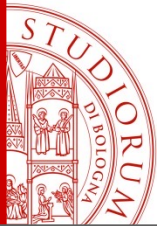
The relationship between the buyer and the seller

The relationship between buyer and seller is not, in itself, a basis for discarding the transaction value

Art. 134 UCC- IA

Transaction value is accepted if:

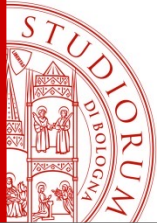
- The circumstance surrounding the sale and the additional information provided by the declarant prove that such relationship did not influence the price;
- The declarant prove that the transaction value closely approximates to one of the test value



Alternative methods

Art. 74 UCC

1. Transaction value of identical goods,
2. Transaction similar of identical goods,
(the comparison must be performed at the same commercial level)
3. Unit price method
4. Computed value method,
5. Fallback option –

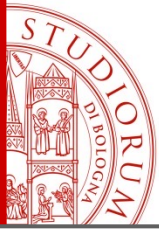


Alternative methods

Hierarchical approach: The customs authority may apply the subsequent method only if it is not possible to determine the customs value on the basis of the preceding method

Focus on the transaction value of identical or similar goods

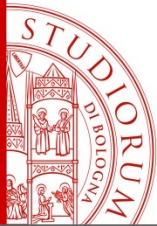
The valuation must take place before the payment of the duties due



Transfer Pricing

“Arm’s length principle”: same conditions those applied between two independent parties in a similar transaction under similar circumstances

Comparability factors: Contractual terms, Functional analysis, Characteristics of the product or service, Economic circumstances, Business strategies;

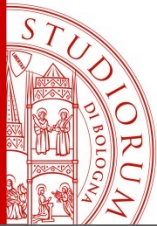


TP Methods

1. Comparable uncontrolled price (CUP) method
2. Resale price method (RPM)
3. Cost plus method
4. Transactional net margin method (TNMM)
5. Transactional profit split method (PSM)

Choice made on a case by case approach

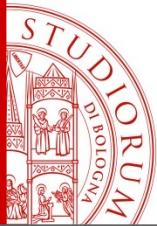
TP Allows Retroactive adjustments



TP Methods

Traditional transaction methods: CUP, RPM, cost plus method – Analyze the price of the transaction

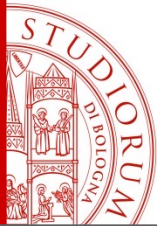
Transactional profit methods: TNMM, PSM – Analyze the profit earned by the involved parties (used when there is no comparable transaction)



Similarities ...

Both TP and CV aim to find out the “real” value of the Transaction

Both TP and CV opt to compare the transaction value applied between the buyer and the seller to the transaction value that would be applied between unrelated parties



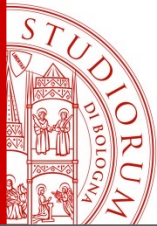
...And Differences

Transfer Pricing

- focus on the profit of the company as a whole
- expressly allows retroactive adjustments
- The TP adjustment can take place after the payment of the income tax

Custom value

- focus on the single Transaction
- Does not expressly allows retroactive adjustments
- The alternative evaluation method must be applied before the payment of the duties due

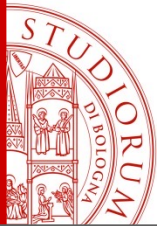


Question that must be answered

Can customs valuation take into consideration retroactive adjustment?

Is it possible to consider TP methods that focus on the profit of the company as whole for Customs valuation purposes?

Is it possible to use TP data in order to analyze the “circumstances surrounding the sale?”



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