The Use of Statistical Values to Combat Undervaluation in the European Union*

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In this article, the authors discuss the use of databases and statistical values to combat undervaluation of goods imported into the European Union (EU). In recent cases, the Court of Justice of the European Union (CJEU) has allowed the use of statistical values and databases, seemingly giving customs authorities an unlimited license to reject the transaction value. The question rises if this will effectively lead to a return to the Brussels Valuation Definition.

Keywords: WTO, CJEU, customs valuation, undervaluation, statistical values

1 INTRODUCTION

Combating fraud with regard to undervalued imports nowadays poses a challenge on customs authorities in the European Union (EU) and is one of the reasons of the so-called ‘customs gap’ in the EU.1 This is to a large extent due to the rise of e-commerce which lead to an increase of low-value consignments into the EU. Customs authorities are looking for methodologies to detect undervaluation and if detected, to determine customs values for these undervalued goods.

The European Anti-Fraud Office (OLAF) of the EU developed a methodology based on statistical values, which was allowed by the Court of Justice of the European Union (CJEU) in its ruling Commission/United Kingdom of 8 March 2022. The method was used there to estimate the amount of traditional own resources that the United Kingdom (UK) failed to levy and contribute to the EU’s

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own resources due to undervaluation of imports into the UK. This approval for using statistical values should not be seen in isolation, but is part of a trend whereby customs authorities use statistical values to detect undervaluation more often, and, in particular cases, even use to determine the customs value of imported goods if they suspect that imported goods have been undervalued. This trend can also be evidenced by the fact that there have been many CJEU cases (pending) recently about the use of statistical values. These cases deal with the question whether a statistical value can be considered sufficiently representative and whether a customs authority of an EU Member State needs to consult other customs authorities in the EU when it uses a statistical value from its national database. Moreover, it is questioned whether statistical values in an EU database should take precedence over statistical values in a national database.

In their contribution the authors analyse to what extent statistical values can be used to determine the customs value of goods being imported into the EU. They discuss the provisions included in the Customs Valuation Agreement (CVA) of the World Trade Organization (WTO) and relevant cases being dealt with by the Dispute Settlement Body (DSB) of the WTO (section 2). In this part they also address the fundamental question whether statistical values fit into the current customs valuation system which is primarily based on the actual price paid or payable for imported goods, opposed to the previous system – the Brussels Valuation Definition – which adopted the normal value as method to determine the customs value of imported goods. They subsequently discuss the relevant legal provisions in the current legal customs framework in the EU to prevent under-valuation and (pending) decisions of the CJEU on the use of statistical values (section 3). Based on the analyses in sections 2 and 3, they discuss to what extent statistical values can be used to detect undervaluation and to determine customs values in the EU (section 4). This contribution will be concluded by a short summary and a brief outlook on the expected developments regarding the use of statistical values (section 5).

2 INTERNATIONAL PERSPECTIVE ON THE USE OF STATISTICAL VALUES

2.1 INTRODUCTION

During the Tokyo Round negotiations, the General Agreement on Tariffs and Trade (GATT) Valuation Code was developed which entered into force on 1 January 1981. The GATT Valuation Code or, how it is referred to after the establishment of the WTO, the CVA, provides for an internationally accepted framework for determining customs values. Members to the WTO are obliged
to implement these provisions into their own customs legislation and adhere to
the principles of this agreement. According to the agreement, customs values
should be determined according to a positive value system. That means that
customs values are generally based on the actual price paid for the goods. That
is a significant difference compared to the predecessor of the CVA, the Brussel’s
definition of value that is based on the notional ‘open market’ price. Both
systems are based on the principles laid down in Article VII of the GATT
1947.

For establishing customs values, the CVA provides for five methods. The
valuation methods are set up in a strict hierarchical order and are subordinately
linked to each other. Therefore, they are to be applied sequentially. It is only when
the customs value cannot be determined by applying a given method that it is
appropriate to refer to the method which comes immediately after it in the order
established by the CVA. In the hierarchical order, the customs valuation methods
provided for in the CVA are the following:

1. Transaction value of the imported goods
2. Transaction value of identical goods
3. Transaction value of similar goods
4. Deducted value method
5. Computed value method

On request of the importer, the fourth and fifth method can be reversed. If none of
the methods can be applied in a given situation, the customs value should be
established by reasonable means under the fallback method.

The transaction method is the primary and preferred customs value method.
According to Article 1(1) CVA, the transaction value is based on the price actually
paid or payable for the goods when sold for export to the country of importation.
To adhere to the principle laid down in GATT 1947 that the value for customs
purposes of imported merchandise should be based on the actual value of the
imported merchandise, price adjustments should be made, and particular condi-
tions should be complied with while using the transaction value method. These
price adjustments and conditions should prevent that imported goods are over-
valued or undervalued under the CVA. Compared to the Brussel’s definition of
value this is a novelty, as under this valuation system it seems that provisions were
only aimed at preventing undervaluation.²

The conditions to determine the customs value according to the transaction
value derive from Article 1:

– Evidence of a sale should be available;
– There must be no restrictions to the use or disposition or use of the goods by the buyer;
– The sale or price must not be subject to conditions or considerations for which a value cannot be determined with respect to the goods being valued;
– No part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless adjustment can be made;
– The buyer and seller are not related, unless it can be demonstrated that the relationship did not influence the price, or the transaction value closely approximates a test value.

The uplift price adjustments are laid down in Article 8 CVA. These are for example royalty and license fees paid as a condition of sale of the imported goods, commissions and assists. For determining the customs value according the transaction value, the actually price paid or payable may also be adjusted downwards. The legal basis for the downward price adjustments is somewhat more difficult to find. They can be found in Article 8 CVA, the notes to Articles 1 and 8 CVA, and Decision 3.1 of the WTO Valuation Committee.3

2.2. WTO’S CUSTOMS VALUATION: PROVISIONS TO FIGHT UNDERSALE

As set out in section 2.1, it is the actual price paid or payable by the buyer of the imported goods that constitute the transaction value. In principle the buyer and seller are at liberty to determine the price for the imported goods as long as the in section 2.1 said adjustments are made and the conditions are complied with. Even prices below the prevailing market prices or production cost or imported goods purchased in flash sales are acceptable.4 This, however, does not mean that the customs authorities cannot have doubts about the truth or accuracy of the

4 Advisory opinion 2.1, ‘Acceptability of a price below prevailing market prices for identical goods’, adopted by the WCO TCCV during the second Session on 2 Oct. 1981, 27.960. Prices below the prevailing market prices for identical goods may for instance be acceptable if a seller sees the sale as an opportunity to break into the market. It may in such cases even be acceptable that the goods are sold below their cost of production, see Case study 12.1, ‘Application of Article 1 of the Valuation Agreement for goods sold for export at prices below their cost of production’, adopted during the eleventh Session on 3 Nov. 2000, VT0164. Also a highly discounted price of goods purchased in a flash sale could be accepted as the basis for customs value under the transaction value and can even be used to determine the transaction value of identical or similar goods for which there is no transaction
particulars or of documents produced in support of the customs value in the submitted import declaration. The CVA includes provisions paving the way for customs authorities to satisfy themselves as to the truth or accuracy in case of doubts, in particular Article 17 and paragraph 6 of Annex III of the CVA as well as Decision 6.1 of the WTO Valuation Committee\(^5\) should in that regard be mentioned. These provisions and this Decision enable customs authorities to fight undervaluation and will be discussed in more detail below. Additionally, the Technical Committee on Customs Valuation (TCCV) of the World Customs Organization (WCO) provides in several non-binding instruments clarity on to what extent customs authorities may request for additional information to satisfy themselves as to the truth or accuracy.

In Article 17 CVA, it is made clear that 'nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes'. This generous provision for customs authorities, can create a challenge to shield the interest of traders. Decision 6.1 recognizes in its preamble that this may result in a balancing act, because although on the one hand the CVA recognize that customs authorities may have reasons to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value, the customs authorities should on the other hand not prejudice the legitimate commercial interests of traders. This assessment of balancing the competing interests might be a slippery road. Customs authorities that suspect the presented documentation to be fraudulent may invalidate the declared customs value if national law provides them this right.\(^6\) In case of inadvertent errors or incomplete documentation customs authorities should, however, have a relatively reticent attitude and provide opportunity to importers to further complete information or to ratify the errors before taking decisions such as invalidating the declared customs value.\(^7\) In practice the tension of interests results in various legal procedures as is also evidenced by the existence of two cases of the DSB of the WTO (section 2.3) and several court cases of the CJEU (section 3).\(^8\) This also

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\(^5\) Decision 6.1, ‘Cases where Customs administrations have reasons to doubt the truth or accuracy of the declared value’, adopted by the World Trade Organization (WTO) Valuation Committee, under the Agreement on Implementation of Art. VII of the General Agreement on Tariffs and Trade 1994 (the International Valuation Agreement) during the first meeting on 12 May 1995.


\(^8\) The WCO TCCV also issued to case studies that illustrates how the application of Art. 17 CVA and Decision 6.1 work out in practice. Case study 13.1, ‘Application of Decision 6.1 of the Committee on
has to do with the fact that while full cooperation of importers is expected in case customs authorities have questions, the CVA leaves it up to WTO Member States' own customs legislation to decide about the burden of proof.9

While discretionary power is given to the customs authorities to ask for additional documentation, the customs authorities should adhere to the right to be heard principle and the customs authorities should motivate their decisions. The right to be heard can be distracted from Decision 6.1 that grants importers the reasonable opportunity to respond before customs authorities take their final adverse decision. This Decision along with Article 11 CVA also requires the customs authorities to communicate the decision and the grounds therefore in writing. If the buyer and seller are related parties and the customs authorities have grounds for considering that the relationship influenced the price, Article 1(2)(a) CVA and the note to this provision repeat that the customs authorities should also in this case adhere to the right to be heard principle and the obligation to motivate decisions. Although it is not made explicit in the CVA, it seems that Article 1(2)(a) CVA is to be treated as *lex specialis* in relation to Articles 11 and 17 CVA. In somewhat more detail it explains when customs authorities are entitled to make enquires. In that respect the note to Article 1(2)(a) CVA mentions that the existence of a relationship as such is not grounds to reject the transaction value, and enquiries should only be made if customs authorities have doubts about the acceptability of the price.10 It also details what kind of information the importer should provide to remove the doubts the customs authorities have. For a further elaboration about these provisions in an EU context, see section 3.7.

2.3. CASES BEFORE THE WTO'S DSB ON THE USE OF STATISTICAL VALUES AND ROLE OF CUSTOMS AUTHORITIES

2.3[a] Introduction

The DSB deals with conflicts between WTO Member States. A member can bring a matter before the DSB if it is of the opinion that another member does not respect any of the agreements contained in the Final Act of the Uruguay Round and the CVA is one of those agreements. Up to date there are only two cases...

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10 Commentary 14.1, 'Application of Article 1, paragraph 2', adopted by the WCO TCCV during the eighteenth Session on 21 Nov. 1989, 35.650.
whereby the conflict primarily has to do with one member claiming that another
did not respect the CVA. These cases are of interest as they shed light on the use
of statistical data (‘Colombia – Indicative Prices and Restrictions on Ports of Entry’,
section 2.3.2) and the role of customs authorities if they have doubts about the
acceptability of the declared prices (‘Thailand – Customs and Fiscal Measures on
Cigarettes from the Philippines’, section 2.3.3).

2.3[b] DSB: Colombia: Indicative Prices and Restrictions on Ports of Entry

2.3[b][i] Fact and Circumstances

The Colombian customs authorities were confronted with several schemes used in
the undervaluation of textile products imported under Chapters 50 to 64 of the
Harmonized System from in particular the Colon Free Zone (CFZ) and Panama.
To counter the undervaluation of these imported textile products, the Colombian
legislator issued a new customs regulation. Based on this regulation, importers
declaring a transaction value below the ‘indicative prices’, had five days to ‘correct’
their customs declaration. In the corrected customs declaration, the customs value
should correspond to the indicative price and the respective importer should pay
the additional import duties. If the importer refuses to make the correction and pay
the additional duties, it should either reexport the goods or the goods would be
legally abandoned. The indicative prices have been presented by the Colombian
legislator as reference price for the use of the control mechanism on the declared
price for the imported goods. The indicate prices are based on the average product
costs and, if that information is not available for the particular product, the lowest
price actually negotiated or offered for importation into Colombia. After correct-
ing the customs declarations and payment of additional duties, the goods are
released, and the documentation related to the import is sent over to the audit
department of the Colombian customs authorities for further review. If after that
review it turns out that the customs value below the indicative price would have
been acceptable, the additional duties are remitted. Alternatively, if the customs
value should have been higher than the indicative price, additional import duties
will be assessed. Panama filed a complaint with the DSB arguing that those
indicative prices form a breach with the hierarchal and sequential order between
the customs valuation methods in the CVA. Colombia claimed, however, that the
indicative prices were only used as an additional control mechanism and are merely
used as a tool to set the amount of a cash deposit guarantee.

11 Colombia – Indicative Prices and Restrictions on Ports of Entry, 27 Apr. 2009, WT/DS366/R,
2.3[b][ii] Considerations of the DSB

The established Panel for this case considered that the legislation speaks about ‘payment’ instead of ‘guarantee’ and only allows the additional payment as – what Colombia is referring to – guarantee mechanism. Cash deposits were, for instance, not allowed. The Panel also found that the subsequent controls were not carried out in all cases and therefore the indicative prices were the final customs values in several cases. Lastly, in case a lower value than the indicative was found acceptable during the review of the audit department, the importers should actively request for a repayment of overpaid import duties and the repayment took on average two years. The Panel therefore concluded that the indicative prices are imposing a threshold that is not in conformity with the CVA. In particular it is a violation with the hierarchal and sequential order between the customs valuation methods laid down in the CVA. It also does not consider that valuing an imported good should be examined case-by-case and should take the specific circumstances surrounding the transaction at issue into account. Finally, indicative prices can also not be used to determine the customs value with reasonable means under the fallback method as this method precludes a system which provides for the acceptance for customs purposes of the higher of two alternative values or minimum values.

2.3[c] DSB: Thailand Cigarettes: Customs and Fiscal Measures on Cigarettes from the Philippines

2.3[c][i] Fact and Circumstances

In this case Thailand is accused by the Philippines for protecting the interests of a state-owned producer of cigarettes by continuously scrutinizing the related-party imports from Philip Morris Thailand (PM) into Thailand. The customs authorities are accused from rejecting the transaction value by default in favour of the deducted value method, chronically delay decisions (e.g., administrative appeals had not been decided after more than seven years) and a lack of transparency. Moreover, the High Ministry and Customs officers were, simultaneously, members of the board of the state-owner producer.

2.3[c][ii] Considerations of the DSB

The established Panel considers that customs authorities should examine the circumstances of the sale if they have doubts about the acceptability of the price

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according to Article 1(2)(a) CVA, instead of rejecting the transaction value by default. For the examination, the customs authorities should play an active role. Based on the ordinary meaning of ‘examine’ the Panel stresses that with respect to the examination of the sale that ‘customs authorities must carefully consider, investigate and inquire into the information provided by importers concerning the circumstances of the transaction’. Because the transaction value is the primary and preferred customs valuation method, ‘questioning the transaction value would naturally demand the customs authorities’ critical consideration of, inquiry into, and investigation of, the relevant situation’. To enable the customs authorities to examine the sale, the importer is responsible for providing sufficient information as stated in the interpretative note to Article 1(2)(a) CVA. If the evidence is short-coming, the customs authorities still have an active role to play. The Panel observes in that regard that ‘competent authorities have an independent duty of investigation and that they cannot ‘remain passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties’. It becomes evident from the quotations from the report of the Panel that a proper degree of activity is expected from the customs authorities, which seems, based on various court cases of the CJEU, different in the EU (see section 3).

3 DECISIONS OF THE CJEU ON THE USE OF STATISTICAL VALUES

3.1 INTRODUCTION

In several cases, the CJEU has shed its light on the acceptability of using statistical values either for detecting undervaluation or for valuing imported goods as such. In this section we discuss the most important cases to lay the foundation for the analysis in section 4 where we explore the extent to which statistical values can be used to detect undervaluation and to determine customs values from an international and CJEU perspective. We structured the discussion of every case in a similar way, meaning that after the facts and circumstances, we discuss the considerations and conclusion of the CJEU whereafter we present some critical observations about the case.

We note that most cases are decided under the Community Customs Code (CCC) and Implementing Provisions of the CCC (CCIP). The CCC legal
package codified the customs legislation in the EU and was repealed by the Union Customs Code (UCC),\(^{16}\) Delegated Act UCC (DA-UCC)\(^{17}\) and Implementing Act UCC (IA-UCC)\(^{18}\) on 1 May 2016 when most of the UCC’s substantive provisions became applicable. We are of the opinion that the decision under the CCC legal package equally apply to identical cases under the UCC legal package.

3.2 **EURO 2004 Hungary, C-291/15\(^{19}\)**

### 3.2[a] **Facts and Circumstances**

EURO 2004 Hungary released several products of Chinese origin for free circulation in Hungary based on the sales price established between non-related parties. During post-clearance examination initiated under Article 78 CCC by the Hungarian Customs Authorities, they compared the commercial invoice which had been submitted with the importer’s accounting records and proofs of payment and with the bank certificate produced and found that the amount indicated in those documents corresponded to the content of the customs declaration. According to the procedure in Article 181a(2) CCIP, the customs authorities asked EURO 2004 Hungary for additional information. The latter did not provide any further information. As their doubts continued to exist, the Hungarian Customs Authorities enforced Article 181a(1) CCIP and rejected the declared price in favour of the transaction value of similar goods.

### 3.2[b] **Considerations and Decision CJEU**

The question asked to the CJEU was whether the customs authorities were in this specific case entitled to reject the transaction value following the procedure of Article 181a CCIP. The European Commission brought forward that the declared prices were 50% lower than the statistical mean value. The CJEU considers that this appears sufficient to substantiate the customs authority’s doubts and its rejection of the declared customs value of the goods at issue, because Article 181a CCIP should be understood as allowing authorities to have doubts as to the accuracy of

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the customs value of the imported goods, despite the undisputed authenticity of the provided documents. Customs authorities may therefore reject the declared values, if they give the importer reasonable opportunity to respond to the grounds for those doubts, which they did in the case at hand.

3.2[c] Observations

Important to stress is that the transaction value was rejected following the procedure as set out in Article 181a CCIP which allows customs authorities to reject the transaction value method if there are reasonable doubts that the declared value does not represent the total amount paid or payable. In other words, the customs authorities did not dispute the unrelated nature of the relationship between the buyer and seller of the imported goods. This differs from the cases Baltic Masters and OGL–Food Trade Lebensmittelvertrieb GmbH where the customs authorities argued that the buyer and seller are related parties and the relationship between the buyer and seller influenced the declared value (see section 3.7 for a further discussion on these two approaches).

Irrespective of that the parties are considered non-related, the transaction value was disputed merely because the declared prices were 50% lower than the statistical mean value. Given the instruments of the TCCV of the WCO, this should not necessarily result in a rejection of the declared customs value (section 2.2). Based on the case Colombia – Indicative Prices and Restrictions on Ports of Entry, it could be argued that the customs authorities should have taken a more active role to find out whether specific circumstances caused EURO 2004, Hungary to declare the goods against prices lower than 50% of the statistical mean value. They should have asked specific questions about the apparent shortcomings in the evidence submitted. Only asking for additional information does not seem sufficient according to the DSB of the WTO, because EURO 2004, Hungary might not have been aware what information besides the provided commercial invoice, the accounting records, proofs of payment and bank certificate should have been provided.

3.3 ‘Oribalt Rīga’ SIA, C-1/1820

3.3[a] Facts and Circumstances

Ranboxy Laboratories shipped laboratory equipment to Latvia. Oribalt Rīga’ SIA provided Ranboxy Laboratories with consignment services in Latvia and released

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the goods for free circulation on behalf of Ranbaxy Laboratories. The cus-
toms value was determined on a pro forma invoice drawn up by Ranbacy
Laboratories for customs purposes. The imported laboratory equipment was
only sold after import and, once the goods had been sold, Ranbaxy
Laboratories issued Oribalt Rīga’ SIA with new invoices for the goods sold,
also taking discounts into consideration. Because a sale upon the release of
the goods was lacking, the Latvian Customs Authorities took the view in the
post-clearance audit that the customs value of the imported goods could not
be determined by using the transaction value based on the pro forma invoices.
The Latvian Customs Authorities revalued the goods by using the deducted
value, as they lacked information about identical or similar goods. Oribalt
Rīga’ SIA argued that the Latvian authorities should and could have
obtained the information necessary to identify identical or similar goods.
This would, according to Oribalt Rīga’ SIA, result in a more favourable
outcome.

3.3[b] Considerations and Decision CJEU

One of the questions referred to the CJEU in this case is about the definition
of similar goods. In that context, the Advocate General addressed the question what
role customs authorities should take to identify identical or similar goods if they
do not have those to their disposal the necessary expertise and information to
undertake that assessment with respect to the goods to be valued. The Advocate
General seems to advocate the customs authorities to take an active role and
points at various courses of action that the customs authorities in that case can
take:

1. The customs authority may request any further documents and
   information from the declarant as it considers necessary in establish-
   ing the customs value under any of the valuation methods in
   Articles 30 and 31 of the CCC;
2. 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;
3. 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
4. The customs authority may request analyses or expert reports on
   the goods to be valued at the expense of the declarant.
The CJEU did not address these questions and stuck to providing clarity on what factors should be taken into account for identifying similar goods. The CJEU did in that respect decide that in order to identify ‘similar goods’, customs authorities should take into consideration any relevant factor, such as the respective compositions 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.

3.3[c] Observations

Surprisingly enough the Advocate General sees an active role for the customs authorities and provides an overview of the legal actions customs authorities can take. This can be seen as making more specific the active role that customs authorities should take according to the DSB in the case Colombia – Indicative Prices and Restrictions on Ports of Entry, however also a breach with the line the CJEU has developed in EURO 2004, Hungary. Although a statement in the General Introductory Commentary to the WTO CVA acknowledges that information about the customs value of identical or similar imported goods is not immediately available to the customs administration in the port of importation, the legal actions mentioned by the Advocate General do not dismiss the customs authorities from taking further action by for example consulting customs authorities in other Member States. The latter seems to be, mutatis mutandis, supported by the Fawkes case discussed below (section 3.5).

In our opinion, the active role of the customs authorities is thus highlighted by paragraph 2 of the General Introductory Commentary to the WTO CVA, where it is stated:

It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.
3.4 ‘Baltic Master’ UAB, C-599/20

3.4[a] Facts and Circumstances

Baltic Masters imported goods into Lithuania. The Lithuanian Customs Authorities started a post-clearance audit and took the view that the transaction value declared could not be accepted since the applicant and the seller had to be treated as related parties and the relationship influenced the price. Following the rejection of the declared value, the customs authorities used a statistical value from the national database under the fallback method. The information contained in a national database related to only one single import of goods which has the same origin and which, although not similar, was ascribed to the same TARIC code (TARIf Intégré Communautaire; integrated Tariff of the European Union).

3.4[b] Considerations and Decision CJEU

One of the questions referred to the CJEU is whether information as extracted from the database by the Lithuanian Customs Authorities can be used as customs value. The CJEU answers this question in the affirmative. Reason for coming to that conclusion is threefold. First there is a need to establish a customs value if not sufficiently accurate or reliable information concerning the customs value of the goods concerned is provided by the importer. Secondly, the customs authorities need to exercise due care while applying each of the successive methods of determining the customs value. Thirdly, the ‘reasonable flexibility’ for applying the fallback method allows the information extracted from the database by the Lithuanian Customs Authorities to be used as that is to be treated as reasonable.

3.4[c] Observations

Contrary to the EURO 2004, Hungary case, the customs authorities argued that the buyer and seller are related parties and that the relationship influenced the price paid or payable. Therefore the declared transaction value should in their view be rejected in favour of the customs value of one single import of goods which has the same origin and which, although not similar, is ascribed to the same TARIC code. With regard to the question whether a buyer and seller can be regarded as related parties, the CJEU makes clear that while there is no ‘de jure control’ of one party over another, it should be established if ‘de facto’ control exists. The CJEU then concludes that the facts of the case ‘appear to demonstrate a close relationship of trust’

between the seller and Baltic Master but do not appear to support the conclusion that such a position of constraint or direction exists'.

Therefore, based on a relationship between the buyer and seller in this case, it is not likely that the transaction value can be rejected. The CJEU, however, continues its judgment with approving the use of the fallback method. Although the fallback method is approved by the CJEU, which is to be regarded as last resort if no other customs value method can be applied, one may doubt whether this approval can be justified. First, in case of determining a customs value under the fallback method, the principles and general provisions of the WTO CVA should be taken into account. One of the basic features in each of the secondary customs valuation methods is the resulting value is most accurate and closest to the actual value. In this case, the goods are not regarded similar goods and as such one can doubt whether the single import extracted from the database is a good reference. On the other hand, it could fit into the definition of goods of the same class or kind as the goods being valued, as is for example used for the computed value method. Secondly, looking at the Fawkes Kft. Case (to be discussed below), the customs authorities should have consulted the databases of other EU Member States and or various EU services because the information is in our view not sufficient. They should have therefore played a more active role in getting access to information that allowed them to establish the customs value in the manner that is most accurate and closest to the actual value.

3.5 FAWKES KFT., C-187/21

3.5[a] Facts and Circumstances

In this case, apparel products with Chinese origin were shipped to the EU and released for free circulation in Hungary. During a post-clearance audit, the Hungarian Customs Authorities considered the declared value too low and rejected the transaction value. As identical or similar goods could not be identified and information for applying the deducted and computed value method was lacking, the Hungarian Customs Authorities used statistical data from a national database to value the goods under the fallback method. Fawkes contested the decision arguing that the Hungarian Customs Authorities should have consulted other EU databases besides the national database, should have taken into consideration the use of undisputed transaction values of identical or similar goods from Fawkes Kft. and the period considered for the purposes of determining the customs value should have been greater than the period of ninety days referred to by the customs authority.

3.5[b] Considerations and Decision CJEU

The CJEU considers that customs authorities are required to consult all the information sources and databases available to them in order to establish the customs value in the manner that is most accurate and closest to the actual value. That does, however, not mean that they systematically need to consult other EU Member States or EU services and institutions although the customs authorities are entitled to request for additional information from those authorities or those services and institutions. The information extracted from the databases may be limited covering a period of ninety days, including forty-five days before and forty-five days after the customs clearance of the goods being valued if this is a period appropriate for the goods being valued.

In case they use the statistical values to determine the customs value under the transaction value of identical or similar goods, undisputed transaction values from the importer itself do not take precedence over the statistical values provided that (1) for transaction values relating to imports into that Member State, that authority first calls them into question, and (2) for transaction values relating to imports into other Member States, the customs authorities set out the grounds for that exclusion by reference to factors affecting their plausibility.

3.5[c] Observations

This court ruling is for more than one reason of interest. It does not require authorities, if the information extracted from their national database is sufficient, to consult other EU Member States or EU services and institutions. This seems odd as the EU comprises one customs territory and it can therefore be argued that one should take an average price based on imports in the entire EU. The question is whether this is also supported by the case Commission/United Kingdom where, although the facts and circumstances differ (section 3.6), the CJEU ruled that a EU database should be used and not, as the United Kingdom argued, a national database. This will be discussed in section 3.6 in more detail.

The court acknowledged that own data, under certain conditions, should take precedence over statistic values, answers to the hierarchy between the customs valuation methods under which it is preferred to determine the customs value that is closest to the actual value of the imported goods and which takes account of the legitimate commercial interest of traders that may have valid reasons to using a lower value. For the latter we refer also to the instruments discussed in section 2.2.
3.6 **Commission/United Kingdom, C-213/19** 23

### 3.6[a] Facts and Circumstances

The OLAF conducted investigations in several Member States, in particular concerning imports of large quantities of apparel products of Chinese origin into the EU. OLAF found that fraudsters have found ways to declare falsely low values and evaded very large amounts of customs duties. In particular the United Kingdom proved to be a weak link as, according to the findings of OLAF, the abnormally low values of customs declaration were not (sufficiently) contested. OLAF calculated that the EU lost over 2.7 billion euro in connection with the fraud schemes.

The calculations have been based on a tool they have been developing with the European Commission’s Joint Research Centre (JRC). OLAF and JRC used ‘cleaned average price’ (‘CAP’), on the basis of the monthly import prices of the relevant products from China taken from Comext, which is a reference database for detailed statistics on international trade in goods that is managed by Eurostat, over a period of forty-eight months. The average is calculated for the entire EU based on the arithmetical average, that is to say, a non-weighted average, of the CAPs of all the EU Member States. In calculating that arithmetical average, the values that are unusually high or low, are excluded. Subsequently, 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.

The United Kingdom did not carry out the customs controls on risk analysis before clearance of the goods. As a result of the inadequate controls, the customs duties to be made available to the own resources of the EU were not effectively and comprehensively collected. As a result the European Commission started proceedings against the United Kingdom claiming the latter has failed to fulfil its obligations under EU law by failing to apply effective customs controls measures and providing OLAF with all information to calculate the amount of customs duties lost.

### 3.6[b] Considerations and Decision CJEU

The method utilized to detect the undervalued goods and determine the customs duties the United Kingdom should make available to the EU budget, was accepted by the CJEU. Although the Value Added Tax (VAT) Directive was breached no actual loss of VAT revenue occurred. Therefore only customs duties are payable by the United Kingdom.

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3.6(c) Observations

Important to stress is that in this case the European Commission started a procedure against a, back then, EU Member State whereas in all other cases discussed in this contribution, the cases are between local customs authorities and importers. This is important to note in advance, as Member States have different obligations compared to importers. However, the customs valuation regime remains the same for both Member States and importers.

The CJEU notes that the relevant imports were made on a large scale and that the goods concerned were released for free circulation and could not be recalled afterwards for checks to establish their true value. This in combination with the lack of physical controls leads the CJEU to the conclusion that only a statistical method can be used to estimate the loss of own resources. It is clear that this case is about recovering duties lost and coming up with a reasonable estimation of those lost duties. The case is not about using statistical values for determining the customs value of a specific transaction. That being said, the case could provide an argument to favour the use of EU databases rather than national databases. In the case at hand the UK’s use of a national database was dismissed by the CJEU because that database was making use of customs values which included the undervalued imports which were scrutinized by OLAF. The CJEU thus allowed the use of the EU database deployed by OLAF in preference of the UK database.

Given the specific nature of the dispute (Member State against Commission), the fact that in the end the statistical method is used to calculate (or maybe better: estimate) the loss of own resources rather than determining specific customs values, conclusions with regard to the use of statistical methods for determining customs value should not be made too fast. The judgment of the CJEU in this case furthermore does not mean that EU databases are to be preferred when determining whether undervaluation is present. This also follows from the Fawkes case where the CJEU allowed the use of a national database. However, one conclusion might be that if a database is flawed (like the one used by the UK), it cannot be used to determine customs values and other databases should be consulted. However, the question rises how importers confronted with the use of a database and statistical values can prove that a database and the statistical value based on that, are flawed. That seems to be a very difficult task for private businesses.

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3.7 OGL-Food Trade Lebensmittelvertrieb, C-770/21

3.7[a] Facts and Circumstances

In this case currently still pending before the CJEU, courgettes of Turkish origin have been imported into Bulgaria by OGL-Food Trade Lebensmittelvertrieb GmbH. At the time of import, 100 kg courgettes attracted a local market price of 53.80 EUR in Turkey. Although the courgettes were sold for export for 109.60 EUR per 100 kg, the courgettes were declared against a customs value of 90.81 EUR per 100 kg. The re-sale price after import in Bulgaria was fixed at 106 EUR per 100 kg. The customs authorities requested OGL-Food Trade Lebensmittelvertrieb GmbH to prove that the high price declared, compared to the market price in Turkey, was not inflated in order to avoid payment of customs duties. Under the system applicable to the fruit and vegetable sector, the amount of the duty and the import price are inversely proportional, that is to say, the higher the declared import value of such goods, the lower the duty, which even drops to zero beyond a certain value. In order to prove the legitimacy of the higher price of the goods, the customs authorities argue that OGL-Food Trade Lebensmittelvertrieb GmbH, for example, could have submitted documents showing that the product is categorized as organic or was of a special quality. The documents OGL-Food Trade Lebensmittelvertrieb GmbH did hand over were the purchase invoice of the goods, transport invoice, international bill of lading, sales invoice for the goods at the first level of trade, delivery notes, confirmations of receipt of deliveries, reference calculations for the formation of the selling price on the basis of the acquisition price, extracts from import and sales accounts, VAT returns and purchase and sales ledgers. The veracity of the declared customs value was also disputed by the customs authorities as account was taken that the courgettes were sold at a loss after importation.

The Administrativen sad Sofia-grad decided to stay the procedure and refer the case to the CJEU asking four very lengthy questions. In particular the fourth question is of interest for this contribution. The referring court poses the question whether it follows from the CJEU’s ruling in the EURO 2004, Hungary case that a customs value cannot be determined on a transaction value if:

– the transaction value declared is significantly higher than the standard import value determined by the European 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 EU, 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.

3.7[b] Observations

The outcome of this case will be interesting, given the possible comparison to the EURO 2004, Hungary case, where several documents were submitted by EURO 2004, Hungary, but the customs value was rejected nevertheless. In the case discussed here, no contract has been submitted and the referring court is asking the CJEU whether this is a circumstance to reject the customs value and instead use statistical values. Although there was no contract submitted, OGL Food Trade submitted several documents substantiating the price paid for the imported goods (compared to the documents submitted in EURO 2004, Hungary, there were actually a lot more documents submitted). This case may thus trigger some more clarity on the level of information to be provided to the customs authorities to substantiate a customs value which deviates from statistical values in databases.

Also in this case, the customs authorities try to dispute the declared values by arguing that the business relation between OGL Food Trade and its supplier which covered multiple years and transactions, can lead to them being viewed as related persons in the sense of 134 IA UCC. As determined in Article 70 (3) (d) UCC, the transaction value shall apply provided that certain conditions are met, amongst others the condition that the buyer and seller are not related or the relationship did not influence the price. In the Baltic Masters case it was already decided by the CJEU that if there is no de jure control of one party over the other, de facto control should be established. Looking at the facts of the case discussed here, it is questionable whether de facto control is present and thus whether on that basis the transaction value can be rejected. This would mean that the customs authorities can only reject the customs value based on Article 140 IA UCC.

This raises the question whether the customs authorities could take resort to Article 140 IA UCC and how this procedure relates to the one of Article 134 IA
UCC (related parties). Article 140 IA UCC gives the customs authorities the authority to ask for additional information, in case they have reasonable doubts that the declared value represents the price paid or payable. Article 140 (2) IA UCC then bluntly gives the authorities the possibility to reject the application of transaction value ‘if their doubts are not dispelled’. From the EURO 2004, Hungary case it seems to follow that it is sufficient that the authorities express that their doubts are not taken away (dispelled) even if several documents are provided by the importer that substantiate the values declared and the importer is not able (or not willing) to provide more documents to substantiate the value. The CJEU is giving the authorities thus a license to reject the transaction value and apply one of the subsequent valuation methods of the UCC. The judgment in the EURO 2004, Hungary case seems to indicate that it is the call of the customs authorities to reject the transaction value based on reasonable doubt, without it being evaluated by the CJEU whether reasonable doubt is justified. It is sufficient that (as was the case in EURO 2004, Hungary) the declared value was below 50% of the mean statistical value in a national database, and in absence of additional evidence doubt remains with the authorities. The EURO 2004, Hungary case makes it clear that it is up to the judgment of the authorities to decide whether reasonable doubt remains.

As mentioned above, another question is what the difference is between the procedure of Article 140 IA UCC (Article 181a CCC as applied in EURO 2004, Hungary) and Article 134 IA UCC. The latter article regulates the rejection of transaction value in case the value was influenced by the relationship between seller and buyer. Here the authorities can also ask for additional information, but the buyer has the possibility to prove that the value was not influenced by providing test values of other transactions with the same goods. This procedure will therefore require more efforts from customs authorities to come to a final rejection of the customs value. As this involves a discussion also on the admissibility of transfer pricing as a basis for transaction value, we do not go into further detail on this issue which is outside the scope of this article.

4 EXTENT TO WHICH STATISTICAL VALUES CAN BE USED TO DETECT UNDERVALUATION AND TO DETERMINE CUSTOMS VALUES

4.1 INTRODUCTION

As became apparent from the above discussion, there are now several CJEU cases on undervaluation and the use of statistical values. Based on these cases, below we summarize some conclusions and in section 5 provide some critical comments.
4.2 The use of statistical values to detect undervaluation

The use of statistical values to detect undervaluation is allowed under EU customs law. Based on the case Commission/United Kingdom, one can argue that if OLAF or the European Commission instructs Member States to apply statistical values to determine undervaluation, Member States are required to adopt the methodology developed by OLAF. Failing to do so may result in retro-active claims of import duties missed. In other cases, Member States are allowed on their own initiative to use statistical values from databases to detect undervaluation. They do not necessarily need to use an EU database.

4.3 The use of statistical values to determine the customs value of imported goods

Statistical values can be used to determine the customs value of imported goods. From the EURO 2004, Hungary, Fawkes and Baltic Master cases it follows that national databases are sufficient. From the Commission/UK case it could be derived that an EU database is to be preferred over a national database. However, in that case the national database of the UK was flawed. A first conclusion is therefore that if a database is flawed and contains data that ‘contaminate’ the determination of statistical values, it cannot be used to determine customs values. However, for individual importers it may be difficult to prove that the database being used is not representative for determining statistical customs values.

4.4 Conditions statistical values needs to comply with

The CJEU has no trouble with customs authorities using goods which are not even similar goods as a reference when they are using databases for establishing the customs value of undervalued goods. In the Baltic Master case the information contained in a national database furthermore related to only a single import of goods which has the same origin and which, although not similar, is ascribed to the same TARIC code, was used by the customs authorities. This was accepted by the CJEU. Also here the bars are not set very high by the CJEU.

4.5 Role of the customs authorities

Looking at the case law of the CJEU discussed in our contribution, the role of the customs authorities is for a large part passive. Of course they need to give the
importer the chance to come up with additional information, but if they still have doubts they can reject the transaction value and apply statistical values (via the fallback method). They do not have an obligation to consult EU databases or customs authorities from other Member States. The CJEU does not make clear what information can be provided by importers to take away doubts about the transaction value declared. Possibly the pending OGL Food-Trade case will shed some light on this question.

5 CONCLUSION

It can be concluded that the use of statistical values is on the rise in the EU, but the question rises whether that is a good development. In our view there are not enough safeguards in place against ‘abuse’ by the authorities of these statistical values. Moreover, making it even worse, UCC provisions in that direction are lacking. Combating undervaluation is of course important and recent history has shown that this is a genuine problem. However, giving customs authorities an almost unlimited license to make use of statistical values and rejecting low transaction values is not the way forward. The CJEU should give much more detailed guidelines on what importers can submit as evidence to prove that low values are indeed the price paid or payable for the imported goods.

Looking at case study 12.1 of the TCCV one can conclude that under the WTO CVA it can be derived that authorities should investigate and take account of special circumstances which justify lower than market values:

the mere fact that a price is lower than prevailing market prices for identical goods is not sufficient grounds for rejection of the transaction value under Article 1. Similarly, the mere fact that the price in this case is below the seller’s cost of production and does not return a profit to the seller, is not sufficient grounds for rejection of the transaction value.

Advisory Opinion 2.1. of the TCCV comes to the same conclusion, but also refers to Article 17 of the WTO CVA, which makes clear that authorities can still call into question the ‘truth or accuracy of any statement, document or declaration’. In our view the WTO CVA thus calls for an active investigation by the authorities as they are not allowed to bluntly reject transaction values when they are lower than prevailing market prices. This perspective is missing in the cases decided by the CJEU and this fuels the fear that we are going back to the

26 There are still arguments for importers to substantiate that the declared price is the price paid or payable that are even approved as such by the CJEU. In that regard we refer to the case Lifosa where the transport costs covered by the buyer exceeded the price payable and declared price for the imported goods, see CJEU 22 Apr. 2021, C-75/20 (‘Lifosa’ UAB), ECLI:EU:C:2021:320.
The rejection of transaction value because of undervaluation should therefore be subject to strict conditions set out by the CJEU as currently there seems to be a wider development that supports the departure from the transaction value. This development contradicts the principle that the transaction value is still the primary and preferred method under the current system.  

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28 See for instance the Hamamatsu-case, that could be interpreted as meaning that the transaction value cannot be used (easily) if it is based on a transfer price that might be adjusted at end-year, see CJEU 20 Dec. 2021, C-529/16 (Hamamatsu Photonics Deutschland), ECLI:EU:C:2017:984 and the end decision of the Bundesfinanzhof of 17 May 2022, VII R 2/19. These decisions seem to deny the call of the WCO for closer alignment between transfer pricing and customs valuation and makes it more difficult to use the transaction value as means to appraise imported goods, see M. L. Schippers & M. Friedhoff, *CJEU Judgment in Hamamatsu Case: An Abrupt End to Interaction Between Transfer Pricing and Customs Valuation?*, 28(1) EC Tax Rev. 32–42.