TradeWatch

EY Global Trade

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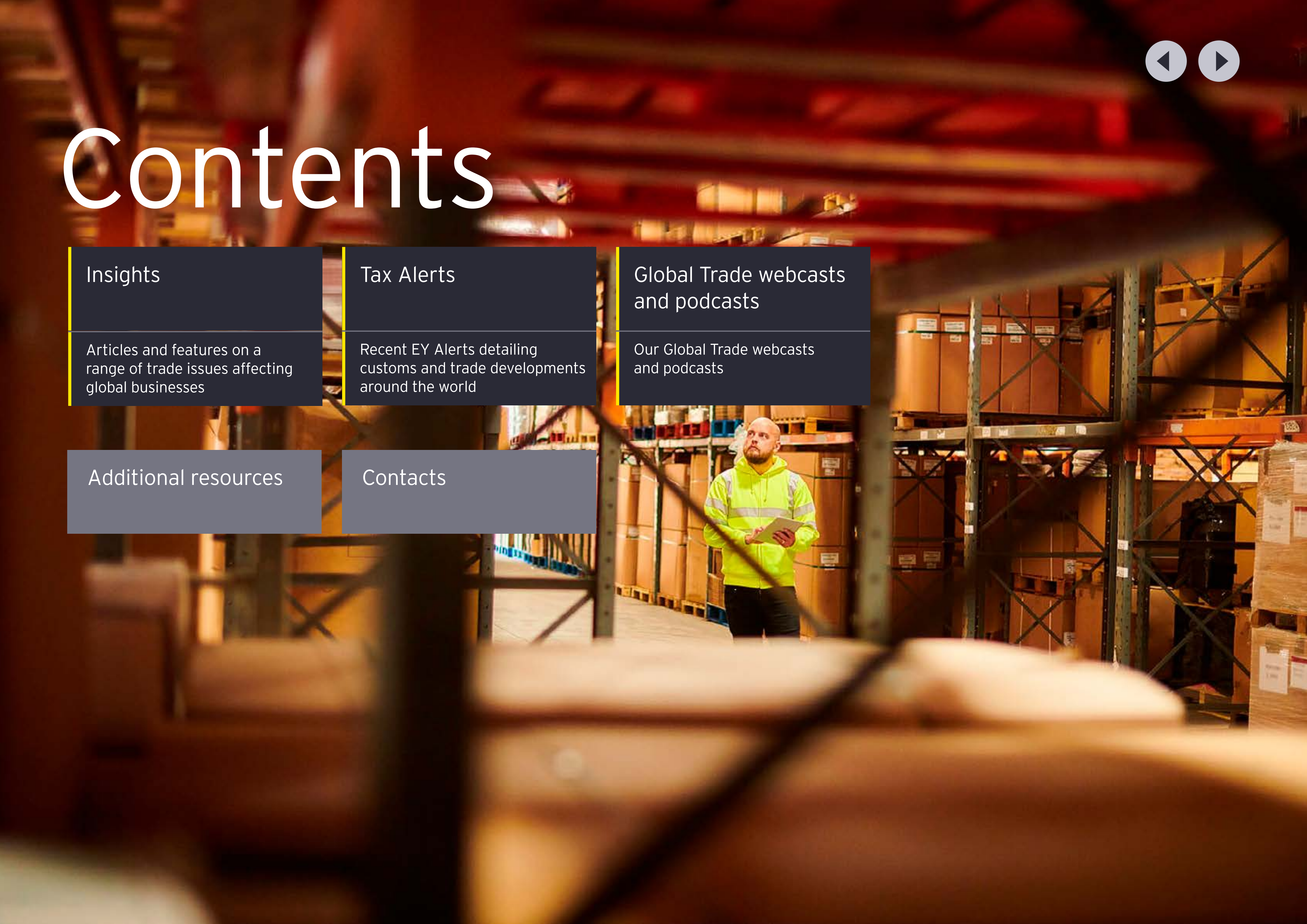

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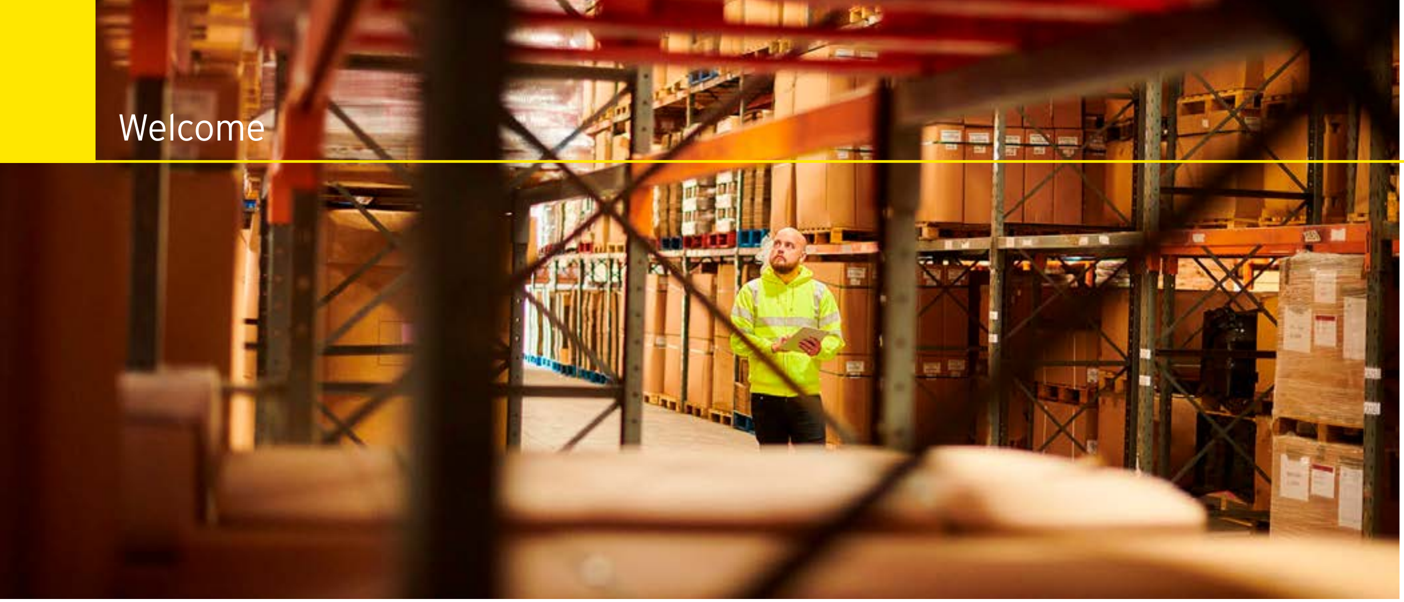

Welcome

Welcome to Issue 3, 2022 of *TradeWatch*, the global EY organization's global trade magazine. In this final edition of the year, we reflect on what we have seen in trade in 2022, examine some of the current trade trends and look forward to the trade outlook for 2023.

2022 key trends in review

Trade disruption

One clear theme of the past year has been trade disruption. The war in Ukraine has greatly contributed to the levels of disruption, but it has not been the only factor. Trade disputes, new trade agreements and alliances, a rapidly changing regulatory environment, and the ongoing effects of the COVID-19 pandemic have all contributed to creating high levels of trade uncertainty.

These factors are creating new risks and new opportunities for companies all around the world, elevating trade and supply chain issues to the boardroom and putting the trade function in the spotlight as never before.

Legislative change

2022 saw many new legislative proposals impacting trade, such as proposals for transparency to counter adverse tax practices, environmental measures, and the Creating Helpful Incentives to Produce Semi-conductors for America (CHIPS) Act in the United States (US).

Customs valuation

Traders importing goods into the European Union (EU) are facing increased scrutiny from the customs authorities on customs valuation.

Of particular interest in this regard is the final decision in the Hamamatsu case, recently delivered by the German Federal Fiscal Court. The court ruled that a downward transfer pricing adjustment does not entitle the company to claim a refund of import duties. However, the outcome of the case is not clear on other crucial aspects, such as whether upward price adjustments should also be ignored for customs valuation purposes. It seems that the German Court and the Court of Justice of the EU (CJEU) may not be aligned with a global trend, supported by the World Customs Organization (WCO), for a closer alignment between customs values and transfer prices. At the time of writing, the EU still has not issued clear guidance on this matter. You can read more on the Hamamatsu case and its implications for business in "Hamamatsu – a long journey about to end?" (page 63) and in *TradeWatch* Issue 2, 2022.[1]

Other recent developments and practices related to valuation are also impacting companies trading in the EU. They include several recent CJEU court cases that have considered the use of statistical value, discussed in more detail in *TradeWatch* Issue 2, 2022.[2] In addition, some Member States' customs authorities are paying increased attention to back-to-back ordering flows, with some countries taking the position that the first purchase order (PO) triggering a succession of sales should be used to determine the customs value.

1 "Germany: Hamamatsu – the journey nears its end" in *TradeWatch* Issue 2, 2022, page 43, *EY website*. Find it here.

2 "EU: CJEU rules on use of statistical data for determination of customs value" in *TradeWatch* Issue 2, 2022, page 35, *EY website*. Find it here.

Sustainability

Climate change and related concerns about the environment and social policy have been in the news for several years, but their impact on global trade has greatly increased in the past year as more countries commit to ambitious net-zero targets and more organizations include environmental, social and governance (ESG) measures in their corporate strategies. Trade policy is at the heart of these commitments. Around the globe, 2022 has seen a variety of measures proposed or introduced in this area, including taxes and levies aimed at combatting plastic waste and decreasing the use of fossil fuels and incentives to adopt greener methods of producing and distributing goods.

In this edition

We see the key trends for 2022 reflected in a number of the articles in this edition of *TradeWatch*, including "Thailand: Five-year extension of Thai Customs' One-Stop Service voluntary disclosure process" (page 45), "Poland: Transfer pricing adjustments and their impact on VAT, excise and customs duties" (page 66) and "Technical Committee on Customs Valuation approves new advisory opinions on ancillary charges" (page 3).

Regulations, often connected to geopolitical events, continue to add to the workload of the trade function, including monitoring and complying with trade security programs, sanctions and export controls – "US implements new technology export controls on China" (page 34) and "Japan: Updates on sanction measures" (page 41). On the positive side, we consider opportunities and trade facilitation measures, such as those offered by the Authorized Economic Operator (AEO) program in Vietnam (page 51), the new India-Australia free trade agreement (page 5), investment opportunities in Costa Rica (page 28) and freeports in the United Kingdom (page 71).

Our authors also consider how advanced technologies and the use of trade data solutions are becoming more important in the domain of trade. See "Blockchain and its potential role in the future of global trade" (page 11) and "Going with the data flow: things every business should know" (page 16).

Outlook for next year

We expect these trends – including trade disruption, customs valuation, transfer pricing, and the interplay between trade policy and the ESG agenda – will continue to influence the trade policies of governments and the trade strategies of corporations into 2023 and beyond.

In particular, we see that new environmental taxes and initiatives will become even more important next year. In the US, measures aimed at promoting near-shoring and decarbonization continue, and in Europe, new environmental taxes and measures are expected to come into effect or be clarified, including plastic taxes in Spain and Italy,[3] and the EU Carbon Border Adjustment Mechanism (CBAM)[4] and deforestation regulation.[5]

We hope you enjoy this edition of *TradeWatch*. We aim to reflect the key trends affecting international businesses and provide news and insights you can use to inform your trade strategy and improve your trade operations.

If you would like more information on any of the topics covered in this issue or how they may impact your business, please reach out to the authors listed with the articles or any of the EY Global Trade professionals listed in the Contacts section of the magazine. We also welcome your feedback and suggestions for future editions.

Jeroen Scholten
EY Global Trade Leader

Martijn Schippers
Chief Editor of TradeWatch Magazine

3 See "EU: New plastic packaging measures offer businesses an opportunity to innovate" from *TradeWatch* Issue 2, 2022, page 62. Find it here.

4 Related articles on this topic are available in previous editions of *TradeWatch*: "EU: Final legislation on CBAM expected soon" from *TradeWatch* Issue 2, 2022, page 57. Find it here. "CBAM and its impact on EU cross-border imports" from *TradeWatch* Issue 1, 2022, page 61. Find it here. "EU: Emissions – Europe's new frontier" from *TradeWatch* Issue 3, 2021, page 36. Find it here.

5 See "EU: Proposal to introduce a deforestation regulation" from *TradeWatch* Issue 2, 2022, page 65. Find it here.

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Technical Committee on Customs Valuation approves new advisory opinions on ancillary charges

The Technical Committee on Customs Valuation (TCCV) is a committee of customs authorities created by the World Trade Organization (WTO) Valuation Agreement. The committee is tasked with providing interpretation and guidance on the Valuation Agreement and is administered by the World Customs Organization (WCO). While its guidance is not binding on any jurisdiction, its pronouncements are regularly cited by customs authorities worldwide.

The TCCV approved a new advisory opinion at its October 2022 meeting involving "ancillary charges" appearing on a second invoice from the seller to the buyer. With approval from the WCO council, it is expected to be adopted as Advisory Opinion 25.1.

Fact pattern

The fact pattern involves an exporter who sends two invoices for each shipment received by an unrelated importer, the first for the unit prices of the goods and the second containing additional charges broken out into three categories:

1. A per-unit charge for participation in a "Savings Program," in which the importer receives free units of goods from the seller if certain purchasing targets are met over a period of time
2. A per-unit charge for a "Club Program," a program in which the importer receives free gifts and hotel packages if certain purchasing targets are met over a period of time
3. A per-unit "currency surcharge," which the exporter states is charged to maintain the price of the product with regard to any change that might occur in the foreign exchange (forex) market

Importers have the option of participating in both the Savings Program and Club Program. Whether the importer participates, the price of the goods stated on the first invoice does not change. The currency surcharge is charged to all importers, regardless of participation in either of the programs.

Transaction value

The primary method of customs valuation is transaction value as set forth in Article 1 of the WTO Valuation Agreement. Transaction value is defined as the price paid or payable for imported merchandise, subject to specified adjustments. In some situations, when invoices specify breakouts that are related to the goods imported, it is difficult to identify if charges are for the goods or instead are for

something else. Pertinent to this analysis, paragraph 7 of Annex III to the Valuation Agreement says, "The price actually paid or payable includes all payments actually made or to be made, as a condition of sale of the imported goods, by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller."

TCCV analysis

Focusing on the optional nature of the charges for the two programs, the TCCV concluded that those charges are for something other than the goods. The TCCV points out that regardless of participation in the programs, the goods can be purchased for the same price and on the same commercial terms. Consequently, those charges are not part of the transaction value of the imported goods, but instead are paid for the possibility to obtain free units of the same goods or gifts or hotel packages when specific purchasing targets are met. As the payments are optional, they would not properly be characterized as a condition of sale as specified in paragraph 7 to Annex III.

In contrast to the program charges, the currency surcharge is a required payment for every purchase. The TCCV notes that although the stated purpose of the currency surcharge is to maintain the price of the imported goods with regard to any change that might occur in the forex market, the exporter does not give buyers the option of assuming the foreign exchange risk or paying in a different currency to avoid paying the currency surcharge. As such, it cannot be shown that the payment is for something other than the goods, and the mandatory currency surcharge is considered part of the price paid or payable for the imported goods.

The Advisory Opinion concludes with a caution that any free units of goods or gifts received as part of the programs are not addressed by this Advisory Opinion and would need to be separately considered.

Implications for importers

It is often quite difficult for customs authorities to ascertain whether payments are made for goods or for something else. As noted in this Advisory Opinion, even when a payment is characterized as for something other than the goods (i.e., the currency surcharge), it is important for the importer to demonstrate that fact; simply labelling the payment as for "something else" is not sufficient. Of course, the Advisory Opinion also demonstrates that when additional payments are demonstrated to be for something other than the imported goods (i.e., the program charges), those payments are not part of the transaction value. Exporters and importers structuring transactions involving multiple value streams, some of which may not be related to imported goods, are well advised to clearly separate consideration and support each portion of the transaction to avoid all payments being considered part of the price paid or payable for the imported goods. ■

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The India-Australia Economic Cooperation and Trade Agreement – a long-awaited pathbreaker

In April 2022, India and Australia sealed the Economic Cooperation and Trade Agreement (ECTA), an "early harvest agreement"[1] intended as a precursor to a Comprehensive Economic Cooperation Agreement (CECA). The trade agreement between the two countries has been long pending after negotiations stalled in 2015. The initiative was relaunched at the 17th India-Australia Joint Ministerial Commission meeting on 30 September 2021. At this meeting, Australian Trade Minister Dan Tehan and Indian Minister of Commerce Piyush Goyal reaffirmed their commitment to conclude a CECA and agreed upon a timeline to initially reach an interim agreement by December 2021 and to conclude the negotiations on a full CECA by the end of 2022. The ECTA is believed to provide the much-needed impetus in trade between the two countries with a broadened and diversified list of goods to be considered for trading.

At this stage, the ECTA has yet to enter into force.

1 **An early harvest agreement** is a precursor to a free trade agreement between two trading partners. It is used to liberalize tariffs on the trade of certain goods between two countries or trading blocs before a comprehensive free trade agreement is concluded.

Salient features of ECTA

The ECTA is the first trade agreement India has entered into with a developed country in more than a decade. The Agreement encompasses cooperation across the entire gamut of bilateral economic and commercial relations between the two countries and covers areas like trade in goods, rules of origin, trade in services, technical barriers to trade, sanitary and phytosanitary measures, dispute settlement, movement of natural persons, telecommunications, customs procedures, and pharmaceutical products, as well as cooperation in other areas. Eight subject-specific side letters covering various aspects of bilateral economic cooperation were also concluded as part of the Agreement.

Objectives of ECTA

The objectives of the ECTA include:

- Establishing a free trade area between India and Australia and a framework for strengthening and enhancing the economic, trade and investment relationship
- Liberalizing and promoting trade in goods and services in accordance with Articles of the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS)
- Improving the efficiency and competitiveness in manufacturing and services sectors to expand trade and investment between the two countries
- Facilitating, enhancing and exploring new areas of economic cooperation
- Developing appropriate measures for closer economic cooperation between the countries

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Trade in goods

It has been mutually agreed that neither country will increase any existing customs duty, or adopt any new customs duty, on an originating good and that each country will progressively eliminate or reduce its customs duties on originating goods in accordance with the Schedule for each country in Annexure 2A to the ECTA (Tariff Commitments).[2]

The countries may also mutually or unilaterally consider accelerating the elimination of customs duties set out in their respective Schedules in Annexure 2A. If the most-favored-nation (MFN) rate of customs duty applied by a country on a particular good is lower than the rate of customs duty provided for in its Schedule in Annexure 2A (Tariff Commitments), the lower rate will prevail.

To keep in perspective the imminent trade liberalization proposed under the ECTA, especially in India, note that in 2008 the Indian tariff schedule contained 12,552 tariff lines (identified at the eight-digit Harmonized System (HS) level) under which nearly 3.7% of these tariff lines were duty-free and 87.8% attracted an ad valorem duty. On the other hand, the Australian tariff schedule identified 6,256 tariff lines (at the eight-digit HS level) during the same period, where 52% of these lines were duty-free, with the vast majority of the remaining 48% being levied with an ad valorem tariff.[3]

Across all tariff lines in the Australian and Indian tariff schedules, the average (unweighted) 2008 tariff rate levied on imports from the other country was estimated to be 3.2% in Australia and 17.6% in India. The table below illustrates the tariffs levied on imports from Australia and India in 2008.

Applied tariff barriers to bilateral merchandise trade 2008

Sector	Australian tariff	Indian tariff
	Percent	Percent
Paddy rice	0.0	80.0
Wheat	0.0	37.5
Cereal grains nec	0.0	20.2
Vegetables, fruit, nuts	0.6	33.5
Oil seeds	0.5	33.0
Sugar cane, sugar beet	0.0	30.0
Plant-based fibers	0.0	13.6
Crops nec	0.1	38.9
Bovine cattle and sheep	0.0	22.6
Animal products nec	0.3	23.0
Raw milk	0.0	0.0
Wool, silk-worm cocoons	0.7	7.8
Forestry	0.0	19.2
Fishing	0.0	28.5
Coal	0.0	6.2
Oil	0.0	7.5
Gas	0.0	5.0
Minerals nec	0.4	4.9
Bovine meat products	0.0	28.2
Meat products nec	0.6	33.9
Vegetable oils and fats	1.3	55.1

Sector	Australian tariff	Indian tariff
	Percent	Percent
Dairy products	0.7	33.8
Processed rice	0.0	72.5
Sugar	0.0	42.5
Food products nec	1.5	32.4
Beverage and tobacco	2.1	87.8
Textiles	7.0	39.2
Wearing apparel	13.4	27.7
Leather products	5.1	10.0
Wood products	2.8	9.9
Paper goods, publishing	2.7	9.6
Petroleum, coal products	0.0	9.5
Chemical, rubber, plastic	2.1	9.1
Mineral products nec	3.0	8.9
Ferrous metals	1.8	10.0
Metals nec	1.0	5.9
Metal products	4.2	9.8
Motor vehicles and parts	4.9	33.2
Transport equipment nec	2.3	20.5
Electronic equipment	1.1	4.2
Machinery nec	2.6	7.3
Manufactures nec	2.2	10.0

Source: Economic Modelling for the Australia-India FTA Feasibility Study[4]

2 "Australia-India ECTA Annex 2A (Tariff Commitments) Section 2A (Tariff Schedule of Australia)," *Australian Government Department of Foreign Affairs and Trade website*, Find it here. "Australia-India ECTA Annex 2A (Tariff Commitments) Section 2A (Tariff Schedule of India)," *Australian Government Department of Foreign Affairs and Trade website*. Find it here.

3 "Economic Modelling for the Australia-India FTA Feasibility Study," *Centre for International Economics Canberra & Sydney*, p. 10, August 2008.

4 Economic Modelling for the Australia-India FTA Feasibility Study' *Australian government website*. Find it here.

Other than customs duties, all charges equivalent to an internal tax or other internal charges and anti-dumping and countervailing duties imposed on or in connection with importation or exportation should be limited in amount to the approximate cost of services rendered and should not represent an indirect protection to domestic goods or taxation of imports or exports for fiscal purposes.

Tariffs will be eliminated on more than 85% of Australian goods exports to India (valued at more than AUD12.6 billion a year in 2018–20), which would reach 91% (valued at AUD13.4 billion) over 10 years. After the agreement comes into force, 96% of Indian goods imports entering Australia will also be duty-free.

India is the world's largest democracy and one of the world's fastest-growing economies, with gross domestic product (GDP) projected to grow by 6.8% in 2022[5]. India will be offering preferential access to Australia on over 70% of its tariff lines, including lines of export interest to Australia, which are primarily raw materials and intermediaries, such as coal, mineral ores and wines. This is the first time that India has offered benefit to alcoholic beverages in a free trade agreement (FTA), which may also kick-start export of Indian liquor to Australia and reduce tariff disparities.

The ECTA will progressively eliminate tariffs over three to 10 years on goods such as infant formula; certain peas and beans; certain nuts, such as macadamias, shelled pistachios, cashews and hazelnuts; certain fruit and vegetables, such as avocados, onions, cherries and berries; certain oil seeds and oils; certain food preparation, such as malt extract; pasta; breakfast cereals; petroleum oils; certain non-ferrous metals; pharmaceutical products; and certain medical devices.

There will be immediate access to duty-free quota for cotton and an immediate 50% tariff reduction to quotas on lentils, almonds, oranges, mandarins and pears.

Tariffs will be locked in at 0% on barley, oats, hides and skins, and liquefied natural gas (LNG).

The following are some of the major goods[6] exported from Australia that are expected to enjoy tariff reduction or elimination in India with the CECA coming into force.

Goods	Present tariff rate	Anticipated tariff after reduction/ elimination
Sheep meat	30%	Nil
Wool	2.5%	Nil
Wine	USD 5 per bottle	100% to 50% over 10 years
Wine bottles	USD 15 per bottle	75% to 25% over 10 years
Avocados, onions, broad, kidney and adzuki beans, cherries, shelled pistachios, macadamias, cashews in-shell, blueberries, raspberries, blackberries, currants	30%	Nil over seven years
Coal, alumina, metallic ores, including manganese, copper and nickel; and critical minerals, including titanium and zirconium	Various	Nil
LNG	Various	
Pharmaceutical products and certain medical devices	Various	Nil over five and seven years

India will benefit from preferential market access provided by Australia on 100% of its tariff lines. This includes all the labor-intensive sectors of export interest to India, such as gems and jewelry, textiles, leather, footwear, furniture, food, agricultural products, engineering products, medical devices and automobiles.

5 International Monetary Fund Datamapper accessed on 8 November 2022, World Economic Outlook (October 2022) – Real GDP growth. Find it here.

6 "Historic trade deal with India," *Minister for Trade, Tourism and Investment website*, April 2022. Find it here.

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Supply chain and market access for business

Once the agreement comes into force, there will be opportunities to review and improve existing businesses' supply chain networks to take advantage of the Australia-India ECTA (AI-ECTA) on originated goods traded between India and Australia. By removing barriers, the AI-ECTA will create new opportunities for market entry across various industries such as food and agribusiness, energy and resources, medical, and consumer packaged goods.

Rules of origin

For this agreement, before goods can be considered to be originating, all non-originating materials must have undergone at least a change in tariff sub-heading (CTSH) level of the Harmonized System and the Qualifying Value Content (QVC) of the good must not be less than 35% of the free on board (FOB) value as per a build-up formula or 45% of the FOB value calculated as per a build-down formula, provided that the final production process of the manufacture of the good is performed within the territory of the exporting country.

The QVC shall be calculated using the following build-down or build-up formula:

a) Build-down formula: based on the value of non-originating materials

$$\text{[QVC} = \frac{\textit{FOB value – value of non-originating materials}}{\text{FOB value}} \text{ x 100]}$$

b) Build-up formula: based on the value of non-originating materials

$$\text{[QVC} = \frac{\textit{FOB value of originating materials}}{\text{FOB value}} \text{ x 100]}$$

A certificate of origin issued under the agreement may indicate two or more invoices issued for a single importation. The certificate of origin must be issued before or within five working days of the date of exportation. However, if a certificate of origin could not be issued at the time of exportation or within five working days from the date of shipment, there is a provision in the agreement for retroactive issuance.

A provision for acceptance of a "non-party invoice" or an invoice issued by a third party has also been made, provided that the goods meet the requirements of rules of origin under the agreement. In such cases, the exporter of the goods must indicate "non-party invoicing," and the name, address and country of the company issuing the invoice must appear in a separate column in the certificate of origin.

Trade in services

Regarding trade in services, Australia has offered India wide-ranging commitments in around 135 subsectors and MFN status in 120 subsectors that cover key areas of interest to the Indian economy, such as information technology, information technology-enabled services, business services, health, education and audio visual services. Some of the key offerings from Australia in the services space include quotas for chefs and yoga teachers, post-study work visas of two to four years for Indian students on a reciprocal basis, mutual recognition of professional services and other licensed or

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regulated occupations, and work and holiday visa arrangements for young professionals.

India has offered market access to Australia in more than 100 subsectors and MFN status in 31 subsectors in 11 broad service sectors, such as business services, communication services, and construction and related engineering services.

Both sides have also agreed to a separate annex on pharmaceutical products under this agreement, which will enable fast-track approval for patented, generic and biosimilar medicines.

In a boost to India's science, technology, engineering and mathematics (STEM) and IT workforces, the length of stay for an Indian student with a bachelor's degree with first-class honors will be extended from two to three years post-study in STEM and information and communications technology (ICT) sectors.

In identifying the qualifying services, this is India's first agreement where a mixed scheduling approach is adopted for scheduling sector-specific commitments. This is a step before complete transition to a negative list approach (under which all services are covered except those that are specifically excluded). Adopting the positive list approach, by listing only those sectors in which trade commitments are made, gives India the right to impose trade barriers or regulatory restrictions over all the sectors that are not included in the list. Australia follows a negative list approach. Further, there is a transition clause in the ECTA, according to which India has to submit a proposed schedule of non-conforming measures within five years of the date of entry into force of the Agreement providing an equivalent of liberalization. This implies that both countries will eventually move to a negative list approach. This would be the first time that India will follow a negative list approach in trade agreements.

Each country is anticipated to make commitments under national treatment, MFN treatment and market access. Commitments between the two countries have been categorized into Schedules for Specific Commitments for India – the positive list (Annexure-8E)[6] – and Schedules for Non-conforming measures for Australia – the negative list (Annexure-8F).[7]

Temporary movement of natural persons

The ECTA has measures set out in each country's Schedule in Annexure 9A (Schedules of Specific Commitments on Temporary Movement of Natural Persons)[8] affecting the movement of natural persons of a country into the territory of the other country, where such persons are engaged in trade in goods, the supply of services or the conduct of investment. Commitments have been made concerning the temporary entry of natural persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of natural persons. The countries have agreed to establish a work group of representatives from both sides to oversee, review, monitor and consider opportunities to facilitate the temporary entry of each country's respective natural persons into the other country for business purposes in accordance with the ECTA.

Negotiation of a CECA

It has been agreed to establish a Negotiation Subcommittee comprising government representatives of the two countries. Within 75 days after the date of signature of the ECTA, the Negotiation Subcommittee will commence negotiations on amendments to the ECTA, on a without-prejudice basis, on areas including, among others, market access for goods and services, a complete Product Specific Rules Schedule, a Digital Trade Chapter and a Government Procurement Chapter to transform the ECTA into a CECA. Following such negotiations, the countries may make amendments to the ECTA to transform it into a CECA.

Benefits of the ECTA to Australia

India is one of Australia's most important trading partners, currently its seventh largest, and their economies are highly complementary. Australian resources and other commodities such as wool and cotton are important inputs that drive Indian industry. India is also a growing market for Australia's critical minerals and resources sectors. Australian services are increasingly sought after in India, with Australian services exports nearly doubling in value over the past decade.

6 "Australia-India ECTA Annex 8E Schedules of Specific Commitments – Schedule of India," *Australian Government Department of Foreign Affairs and Trade website*. Find it here.

7 "Australia-India ECTA Annex 8F Schedules of Non-Conforming Measures – Schedule of Australia," *Australian Government Department of Foreign Affairs and Trade website*. Find it here.

8 "Australia-India ECTA Annex 9A Australia's schedule of specific commitments on temporary movement of natural persons," *Australian Government Department of Foreign Affairs and Trade website*. Find it here.
"Australia-India ECTA Annex 9A India's schedule of specific commitments on temporary movement of natural persons," *Australian Government Department of Foreign Affairs and Trade website*. Find it here.

As noted above, key Australian goods that will be duty-free as soon as the agreement enters into force include sheep meat; wool; metallic ores, such as manganese, copper and zirconium; coal; alumina; titanium dioxide; certain critical minerals; and certain non-ferrous metals. India will also lock in existing duty-free entry for Australian barley, oats, hides and skins, and LNG.

Australia can be expected to have greater predictability in its trade with India in sectors such as higher education and adult education, business services (such as tax, medical and dental, architectural and urban planning), research and development, communication, construction and engineering, insurance, banking, hospital, audio-visual services, and tourism and travel.

Benefits of the ECTA to India

Indian exports to Australia primarily consist of consumer and manufactured goods, including most textiles and apparel, a few agricultural and fish products, leather, footwear, furniture, sport goods, jewelry, machinery, electrical goods, railway wagons, selected pharmaceutical products and medical devices. Currently, most of these items attract 4% to 5% import duty in Australia. Therefore, India will mainly benefit from tariff liberalization by Australia, along with fast-track approval for pharmaceutical products. Australia is offering zero-duty access to 100% tariff lines from India, and zero duty on 96.4% value of Indian exports will be offered immediately. For 113 tariff items comprising 3.6% of exports, the duty will be brought down to zero in the next five years.

Moreover, as India largely imports raw materials and intermediates from Australia, many industries in India will get cheaper raw materials to make them more competitive. In particular, this will benefit the steel, aluminum and apparel sectors.

India is also offering concessions on tariffs to Australia on imports of goods, mainly raw materials and intermediates, in the form of tariff elimination or tariff reduction, with or without a tariff-rate quota. India is immediately eliminating tariffs on 40% of its tariff lines, comprising 85% of Australia's exports in value terms to India. Tariffs will be eliminated or reduced on 30.3% of its tariff lines progressively over three to 10 years, per the agreement. Only a few agricultural products, such as oranges, mandarins, almonds, pears and cotton, have been allowed with limited quota.

India has kept many sensitive products in the exclusion category without offering any concession, comprising 29.8% of tariff lines. Some of these products are milk and other dairy products, chickpeas, walnuts, pistachio nuts, wheat, rice, bajra, apples, sunflower seed oil, sugar, oil cakes, gold, silver, platinum, jewelry, iron ore and most medical devices.

Actions for business

- Assess goods against the ECTA rules of origin to support importers and exporters to claim the tariff concession available under the agreement.
- Assess the ECTA consignment rule against the business's supply chains to obtain the benefits of the Agreement.
- Review the HS code classification of originated goods and seek advice where issues or uncertainties arise.
- Identify how to prepare and file the relevant import and export documents to comply with the ECTA, including certificates of origin and any other customs documentation of non-party countries when requested by any of the importing parties.
- Consider whether some or all of these activities could be outsourced to or be managed by third parties.
- Consider the tax implications of cross-border trades between Australia and India.
- Consider any other customs-related matters regarding the ECTA and their impact on supply chains and business operations. ■

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Blockchain and its potential role in the future of global trade

In recent years, many businesses and governments around the world have considered whether blockchain technology can or should be used to facilitate global trade. Blockchains could help to increase safety and security as goods move across borders, potentially cutting transit times and costs. But what are the obstacles preventing or delaying the use of blockchains in global trade, and what steps may be needed to implement these ideas?

Overview of blockchain

The fundamental characteristic of a blockchain is to act as a digital record of activity or information that maintains a source of truth that is extremely difficult to alter or modify. This is achieved through the principles of cryptography, advanced mathematical techniques and technology.

Blockchain networks consist of distributed ledgers, commonly referred to as nodes. Removing the need for a centralized party to maintain full control, blockchains rely on peer-to-peer collaboration and consensus. Data added to new blocks in the blockchain requires validation and agreement from all the administrators of the blockchain (known as miners) before they are added to the distributed ledgers on all nodes.

Blocks on the chain are linked together using mathematics and cryptography. Once blocks are added to the chain, they are extremely difficult to modify. Generally, each node within the blockchain network will keep a copy of a part of the entire blockchain. Therefore, making false changes to the chain requires large control of the nodes on the network, which is extremely difficult to achieve.

Most blockchain protocols allow for the execution of "smart contracts," which are essentially business logic that can be published on the blockchain ledger (and synchronized across the network of nodes). Parties can use smart contracts to execute certain predetermined rules. Smart contracts can also be self-executing, without the involvement of third parties and without any time loss.

Applying blockchain technology comes at a cost. Blockchain solutions need to be well designed to achieve cost benefits compared to processes that do not use this technology. Because blockchain ledgers are typically not the most efficient data storage solutions (as all information needs to be synched across the network of nodes), often key confidential information is not stored on the blockchain ledger itself but in traditional "off-chain" databases. Only hashes (unique digital fingerprints) of the off-chain data are then stored on the blockchain network and synched across the network of nodes. By comparing a hash on the blockchain with a hash from the off-chain data, the authenticity of off-chain data can be verified.

How blockchain could address global trade challenges with moving goods internationally

To evaluate blockchain's applicability to global trade, it is important to first understand the challenges that businesses face in trading internationally that could align with blockchain's uses:

- Moving goods across borders typically involves many parties engaged in a variety of processes and corresponding customs formalities. Much of this activity currently relies on physical documentation that can easily be lost or may be inconsistent. For example, manually creating documents and entering data into systems can result in data errors. A single weak link can create compliance errors for the entire chain or lead to complications that need the effort of multiple parties to resolve.
- Finance and cash flow for trading globally, including the assurance that other parties can meet their payment obligations in the future, rely heavily on third-party interactions.
- Clearance processes and the interaction with customs authorities and other government officials (including those responsible for health, food, animal products, etc.) are time consuming and require duplication of data.
- Customs authorities may lack the necessary information to make adequate decisions on risk assessments, with the potential for higher unidentified fraudulent movements.

Elements of global trade that blockchain can support

Many areas of global trade and customs could benefit from blockchain technology in the following ways:

Reduce trade friction

Trade barriers, including tariff, nontariff and technical barriers, lead to increased trade friction, adding to the complexity of doing business internationally. Understandably, these trade barriers are often a focal point of discussions between jurisdictions and of negotiations for trade agreements. However, the process of facilitating trade generally involves paperwork and other compliance obligations that can be costly and burdensome. As a result, trade facilitation opportunities may be missed.

Blockchains could allow trading parties to reduce the efforts needed to carry out cross-border movements of goods and to benefit from trade facilitation, such as free trade agreements and trusted trader programs, through automated exchanges of information in predefined smart contracts.

The more efficient trade processes can become, the greater the likelihood that more traders will make use of trade facilitation measures, thus increasing frictionless trade.

Blockchain technology could, therefore, support not only larger traders with trading more widely and cost-effectively, but also smaller and newer traders that may struggle with a lack of knowledge or resources.

In addition to the benefits of using blockchains to facilitate customs processes, there are many other related areas of tax where this technology could bring benefits to traders and tax authorities in terms of accuracy, transparency and fraud prevention. Examples include value-added tax (VAT), excise taxes, environmental taxes and the proposed Carbon Border Adjustment Mechanism (CBAM).

Increase trust, authenticity and availability of information

Fraud will always be a challenge for businesses and tax and customs authorities. Therefore, adding as much information as possible to a distributed ledger that is trusted by users and inherently difficult to tamper with could result in significant benefits.

Many trusted trader programs globally allow for authorizations to reduce border checks on goods to add efficiency for traders and authorities. Blockchains can support these programs by maintaining trust in areas such as certification, documentation, identity authentication, availability of finance, expedited shipments, and streamlined processes can be enabled and be more effective.

Another benefit is the availability of this information across multiple parties in a supply chain, which otherwise may be subject to long wait times and delays.

Reduce potential loss of information

In many instances, historical information is needed, such as by customs authorities when investigating compliance issues. The distributed nature of the information held on a blockchain can reduce the burden and reliance on individual owners, so important historical information is much more likely to be retained and accessible.

Considerable cost reductions

Automation, defined process models and blockchain technology (including smart contracts) can be used to further digitize trade processes. The full digitization of data sharing along the supply chain and eliminating today's paper-based processes can reduce costs.

What is happening in practice?

More business activity is happening at a rapid pace, and this disruption is starting to change the perception of the future of trade, showcasing how blockchain technology can be applied in practical ways. The following are some examples of current blockchain trade developments around the world:

- A digital supply chain platform that helps to connect stakeholders and information related to supply chain movements. This includes traders, freight forwarders, inland transportation, ports and terminals, ocean carriers, customs, and other government authorities.
- Blockchain-based platforms that allow importers and exporters to exchange trade documents, such as commercial invoices, packing lists and certificates of origin, to support secure paperless transactions. In principle, this can support reduced customs clearance times.

- A consortium including customs authorities and a technology provider concluded a pilot use of blockchain technology to make logistics paperwork available in real time with an immutable ledger to simplify the document issuance process.
- An enterprise-ready business-to-business (B2B) blockchain platform solution that aimed to cover the entire logistics process of a shipment — connecting shipping companies, port operators and cargo owners.
- An industry consortium used long-term supplier declarations as customs preference qualification data in its first use case of a blockchain-based tax and customs solution. Additional use cases in customs, VAT, transfer pricing and supporting real-time tax audits have been identified for the solution in the future.
- EY OpsChain: The EY OpsChain Traceability solution provides a trusted platform for traceability and transparency of data within an ecosystem through the use of notarization and tokenization. While the main focus of the solution is the tracking of goods throughout the end-to-end supply chain, the information recorded on the ledger can be made available and connected with data from other sources for customs and tax processes (e.g., to feed analytics solutions employed for automated risk management). EY teams are exploring use cases in the context of sharing information about the qualifaction of goods for customs preferences as well as non-preferential origin. Another use case under testing is the use of EY OpsChain technology for documenting, tracing and sharing criteria in the context of the sustainability requirements that businesses will need to share in the future.

Obstacles

As with any transformation, there are obstacles. The following obstacles may prevent blockchains from making a significant impact to global trade:

Lack of blockchain alignment: Organizations are creating or using segregated blockchains without interoperability. This is not consistent with key blockchain principles, including scalability and use of standards.

To transform global trade by sharing information digitally and avoiding paper-based processes, a huge standardization effort is needed. Only when stakeholders agree on the data points and parameters that need to be shared on the distributed ledger could such a system be used in practice. This is an ambition that the World Customs Organization and certain regional initiatives are pursuing.

Legislative challenges: The benefits of blockchain extend beyond the use of information that has touch points in a single customs authority. The ability for multiple authorities involved in the trade process to receive information in a manner that reduces the administrative burden across the supply chain is constrained by the level of flexibility in legislation and formalized trust across authorities. As such, global standardization of data structures is key to enabling global sharing of data. As blockchain proves its capabilities, legislation will need to be adopted, otherwise it will not be possible to leverage the full process efficiency and cost benefits for businesses and authorities.

Lack of digitization: Paper forms are still the norm in carrying out trade processes, and this data is often digitized later for archiving and record-keeping. Along with the inefficiency and potential for errors and risks, the lack of coordinated and digitized data means that the improvements that blockchain could facilitate are held back until this key prerequisite is met.

Digitized processes will ideally be easy to access and user-friendly so that small and medium-size businesses, and even private individuals, can participate in digitized trade.

Operating costs: A fully digitized trade environment can save significant cost by reducing paperwork and manual intervention in the supply chain by avoiding repeated data entries, data checks and false entries by the different stakeholders.

Costs related to services needed to carry out trade processes may also be reduced. For example, some of today's intermediary services may transform to simply data processing and compliance checks. While this may bring benefits to economic operators, it may also result in disruption to some service providers' business models.

However, using advanced technologies can also bring higher costs. Depending on the type of blockchain and technical concepts, using a blockchain comes with costs for infrastructure, operating transactions and operational costs. Therefore, each blockchain solution requires a carefully thought-out setup to avoid reducing the cost savings and other benefits that increased data sharing can bring.

Remaining risks: Even when trade processes are fully digitized and authenticated using blockchain, it may not be possible to guarantee the elimination of fraud. Scammers will adapt their behavior and actions to commit fraudulent activity.

For example, while it can be validated that data authenticated through the blockchain has not been falsified during the process, there is a risk that, by deliberate action or by unintended error, false data is put on the blockchain, such as from an off-chain database. Another risk is that data reflects the facts and circumstances at the time that the transaction started, but then the actual goods are tampered with or substituted in real life without changing the digital record.

Therefore, blockchain will not eliminate fraud. However, this technology may help to greatly reduce it. The more data there is about transactions throughout the supply chain that is kept and managed centrally, the more difficult fraud will become because the effort to design a whole environment with plausible-looking data will increase. Benefits from a risk management perspective include increased availability of trade data (whether secured by a blockchain or not) to businesses, customs authorities and other agencies. This information used in conjunction with conventional checks and investigations can increase risk screening to identify implausible and suspicious fact patterns. As such, expect that with fully digitized trade processes, customs and tax authorities will also increase – but better target – controls and process-integrated risk management in the virtual world while keeping their investigation units and activities on the ground.

Conclusion

With fully digitized trade and clean data, global supply chains can adopt faster clearance processes at less cost, given savings from reduced paperwork and intermediary services and with a reduced compliance risk.

In this context, blockchain provides certainty that data shared is genuinely the data provided by the original source. However, blockchain will not fully eliminate risks, and unintended data errors or different legal interpretations may occur. Therefore, companies must continue building their capabilities to leverage the benefits from working with trade data in a more automated environment while having robust processes to determine they have the correct data to feed into trade systems and share with others. Proper risk management processes will be key so that businesses and authorities do not simply rely on data taken from sharing platforms. ■

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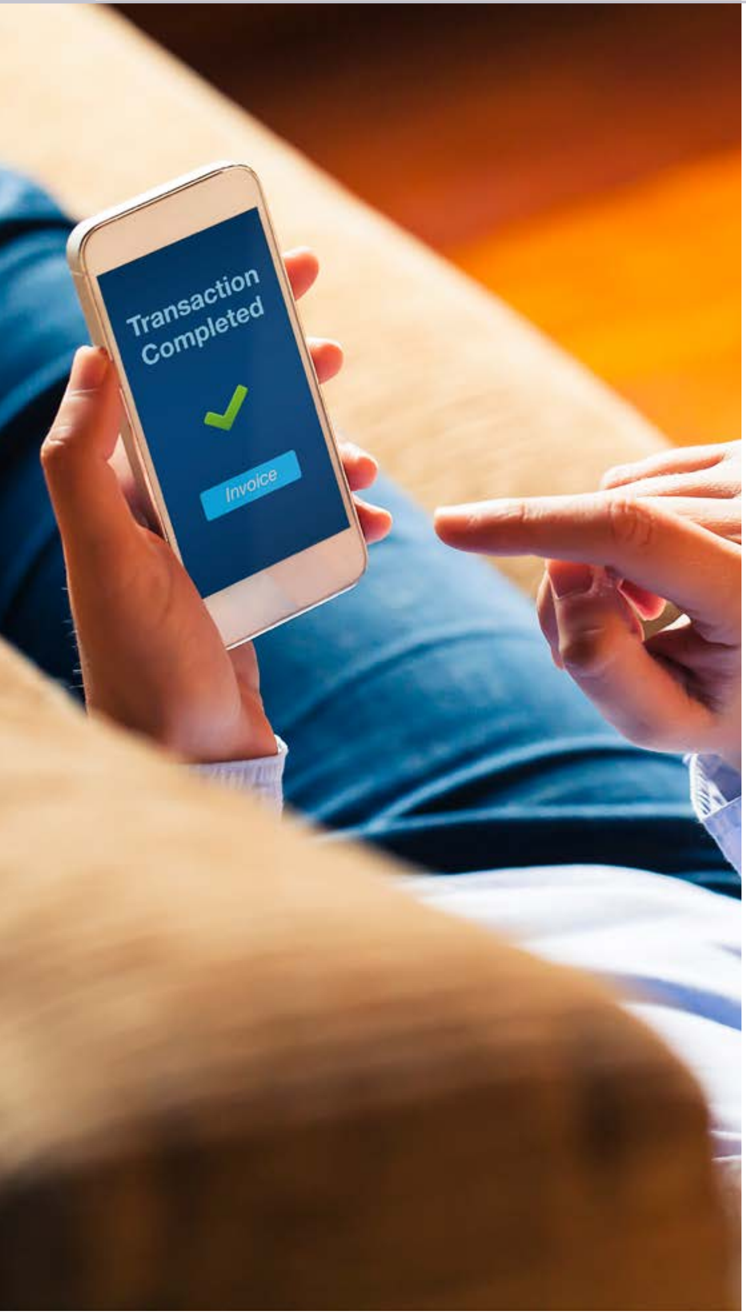

Going with the data flow: things every business should know

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What is digital trade?

Digital trade is playing an increasing role in the day-to-day operations of international organizations and in the approaches that governments take to removing trade barriers.

The term "digital trade" is very broad. It refers to any and all places where trade and digital activity meet.

If you send a digital invoice, live-stream media content, email reports, use a digital payment system, or ship goods through customs using a digital compliance system, then you're engaged in digital trade. In short, digital trade matters to all businesses with international suppliers, customers or clients.

It may be helpful to think about digital trade under three headings:

1. Digitizing and automating trade administration for efficiency and transparency
2. How technology is changing the way businesses trade
3. How digital trade can be made safe and secure for users

But the common thread throughout is data, as all digital trade activities rely on cross-border data flows.

Trade talk – barriers to data flows are barriers to trade

When considering data flows, three crucial barriers are tariffs, regulatory fragmentation and data localization.

Tariffs

Tariffs are often seen as the most traditional barrier to trade. Tariffs do not currently apply to data flows, but that could change.

Since 1998, the members of the World Trade Organization (WTO) have been signed up to a rolling e-commerce moratorium, committing them not to charge customs duties on data moving across borders. However, some WTO members, including India and South Africa, are increasingly unhappy with the current arrangement, raising questions as to whether the moratorium will be renewed at the next WTO Ministerial Conference, expected to take place in 2023.

Regulatory fragmentation

Currently, tariffs are often of lesser concern than the limitations placed on trade by nontariff measures. Regulatory fragmentation is a potential hurdle to businesses expanding in overseas markets. The harder it is for people to comply with mismatched or even directly contradictory regulation in different countries, the less likely they are to trade.

This issue is particularly acute in the context of the regulation of personal data.

Personal data protection overlaps with policy issues around privacy, national security, sovereignty and the commercial value of data. Very different approaches have developed in the data cultures of three of the most important stakeholders in the debate – the European Union (EU), the United States (US) and China – with numerous commentators referring not just to fragmentation but to the compartmentalization of the internet as a result of the localization requirements imposed on personal data.

Data localization

Data localization requirements do what their name implies – they require data to be stored and used within, or routed through, a particular geographical location. This constrains the ability of overseas companies to serve clients and may mean they need to set up in-country servers to conduct business.

While some countries do allow data to flow freely between jurisdictions around the world – often relying on legal protections to accompany the data – in recent years, many others have enacted new barriers to transferring data internationally, making it more expensive and time-consuming, and sometimes illegal, to do so.

A 2022 report by the Organisation for Economic Co-operation and Development (OECD)[1] shows that data localization measures affecting all types of data are increasing rapidly. Using OECD data, a 2021 Information Technology and Innovation Foundation (ITIF) study[2] noted that the number of data-localization measures in force around the world has more than doubled in four years. In 2017, 35 countries had implemented 67 such barriers. Now, 62 countries have imposed 144 restrictions, and dozens more are under consideration. The report says that an "estimate[d] 1-point increase in a country's data restrictiveness reduces its gross trade output by 7%, slows its productivity by 2.9%, and increases downstream prices for data-reliant industries by 1.5% over five years."

Businesses use data to create value, and for many, they can only maximize that value when data can flow freely across borders. Therefore, data localization restrictions can reduce access to markets and undermine the impact data-intensive services can have on economic productivity and innovation.[3]

That said, many regimes that impose data localization requirements do allow exceptions, where data can be transferred across borders if particular conditions are met. For example, under the EU's General Data Protection Regulation (GDPR), personal data can be transferred to countries outside the internal market for which an "Adequacy Decision" has been issued, recognizing that functional equivalence may be achieved by a different regime. It may also be possible to transfer data within a company group or under contractual arrangements, if these transfers meet particular criteria. Understanding precisely when and how such transfers can take place is important for all aspects of data handling, including storage, and so it needs to be considered carefully when data decisions are made, such as when appointing a cloud storage provider.

How can trade arrangements help?

Digital provisions in trade agreements could be better. Historically, they have not provided additional market access; instead, they lock in the status quo and prevent the creation of new barriers to trade, for example, by ensuring that discriminatory regulations cannot be introduced.

More recent trade agreements often include provisions that purport to remove barriers to data flows and introduce provisions to prevent data localization requirements. However, in practice, many countries claim that legitimate public policy exceptions disapply these provisions (for example, to address national security, privacy, and prudential and other regulatory or law enforcement concerns). Export controls can also impose limitations on data flows, and many companies do not realize that sending data via electronic means can fall under the export control legislation.

1 López González, J., Casalini, F. and Porras, J., "A Preliminary Mapping of Data Localisation Measures," OECD Trade Policy Papers, No. 262, OECD Publishing. Find it here.

2 "Restrictions on International Data Flows Have Doubled in Four Years, With Measurable Economic Consequences, ITIF Reports," *Information Technology and Innovation Foundation website*, 19 July 2021.

3 Goldfarb, A. and Trefler, D., "AI and International Trade," National Bureau of Economic Research, working paper No. 24254. Find it here. Triplett, J. and Bosworth, B., "Productivity Measurement Issues in Services Industries: Baumol's Disease Has Been Cured," Economic Policy Review, 9(3): 23-33. Find it here.

That isn't to say that the existing provisions in trade agreements are without value. They and the negotiations themselves can play an important role in fostering regulatory dialogue. But to get serious about guaranteeing free flows of data, then digital provisions must be made stronger.

The ITIF report says, "Building an open, rules-based, and innovative global digital economy will depend on a small group of proactive and ambitious countries ... [They] will need to work together to develop new norms, rules, cooperation mechanisms, and agreements to address legitimate concerns raised by cross-border data flows while supporting the free flow of data. These initiatives can then form the foundation for broader debate, adaptation, and adoption to expand to more issues and countries." It also says, "Countries such as Canada, Japan, the United States, and others that support an open, innovative, and integrated global digital economy should join or emulate the digital economy agreements Australia, Chile, New Zealand, and Singapore have negotiated."

Harnessing the tide

Successful digital trade relies on the ability to navigate a host of data channels. The sheer pace of change in the digital landscape compounds the importance of aligning the trade and data aspects of a business's international strategy.

Just to stay compliant, businesses need to be aware of digital policy developments and regulations. But there is scope to go beyond mere compliance and to arrange operations to reduce potential constraints. Systems such as the GDPR were actually designed to facilitate the responsible use of data: Fully engaging with what data regimes do permit frees businesses from the potential of adopting an overly cautious approach that fails to make use of data in ways that are permitted.

As governments grapple with balancing data protection with fostering innovation and boosting trade, now is the ideal time for businesses to engage with regulators and trade departments to drive future policy to support digital trade. ■

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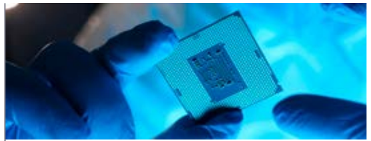

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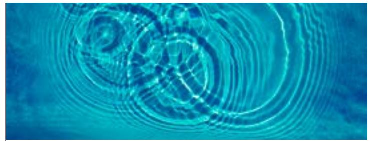

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Canada: Assessment and Revenue Management – Release 2 expected in October 2023

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Introduction

The Canada Border Services Agency's Assessment and Revenue Management (CARM) is a multiyear initiative to modernize the way Canada Border Services Agency (CBSA) assesses imported goods, manages revenue and enforces trade compliance. As of May 2021, a limited-functionality version of the CARM Client Portal (CCP), Release 1, is available for existing importers, Canadian exporters, customs brokers and trade consultants to interact with the CBSA. Release 2, which is currently scheduled for release in October 2023, will expand the functionalities of the CCP. Once fully implemented, CARM will simplify the overall importing process, provide a modern interface for importing into Canada, give importers self-service access to their information, reduce the cost of importing into Canada, and improve consistency of compliance with trade rules.

Importers should start to assess the impact of Release 2 and to start preparing now for its introduction.

Background

Release 0, launched in January 2021, was the first step in the CARM implementation process and involved moving CBSA's existing accounts receivable ledger (ARL) system from its then data center configuration to an SAP S/4HANA system, in preparation for supporting the IT requirements of CARM.

Release 1, launched in May 2021, introduced the CCP, an online self-service tool for importers and customs brokers to interact on a paperless basis with CBSA. The CCP allows importers and customs brokers to tailor the services they need to manage their own accounts with CBSA.

Current functionalities of Release 1 include:

- The ability to grant access to an importer's account to third-party service providers (e.g., customs brokers, trade consultants)
- New secure online payment options
- Tools to help classify goods and estimate duties and taxes payable
- Application program interface (API) to retrieve tariff data
- The ability to electronically request rulings and track their progress

To access the CARM Release 1 functionality, a valid Canada Revenue Agency (CRA)-issued Business Number (BN) and import or export account (RM) identifier, also referred to as a "BN15," are required.

Review of upcoming functions in Release 2

Releases 0 and 1 are the foundations upon which Release 2 is being built. Once Release 2 is introduced, the following functions to the CCP will be enabled:

- Business registration and program enrollment
- Introduction of electronic commercial accounting declarations (CAD), with the ability to execute corrections and adjustments directly in the CCP; the CAD will replace the existing customs coding form (Form B3-3), adjustment request form (Form B2) and related processes
- Changes to Release Prior to Payment (RPP)[1] requirements for bonds
- New harmonized billing cycles
- New offsetting options
- Electronic management for appeals and compliance actions

CBSA will continue to consult with trade chain partners and communicate information regarding Release 2 via CBSA working groups and the CARM website.[2] Therefore, although October 2023 is the latest scheduled go-live date for Release 2, CBSA may postpone the go-live date if needed to address concerns from the trade community or system-related issues with the CCP.

New financial security requirements

Under Release 2, importers will be required to post financial security directly on their accounts to take advantage of RPP privileges. Customs brokers will no longer be able to secure client accounts using their security. To facilitate this, various options will be available, including posting a cash or electronic bond. CBSA will be able, through CCP, to prompt importers and delegated brokers at risk of surpassing financial security levels. This new requirement is designed to reinforce that the importer is liable for their imports, even if they are using a customs broker.

In CARM Release 2, importers will be required to post security with cash or noncash bonds to have access to RPP privileges.

- **For noncash bonds:**
  The security requirement will be to post a bond equal to or greater than 50% of the importer's highest monthly accounts receivable (inclusive of duties and taxes, including goods and services tax (GST)) within the prescribed time.

  A minimum bond of CAD25,000 will be required for RPP privileges.

- **For cash bonds:**
  The security requirement will be to post a bond equal to or greater than 100% of the importer's highest monthly accounts receivable (inclusive of duties and taxes, including GST) within the prescribed period. This can be done by making a deposit through the CCP as of Release 2.

  No minimum bond requirement will exist for cash bonds.

The current time frame for calculating RPP security is from 25 July of the prior year to 24 July of the current year, with updates required by 15 October of each year. For importers without 12 months of history, an estimate will be permitted as it is today.

Financial security bonds will secure all accounts receivable e.g., duties, taxes (including GST), fees, interest, adjustments, and Special Import Measures Act duties. The existing bond cap of CAD10 million will remain. It will be incumbent on the importer to maintain RPP financial security in the amount of their highest monthly accounts receivable.

CARM will enroll sureties via the CCP and provide the ability to establish a direct connection with CBSA. Importers or their delegates will be able to view all security posted, and the CCP will send proactive reminders to increase security or make a payment if an importer's account balance is approaching the amount of security posted.

1 RPP privilege is a privilege that entitles importers and licensed customs brokers who have posted financial security and obtained an account security number to obtain release of goods from CBSA before paying duties and taxes, defer accounting for goods, and defer payment of duties and taxes.

2 "CARM Client Portal: Bulletins," *Government of Canada website*. Find it here.

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New billing cycles

A new billing cycle will be introduced to harmonize payment due dates for all transactions and simplify how accounting information can be corrected or adjusted. The following billing cycles and payment due dates will be affected by CARM:

- High-value shipments and low-value shipments (HVS/LVS)
- Courier low-value shipments (CLVS)
- Continuous transmission commodities (CTC)
- Customs self-assessment program (CSA)
- CBSA commercial invoices in alignment with commercial invoice payment due dates

Timing for	HVS/LVS	CLVS	CSA (Option 1)	CSA (Option 2)	CTC
CAD	5 business days post-release	24th of calendar month 2	Until payment due date	Until payment due date	24th of calendar month 2
SOA	25th of calendar month 2 for all goods released between the 18th of calendar month 1 to the 17th of calendar month 2	25th of calendar month 2 for all goods released in calendar month 1	25th of calendar month 2 for all goods released in calendar month 1	25th of calendar month 2 for all goods released between the 18th of calendar month 1 to the 17th of calendar month 2	25th of calendar month 2 for all goods released in calendar month 1
Payment due date	10 weekdays after the 17th of calendar month 2				
Correction period	From CAD submission date to payment due date				
Adjustment period	From payment due date onward				

Key takeaways for importers

CARM requires a transition plan and change management. Importers are encouraged to be proactive and take steps to prepare for the introduction of CARM Release 2. As discussed above, several high-impact changes have already taken place under Release 1, and more are scheduled to be introduced in Release 2. While the transition to CARM may create disruption for importers, the transition is also an opportune moment for importers to conduct a strategic reassessment of their trade function within the overall business and to modernize and optimize trade operations to comply with the digital analytics-driven CBSA enforcement environment that CARM will create.

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Prior to Release 2, importers should develop a go-live plan that assesses the current state of their trade operations and trade compliance program and identifies improvement opportunities. Active monitoring of CBSA updates on CARM will be critical to remain up to date with CARM developments. Further, financial security should be obtained well in advance of the Release 2 go-live date. Importers should also register an account on the CCP to familiarize themselves with the layout and functions of the portal as well as consider individuals or service providers that will have delegated authority for accessing the CCP on the importer's behalf.

With a robust go-live plan, importers will be able to manage disruptions to their business with the introduction of Release 2. At this stage, high-impact changes will be introduced: new billing cycles, new declaration formats and mandatory posting of security by the importer. New processes and controls will need to be implemented to adapt to these changes. New trade data analytics opportunities will be available for importers to leverage through real-time access to import data through the CCP – importers can either monitor their data directly or outsource such responsibilities to service providers with delegated authority in the CCP.

Post-Release 2, the foundations should exist for a self-directed, modernized and optimized trade compliance program that is fully integrated with CARM, outsources functions as needed, employs trade data analytics and remains current with CBSA enforcement activities and priorities. ■

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Colombia: Constitutional Court invalidates the customs sanctioning and confiscation regime contained in the Customs Code

On 9 December 2021, the Colombian Constitutional Court issued Ruling No. C-441-21 declaring that one of the articles of the current Customs Framework Law was unconstitutional. This article was the foundation of the Sanctioning and Confiscation Regime contained in the Customs Code (Decree 1165 of 2019). The Constitutional Court established that a new regulation related to this matter must be made before 20 June 2023.

What happened in Colombia?

On 23 April 2021, an individual filed a lawsuit against Article 5 subsection (4) of Law No. 1609 from 2013 claiming, among other things, that the Customs Sanctioning and Confiscation Regime contained in the Customs Code cannot be determined by framework laws or regulated through a decree issued by the Ministry of Finance.[1]

On 9 December 2021, the Colombian Constitutional Court issued Ruling No. C-441-21, in which it declared that the disputed subsection of Law No. 1609 from 2013 was indeed unconstitutional, citing the following arguments:

- Not all aspects of the customs regime are subject to a Framework Law. This means that this is a matter that should be reviewed by the Congress in Colombia and not the Ministry of Finance or the Customs Administration.
- Although the Customs Sanctioning and Confiscation Regime is directly related to customs matters, the government (in this case, the Ministry of Finance) cannot determine it, as it is not its competency.
- One of the reasons that the Customs Sanctioning and Confiscation Regime cannot be determined by the government is because this subject does not require the agility and dynamism typical of matters covered by a framework law. In addition, there are no commercial policy reasons that justify the government regulating customs sanctions; therefore, sanctions must be established in laws and not in administrative decrees.

1 In Colombia, the Customs Administration is part of the Ministry of Finance.

- As will be explained later, the regulation of any sanctioning regime is a task for the legislator; consequently, in the Customs Framework, this responsibility cannot be assigned to the government (Ministry), as it does not have the authority to establish it.

The consequence of this ruling is that the article from the law that was declared to be unconstitutional and the administrative decrees that were based on that article should be excluded from the legal system.

Constitutional background

Framework laws

Colombia's political system has three branches of government: executive, legislative and judicial. These branches have separate functions but collaborate harmoniously to achieve their purposes.

- The Legislative Branch (Congress) is made up of the Senate and the House of Representatives. Congress is responsible for amending the Constitution, enacting laws, and exercising political checks on the government and administration.
- The Executive Branch is run by the president of the republic, who is the head of state, head of government and top administrative authority. The national government comprises the president of the republic, the ministers and the directors of the administrative departments.
- The Judicial Branch (courts and judges) is responsible for the justice administration.

The issuance of laws generally belongs to the Legislative Branch. However, in some special cases, the Colombian Constitution allows Congress to issue framework laws to lay down general obligations and principles but to leave to the governing authorities (Executive Branch) the task of enacting further legislation and other specific measures, as may be required for their operation. Framework laws regulate changing matters that, given their complexity and constant evolution, require collaboration between the Executive and the Legislative branches.

The Customs Framework Law

The Colombian Constitution established in Article No. 150.19 that the government, for commercial policy reasons, can modify the tariffs, customs rates and other provisions concerning the customs regime (provided that they are fast-changing issues that require a quick implementation and that, due to its constant evolution, require rapid handling). This means that Congress can issue a law containing all the general guidelines that the government must follow when issuing the customs regime through an administrative decree (a lower-rank legislative instrument).

In this regard, the Congress issued the Customs Law Framework on 2 January 2013 with Law No. 1609 of 2013, which contains seven articles that deal with facilitation of the development and application of international treaties, the adequacy of the provisions of the customs regime to the commercial policy of the country, the streamlining of foreign trade operations, and the promotion of the use of technology.

In particular, Article 5 of this law states the following:

Article 5. General criteria. The Decrees and other Administrative Acts issued by the National Government to develop the customs framework law must observe the following criteria:

1. *It is the social responsibility of Public Officials and Foreign Trade Operators to tend to prevent, avoid and control behaviors that are contrary to the loyal and correct performance of customs functions and other obligations related to them.*
2. *The State Authorities and the foreign trade operators will periodically evaluate the general operation of the information systems and technologies used in the development of foreign trade operations and will strive for their constant updating, in accordance with the needs and good practices recognized by international law.*
3. *When a provision requires a regulation by a competent authority for its publication, the latter must issue the regulation within a period not exceeding 180 days after its publication in the Official Gazette, which allows effective and real compliance with the provision to regulate. Notwithstanding to the fact*

that the authority must implement a computer systematization model for the fulfillment of customs obligations, in which case it must do so within a period not exceeding twenty-four (24) months with the performance of pilot tests of operation at intervals of six (6) months.

4. *The provisions that constitute the Sanctioning Regime and the confiscation of goods in customs matters, as well as the applicable procedure, must be contained in the decrees that the National Government issues in development of the Framework Law.*

5. *The Decrees issued by the National Government to develop the Customs Law Framework and other acts that regulate it, must consider the elements of Legal Security. The administrative actions related to the customs function, in accordance with the Constitution, must be public and permanent, with the exceptions established by law, and substantive law will prevail in them.*

Principles of the Customs Sanctioning Regime

In Colombia, the Constitution establishes that the Customs and Tax Administration can impose sanctions on citizens, companies and public officials when they engage in actions contrary to the legal system. However, even though these sanctions are imposed by the Administration and not by a judge, the procedures and penalties must be based on constitutional principles, such as the "principle of law reserve."

The principle of law reserve

The principle of law reserve states that sanctions and related procedures must be contained in a rule that has the status of being a law. The rationale for this principle is that the sanctions should be found in rules issued by the Congress and not by decrees issued by the government, since the issuance of laws requires certain procedures and is governed by democracy, while the issuance of decrees does not.

The application of the law reserve principle implies, therefore, that customs sanctions, confiscation and related procedures cannot be regulated through an administrative decree and, conversely, must be regulated through a law issued by the Congress.

What is next?

Reflecting on the future challenges inherent in the process of creating new laws, there is an urgent need for Congress to come to an agreement with the Administration on this matter. It is clear that the decision made by the Constitutional Court could create legal uncertainty due to the absence of regulation. However, the Court has stated that the current Sanctioning Regime contained in the Customs Code will continue in force while Congress reviews and approves a new Sanctioning Regime. The deadline for Congress to issue a new law is 20 June 2023.

For Congress, the task in this period will be to issue a sanctioning regime that is fair, legal and proportional to the different situations that could arise for international trade. While this new regulation is presented and discussed by Congress, importers, exporters, customs brokers and all foreign trade actors must continue to use the current regime. Once the new regulation is in place, it must be verified in accordance with the principles established by law, in order to apply it appropriately.

In this sense, it is expected that in the second half of 2023 Colombia will have a new regime that meets the expectations of customs and foreign trade actors, and, above all, that focuses on what is substantial over what is formal. Additionally, the new regime should make sure that the activities that Customs seeks to manage, such as smuggling and noncompliance with the customs regime, are punished proportionally, following due process. ■

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Costa Rica: Business landscape, trade facilitation and amendments to General Customs Law

Costa Rica is a small country in Central America with a sound democracy, a stable political system and a very well-educated workforce, which is home to more than 300 multinationals. The country has seen strong growth in recent years, with North America the principal destination market for exports, followed by Central America, Europe, Asia and the Caribbean. Recent customs law reforms provide new opportunities for inward investment into the country and measures that facilitate international trade while preventing illicit trading.

Growth drivers

In 2021, the country reported 24% growth in the export of goods, reaching USD14,553 million, surpassing 2020 figures, and 2022 figures are already showing a larger growth, according to the Costa Rican promotion agency Procomer.[1]

Some of this growth is driven by large multinationals operating in the country, with growth in sectors including precision and medical devices, which is the country's leading export sector (growth of 33%); agriculture (+6%); the food industry (+26%); chemical pharmaceuticals (+10%); electrical and electronics (+37%); metalworking (+71%); plastics (+26%); and livestock and fisheries (+13%).[2]

1 'The recovery of Costa Rican goods exports showed a consolidated increase of 24% at the close of 2021' *Procomer Costa Rica website*. Find it here.

2 ibid.

Growth in the agricultural sector has been in staple foods, such as pineapple (+12%), ornamental plants (+31%) and frozen fruits (+42%), and diversified products, such as mango (+65%), coconut (+144%), chayote (+11%), cassava (+5%), tiquisque (cocoyam) (+46%), yams (+145%) and ñampi (taro) (+13%).[3]

Customs reform

In line with the country's strategy of attracting foreign investment and facilitating trade and investment, a new amendment to the general customs law was published on 29 June 2022, the most comprehensive reform in the last 20 years. There is still a six-month period for a regulation to be released, detailing the scope and some of the specific provisions of the law; however, businesses are already capable of taking advantage of some of the benefits introduced by this law, as the administration has adopted and applied the new measures, despite the fact that the regulation has not been published. Therefore, it is important to consider changes introduced by this reform.

Trade facilitation measures

Trade facilitation measures include the option of deferred payments, aimed at supporting businesses by granting a one-month period for the payment of taxes and duties after the import has been carried out.

The accumulated declaration facility allows importers to accumulate the declarations in a specific period, for example, to check for consistency in the declaration with amounts of goods imported. Payment is made at the end of the period when amounts are confirmed.

Advance rulings with binding force have been introduced, in line with the practices in other administrations, such as the US, whereby information on issues such as classification, valuation and customs matters can be made publicly available and the ruling grants legal certainty to businesses.

Combatting illicit trade

The amendment also introduces the obligation for public auxiliaries such as free-trade zones and customs agents to incorporate new technologies for better control and inspection. The objective is to avoid illicit trade and smuggling. Anti-smuggling measures are also at the heart of the reform, with criminal penalties consisting of custodial sentences and fines to those involved in such behaviors.

The reform also changes the amounts of sanctions and fines, and the discounts. Whereas the previous text contained the fine of $500, new sanctions are $1,000 and $4,000 and include business closure and other measures. These changes are of particular relevance to free-trade zones; since they are auxiliaries of the public function, they are subject of some of the increased fines.

Authorized Economic Operator

Special mention should be given to the Authorized Economic Operator (AEO) certification, which an important trade facilitation program for compliant businesses, that Costa Rica is supporting in full. The reform includes some of the benefits for AEO companies, for example, the option for an AEO to nationalize goods not at the point of entry or in a warehouse but in its own facilities. This means that companies with AEO status can benefit from savings, as they are not required to transport goods from the port into a warehouse until duties and taxes are paid.

3 ibid.

Free-trade zones

Free-trade zone incentives ranging from zero income tax, zero duties and applied taxes to operations within the zones, a new modern customs law, political stability, and education make this a great option to serve other Latin American and North American markets.

Costa Rica: Example tax incentives for certain free-trade zones	
Tax	**Incentive**
Income tax (30% ordinary rate)	0% during first eight years – 15% during following four years for companies operating within the Greater Metropolitan Area (GMA). 0% during the first 12 years – 15% during the following six years for companies operating out of the GMA.
Dividend withholding tax (15% ordinary rate)	0% during first eight years – 7.5% during following four years, for companies operating within the GMA. 0% during the first 12 years – 7.5% during the following six years for companies operating out of the GMA.
Withholding taxes on remittances abroad	Exempt
Tax on net assets, capital, real estate and real estate transfer tax	Exempt for 10 years
Sales tax on goods and services (VAT) (13% ordinary rate)	Exempt
Municipal tax	Exempt for 10 years (with exceptions)
Import duties on raw materials, equipment, machinery, etc.	Exempt

Summary

In line with the country's strategy to be a strong preferred recipient of foreign direct investment in the region, while this reform contains strong penalties for noncompliance, it also has valuable trade facilitation measures and facilities for companies that comply with the law.

For businesses already established in Costa Rica, it is recommended that they check compliance with the new customs law to identify any risks and opportunities.

Businesses looking for expansion or a nearshoring option should consider the opportunities available for facilitated trade and consider that sectors such as advanced manufacturing, pharma and services all receive special incentives.

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US: Uyghur Forced Labor Prevention Act goes into force

In December 2021, United States (US) President Joseph Biden signed into law the Uyghur Forced Labor Prevention Act (UFLPA), passed by the US Congress with bipartisan support.[1] Among the goals of the UFLPA is to enhance existing prohibitions against importing goods into the US made with forced labor.[2] The law, which went into effect on 21 June 2022, impacts companies in a variety of industries that have supply chains directly and indirectly tied to China.

Restrictions on imports of merchandise produced with forced labor is not new to US importers, as US Customs and Border Protection (CBP or Customs) has prohibited imports made with forced labor regularly for the past several years via Withhold Release Orders (WRO), established in 2015 under the Trade Facilitation and Trade Enforcement Act (TFTEA). Prior to TFTEA, US importers were allowed to import goods produced with forced labor, provided the product produced domestically did not meet US consumptive demand.

Under a WRO, CBP may withhold the release of imported goods when information indicates that the goods were produced with forced labor. In those cases, importers must either export the withheld shipments or submit certain documentation demonstrating that the goods were not produced with forced labor. However, based on previous WROs' levels of specificity, the impact to US importers has been relatively limited.

The UFLPA diverges significantly from the previous, more specific WROs. The law creates a rebuttable presumption that goods mined, produced or manufactured (wholly or in part) in China's Xinjiang Uyghur Autonomous Region (XUAR), or goods produced by certain named entities (the Entity List), are produced with forced labor. Goods meeting this description are prohibited from importation into the US.

1 Pub. L. No. 117-78, "An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes."

2 Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits the import of any product made wholly or in part by forced labor.

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Rebutting the presumption

To overcome the rebuttable presumption, importers must provide documentation that clearly demonstrates that the goods were not mined, produced or manufactured wholly or in part by forced labor.

The Department of Homeland Security (DHS), as Chair of the Forced Labor Enforcement Task Force (FLETF), published the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China (UFLPA Strategy) on 21 June 2022 with specific guidance to importers. Example documentation outlined in the strategy is detailed in the chart opposite:

The rebuttable presumption applies to merchandise imported on or after 21 June 2022. Should CBP decide to take enforcement actions on a shipment, the importer will be issued a notice of detention, pursuant to 19 U.S.C. § 1499 and 19 C.F.R. § 151.16. CBP will provide the importer with instructions to submit information for the evidence for their rebuttal. Importers will have 30 days from the date the merchandise is presented for examination to request an exemption.

Category	Example supporting documentation	
Due diligence, supply chain tracing information, information on supply chain management measures	▸ Engagement with suppliers and other stakeholders to assess and address forced labor risk ▸ Mapping of the supply chain and assessment of forced labor risks along the supply chain from raw materials to production of the imported good ▸ Training on forced labor risks for employees and agents who select and interact with suppliers	▸ Remediation of any forced labor conditions identified or termination of the supplier ▸ Relationship if remediation is not possible or is not timely completed ▸ Independent verification of the implementation and effectiveness of the due diligence system

Supply chain tracing information	▸ Evidence pertaining to overall supply chain
	  ▸ e.g., detailed description of supply chain, including imported merchandise and components thereof, including all stages of mining, production or manufacture
		▸ Evidence pertaining to merchandise or any component thereof
		  ▸ e.g., purchase orders, invoices, packing lists
		▸ Evidence pertaining to miner, producer or manufacturer
		  ▸ e.g., production orders, production reports

Information on supply chain management measures	▸ Internal controls to prevent or mitigate forced labor risk and remediate any use of forced labor identified in the mining, production, or manufacture of imported goods	▸ An importer should be able to demonstrate that documents provided are part of an operating system or an accounting system that includes audited financial statements
Evidence that goods were not mined, produced or manufactured wholly or in part in XUAR	▸ Documentation that traces the supply chain of the goods	
Evidence that goods originating in China were not mined, produced or manufactured wholly or in part by forced labor	▸ Supply chain mapping ▸ Information on workers, such as wage payment and production output at entities involved in the production process	▸ Information about the worker recruitment process and internal controls that document how employees are working voluntarily ▸ Credible audits identifying forced labor indicators and, if applicable, remediation

3 "Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China," *US Department of Homeland Security website*. Find it here.

CBP will then make a determination on whether to release, exclude or seize the merchandise. Importers whose merchandise is excluded or seized may file a protest or petition, respectively, to request an exception to the rebuttable presumption.

Should CBP reject an importer's exception request and determine the merchandise was produced with forced labor, the importer may face penalties. The Tariff Act of 1930 provides CBP with the authority to issue civil penalties against importers for entering, introducing, or attempting to enter or introduce any merchandise into the commerce of the US contrary to law.

Industry impact

As the XUAR is a region of China that provides raw materials at the start of the supply chain for many types of products, the UFLPA impacts many industries. It expressly targets the production of cotton, tomatoes and polysilicon (a key input in solar panels). As such, the related industries (e.g., apparel and textiles for cotton, solar panel producers) should be particularly diligent regarding Chinese-based material suppliers or sources of supply.

Planning

Importers need to have a thorough understanding of and visibility of their supply chain. CBP's UFLPA detentions and inquiries have only a 30-day response deadline, which is not enough time to undertake the processes of either proving the product is not within scope or rebutting the presumption. Consequently, importers with supply chains that have nexus with China should conduct proactive reviews of their supply chains. The review should map all direct (i.e., tier 1 suppliers) and indirect suppliers (i.e., tier 2 suppliers and beyond), as well as trace each material used in production to assess its origin and risk under the UFLPA. Importers should then develop an appropriate action plan to respond to potential CBP inquiries.

Actions importers can take to develop compliance measures for suppliers and products potentially affected by the UFLPA include:

- Updating trade compliance processes and procedures for supplier selection processes and related due diligence
- Reviewing contract language for current suppliers to assess whether updates to address forced labor risks and compliance are needed
- Ongoing supplier monitoring
- Creating whistleblower and escalation processes

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US: Implements new technology export controls on China

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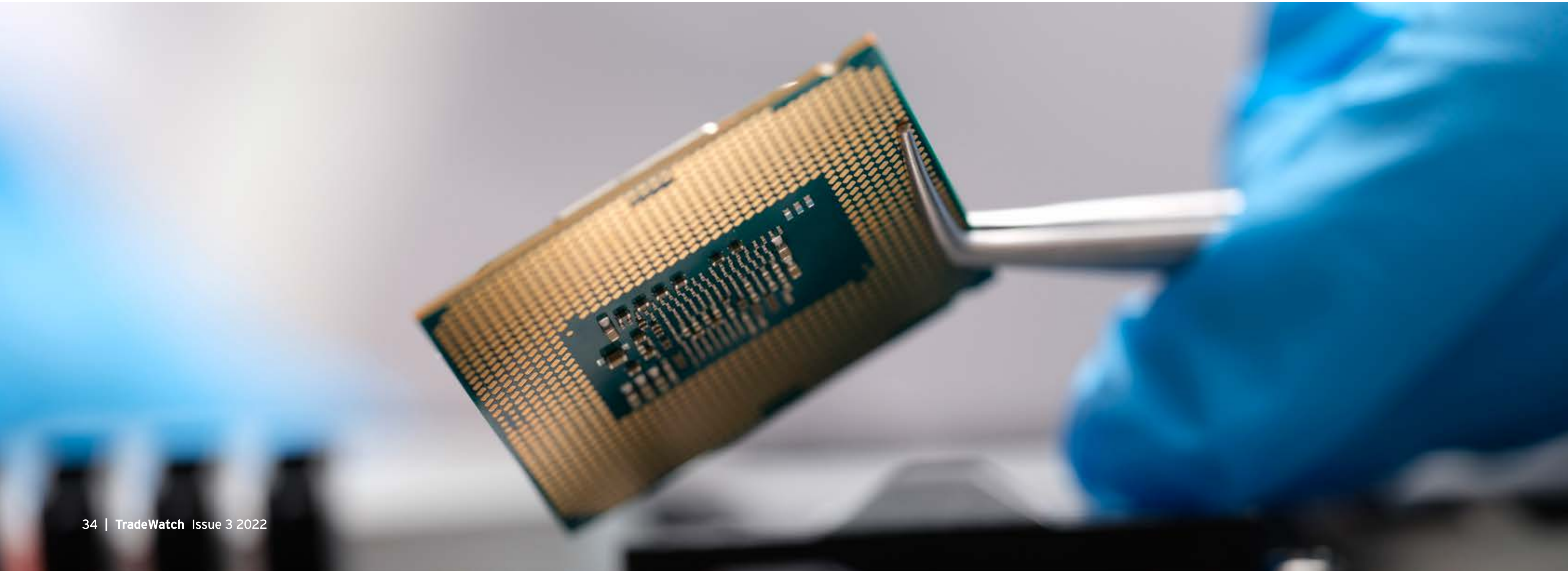
On 7 October 2022, the United States (US) Department of Commerce's Bureau of Industry and Security (BIS) announced sweeping export controls via an Interim Final Rule focused on semiconductors, integrated circuits (ICs), related manufacturing equipment, advanced computing and supercomputers. The new restrictions under the Export Administration Regulations (EAR) are generally focused on activities involving China.[1]

These new export controls are among the broadest and most substantial in recent years. In addition to creating major hurdles for the PRC's domestic chip industry, these changes will affect US and non-US companies in the semiconductor sector and adjacent sectors with business operations in the PRC, as well as companies in any industry that supply items or services to the PRC involving computers, servers or ICs.

Notably, these export controls can impact operations throughout the semiconductor supply chain, including elements not based in the US or performed by US companies.

1 See 87 Fed. Reg. 62,186 (13 October 2022), *Federal register website*. Find it here.



Key aspects of the new restrictions include:

- New and amended Export Control Classification Numbers (ECCN) on the EAR's Commerce Control List (CCL) requiring a license for China, focused on semiconductor manufacturing equipment and advanced ICs
- Expansion of the EAR's jurisdiction over items made outside the US, with respect to China and advanced computing and ICs
- New EAR end-use rules with respect to China, semiconductor manufacturing and supercomputers
- New and significant restrictions on activities performed by US persons involving China -based IC development and production
- Revisions to the EAR's Unverified List, a restricted-party list

New and amended ECCNs

Among the changes in the Interim Final Rule are new and amended ECCNs. The associated licensing requirements for exports, re-exports, and in-country transfers to or within China are based on the EAR's Regional Stability (RS) licensing reasons, although limited to China only. Anti-Terrorism (AT) licensing reasons for embargoed countries apply as well.

New ECCNs are listed below, and certain associated ECCNs are also revised or impacted.

- **ECCN 3A090**
  - Effective 21 October 2022
  - Controls certain advanced ICs (i.e., ICs that have or are programmable to have an aggregate bidirectional transfer rate over all inputs and outputs of 600 gigabytes or more to or from ICs other than volatile memories (and other characteristics in the ECCN))
- **ECCN 3B090**
  - Effective 7 October 2022
  - Controls certain semiconductor manufacturing equipment and related items
- **ECCN 4A090**
  - Effective 21 October 2022
  - Controls certain computers, electronic assemblies and components containing ICs that exceed the limit in 3A090.a
- **ECCN 4D090**
  - Effective 21 October 2022
  - Controls software specially designed or modified for the development or production of the items controlled under ECCN 4A090

Generally, export license applications related to China for items under these ECCNs will be reviewed by BIS under a presumption of denial.

License applications will be reviewed on a case-by-case basis for items destined to end users in China that are headquartered in the US or a country in EAR Country Group A:5 or A:6. Use of license exceptions for these ECCNs is limited.

Expanded scope of EAR jurisdiction

Generally, the EAR's Foreign Direct Product Rule (FDPR) expands the EAR's jurisdiction to foreign-produced items outside the US that are a direct product of specified technology or software or are produced by a plant or major component of a plant that itself is a direct product of specified technology or software.

Effective 21 October 2022, BIS is adding three new FDPRs to further extend EAR jurisdiction to items produced outside the US. As a result, US and non-US companies will face challenges with supplying semiconductor and supercomputer-related hardware and software to China when the supply chain contains US software, technology or commodities.

Each of the FDPRs is complex, with extensive detail, and should be read carefully in full.

To summarize, the FDPRs include:

- **Entity List FDPR**, covering items destined to 28 China-based entities already listed on the BIS Entity List, now designated with new Entity List Footnote 4. Generally, companies face license requirements for exports, re-exports and in-country transfers to entities on the Entity List; however, this new FDPR expands what types of transactions involving items made outside the US would be considered subject to the EAR and, accordingly, incur these license requirements.

- **Advanced Computing FDPR**, covering certain advanced ICs, commodities containing such ICs, or related technology when there is knowledge that the items are either (i) destined for China or incorporation into a non-EAR99 item destined for China or (ii) technology developed by a China-based entity for the production of certain related items.
- **Supercomputer End-Use FDPR**, covering items to be used in development, production or other services with a supercomputer located in or destined for China, or to be incorporated into or used in the development or production of certain items to be used in a supercomputer located in or destined for China.

End-use restrictions

Among the mechanisms in the EAR for export controls are restrictions on end use for items that are exported, re-exported or transferred.

The Interim Final Rule adds new provisions on end use, requiring an export license for various commodities, software and technology where the exporter has "knowledge" at the time of export, re-export or in-country transfer that the item will be used, whether directly or indirectly, for certain end uses related to supercomputers or semiconductor manufacturing. These new Interim Final Rule provisions also provide a detailed technical definition of supercomputers.

These end-use restrictions are specific to certain technical parameters and circumstances, and companies should review the restrictions in full.

License exceptions are not available for these end-use restrictions. BIS will review license applications under a presumption of denial, except in some cases for end users in China that are headquartered in the US or in countries under Country Groups A:5 or A:6, along with certain other conditions.

Restrictions on US person activities

Effective 12 October 2022, a BIS license is required before US persons (US citizens, permanent residents and limited other residency statuses) can provide certain support for the development or production of certain ICs produced at a semiconductor fabrication facility located in China. BIS will review these license applications under a presumption of denial, except for a more general review policy related to end users in China that are headquartered in the US or in EAR Country Groups A:5 or A:6.

The term "support" encompasses a number of activities. More specifically, the following types of support incur the license requirement:

- Shipping, transmitting, or transferring, or facilitating such movement, to or withinChina, or servicing any item not subject to the EAR (i.e., outside of EAR jurisdiction) with knowledge that the item will be used in the development or production of ICs at a semiconductor fabrication facility in China that produces certain advanced ICs described in these provisions.

- Shipping, transmitting, or transferring, or facilitating such movement, to or withinChina, or servicing any item (if meeting the parameters of any ECCN in CCL Category 3 Product Groups B, C, D or E) not subject to the EAR with knowledge that the item will be used in the development or production of ICs at a semiconductor fabrication facility in Chinawhere the US person does not have knowledge of whether the facility produces ICs meeting the above technical criteria.
- Shipping, transmitting, or transferring, or facilitating such movement, to or within China, or servicing any item not subject to the EAR and meeting the parameters of certain ECCNs regardless of the end use or end user.

Temporary General License

In addition to a limited-duration savings clause for certain activities, BIS issued a Temporary General License (TGL) in an effort to mitigate disruption to supply chains, effective 21 October 2022 through 7 April 2023. The TGL authorizes shipment to Chinaby companies not headquartered in certain otherwise restricted countries to engage in limited activities otherwise restricted by the Interim Final Rule.

Updates to Entity List determination criteria and Unverified List

On 7 October 2022, BIS released a separate Federal Register Notice with new criteria for adding a party to the BIS Entity List, including a sustained lack of cooperation by the host government (e.g., the government of the country in which an end-use check is to be performed) that effectively prevents BIS from determining compliance with the EAR. The expected result of this change is that more companies and institutions in China will later be added to the Entity List.

In addition, BIS designated 31 entities in China to the BIS Unverified List (UVL), a restricted-party list identifying parties for which BIS has been unable to confirm their bona fides. Generally, license exceptions may not be used for transactions with parties on the UVL, and certain written statements must be acquired from the UVL party in advance, in addition to other requirements imposed by a UVL listing.[2]

Actions for businesses

The impact of these changes on the semiconductor industry is significant and the greatest impact will be felt by companies with business in China involving semiconductor manufacturing, advanced computing and supercomputers. However, companies in any industry that ship to or use computers or ICs in the PRC will need to review these new restrictions.

2 See 87 Fed. Reg. 61,971 (October 13, 2022).

The restrictions on US persons will also create exceptional challenges for companies involved in engineering or technical work with China -based semiconductor or advanced computing companies.

Companies in the semiconductor and advanced computing spaces should consider the following immediate actions:

- Identify any products or service offerings involving China , including technology and software, that may be captured under the new ECCNs related to semiconductor manufacturing equipment, ICs and items containing ICs.
- Regarding the FDPRs and the EAR's jurisdiction over items made outside the US, review operations and shipment activity originating outside the US and involving the PRC with respect to advanced computing and supercomputers.
- Review global shipments and operations related to China -based IC fabrication or supercomputers, with respect to end-use restrictions.
- Review the activities of personnel supporting engineering or technical work for China companies in the semiconductor, advanced computing or supercomputer fields. ■

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China: Customs updates for September 2022

Commodity classifications for 2022

On 17 August 2022, the General Administration of Customs (GAC) issued the decision on commodity classifications for 2022 through GAC Public Notice [2022] No. 78 (PN 78).[1] The aim is to facilitate consignees and consignors of imported and exported goods and their agents to correctly declare the classification of commodities and to ensure the unification of commodity classification for customs (see Annex 1 to PN 78). At the same time, the GAC also issued the decision on commodity classification for 2022 according to the World Customs Organization's opinion (see Annex 2 to PN 78) in line with the actual situation of China's import and export commodities and international trade.

PN 78 came into effect on 1 September 2022. Import and export enterprises and related agencies are encouraged to make reference to PN 78 for greater detail of the commodity classification for 2022. If in doubt about the appropriate classification to use for goods, businesses should consult with professional advisors, as appropriate.

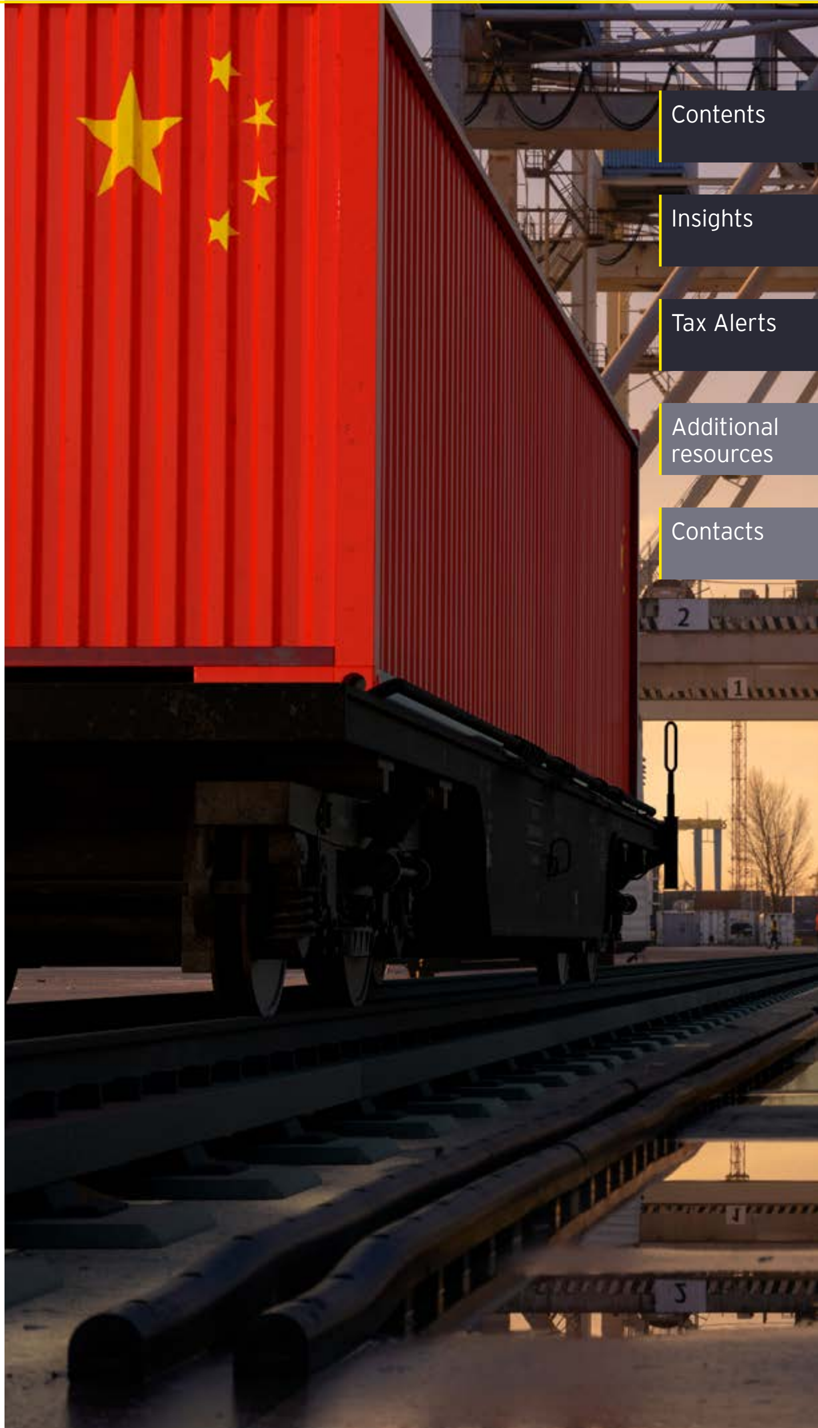
Measures for the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone

On 7 September 2022, the GAC issued the "Measures of the GAC for Supporting the Comprehensive Deepening of the Reform and Opening-up in the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone" via Circular [2022] No. 137 (Circular 137).[2]

The measures support the construction of an experimental platform of the Guangdong-Hong Kong-Macao Greater Bay Area for comprehensively deepening the reform of and innovation in the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone (the Qianhai Cooperation Zone).

Key measures introduced in Circular 137 include:

- **Support for Qianhai to build a big data service platform for cross-border trade**
  This involves building a pilot big data platform for cross-border trade in Qianhai and promoting the interconnection of cross-border data, mutual recognition of documents, and mutual assistance of supervision between Shenzhen and Hong Kong.



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1 The full text of PN 78 is available here.
2 The full text of Circular 137 is available here.

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- **Implement "soft interconnection" cooperation in rules and systems between Shenzhen and Hong Kong**
  This involves promoting the linkage of regulatory rules and testing standards between Shenzhen and Hong Kong and piloting a "one-time testing, one-time certification and integrated pass."
- **Expand health and quarantine cooperation between Shenzhen and Hong Kong**
  This measure involves promoting the inclusion of customs health declaration information into the transcoding scope of health codes of Guangdong and Hong Kong, and implementing information sharing, mutual recognition of results and joint epidemic prevention.
- **Serve Hong Kong and Macao enterprises settling in Qianhai**
  Hong Kong and Macao enterprises that carry out production and business activities with registration in Shenzhen as market entities can directly handle record filing under the capacity of customs declaration entities in the Shenzhen Qianhai Shekou area of China (Guangdong) Pilot Free Trade Zone (PFTZ).
- **Enhance the comprehensive hub function of Qianhai**
  This measure involves supporting the establishment of ports in Qianhai according to regulations; supporting the construction of an international trade comprehensive port; and implementing land, marine and air multimodal transportations.
- **Build an upgraded comprehensive bonded zone with characteristics of Shenzhen-Hong Kong modern service industry**
  This measure involves exploring and piloting rules for interconnection and system innovation between Shenzhen and Hong Kong and exploring the establishment of service facilities such as catering, retail of consumer goods and charging piles in designated areas that support production and business activities in the zone and do not involve goods that are duty-free, bonded or subject to tax refund.
- **Improve quality and efficiency of tax-free consumption**
  This involves facilitating the circulation between duty-free goods supervision warehouses outside the zone and bonded goods supervision warehouses inside the zone and improving the efficiency of circulation and sales.
- **Support the collaborative development of the Shenzhen Qianhai Shekou Area of China (Guangdong) PFTZ and Qianhai Cooperation Zone**
  Under the requirements for the replication and promotion of innovation systems and the scope of implementation, this involves supporting the promotion and implementation of the innovation system of the Shenzhen Qianhai Shekou Area of China (Guangdong) PFTZ in the Qianhai Cooperation Zone.

GAC measures for promoting comprehensive cooperation among Guangdong, Hong Kong and Macau by opening up Guangzhou Nansha

To further implement the Overall Plan for Promoting Comprehensive Cooperation Among Guangdong, Hong Kong and Macau by Further Deepening the Open-up of Guangzhou Nansha (Plan),[3] which was issued by the State Council on 20 September 2022, the GAC introduced certain measures for promoting comprehensive cooperation among Guangdong, Hong Kong and Macau by further increasing the opening up of Guangzhou Nansha. These measures were contained in Circular [2022] No. 143 (Circular 143).[4]

3 The full content of the Plan is available here.
4 The full content of Circular 143 is available here.

Key features of Circular 143 include:

Facilitating mobility

- **Support circulation**
  This involves piloting the "positive list for cross-border scientific research materials" and approved list "for the import of biomedical research and development materials."

- **Facilitate personnel mobility**
  This involves facilitating customs clearance for scientific researchers who enjoy the treatment of national high-level returnee talents, scientists and technology experts, and supporting the information-sharing of customs health declaration, "Yuekang Code" of Guangdong and "Gangkang Code" of Hong Kong, and mutual recognition of results.

- **Support the integrated development of international distribution centers**
  This involves supporting the integration of logistics of various trade modes and assisting the Nansha Comprehensive Bonded Zone (CBZ) in building commodity supply chain management platforms.

Promoting the development of major strategic platforms

- **Support the development of cross-border e-commerce**
  This involves enhancing the import and export goods return procedures used for cross-border e-commerce and supporting eligible enterprises in Nansha to establish retail import returns centers for cross-border e-commerce.

- **Support "Bonded+" business**
  This involves supporting the development of aircraft bonded leasing, bonded delivery of commodity futures, high-tech and high value-added global maintenance, etc.

- **Assist the development of automobile industry chain**
  This involves supporting the development of parallel imported vehicles, new energy vehicles and intelligent vehicles in the Nansha CBZ.

Building a global comprehensive service base

- **Support the development of trade in services**
  This involves encouraging large enterprise groups to establish regional headquarters or functional headquarters in Nansha and supporting Nansha to establish comprehensive offshore trade service platforms.

- **Regional Comprehensive Economic Partnership (RCEP) Agreement**
  This involves the high-quality implementation of RCEP and relevant customs provisions in Nansha and helping enterprises in the area to fully enjoy RCEP benefits.

- **Support the construction of a comprehensive service system**
  This involves piloting the reform of optimizing the export supervision process at Nansha Ports and strengthening the construction of precise service capacity of technical trade measures.

Strengthening the linkage of rules among Guangdong, Hong Kong and Macau

- **Improve the business environment at ports**
  This measure relates to promoting the normalization of special action measures for facilitating cross-border trade, including coordinating the implementation of tax refund policies of port of departure and further expanding the scope of the policies.

- **Deepen the reform of smart customs**
  This involves strengthening international customs cooperation and implementing online handling and simplified procedures of customs administrative licensing matters.

- **Intellectual property rights protection**
  This measure relates to enhanced cooperation among Guangdong, Hong Kong and Macau in the enforcement of intellectual property rights protection. It involves fully boosting the function of the intellectual property dispute mediation centers that are jointly established by the customs and local courts. ■

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Japan: Updates on sanction measures

In light of war in Ukraine, amendments to the Foreign Exchange and Foreign Trade Act and Temporary Tariff Measures Act are being approved successively in Japan. This article summarizes the measures that have been or will be implemented by the Japanese government.

Regulations on payments and specified capital transactions

Pursuant to the Notification by the Ministry of Foreign Affairs (MOFA), the payments to and capital transactions (e.g., deposit contract, trust agreement and loan agreement) with individuals from the self-proclaimed Donetsk People's Republic and the Luhansk People's Republic, as well as certain individuals from specified banks of the Russian Federation (Russia), have become subject to an approval system. In addition, the following measures have been implemented to prohibit the Russian government from publishing and distributing new securities in Japan:

- Regulations on publication or registration of securities
- Regulations on acquisition or negotiation of securities
- Regulations on service transactions

Import prohibitions

Measures regarding the duty rates imposed on imports from Russia[1]

As of 21 April 2022, pursuant to the amendment to the Temporary Tariff Measures Act,[2] imports from Russia are no longer applicable to most-favored-nations (MFN) tariff rates[3] and will instead be subject to the general rate or the temporary rate where applicable. This measure affects tariff rates of seafood and lumber imported from Russia in particular, with the tariff rate applicable to snow crab increasing from 4% to 6%, sockeye salmon from 3.5% to 5%, and pine (lumber) from 4.8% to 8%. On the other hand, tariff rates applicable to liquefied natural gas, nonferrous metals and coal are not affected, as their general rates are already at 0%.

Prohibition of imports of certain goods from Russia[4]

As of 19 April 2022, the importation of goods specified on the Notification by the Ministry of Economy, Trade, and Industry (METI) are subject to the approval by the Minister where the goods' country of origin or shipment is Russia.

Examples of prohibited items include alcoholic beverages, wood (chips, logs and veneer), machinery and electrical machinery. In addition, goods of precious metal specified on the Notification by MOFA have also become subject to the import prohibition measure as of 1 August 2022.[5]

Export prohibitions

The first sanction measures, such as the prohibition of exports of certain items to Russia, came into effect on 18 March 2022, with the Cabinet approving the partial amendment to the Export Trade Control Order in response to their earlier announcements.[6] The prohibitions have then quickly extended to cover luxury goods exported to Russia[7] in response to the Cabinet's decisions[8] and to banknotes[9] on 5 April 2022.

Most recently, the Cabinet has approved the export prohibitions on goods related to chemical or biological weapons to Russia on 26 September 2022, which came into effect from 7 October 2022.

Details of the restrictions are summarized below:

Introduction of more rigorous screening procedures

- For goods exported to Russia and Belarus, Japan amended the requirements for comprehensive permits and document submission. Special general comprehensive permits, specific comprehensive permits and specified subsidiary comprehensive permits are no longer applicable to goods destinated for Russia and Belarus, and individual permits and examinations of each export are required instead (however, exports are not permitted in general).
- Document submission requirements for permit applications are amended.
- Permit applications are to be submitted to the Ministry (head office) in principle.
- This implies that, with the exception of some goods (e.g., food, pharmaceutical products, goods exported for the purpose of humanitarian aid), exports to Russia and Belarus are now prohibited in general.

1 Withdrawal of MFN tax rates on imports from Russia. Find it here.

2 The amendment was approved by the plenary session of the House of Councillors on 20 April 2022 and was subsequently enforced on 21 April 2022.

3 This refers to tariff rates applicable to World Trade Organization members, as stipulated in Section 1 of the General Agreement on Tariffs and Trade Article I.

4 Prohibition of imports of certain goods from Russia. Find it here.

5 Following the Cabinet's approval on the measure to freeze the assets, funds and economic resources of the Russian Federation on 5 July 2022, the Ministry of Finance (MOF) has issued a Notification on import prohibition pertaining to goods of precious metals pursuant to the Foreign Exchange and Foreign Trade Act, which came into force on 1 August 2022.

6 On 26 February 2022 and 1, 3 and 8 March 2022, the Cabinet announced a tightening of the screening procedures and prohibited exports to Russia and Belarus of items subject to the international export control regime and of general-purpose items and services that may contribute to strengthening military capabilities.

7 Export prohibition of luxury goods to Russia. Find it here.

8 The export prohibition of luxury goods was introduced to reflect the Cabinet's decisions made on 25 and 29 March 2022.

9 The export prohibition of banknotes was introduced pursuant to the amendment to the Notification by MOF based on Article 8, Paragraph 1 of the Foreign Exchange Order.

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Prohibition of export to Russia and Belarus[10]

	Export prohibitions to Russia and Belarus		Export prohibitions to Russia				
Item category	**Item subject to international export control regime**[11]	**General purpose goods that may contribute to strengthening military capabilities**	**Chemical weapon and other**	**Advanced goods and technology**	**Goods that contribute to strengthening industrial infrastructure**[12]	**Devices for oil refining, catalyst for oil refining**	**Luxury goods**[13]
List of items	‣ Machine tools ‣ Carbon fiber ‣ High-performance semiconductors ‣ Other technologies related to above goods	‣ Semiconductors ‣ Computers ‣ General purpose products, such as telecommunications equipment ‣ Other technologies related to above goods	‣ Raw materials for chemical formulations as well as substances and raw materials that contain toxicity equivalent to chemical formulation for arms (73 items) ‣ Devices used to manufacture chemical formulations and their parts and accessories (11 items) ‣ Devices used to manufacture bacterial formulations and their parts (five items)	‣ Quantum computers ‣ 3D printers ‣ Other technologies related to above goods	‣ Wood and parts of wooden items ‣ Steel storage tanks and other similar tanks ‣ Hand tools or interchangeable tools for processing machinery ‣ Knives and blades for machinery and/or fixtures ‣ Machinery and their parts and accessories (e.g., bulldozer, valve) ‣ Electric appliances and their parts (e.g., alternator generator, transformer) ‣ Railway locomotives, maintenance vehicles for railways, machinery for transport and parts (e.g., motor truck [gross vehicle weight within over 5 tons 20 tons or below], dump trucks) ‣ Measuring and checking instruments and their parts, etc.		**Prohibition under the Export Trade Control Order** ‣ Alcoholic beverages and tobacco products ‣ Perfumes and cosmetics ‣ Leather goods, fur clothing, footwear (exceeding JPY100,000) and hats (exceeding JPY100,000) ‣ Carpets ‣ Jewelry, ceramics and glassware ‣ Diving apparatus ‣ Passenger cars (exceeding JPY6 million) and motorcycles (exceeding JPY600,000) ‣ Laptop computers ‣ Watches (using precious metals) ‣ Grand pianos (exceeding JPY200,000) ‣ Works of art and artifacts **Prohibition under Notification issued by MOF** ‣ Banknotes ‣ Gold coins ‣ Gold bullion

10 Amendment of the Export Trade Control Order pursuant to the Foreign Exchange and Foreign Trade Act. Find it here.

11 Arms and military-usable goods falling under items 1–15 of Appended Table 1 of the Export Trade Control Order.

12 Amendment of the Export Trade Control Order pursuant to the Foreign Exchange and Foreign Trade Act (Prohibition on goods that contribute to strengthening industrial infrastructure). Find it here.

13 Subject luxury goods can be judged by HS code and amount of the goods. Find it here.

Prohibition on exports to and imports from specific regions and organizations

- Prohibition on exports to and imports from the self-proclaimed Donetsk People's Republic and the Luhansk People's Republic was implemented in accordance with a plenary session of the House of Councillors on 26 February 2022.
- In addition, both direct and indirect transactions pertaining to exports to Russia and Belarus with individuals or organizations specified in the Notification issued by METI are also subject to this prohibition measure.
- Specified organizations include the Russian Ministry of Defense and Russian aircraft manufacturers (in total, prohibition applies to 287 organizations in Russia and 27 organizations in Belarus).

Prohibition on providing services to Russia

In addition to the prohibition on providing services pertaining to goods subject to export prohibition, provision of services for entrustment, finance auditing and management consulting in Russia have become subject to the permission system as of 5 July 2022, pursuant to the Notification issued by MOF.

Summary

The war in Ukraine and the measures the international community has taken in response have continuously changed. It is possible that Japan will further tighten regulations and that other countries will as well. To minimize the potential negative impact caused by such changes, it would be prudent for companies operating in Japan that have business with Russia to establish internal procedures capable of monitoring and collecting accurate information in a timely manner and to build a resilient supply chain network based on such information.

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Thailand: Five-year extension of Thai Customs' One-Stop Service voluntary disclosure process

The One-Stop Service process is a voluntary disclosure program that enables importers and exporters who wish to self-declare and correct past declaration errors to settle their outstanding duty liability with Thai Customs in compliance with customs laws.

When it was first launched in 2017, the program was available for a limited period, but it has been periodically extended to encourage and facilitate importers and exporters to correct unintentional errors or mistakes in past import and export declaration filings. From 1 October 2022, this process has been extended for five years, until 30 September 2026.

As previously, the program does not apply under any of the following circumstances:

- When goods were smuggled into Thailand or there is clear witness or evidence of fraudulent intent to avoid duty payment
- When goods were prohibited or restricted or violated intellectual property rights
- When there is an ongoing post-clearance audit, investigation or prosecution in respect of a customs offense being conducted by relevant government authorities, such as the Department of Special Investigations or the Economic Crime Suppression Division

For voluntary disclosure cases accepted and dealt with under this process, liability will generally cover duty and tax shortages, including surcharges thereon for delayed payments. In the case of a customs penalty, waiver of the customs penalty is generally forthcoming as long as there is no duty evasion intent.

With effect from 19 October 2022, where the customs penalty related to imports within the past 5-year period is waived, the VAT penalty is also waived.

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Thailand: Incentives to promote the development of the battery electric vehicle sector

To steer Thailand toward a carbon-neutral economy by 2050, the National Electric Vehicle Policy Committee presented various proposals to the Thai Cabinet. This included a battery electric vehicle (BEV) incentives package aimed at promoting the adoption of BEVs and encouraging the manufacture of BEVs in Thailand under the 30@30 plan. The 30@30 plan aims for 30% of Thailand's annual vehicle production to be zero-emission vehicles by 2030.

Following the Thai Cabinet's approval in February 2022, the Ministry of Finance (MOF), Customs Department and Excise Department have released a series of Notifications. The Notifications formally announce several incentives under the BEV package, as summarized below. It should be noted that this package covers BEVs only and does not apply to hybrid electric vehicles (HEVs) or plug-in hybrid electric vehicles (PHEVs).

BEV incentive packages

Subsidy

With effect from 21 March 2022, importers and local manufacturers of BEVs are entitled to receive the following subsidies:

	Passenger BEVs	Transport BEVs with 10 seats or fewer	BEV pick-ups (4,000 kg or less)	BEV motorcycles
Retail price (before VAT) threshold	Up to THB2,000,000			Up to THB150,000
Battery kWh specification	10 kWh minimum		30 kWh minimum	–
Subsidy amount (per unit)	THB70,000 (under 30 kWh) or THB150,000 (30kWh and above)		THB150,000	THB18,000
Subsidy period	BEV importer: until 31 December 2023 BEV manufacturer: until 31 December 2025		BEV manufacturer: until 31 December 2025	BEV importer: until 31 December 2023 BEV manufacturer: until 31 December 2025

In principle, payment of the subsidy claim is on a first-come, first-served basis. To support the subsidy claim, the claimant must submit the end customer's BEV vehicle registration documentation to the Excise Department.

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To date, the government has approved an initial budget allocation of THB3 billion to fund the subsidy plan, with an additional THB40 billion budget allocation being sought and currently under review, based on anticipated BEV volumes.

Duty exemption or reduction on BEV imports

With effect from 4 May 2022, BEV importers are also eligible for either duty exemption or reduction, depending on the prevailing free trade agreement (FTA) vs. non-FTA duty rate applicable on the passenger BEV imports into Thailand, as summarized below:

	Passenger BEVs imported from 4 May 2022 until 31 December 2023	
Retail price and battery kWh	Up to THB2,000,000	Between THB2,000,000 and THB7,000,000
Battery kWh specification	N/A	30kWh minimum
Duty rate under BEV incentive package	If the prevailing FTA duty rate is 40% or less, the applied duty rate is exempt. If the prevailing FTA duty rate is more than 40%, the FTA duty rate is reduced by up to 40%. If the prevailing non-FTA rate is 80%, the non-FTA duty rate is reduced to 40%.	If the prevailing FTA duty rate is less than 20%, the applied duty rate is exempt. If the prevailing FTA duty rate is more than 20%, the FTA duty rate is reduced by up to 20%. If the prevailing non-FTA rate is 80%, the non-FTA duty rate is reduced to 60%.

As BEV imports originating from China are currently exempted from Thai duty under the ASEAN-China FTA, the duty exemption reduction policy under the BEV incentive package is aimed at leveling or reducing the duty gaps for BEV imports from Thailand's other FTA and non-FTA trading partners.

Excise tax reduction

In Thailand, excise tax is levied based on the retail selling price (before value-added tax (VAT)). With effect from 9 June 2022, the BEV incentive policy provides for reduced excise tax rates for importers and local manufacturers of BEVs, as outlined in the following table:

	Passenger BEVs and transport BEVs with 10 seats or fewer	BEV pick-ups (up to 4,000 kg)
Standard rate	8%	10%
Reduced rate under the BEV package and eligible applicant	2% BEV importer: until 31 December 2023 BEV manufacturer: until 31 December 2030	0% (until 31 December 2025) 2% (from 1 January 2026 to 31 December 2030) Applies only to BEV manufacturer

Conditions for BEV incentive packages

The Excise Department, in conjunction with the MOF and Customs Department, is tasked with overseeing and supervising the implementation of the BEV incentive package. Businesses that wish to use the BEV incentive package should apply to the Excise Department with a BEV business plan, a Memorandum of Understanding (MOU) agreement and enter into a bank guarantee with the Excise Department.

The key conditions applicable to BEV importers and BEV manufacturers are outlined below:

BEV importers

<table>
<tr><th></th><th>Passenger BEVs and transport BEVs with 10 seats or fewer</th><th>BEV motorcycles</th></tr>
<tr><td>Local BEV assembly and volume requirements</td><td>Must produce BEVs domestically by 2024 to compensate for the same volumes of BEVs imported during 2022–23 where BEV incentives are claimed.
The 2024 deadline can be extended to 2025, but the volume of locally built BEVs will increase to 1.5 times BEV import volumes during 2022–23.
For BEVs with a retail price of THB2,000,000 or less, the applicant can produce any BEV models to compensate for the BEV import volumes.
For BEVs with a retail price above THB2,000,000 but not more than THB7,000,000, applicant must produce the same BEV model as imported.</td><td>Must locally produce any BEV motorcycle models by 2024 to compensate for the number of BEV imports during 2022–23 where BEV incentives are claimed.

The 2024 deadline could be extended to 2025, but the volume of locally built BEVs will increase to 1.5 times BEV import volumes during 2022–23.</td></tr>
<tr><td>Battery localization conditions</td><td>Applicant must localize the battery in accordance with the criteria and conditions specified by the Excise Department starting from 1 January 2026.

Specifically, BEV manufacturers must comply with any one of the three localization options:
<table>
<tr><th colspan="3">Conditions of battery localization</th></tr>
<tr><th>Option 1</th><th>Option 2</th><th>Option 3</th></tr>
<tr><td>Localize battery cells by 1 January 2026</td><td>Localize battery modules by 1 January 2026
Localize power conditioning unit (PCU) inverters by 1 January 2030
Localize any one of the following parts by 1 January 2035:
Traction motors
Reduction gears
Air compressors for BEV batteries
Battery management systems (BMS)
Drive control units (DCU)</td><td>Localize battery pack assembly by 1 January 2026
Localize PCU Inverter by 1 January 2030, and
Localize any two of the following parts by 1 January 2035:
Traction motors
Reduction gears
Air compressors for BEV batteries
BMS
DCU</td></tr>
</table></td><td>Not applicable</td></tr>
<tr><td>BEV model changes</td><td colspan="2">Any minor changes to the BEV model to be produced locally are subject to approval of the BEV Subsidy Policy Committee of the Excise Department</td></tr>
</table>

BEV manufacturers in Thailand

	Passenger BEVs	Transport BEVs with 10 seats or fewer	BEV pick-ups (up to 4,000 kg)
Battery localization conditions	Applicant must localize the battery in accordance with the criteria and conditions specified by the Excise Department starting from 1 January 2026. The battery localization options are the same as those applicable to BEV importers.		
Minor change condition	Any minor changes to the BEV model to be produced locally are subject to approval of the BEV Subsidy Policy Committee of the Excise Department		

Consequences for failure to meet BEV incentive conditions

BEV importers that failed to locally produce the mandated BEV volumes within the deadline are subject to the following:

- Forfeiture of the bank guarantee pledged
- Clawback of the subsidies received by BEV importers for any shortfall in the local BEV production volumes plus 7.5% annual interest (on a non-compounding basis)
- Retroactive assessment of the excise tax shortage, 100% penalty and monthly 1.5% interest for any shortfall in the local BEV production volumes

BEV importers and local manufacturers that fail to fulfill battery localization requirements on the local production of BEVs are subject to:

- 200% penalty (based on the excise tax shortage) based on the volume of BEVs produced locally that do not meet the battery localization requirements

Additional concessional treatment granted to BEV manufacturers within Thailand's Free Zone (FZ) or Industrial Estate Authority of Thailand (I-EAT) FZ area

Under current FZ and I-EAT FZ rules, vehicles produced in FZ or I-EAT FZ areas are eligible for import duty exemption when they are removed from the FZ for sale or distribution in the Thai market. To qualify for the duty exemption, vehicles must meet these criteria:

- The vehicle production meets the essential production process criteria, as determined by the Office of Industrial Economics of the Ministry of Industry, in accordance with the predetermined annual production volume thresholds.
- The local content ratio of the vehicles produced is at least 40% of the ex-factory value.

To further complement the BEV incentive package discussed above, the MOF announced further local content concessionary treatment for BEVs produced in FZ or I-EAT FZ areas on 7 October 2022. Specifically, BEV assemblers in FZ or I-EAT FZ areas will be temporarily allowed to include the cost, insurance and freight value of imported batteries as part of their local content ratio calculation on the assembled BEV, subject to a limit of 15% of the ex-factory value of the assembled BEV.

This local content concessionary treatment is permitted from 8 October 2022 to 31 December 2025.

Concluding remarks

While the BEV incentives package offers significant fiscal incentives for introducing BEV models in the Thai market, in the form of subsidies and lower tax costs, these benefits are subject to the ability to meet stringent local BEV assembly and battery localization requirements starting from 2024 as part of the Thai government's 30@30 plan to step up overall BEV production volumes.

Businesses with an interest in supplying BEVs to the Thai market should carefully assess the overall benefits and compliance costs of these incentives by evaluating their initial BEV import plan against a future local BEV assembly plan, BEV model mix and volumes, the Thai government's budget funding allocation for the subsidy program, and local sourcing options for key parts and the related cost impact.

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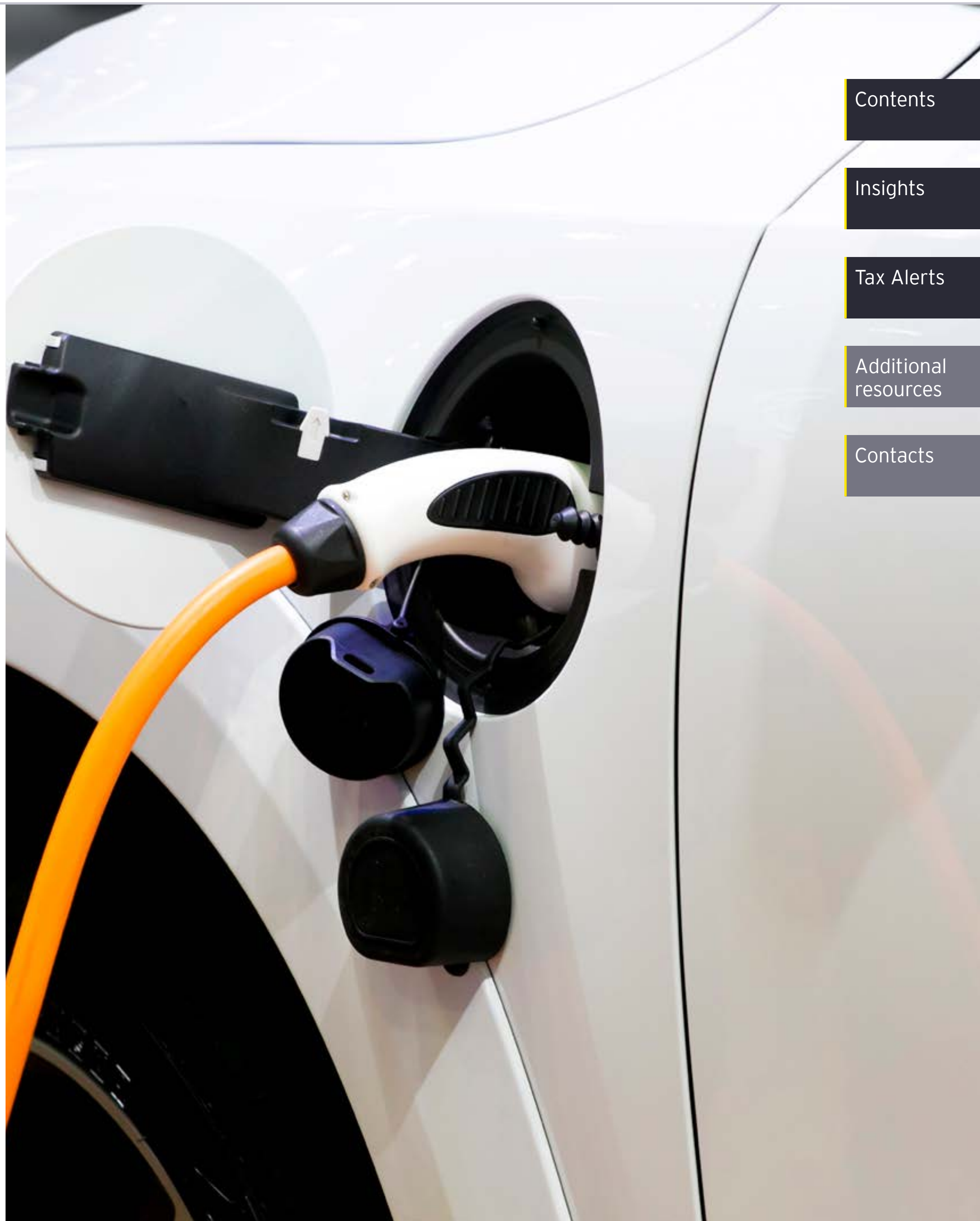
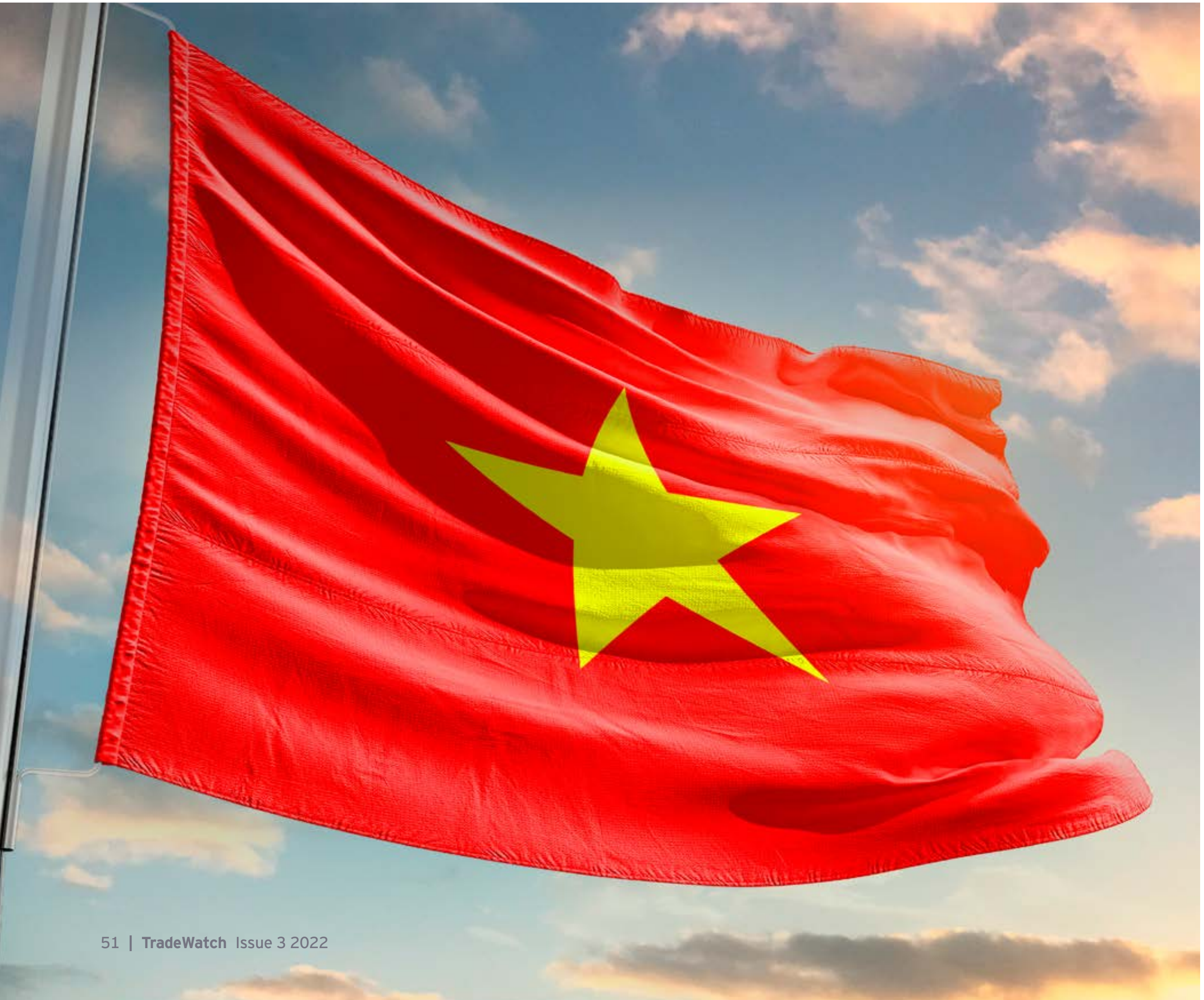


Vietnam: Authorized Economic Operator regime



The Authorized Economic Operator (AEO) regime brings several benefits for businesses when working with their local and national customs authorities. These include, but are not limited to, faster customs clearance, fewer documentation requirements, fewer physical checks and faster customs duty refunds.

AEO operates under both the domestic Vietnam Customs Law and the World Customs Organization's SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE framework) that recommends how AEO programs should be conducted. Vietnam started its pilot AEO regime in 2011 with Circular 63/2011/TT-BTC, with eight businesses initially being granted AEO status. Following the pilot, the official AEO program began in 2014 under Customs Law No. 54/2014/QH13 and Circular 72/2015/TT- BTC.

As of this writing, there are approximately 70 businesses operating in different industries that have been granted AEO status. However, no logistics service company or customs broker is included in the list yet.

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Benefits

The current Vietnam customs regulations provide benefits and favorable treatments to AEO businesses, such as:

- General exemption from documentation checks (though there may be limited to random checks if there are signs of noncompliance)
- General exemption from physical checks – for export processing enterprises, random checks are applied to less than 0.5%[1] of the total number of import and export declarations; for other businesses, checks are performed using a scanner only rather than conducted manually
- Carrying out customs procedures for incomplete customs declarations
- Priority for customs procedures and in warehousing – in customs clearance, in customs policy guidance – not more than eight working hours
- Customs clearance carried out first, then supplementary specialized checks carried out later
- Duty/tax refunds are actioned first, with the relevant documentation checked later; the refund time should not be more than one business day
- For on-the-spot exports, import for export manufacturing and purchases from bonded warehouses for export manufacturing, the business can deliver or receive goods first and do customs procedures later
- Being prioritized to be audited post-customs clearance at the office of the customs authorities, rather than at the premises of business, where possible
- Post-customs clearance audits should not be more than once in a three-year period

AEO status provides real commercial benefits:

- Reducing overall administrative costs
- Shortening goods' clearance times and reducing logistics compliance costs
- Ensuring that materials needed for manufacturing and goods are delivered on time
- Deferred payment of duties and tax
- Potential collaboration between AEOs across countries

Regulatory requirements for businesses to be granted AEO status

Businesses must have a good compliance record with the Vietnam customs and tax regulations. In particular:

- Within the past two years before AEO application, the business must not have violated the customs and tax regulations to the extent of:
    - Tax evasion or tax fraud
    - Smuggling and illegal transportation of goods across the border
    - Administrative customs offenses that result in a form and level of penalties beyond the authority of the Director of Sub-department of Customs (i.e., at the district level) or equivalent levels
    - For a customs broker, the number of customs declarations that are subject to administrative penalties for tax/customs offense, as imposed by the Director of the Sub-department of Customs, may not exceed 0.5% of the total number of customs declarations
    - Having no overdue tax or customs debts or liabilities
- The AEO applicant's turnover should meet one of the following specific thresholds:
    - An import-export turnover of USD100 million a year or more
    - Export turnover of goods produced in Vietnam of USD40 million per year or more
    - If the goods are agricultural or aquatic products produced, raised or grown in Vietnam, an export turnover of at least USD30 million per year; the turnover thresholds should be the average turnover for two or more consecutive years, up to the date of the application for AEO
    - For a customs broker, the annual number of customs declarations is at least 20,000 declarations
- As an exception, high-tech enterprises as defined by the regulations on high technologies may qualify for AEO status even if they do not meet the above turnover requirements.

Customs entries should be filed electronically (i.e., by applying e-customs). The AEO business must use export/import management software programs meeting the requirements of the customs authorities.

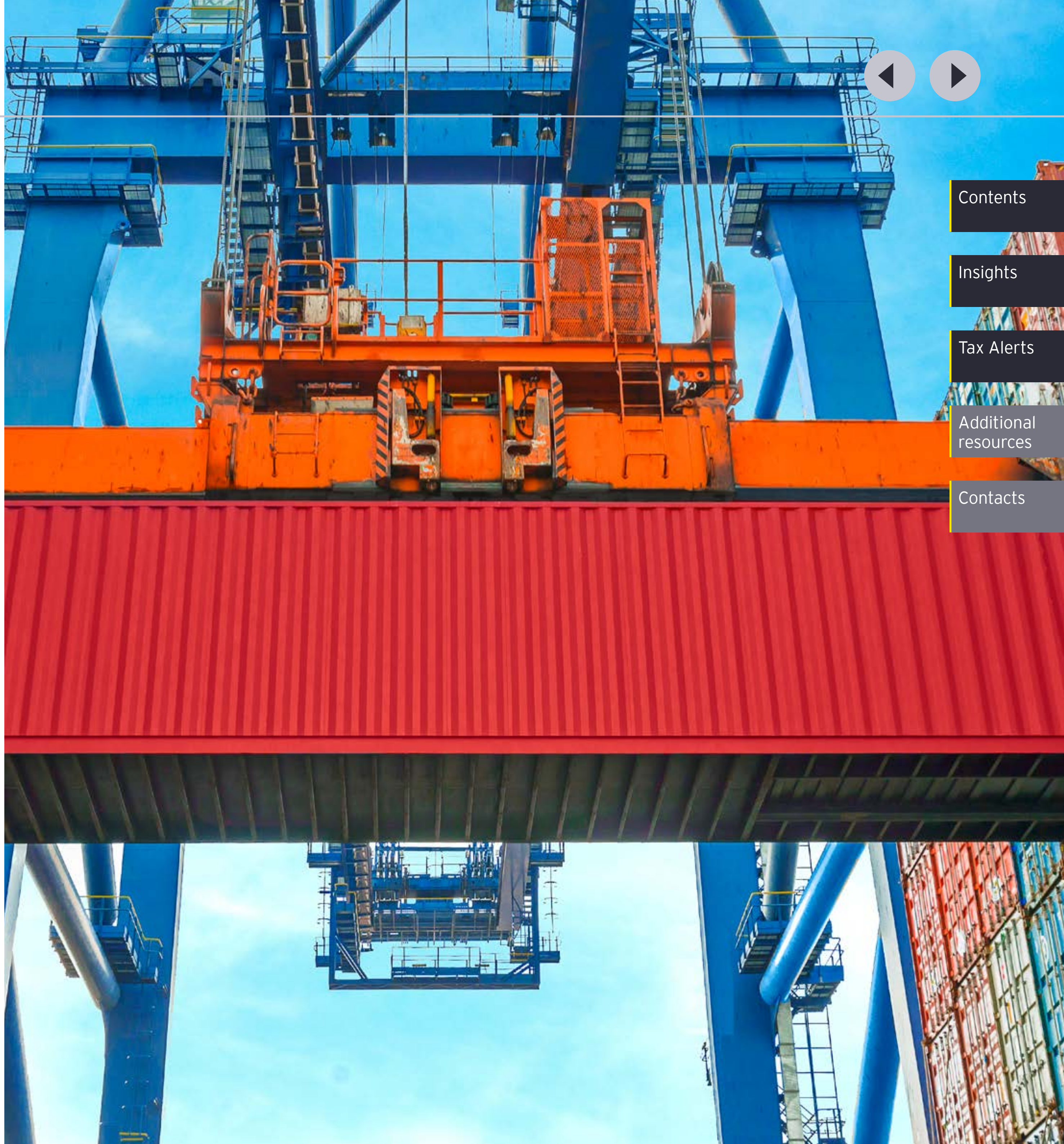
1 Article 5, Circular 72/2015/TT-BTC dated 12 May 2015 of Vietnam's Ministry of Finance.

Payments for export and import shipments must be made via bank transfer (i.e., through noncash methods).

The following requirements apply for internal management systems:

- Businesses should conduct and maintain processes to manage, monitor and control its entire operation.
- Businesses should have measures, instruments and internal management processes to ensure the safety and security of the supply chain of exported and imported goods to:
  - Monitor the transport process of goods from enterprises to ports and from ports to enterprises.
  - Inspect the safety of containers before they are loaded onto vehicles.
  - Supervise at important positions, such as fences, entrances and exits, warehouses, manufacturing areas, and administrative areas.
  - Assign employees to enter and work in the areas suitable for their tasks
- Control security of information technology systems
- Ensure staff security

Businesses must meet the prescribed accounting and auditing standards as provided by the Ministry of Finance, including the statutory independent audit on yearly financial statements.



A glance at the administrative procedures to apply for AEO and recommendations

Businesses that meet the abovementioned requirements should submit an application, including the prescribed forms and enclosed supporting documents, to the local city or province-level Customs Department where they are located.

The Customs Department will carry out checks on the submitted application, conduct a site visit (possibly a post-customs clearance audit) and forward the results to the General Department of Customs (GDC) for review.

If the checks are successful, the GDC will conduct formal meetings with the business and initiate formal procedures to recognize its AEO status.

By law, the timeline for the whole process may take 45 days, with a possible extension of 30 days for complicated cases. In practice, however, given the volume of documentation and information required, the process may take longer, quite possibly several months. There is no administration fee for the AEO recognition application.

The process will generally include a post-customs clearance audit to check the actual qualification or compliance of the business with its obligations and its suitability for being an AEO. If any customs violations are found, AEO status will not be granted, but the business may also be subject to customs duty collection and administrative penalties and late payment interests. Businesses should consider an AEO application carefully, including having advance planning and a prior internal audit so that the business satisfies the prescribed criteria before applying for AEO status.

Possible improvements of the Vietnam regulations on AEO and current progress

The current regulations mainly focus on large-scale businesses, and hence small and medium-sized enterprises (SMEs) and customs brokerage service companies may not meet the AEO requirements. This may result in an unfair competitive condition for businesses in general and for SMEs in particular. This situation may need to be addressed, especially in a period when Vietnam is encouraging an open and "initiative" economy and startups. Furthermore, Vietnam has not signed any AEO mutual recognition agreements (MRAs), so generally an AEO in Vietnam will not be recognized in another country, making the scope of the AEO program narrow. In addition, some requirements for internal management systems differ from the suggested standards per the World Customs Organization's SAFE Framework.

To address these issues, Vietnam is introducing possible and relevant changes in the draft regulations (Decree level) on AEO. Vietnam is also in the process of negotiating an MRA with Korea and the Association of Southeast Asian Nations (ASEAN).

Another possible improvement relates to the imposition of administrative penalties and enforcement on AEO businesses. Adopting AEO regulations that provide some exceptions and/or leniency treatments, including penalty reductions on AEO businesses, may encourage more businesses to join this program.

Summary and recommendations

AEO brings many benefits for businesses engaged in cross-border trade, including improved regulatory procedures and commercial benefits. Businesses should review and consider applying for AEO status where possible to improve their business performance.

The application process is not straightforward, and businesses should prepare thoroughly before lodging an AEO application. Information and application forms are available on the Vietnam General Department of Customs website[2] and other Vietnam Government websites. Businesses may also seek advice from experienced customs advisors and can consult informally or formally in writing with the customs authorities in advance.

SMEs should observe the developments on AEO policies. Individually or through their business associations, they could put forward proposals to extend the scope of AEO for their sectors and business sizes, so that the policies can be updated to consider AEO applications for those segments of the economy. ■

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Eastern Europe: Definition of exporter – VAT consequences

The European Union (EU) customs definition of exporter and its influence on value-added tax (VAT) has been affecting export businesses operating in some countries in Eastern Europe for a number of years. Recent developments in the region, for example, in Poland and Bulgaria, may challenge some exporters' supply chain models and may require them to adjust them to benefit from VAT-free exportations.

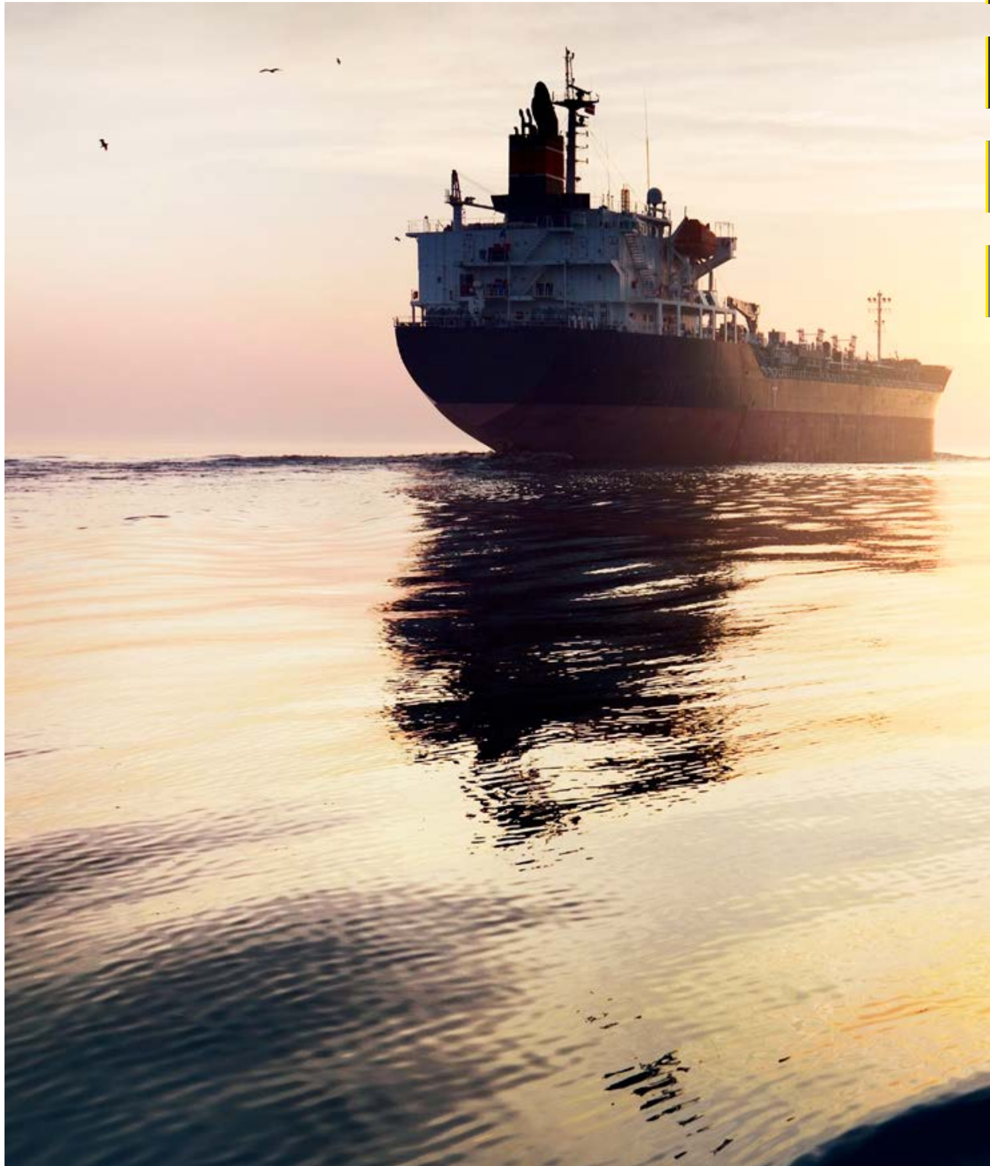
VAT exemption with credit for exports

While domestic sales of goods are generally charged with VAT, exports of goods are generally treated as "exempt with credit." This means that the exporter does not have to charge VAT to the purchaser but is entitled to recover VAT paid on its own costs (including purchase of the exported goods, transport, overheads and similar costs). Exemption with credit is sometimes referred to as "zero rating" as, effectively, the transaction is treated as if it were subject to VAT at a 0% rate. However, exemption may only apply if the seller can prove that it is the exporter of the goods and that the goods have actually been exported from the EU.

The VAT treatment of exports may have a great impact on nonestablished entities registered in specific EU countries where they are designated as the distributor of goods to non-EU markets. In such cases, being able to apply the VAT exemption for these sales is crucial for the export model to be efficient. This concern may be particularly relevant for businesses based in specific EU Member States where the customs definition of an exporter may create difficulties for multinationals' supply chain models.

EU legislation

The EU provision that regulates VAT exemptions for exports is Article 146 of the Council Directive 2006/112/EC of 28 November 2006. According to this article,



Member States shall exempt the following transactions:

- The supply of goods dispatched or transported to a destination outside the EU by or on behalf of the vendor.
- The supply of goods dispatched or transported to a destination outside the EU by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer themselves for the equipping, fueling and provisioning of pleasure boats and private aircraft or any other means of transport for private use.

However, this provision does not stipulate the conditions for application of the exemption. These conditions are the responsibility of national regulators in each Member State.

In accordance with Article 1 (19) of the Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council[1] regarding detailed rules concerning certain provisions of the Union Customs Code (UCC)[2], the term "exporter" means:

(a) A private individual carrying goods to be taken out of the customs territory of the Union where these goods are contained in the private individual's personal baggage.

(b) In other cases, where (a) does not apply:

(i) a person established in the customs territory of the Union, who has the power to determine and has determined that the goods are to be taken out of that customs territory;

(ii) where (i) does not apply, any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of that customs territory.

According to the UCC guidelines[3] published by the European Commission on the interpretation of the above definition of exporter, the exporter may also be a person other than the seller of the goods. It is important that this person is duly authorized by the party to the transaction resulting in the obligation to export and meets the definition of the exporter.

In this case, it should be noted that a person who is a party to a contract under which the goods are to be taken out of the customs territory of the EU can also be an exporter within the framework of the EU regulations.

The concept of *"party to a contract under which the goods are to be taken out of the customs territory of the EU"* means that in cases of exports where Article 1(19)(b)(i) does not apply, the business partners concerned must make contractual or business arrangements to designate who will act as exporter, provided the person designated is established in the customs territory of the EU.

A carrier, a freight forwarder or any other party may act as exporter, provided that person complies with the definition of exporter and agrees to take on this role.

1 "Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code," *EUR-Lex website*, January 2022. Find it here.

2 Delegated Regulation (EU) of 2018/1063 16 May 2018.

3 "UCC Guidance documents," *European Commission: Taxation and Customs Union website*. Find it here.

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Polish perspective

Polish VAT legislation

The Polish VAT Act does not contain a definition of exporter. However, in domestic regulations, the definition of "export of goods" is indicated. According to Article 2(8) of the VAT Act, export of goods shall be understood as the supply of goods dispatched or transported from the territory of the country outside the territory of the EU by either:

- The supplier or on their behalf (so-called direct export).
- The acquirer having their seat outside the territory of the country or on their behalf (so-called indirect export), with the exception of goods exported by the acquirer for the equipping and provisioning of recreational ships and tourist aircraft or any other means of transport for private use.

In all cases, the dispatch of goods outside the EU must be confirmed by the competent customs authority specified in the customs provisions.

The Polish VAT case concerning definition of exporter (I FSK 1187/21)

Recently, the Polish Supreme Administrative Court ruled in the case of a UK-based company (the Company) with a fixed establishment in Poland, which is also part of a multinational group (Group) operating worldwide. The Company is registered in Poland as an active VAT taxpayer.

The Company's position in the Group is structured in such a way that the Company purchases goods from other Group entities and sells them to both EU and non-EU markets.

Due to Brexit, and the consequent change in the UK Company's status from an entity that has its headquarters in the EU to an entity whose principal place of business is outside the EU, the Company considered a change in its business model in Poland. The change was intended to enable the Company to carry out and continue its VAT export operations in the future.

The Company planned to introduce a new model for the export of goods from Poland, in which a related group company (Related Company), established in Poland, would contractually be granted the power for determining that the goods are to be brought to a destination outside the customs territory of the EU – for goods sold by the Company from its Polish warehouse to third-country contractors.

The Related Company would appear as an exporter on customs declarations (box 2 on the Single Administrative Document (SAD)). Throughout the whole process, the Company would remain the owner of the exported goods, the party making business decisions regarding the sale of goods, the party to sales contracts with contractors and the entity indicated as the seller on the invoice documenting the sale. Sales of goods would be made directly by the Company to non-EU contractors and, transactionally, the supply chain would not include the Related Company. Consequently, in the supply of its goods, the Company would issue sales invoices directly to its contractors. Based on the contractual provisions with the Related Company, the Company would have all customs documents required to prove the goods left the EU, which are the formal condition to apply the 0% VAT rate for exports from Poland.

Given the above, the Company decided to obtain a binding individual tax ruling to confirm the model described above as viable and in line with Polish VAT regulations. In particular, the Company asked if the supply of goods shipped or transported from Poland outside the EU, as presented in the description of the future event, constitutes an export of goods, within the meaning of the VAT Act and whether the Company would be entitled to apply the 0% VAT rate based on customs documents confirming the goods are leaving EU, when these documents are in its possession.

The tax authorities replied in an individual tax ruling, No. 0114-KDIP1-2.4012.215.2020.3.RM dated 14 September 2020. In the ruling, the tax authority decided that the Company's position was incorrect. In the opinion of the tax authority, in the circumstances of the case, the applicable legal regulations make it impossible to conclude that the Company's deliveries of goods to third-country purchasers in the planned model meet the conditions for exports of goods taxed at the 0% VAT rate within the meaning of Article 2(8) of the VAT Act.

The tax authorities ruled that because the documents confirming the export of goods outside the EU will be mentioning a different entity than the supplier or purchaser of the goods, the planned transaction cannot be considered an export of goods, within the meaning of Art. 2(8) of the VAT Act. The tax authority disregarded the fact that the physical dispatch of goods from Poland outside the EU would be confirmed by the relevant customs authority and the fact that the Company would possess documentary proof (issued by customs administration) of that export.

The Company disagreed with the position taken by the tax authority and appealed against the ruling to the District Administrative Court. In the judgment of the District Administrative Court No. I SA/Gl 1459/20, dated 23 February 2021, the Court supported the Company's position. The District Administrative Court also noted that in the Polish VAT Act, the catalog of documents confirming export is open and that the list of documents contained in the VAT Act is only an example. Moreover, the District Administrative Court also noted that the entity requesting the interpretation wants to obtain a complete answer to the question formulated, and, therefore, the tax authorities should indicate whether and what role the other documents listed in the request fulfill. Thus, if the export of goods outside the EU is confirmed by evidence other than the IE-599 message (confirmation of export issued by the Polish customs authorities), the tax authorities cannot ignore such circumstance, or applying the VAT rate to the export for domestic sales, because this action violates the principle of neutrality and is not appropriate to the factual findings made by the authority. Consequently, the action takes the form of a tax sanction rather than taxation of the factual transaction.

As a result, the District Administrative Court found the appeal to be appropriate and revoked the original ruling. However, the tax authority filed a complaint with the Supreme Administrative Court, which ruled on the case on 11 October 2022 (case No. I FSK 1187/21).

The judgment of the Supreme Administrative Court indicates that the tax authority's cassation appeal was dismissed, which means a positive result for the Company. While the official justification of the judgment is still to come (the Court issued its judgment during a closed session), the judgment is important for numerous businesses in Poland, particularly for logistics hubs.

The judgment is in line with EU regulations and the UCC guidelines published by the European Commission and confirms the interpretation of the Polish VAT Act's provisions on exports, which is favorable to taxpayers.

Bulgarian perspective

Documentary requirement for export VAT exemption

Under the applicable Bulgarian legislation, one of the mandatory requirements for application of the exemption with credit VAT rate for exports is the possession of a "customs document in which the supplier is listed as an exporter of the goods." The requirement is introduced by means of the Regulations for the Application of the VAT Act (RAVATA), which is a sub-legislative local act introducing rules and provisions aimed to clarify the main law, the Value Added Tax Act (VATA).

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The cited provision in the RAVATA lists the mandatory documentary evidence for exports of goods from Bulgaria to countries outside the EU allowing the supplier to exempt from VAT their sale in accordance with the main VATA rule (itself transposing into the Bulgarian VAT legislation Article 146 from Directive 2006/112).

This requirement in the RAVATA was introduced before the EU customs rule regarding the current exporter definition and implies that:

- The exporter for customs purposes is presumed to be the supplier for VAT purposes.
- The supplier should mandatorily be listed in box 2 of the SAD customs declaration as an exporter to benefit from the VAT exemption.

Practical implications related to export supplies

The current Bulgarian legislative framework for VAT is not aligned with the EU customs legislation. This discrepancy creates significant uncertainty regarding application of the 0% VAT rate for exports in cases where the suppliers are not established within the EU. Usually these are entities acting as distributors of goods within large multinational companies that only have Bulgarian VAT numbers but without any permanent and/or legal establishment.

The uncertainty faced by such entities creates various tax and business risks. On the one hand, the absence of an export customs declaration listing the nonestablished supplier as an exporter is regarded by the tax administration as nonfulfillment of a formal condition and a ground for "effective" assessment of the general 20% VAT rate. This risk, in turn, forces these businesses to amend their supply chains in a manner that is not always sound from a business perspective (e.g., performance of "deemed" intra-Community supply to another EU Member State from where the goods are subsequently exported). Such models create additional administrative and financial burdens and are not sustainable in the long term.

It seems that, in practice, some nonestablished suppliers may obtain an European Economic Operator's Registration and Identification (EORI) numbers and act as if established within the EU by being listed as exporters in the customs declaration. In the absence of an establishment, such reporting may be regarded as being in breach of the EU customs legislation and creates risks not only for sanctions under the customs legislation but also for potential attribution of an establishment for corporate and/or VAT purposes.

Bulgarian legislative developments regarding the exporter issue

An unsuccessful proposal for amendment in the RAVATA was introduced by taxpayers in 2020 as a part of the public consultation for amendment of the sub-legislative act. The proposed text suggested an abridged version of the provision, removing the requirement that the export declaration also lists the supplier as an exporter of the goods.

A second attempt was made in the summer of 2022 by the Bulgarian Ministry of Finance. The Ministry proposed an addition to the current text in the RAVATA introducing the possibility for "another document certifying the export in cases where a possibility for not filing a customs document exists, in accordance with the customs legislation." However, the suggested text was removed from the adopted changes.

The latest attempt to regulate that matter was in September 2022 with a new official proposal by the Ministry of Finance. The proposal introduces a new article in the VATA. The suggested text clarifies that persons not established in the territory of the EU should be listed in box 44 of the SAD customs declaration, in addition to their VAT identification number and the invoice number for the goods by using corresponding codes (at this stage, it remains unclear what type of codes will be required). The draft text also introduces an obligation that the nonestablished supplier (exporter) is mandatorily required to have a Bulgarian fiscal representative. The proposed amendment in the VATA should be voted on by the National Assembly and, if adopted, is expected to come into force at the beginning of 2023.

Romanian perspective

Exporter of record for VAT purposes

The VAT exemption for exports per the EU VAT directive[4] was transposed into the primary VAT legislation in Romania; hence, from this perspective, one could easily argue in favor of a full alignment with the EU VAT rules. Thus, supplies of goods dispatched outside the EU (export transactions), whether by the supplier, by the customer (not established in Romania) or by any other person on their behalf, are VAT-exempt (with credit).

At the same time, more details regarding the practical applicability of VAT exemptions are included in the national regulations. The exporter of record for VAT purposes is defined as the supplier engaged in performing the export transactions, as well as those persons who transport goods outside the EU without a commercial transaction (e.g., transferring stocks across the border to engage in economic activities or transfers as part of supplies of goods that require installation by the supplier or on its behalf in a non-EU state). Beyond this, for the purpose of applying the VAT exemption connected with the international transport of goods (also including the export transactions), the supplier is defined as any of the following persons: the producer of the goods, the owner of the goods or a person acting in their own name but on behalf of another person under a commissionaire structure (i.e., an undisclosed agent).

In terms of supporting documentation, the VAT exemption related to exports of goods could be justified by the exporter of record with a compliant invoice along with formal proof that the goods have left the customs territory (e.g., the certification or notification issued by the export customs office, attesting the fact that the export was completed, or the export report notified to the consignor in the case of excise duty products covered by suspensive arrangements and declared in Excise Movement and Control System (EMCS)).

4 Article 146 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax.

Moreover, an important amendment of the VAT regulations, brought by the changes in the customs regulations and particularly the limitations of non-EU-based companies to act as exporters of record for customs purposes, refers to the fact that whenever a supplier not established in the EU acts as exporter of record for VAT purposes, it is able to apply the VAT exemption based on a customs SAD export declaration mentioning at box 44 its identification details and the number of the invoice connected to the supply of the goods outside the EU.

Thus, from a Romanian standpoint, in applying and documenting the VAT exemption for exports, the legislator was mindful that the exporter of record for VAT purposes and exporter of record for customs purposes may not always be represented by the same company.

It is also encouraging that Romanian VAT regulations specifically refer to the Court of Justice of the European Union (CJEU) decision in case C-275/18 (Milan Vinš),[5] acknowledging that whenever the dispatch of goods outside the territory of the EU cannot be justified with customs notifications or customs-certified exports declarations, the exporter may use other evidence to prove the actual dispatch and, hence, may benefit from the VAT exemption.

Practical implications driven by distinction between VAT vs. the customs exporter of record

In addition to the specific provisions in the VAT legislation, further to many questions and practical difficulties raised by the business environment, the Romanian tax authorities' intention was to address this dichotomy between the two definitions of exporters of record via a circular covering various practical cases. In this guide, the tax authorities tried to set the scene and reiterate the clear distinction between the exporter for VAT purposes and the customs exporter, and the fact that for customs purposes, non-EU established companies may appoint other entities to act as exporter, such as another party from the supply chain, or even a carrier, a logistics provider or any other entity willing to take on this role.

5 "Case C-275/18," *InfoCuria Case-law website.* Find it here.

The tax authorities also restated the importance of box 44 in the customs export declaration for exports. This has been done via practical examples of chain transactions (A-B-C transactions) that involve both EU and non-EU established companies, a unique dispatch of goods outside the EU and where the transportation has been assigned, gradually, to each of the three parties involved in the chain.

In the scenario where party A in the chain (the first supplier in the chain established within the EU) is in charge of the transport, A could be the sole party in the chain acting as exporter of record for VAT purposes and, hence, would be entitled to apply the VAT exemption for exports, regardless of how the customs export declaration is filled in at either box 2 or 44.

However, in a scenario where the transportation is assigned to party B (the buyer-reseller in the chain, established either within or outside EU, but not in Romania), the VAT exemption for export may apply both when the supplier (A) or the customer (B) organizes the transport. The actual assignment of the VAT exemption appears to have been left in the hands of the taxpayers and the manner in which box 44 in the customs export declaration is completed.

An arbitrary allocation of the entity applying the VAT exemption might give a direction to taxpayers, but not always the right direction, and hence, the risk of additional VAT costs cannot be excluded.

Hungarian perspective

Exporter from a customs perspective

The exporter from a customs point of view can be different from the exporter from a VAT point of view who wishes to apply the VAT exemption in Hungary. From a customs point of view, the exporter must be a person physically established in the customs territory of the EU, and they must meet certain requirements (e.g., they have the power to determine and have already determined that the goods are to be transported outside the customs territory of the EU and have a contract under which goods are to be transported outside the customs territory of the EU).

Exporter from a VAT point of view

From a VAT perspective, the exporter is the company or person who is performing the VAT-exempt supply of goods. Based on the Hungarian VAT Act, certain conditions should be met to treat the supply of goods as a VAT-exempt export transaction, for example, the goods should be transported out of the territory of the EU within 90 days from the date of supply, and within this time limit the goods are not to be used or consumed. The goods must leave the territory and proof must be collected from the customs office exiting the goods from the EU. The goods are dispatched as a consignment or transported from the domestic territory by or on behalf of the vendor. We note that if a freight forwarder is involved, it should supply the transportation services to the exporter from a VAT point of view to treat their services as a VAT-exempted transaction.

Perspective from other Eastern European countries

In Czechia, Slovakia, Lithuania and Latvia, the model discussed in the Polish case (i.e., another entity being an exporter within the meaning of the customs regulations being used for VAT purposes) does not currently raise controversies with the local tax authorities and could potentially be applied, providing the entity that applies VAT exemption for the export holds sufficient documentary proof to support the fact that their goods have been exported from the EU.

Summary

The differences in the VAT treatment of similar transactions in the Eastern European countries considered in this article are a testimony to the mutual influence of VAT and customs provisions, which can, at times, cause issues for businesses.

Proper planning of the supply chain and a review of existing chain transactions, in light of the differences between the customs and VAT definitions of exporter, and between the different approaches across the countries, are recommended for multinational businesses that export from the region.

In particular, businesses involved in export transactions in the region should pay special attention to proper documentation of the export transactions for VAT purposes, especially for the implementation of any new export models or for any changes to their supply chains.

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Hamamatsu – a long journey about to end?

In *TradeWatch* Issue 2 2022, we published an article, "Hamamatsu – the journey nears its end," on the long-awaited decision in the Hamamatsu case,[1] which was ultimately delivered by the Federal Fiscal Court in Munich (BFH) during the oral hearing on 17 May 2022. It has taken more than four months for the BFH to publish the written grounds of the decision. The grounds for the judgment have been awaited not only in Germany but also in the rest of the European Union (EU), since the Union Customs Code (UCC) and its predecessor, the Community Customs Code, is applicable throughout the EU.

Tax and customs advisers expected to receive clarity from the BFH about whether downward transfer pricing adjustments can successfully substantiate a claim for a refund of customs duties paid at the time of importation when a higher transaction value was used to calculate the amount due. As there are other court decisions pending about the convergence between transfer pricing adjustments and how to determine customs values in related-party transactions, it was hoped that the court would also provide answers about whether the transaction value method of customs valuation is still the preferred method to use in related-party transactions[2] where it may be assumed that retroactive transfer price adjustments are likely to apply. Also, advisers were hoping that the BFH verdict would indicate something about the treatment of upward transfer price adjustments for determining the final customs value (i.e., how to treat a debit note issued by the exporting seller).

However, the legal reasoning of the judgment does not offer so much clarity as room for interpretation. For those wanting and expecting ultimate clarity, the verdict did not provide clear guidance.

Details of the verdict

Refund claim denied, as expected

As indicated in our previous article, the court decided that no refund for customs duties is to be granted if a preliminary transfer price was used in the customs declaration that is adjusted later by a lump sum credit note issued by the seller of the products.

Essentially, the published decision and its verdict confirmed the rumors as to the court's findings.

Scope of the definition of related parties

It was not expected that the BFH would comment in this case on the scope of the definition of "related parties," as it was obvious that both entities involved were considered to be related parties, especially

1 FG München 15 November 2018 (14 K 2028/18).

2 The transaction value method is the first and primary, as well as most commonly used, customs valuation method.

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since the underlying price adjustment mechanism was covered from a corporate tax perspective by an Advance Pricing Agreement (APA). In this aspect, the European Court of Justice (ECJ) case *Baltic Master*[3] sheds more light on the scope of this definition. In this case, the ECJ concluded that a buyer and a seller may be deemed to be related in a situation in which no documents exists to prove such a relationship, but if substantiated by objective elements, it can be demonstrated that one of the parties is de facto in control of the other or both are controlled by a third party.[4]

Transaction value method and its applicability in the case of related-party transactions subject to retroactive price adjustments

In considerations 29 to 39 of its judgment, the BFH verdict elaborates in detail on the applicability of the transaction value as the primary and preferred method for customs valuation, as well as on the alternative valuation methods where the imports are covered by a transfer price. However, clear guidance and rules cannot be derived from the verdict.

Basically, the verdict indicates that the transaction value cannot be applied in cases in which the sum of the prices is reviewed in total at the end of a period (consideration 6). However, the verdict does not provide any clarity, as it only outlines the principles in this respect. These principles are outlined at the beginning of the verdict (consideration 1), where the BFH states that the customs value cannot be determined based on an agreed transaction value consisting partly of an amount initially invoiced and declared, and partly of a flat-rate correction at the end of the accounting period without it being possible to define whether that adjustment will be made upward or downward at the end of the period. BFH confirms that this view also holds if the fallback method[5] is applied (consideration 2).

The BFH's ruling and justification are already receiving criticism, since the BFH makes a connection to Article 8(3) of the Customs Valuation Code drafted by the World Trade Organization (WTO), but BFH ignores that a transfer pricing adjustment potentially triggers a change in the price payable or paid, but never an addition to or deduction from the customs value. Another principle that is constantly referred to in the verdict is the demand that a customs value is required to be fair and uniform and cannot be based on arbitrary or fictitious values (consideration 30).

Considerations of the BFH

As stressed by the BFH in its verdict under considerations 40 and 41, the decisive point in determining the customs value is the time when the customs debt is incurred. In general, this is the time when the relevant customs declaration is accepted by the customs authorities (c.f. Articles 85(1), 77(2) and 172(2) UCC). The BFH further confirms that customs valuation is a product-related and a date-related determination of the value. In this respect, therefore, it is a case-by-case exercise to determine the customs value of imported goods, regardless of which customs valuation method is applied (consideration 42).

Consequently, a subsequent adjustment in the purchase price can only be taken into account in special cases (i.e., in the event of defective products at the time of acceptance of the customs declaration). Thus, in principle, changes in the factual or legal circumstances that occur only after payment of the customs debt, cannot justify a refund of import duties. Accordingly, the European Court of Justice (CJEU) in its decisions has previously permitted a subsequent adjustment of the transaction value only in special cases to prevent customs values being established on "arbitrary or fictitious values".

Given the fact that the decision in this case relates to a downward adjustment, it remains questionable how an uplift adjustment can occur in the light of this principle. In that respect, we think that regardless of any future adjustment, an initial (transfer) price should not be considered as arbitrary or fictitious if at the time the customs declaration is accepted the information at hand shows that the price has not been influenced.

Generally, transfer price adjustments are determined periodically (e.g., at the end of each year or quarter) and may be subject to upward or downward adjustments. Therefore, in practice, in most cases, the import of the products and the customs debt has been incurred before the transfer pricing adjustment is calculated.

By their nature, therefore, transfer price adjustments are not yet known or foreseeable at the decisive time for customs purposes (i.e., acceptance of

3 CJEU 9 June 2022, C-599/20 (Baltic Master), ECLI:EU:C:2022:457.

4 This case is discussed in detail in our article ' EU: CJEU rules on use of statistical data for determination of customs value', *TradeWatch* Issue 2, 2022, page 35, *EY website*. Find it here.

5 Fallback method is to be applied if the customs value cannot be applied under any of the previous methods and should be based on using reasonable means consistent with the principles and general provisions of the Agreement and of Article VII of General Agreement on Tariffs and Trade, and on the basis of data available in the country of importation.

the customs declaration). Furthermore, it is not yet known at that time whether any adjustments would be in the form of a debit or credit note, nor is the amount of the potential adjustment. This means that the value of products that may be adjusted by a potential transfer price adjustment is not quantifiable at the decisive time for customs valuation purposes.

However, the BFH concludes that the customs value can be determined based on the invoice prices during the year, unless there is any indication at the decisive time that these prices do not reflect the true and actual economic value of the imported products and do not consider all elements of these products that have an economic value (considerations 30 and 53). This requires that at the time of acceptance of the customs declaration, there are neither harmful conditions nor a harmful relationship between the buyer and seller from a customs perspective that precludes the application of the transaction value method.

Further, the BFH concludes that transfer price adjustments serve as income tax instruments for avoiding disputes and reducing transfer pricing risks. Therefore, such adjustments have no impact on the customs value within the scope of all customs valuation methods since determining customs values must be done with a clear relation to both the imported product and date (i.e., on a case-by-case valuation of a concrete transaction).

Outlook and actions for business

In the light of the BFH verdict, it remains questionable how retroactive transfer price adjustments (as well as price adjustments in general) will be considered for customs valuation purposes in the future. Since the BFH verdict constitutes the last judicial instance in the Hamamatsu case, guidance from the EU Commission and/or EU customs authorities for clarification and a uniform application and interpretation on this topic is expected and required.

Pending retroactive adjustments (due now or already processed)

The BFH verdict does not significantly alter our previous recommendations for how businesses in Germany should deal with transfer price adjustments for determining the customs value of imported goods:

- In the case of downward transfer price adjustments, applications for refunds should still be made, and appeals should be filed against rejections.
- In the case of upward transfer price adjustments, we advise businesses to notify German Customs but immediately appeal against any subsequent import duty notices.

Current practice for customs value declarations

Referring to the general principles the BFH explicitly mentioned, the fallback method (Method 6) is the adequate choice in case of a price payable or paid, which is based on an initial price and a foreseeable adjustment (downward or upward). We believe that, with flexibility applied, the chosen value should be the transfer price. Our reasoning for this approach is grounded in considerations 30 and 53 of the verdict, in which the BFH refers to customs declarations that were not lodged as incomplete and thus as complete customs declarations (i.e., the standard case). In such cases (such as applies in the Hamamatsu case), the prices were accepted since there was no indication at the time of acceptance of the customs declarations that those prices did not reflect the actual economic value of the imported goods, nor that those prices did not take into account all the elements of those goods which had an economic value.

We believe that, in practice, companies predominantly have preliminary prices in place that match this criterion, since, when price planning is performed, the adjustment process is, never the desired outcome. Therefore, we see strong arguments to defend a preliminary price as the customs value in a customs declaration. Based on discussions with German Customs, however, we understand that there is a high likelihood that German Customs will stick to its opinion regarding uplift transfer pricing adjustments (i.e., treating these as dutiable), and we expect a court decision about the treatment of an uplift case in due course.

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Poland: Transfer pricing adjustments and their impact on VAT, excise and customs duties

Transfer pricing adjustments

Transfer pricing adjustments (TP adjustments) are adjustments that correct (i.e., adjust) the price, remuneration, financial result, financial ratio or other specified financial result that was originally used in a transaction between related entities, in particular, between entities within one capital group.

In accordance with the Polish Corporate Income Tax Act (CIT), the purpose of such adjustments is to amend the transfer prices applied for a given settlement period to an amount compliant with the arm's-length principle. In practice, this means that the price should correspond to the market price that would be used by unrelated entities (third parties) in a similar transaction.

According to Polish regulations, taxpayers valuing the price of transactions concluded with related entities are required to set the price at the market level at the time of the transaction. TP adjustments may increase the price originally applied by increasing revenues or reducing costs (an in-plus adjustment) or by reducing revenues or increasing costs (an in-minus adjustment).

A TP adjustment made after the transaction occurs only when the transfer price applied by the taxpayer does not correspond to the market price that unrelated entities would set, even if, when concluding the transaction, the taxpayer acted rationally and reliably to comply with the arm's-length approach in setting the price. In other words, the adjustment must result from changes in circumstances surrounding the business activity or result from using a method of determining the transfer price based on budgetary data, which are adjusted to actual revenues and costs after the end of a given period.

Polish regulations provide for four formal conditions that must be met jointly (to recognize the correction of revenues or costs for tax purposes). All four conditions must be met in the case of in-minus adjustments, and the first two conditions only need be met in the case of in-plus adjustments:

1. In controlled transactions carried out by the taxpayer during the tax year, conditions were set that would be established by unrelated entities.
2. There has been a change in material circumstances affecting the conditions set during the fiscal year or the actual costs or revenues obtained are known to be the basis for the calculation of the transfer price and ensuring their compliance with the conditions that would be determined by unrelated entities requires transfer pricing adjustments.
3. At the time of the correction, a Polish taxpayer obtains a statement from a related entity or an accounting document confirming that the entity has made a transfer pricing adjustment in the same amount as the taxpayer.
4. There is a legal basis for the exchange of tax information with the country where the related entity has its place of residence, registered office or management board.

TP adjustments usually impact direct taxes. However, the impact of the TP corrections may also have far-reaching consequences for indirect taxes such as value-added tax (VAT), excise taxes and customs.

TP adjustments and their VAT implications – EU perspective

VAT is a harmonized tax at the European Union (EU) level. This means that the general principles of its calculation and settlement should be the same in all Member States. However, EU directives and regulations do not contain regulations specifying how countries should approach the issue of the impact of TP corrections on VAT. This has resulted in the emergence of various approaches in different EU countries. For example, a TP adjustment may be treated as:

- Outside the scope of VAT (no taxable transaction for VAT purposes)
- A price adjustment (the adjustment is connected to a prior underlying taxable transaction, which results in a retroactive adjustment)
- Further consideration for a subsequent supply, resulting in a prospective adjustment
- Consideration for a separate service supply, resulting in a separate taxable transaction for VAT purposes

On 18 April 2018, the VAT Expert Group (VEG), a unit of the European Commission, issued "Paper on topic for discussion: "Possible VAT implications of Transfer Pricing."[1] The paper aims to bring certainty, simplicity and clarity on the VAT treatment of TP adjustments. Although the VEG guidelines are not binding, in practice, they are considered by the Member States and their tax authorities as guidelines as to which VAT treatment is appropriate for individual transactions, taking into account the available regulations and the existing CJEU jurisprudence practice.

In its paper, the VEG stated that TP adjustments should be considered in general as "outside the scope of VAT," where both parties have a full right to recover VAT.

For TP adjustments to have an impact for VAT, all of the following aspects should be considered:

- The existence of consideration
- The existence of a supply (of goods or services)
- The existence of a direct link between the consideration and an initial supply

If the TP adjustment can be directly linked to the initial supply, the VAT treatment of the adjustment is the same as that of the initial supply. However, the TP adjustment must be split so as to link the adjustment to each single supply of goods sold or service provided. According to the VEG, the TP

1 "VEG No. 071 REV2: Paper on topic for discussion: Possible VAT implications of Transfer Pricing," *European Commission website*, April 2018. Find it here.

adjustment should not necessarily result in a price adjustment for VAT purposes, even though the profit adjustment may be an indirect consequence of goods being bought or sold and other types of costs being incurred.

TP adjustments and their VAT implication — Polish perspective

The practice of the Polish tax authorities corresponds in general with the position of the VEG, as presented in the guidelines. Rulings issued by the Polish tax authorities in individual cases of taxpayers often confirm that the adjustment of transfer prices to the market level is outside the scope of VAT. This approach also applies to situations where, after the end of the year, it transpires that a company has not managed to achieve a margin at the market level in a transaction with a related entity. To adjust the transfer prices to the appropriate amount, in such situations, the parties carry out so-called profitability adjustments. We are also identifying cases where TP adjustments fall in the scope of the Polish VAT.

In particular, while reading through the reasoning presented by the Polish tax authorities in tax rulings issued in individual cases, we identify that TP adjustments:

- Remain outside the scope of VAT if they relate to the entire profitability result achieved in a given period and are not linked to specific supplies between related entities (i.e., do not refer to specific invoices, individual items of these invoices or to prices originally applied)[2]
- Should be included in VAT settlements if they relate to specific supplies performed between related entities in a given period (i.e., there is a link between TP adjustments and specific invoices or prices of goods or services)[3]

It should be emphasized that these issues have not been regulated directly in the Polish VAT Act. The only possibility of providing legal protection for a specific transaction or entity is to obtain a binding tax ruling in an individual case. The ruling protects only the applicant. Therefore, relying only on rulings issued in similar circumstances for other entities does not provide adequate protection in the event of a tax audit.

TP adjustments and their customs implications

As we noted earlier, TP adjustments are primarily associated with direct taxes, and their impact on other taxes and duties often goes unnoticed. Many companies are not aware that retrospective TP adjustments could potentially impact the customs valuation of goods imported into the EU.

The concept of customs valuation is central to understanding the impact of TP adjustments on customs duties. The customs value is the basis for calculating customs and other tax duties when importing goods into the EU from outside the EU. It is used for the purposes of the Common Customs Tariff and for non-tariff measures laid down in EU law.

There are several different methods of customs valuation; however, the most important and the one primarily used is the transaction value method. The transaction value is the price paid or payable for the goods between the parties. The price actually paid or payable is the total payment paid or to be paid by the importer to the exporter or by the importer to a third party for the benefit of the exporter for the imported goods and includes all payments made or to be made as a condition of the sale of the imported goods.[4]

Generally, the transaction value method cannot be used if the buyer (the importer) and seller (the exporter) are related to each other and the relationship between them has influenced the price. It is, however, possible to apply the transaction value method if the declarant demonstrates that the declared transaction value is very close to one of the test values (e.g., the customs value of identical or similar goods).[5]

Returning to the issue of TP adjustments, in practice the importer often also acts as a distributor of the imported goods, bearing additional risk and responsibility. The costs related to distribution are included in its net margin and the price of the transaction concluded with a related entity (in this case, the exporter), taking into account the arm's-length principle.

2 Ruling of 26 February 2021 (0114-KDIP4-2.4012.660.2020.2.AS), ruling of 18 February 2021 (0111-KDIB3-1.4012.966.2020.2.KO), ruling of 12 February 2021 (0112-KDIL1-2.4012.610.2020.3.ST).

3 Ruling of 27 July 2020 (0114-KDIP1-2.4012.156.2020.3.RD), ruling of 3 November 2017 (0114-KDIP1-1.4012.389.2017.2.RR).

4 Art. 70 of the Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code; OJ L 269, 10.10.2013.

5 Art. 134 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code; OJ L 343, 29.12.2015.

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However, if the predicted profitability target is not reached, and the importer's income from transactions with the related party exceeds the arm's-length rule, the parties will compensate with a TP adjustment. The question may be raised whether such a change should affect the value of the transaction initially declared for customs purposes, and thus should be included in the correction of the customs declaration by reducing or increasing the value of the transaction.

This issue is currently subject to controversy in Poland. It seems that CJEU case C-529/16[6] (Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München[7] has not brought sufficient certainty to the treatment of TP adjustments in Poland. There is no guidance on the treatment of TP adjustments issued by the Polish customs authorities, and there is not sufficient practice (local court cases) constituting unified jurisprudence that importers can rely on.

Firstly, a distinction should be made between adjustments that would impact the customs value by increasing it and those that would decrease them.

In the case of values being increased, the associated TP adjustments may result in arrears in customs and import duties that are based on the customs value. In such a case, many entities decide to correct their past entries showing the higher value as a basis for the duty calculation. In practice, the Polish customs authorities tend to examine in-plus customs value corrections with special scrutiny, asking for supporting documentation to prove that the value of the adjustment is correct and justified.

In the case of decreased values, if the adjustments cause a lowering of customs values, in practice, it is difficult to successfully proceed with the correction of past entries and to receive reimbursement for any overpaid duties.

The customs value also impacts the taxable amount of import VAT and excise duty (only for passenger cars) in Poland. Taking into account that TP adjustments are subject to numerous VAT rulings and proceedings, it is not uncommon that businesses involved in trade with goods are in possession of individual VAT rulings stating the TP adjustments in their case are "outside of the scope of VAT" or "in the scope of VAT." However, it is often difficult for those entities to apply the approach in the VAT ruling if TP adjustments are connected with import transactions.

For example, in the case of TP adjustments regarded as in the scope of VAT, difficulties arise if the adjustment influences import transactions and results in lowering the taxable amount. Import VAT reporting in Poland is based on customs reporting, and in practice, it is not possible to report a correction in import VAT until there is a correction in the customs declaration or a decision on the customs value and taxable amount for VAT issued by the customs and tax authorities. As mentioned above, the process of successfully correcting past entries by lowering the customs value is difficult to achieve in practice.

On the other hand, when the entity applies an "out of the scope of VAT" treatment in relation to TP adjustments, often the importer does not correct customs entries post-importation for in-plus adjustments. However, the risk of the customs authorities challenging such an approach is not eliminated. In such a case, the importer is exposed not only to the risk of customs arrears and relevant interest for late payment, but also to penal fiscal liability due to non-declaration or nonpayment of duty in the correct amount.

6 "C-529/16," *EUR-Lex website*, December 2017. Find it here.

7 This case is discussed in the article "Germany: Hamamatsu – the journey nears its end" from *TradeWatch* Issue 2 2022, page 43, and in the EY Tax Alert "CJEU issues ruling on determining transaction value for customs valuation," *EY website*, January 2018. Find it here.

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Notwithstanding these comments, in our experience, it is often the case in Poland that the treatment of TP adjustments for customs purposes is driven by the VAT treatment (usually confirmed by the entity's individual tax ruling).

TP adjustments and their Polish excise implications

Excise duty is harmonized at the EU level. As a rule, only "excise goods" listed in Directive 2008/118/EC[8] are subject to excise duty (i.e., energy products, electricity, alcohol and alcoholic beverages, and tobacco products).

However, the Directive also allows Member States to introduce excise duty on products other than excise goods specified in the Horizontal Directive.[9] Under this provision, the Polish Excise Act applies excise duty on passenger cars in the event of their import, intra-Community acquisition or first registration in the territory of the country.

The excise duty taxation of passenger cars in Poland is different compared to other how excise-taxed goods are treated: passenger cars are the only products on which the excise duty depends only on the value of the goods (ad valorem rate) and not, for example, on their volume.

For businesses operating in the automotive industry that trade in passenger cars as part of their related-party transactions, they should identify cars that are registered in the territory of Poland (whether following an intra-Community acquisition or importation) and should evaluate their excise accounts if TP adjustments related to these transactions occur. If a TP adjustment can be directly linked to the supply of passenger cars, which will affect the original price, the question may be raised whether it is also necessary to correct the excise settlements on those passenger cars introduced into the territory of Poland.

Importantly, for imports of passenger cars from outside the EU, the basis for taxing a passenger car with excise duty is the customs value of the car increased by the duty due. For a long time, the practice in Poland related to post-entry corrections of the price of passenger cars were not included as relevant for increasing or decreasing the excise duty. Corrections of excise already declared and paid were not required and were not accepted in practice, regardless of the cause. However, this practice may not be changing. Recently, the court in Warsaw issued a judgment[10] for a taxpayer who applied for a reimbursement of an overpayment of excise duty as a result of a post-transaction decrease in the price of passenger cars it had brought into Poland from another EU Member State, concluding that the adjustment of the excise settlements in this case should be possible (i.a. III SA/Wa 2687/21).[11] This judgment may not have a direct impact on the treatment of TP adjustments for importers in reducing excise duties, but it certainly is a reason for evaluating the possible impact of TP adjustments on excise tax in this area.

Next steps for business

In an era of dynamic changes in international trade and supply chains, an uncertain geopolitical situation and unexpected circumstances influencing economic activity, TP adjustments are not uncommon. While resulting from economic and direct tax principles, TP adjustments may have a major impact on customs and indirect tax settlements. Given the likely prevalence of adjustments, and the often-large sums involved, businesses that undertake related-party transactions should look carefully at the indirect tax consequences of their TP adjustments. Ignoring their impact may create the potential risk of customs and tax arrears as well as personal liability under penal fiscal provisions. ■

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8 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC," *EUR-Lex website*, December 2008. Find it here.

9 "Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast)," *EUR-Lex website*, December 2019. Find it here.

10 "III SA/Wa 2687/21 – Wyrok WSA w Warszawie," *Centralna Baza Orzeczeń Sądów Administracyjnych website*, May 2022. Find it here.

11 Ibid.

UK: Freeports – moving toward delivery

Freeports are specially designated areas within the United Kingdom (UK) where different tax and economic regulations apply. Freeports are made up of tax and customs sites that sit within the Freeport's 45 km outer boundary. The UK Freeport's policy has been designed to drive global trade and investment, regeneration, innovation, skills, and leveling up within Freeport areas. In addition to tax and customs benefits, Freeports also offer benefits related to retained business rates, planning support and seed capital funding. Each Freeport contains a unique governance model, but generally Freeports are made up of both public and private sector partners that are responsible for overseeing the delivery of the Freeport.

There are eight Freeports in the UK:

- East Midlands Airport
- Felixstowe & Harwich (Freeport East)
- Humber
- Liverpool City Region
- Plymouth & South Devon
- Solent
- Thames (London Gateway)
- Teesside

Tax and customs benefits available

Freeports are made up of tax and customs sites. Individual tax and customs sites have their own site boundaries where businesses can locate to claim the benefits available, subject to authorization. The tax benefits available include Business Rates Retention, Stamp Duty Land Tax (SDLT) relief, Employer National Insurance Contributions (NICs) relief, Enhanced Structures and Building Allowance, and Enhanced Capital Allowances. These benefits are available to businesses operating on tax sites to drive investment and innovation within the Freeport. The local council area where Freeport tax sites are located will retain 100% of the business rates growth to allow them to continue to invest in regeneration and infrastructure to support future growth.

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Customs benefits

Freeport customs sites offer benefits such as duty suspension, duty exemption for re-exports, duty flexibility when calculating the customs value on goods released to the Great Britain (GB)[1] market, and simplified import procedures that reduce the administrative burden when clearing goods at the GB border. Goods being imported into a Freeport will not be subject to import value-added tax (VAT) until released to the GB market and will be exempt from import VAT if re-exported from a Freeport customs site.

Benefits available to businesses operating within Freeport customs sites are similar to those already available through customs special procedures. However, there are some additional administrative benefits to operating within a customs site, including:

- **Simplified import declarations** through the Freeport customs special procedure. No supplementary declarations are needed for goods declared to the Freeport customs special procedure.
- **Ability to claim duty suspension, duty exemption on re-export, and duty flexibility for processing or storage activity under one combined customs special procedure.** Goods that are re-exported from a Freeport customs site may be subject to a prohibition of drawback clause, depending on the country of importation.
- **Movement between customs sites using a "by conduct" declaration** allowing businesses to move goods between customs sites without having to use transit or complete a separate customs declaration. The business and the Customs Site Operator (CSO) must maintain relevant records of the movement in accordance with their record-keeping obligations.
- **Movement between a Freeport business to another customs special procedure by declaration by conduct** rather than having to complete a declaration or transit movement.
- **Suspension of import VAT and zero-rating of eligible supplies of goods and related services in the Freeport.**

Each Freeport has its own core target sectors that it seeks to attract to drive trade and investment. Tied to the specific Freeport tax and customs levers are the wider economic benefits associated with Freeports, which include the objective of creating clusters of trade and investment that can drive manufacturing activity in the UK.

How Freeports work

The tax and customs benefits available within Freeports are only available within the specific tax and customs site boundaries, not within the wider Freeport area. Freeport customs sites are managed by a customs site operator(CSO), who must be authorized by the UK tax authority, His Majesty's Revenue and Customs (HMRC), as part of the customs site designation process.

Customs sites have defined boundaries within the wider Freeport area. In practical terms, this means that goods must move to that specific customs site to achieve Freeport customs benefits. Freeport customs sites are designed to attract "business operators," which are companies that operate within customs sites either through processing or storage activity to achieve duty suspension or exemption reliefs. Freeports may have more than one customs site; however, it is up to the Freeport's governing body to determine whether they wish to support additional customs site applications.

To operate on a customs site and obtain the customs benefits available, businesses must be authorized by HMRC through the Freeports customs special procedure, which businesses can apply to subject to agreement with the CSO. By using this procedure, business operators obtain duty suspension and exemption benefits for both storage and processing activity without needing separate customs warehousing or inward processing authorizations. Alternatively, businesses may use an existing customs special procedure that they are already authorized for (such as inward processing and/or customs warehousing) to operate within a designated customs site; however, they must comply with Freeport customs site rules for record-keeping.

1 Great Britain includes England, Scotland and Wales.

There are not yet designated Freeport customs sites at all UK Freeports. The following Freeports have designated customs sites to date:

- Freeport East
- Plymouth and South Devon Freeport
- Solent Freeport
- Teesside Freeport
- Thames Freeport

Freeport levels of operation

Freeports are at varying levels of operationalization. While all Freeports have designated tax sites, Freeports are still under a full business case (FBC) approval process. A government announcement on FBC approvals is expected before the end of 2022. Once Freeport FBCs are approved by the government, Freeports will be working toward becoming fully operational to unlock the wider objectives around trade and investment, skills, innovation, and regeneration.

What's next for UK Freeports?

As Freeports in England move to operational delivery, the bidding process for Freeports in Scotland, Wales and Northern Ireland continues. An announcement on successful bids in Scotland is expected soon. Once the successful bids are announced, it is anticipated that Scottish Freeports will move to the business case stage.

UK investment zones

In addition to Freeports, the UK government has recently announced the development of Investment Zones in England. Investment Zones will be considered through a "rapid Expression of Interest (EOI) process" open to mayoral combined authorities (MCAs), upper tier local authorities (UTLAs) or Freeports. Investment Zones will benefit from tax incentives over a period of 10 years, including:

- **Business Rates:** 100% relief from business rates on newly occupied business premises and certain existing businesses that expand in English Investment Zone tax sites. Councils hosting Investment Zones will receive 100% of the business rates growth in designated sites above an agreed baseline for 25 years.
- **Enhanced Capital Allowance:** 100% first-year allowance for companies' qualifying expenditure on plant and machinery assets for use in tax sites.
- **Enhanced Structures and Buildings Allowance:** Accelerated relief to allow businesses to reduce their taxable profits by 20% of the cost of qualifying nonresidential investment per year, relieving 100% of their cost of investment over five years.
- **Employer National Insurance Contributions relief:** Zero-rate employer NICs on salaries of any new employee working in the tax site for at least 60% of their time, on earnings up to GBP50,270 per year, with employer NICs being charged at the usual rate above this level.
- **Stamp Duty Land Tax:** A full SDLT relief for land and buildings bought for use or development for commercial purposes, and for purchases of land or buildings for residential developers.

The deadline for MCAs, ULTAs and Freeports to submit an EOI for Investment Zones was 14 October 2022. Following this EOI, the government intends to undertake a rapid review and approval process of Investment Zones. More information regarding the governance structure and operating models of Investment Zones is expected to follow. Investment Zones may include existing Freeport tax and customs sites.

Conclusion

Businesses interested in operating in a Freeport tax or customs site should quantify the potential benefit of both the direct and indirect tax levers available. In particular, businesses interested in the potential for customs benefits should consider the benefits that simplified import procedures may offer as well as the potential to operate the equivalent to inward processing and customs warehousing under one customs special procedure.

Businesses should continue to monitor the development of the Investment Zone policy, as it will lead to the creation of additional sites in the UK that offer tax levers for investors. ■

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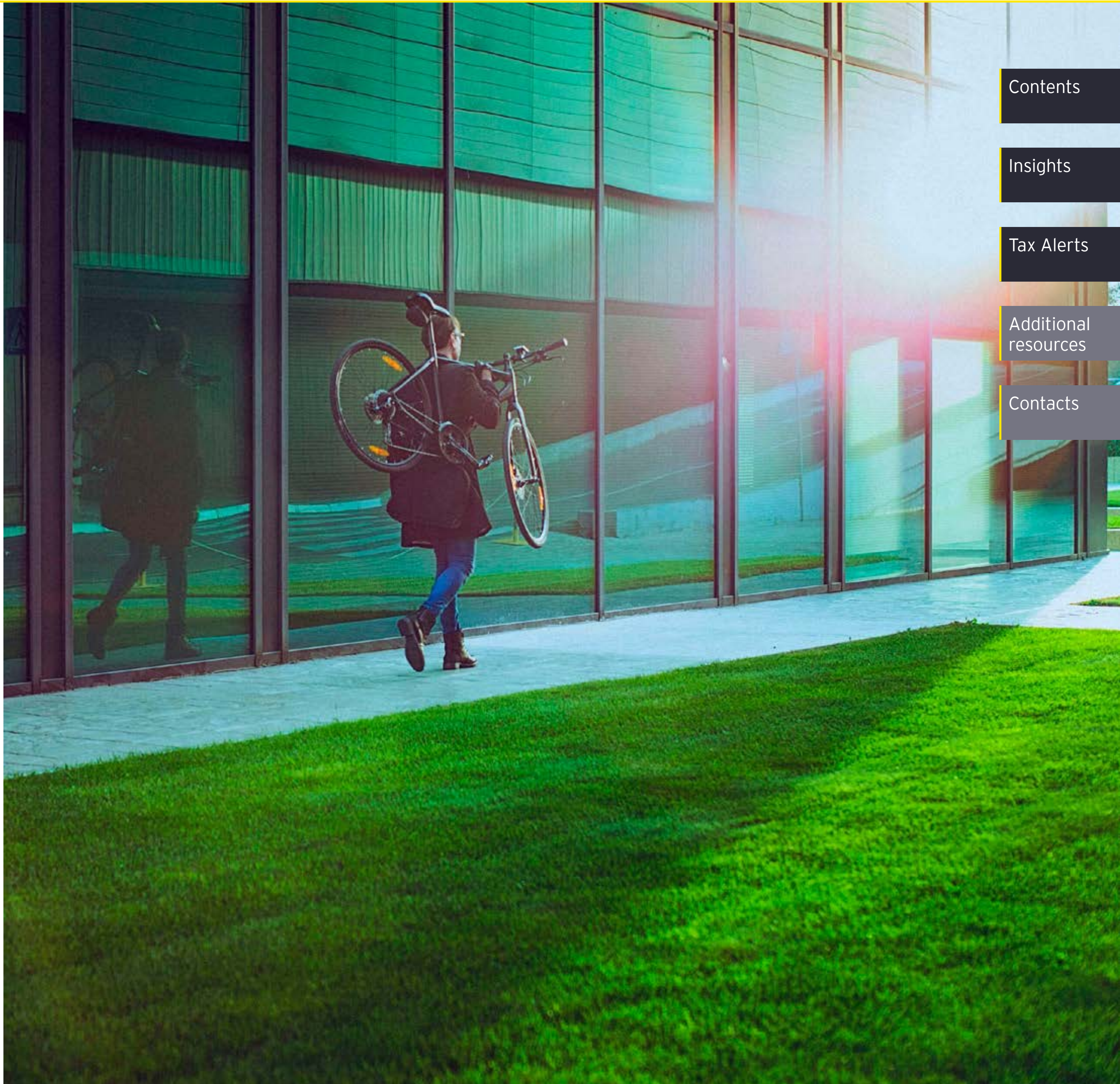

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