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ADMINISTRATIVE LAW CHALLENGES OF POST-CLEARANCE AUDIT IN SERBIA

Most imported/exported goods are not controlled by customs authorities at the border. This allows for the fast release of goods and the better functioning of international trade. The backbone of this system consists of customs declarations filed by the importers/exporters, selective control at the border, based on risk assessment, and the post-clearance audit (PCA) of the accepted customs declarations.

This paper deals with the questionable practice of the Serbian Customs Administration with regard to the conducting of the PCA, particularly its relation with the Law on General Administrative Procedure and the issues related to the classification of goods according to customs tariff.

The author identifies issues regarding the transparency, interpretation and implementation of the PCA in Serbia and contests the (internationally recognized) practice of changing the classification of goods in accepted customs declarations. The author proposes possible solutions for identified challenges.

Key words: *Customs control. – Law on General Administrative Procedure. – Post-clearance audit.*

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1. INTRODUCTION

Empty supermarkets shelves, no fuel at gas stations, no raw materials at factories—is this caused by war, international sanctions, pandemic, or some other disaster? None of the above. This doomsday scenario would occur if customs agencies around the world were to strictly and methodically control each and every cross-border shipment of goods. The consequent breakdown of supply chains would lead to economic collapse and devastate international trade.

This is why customs procedure functions completely differently. Its two pillars are selective border controls based on risk assessment and post-clearance (or post-release) audit (PCA). In order to enable the normal running of international trade, customs services worldwide rely on customs declarations provided by the importers/exporters of goods. On the basis of risk assessment, they decide which consignment of goods will be controlled and to which degree. The rest are released solely on the grounds of the submitted declarations. However, they can still be controlled *via* PCA, again, on the basis of risk assessment.

Post-clearance audit, also referred to as *audit-based control*, is defined in the Revised Kyoto Convention,[1] as a set of "measures by which the Customs satisfy themselves as to the accuracy and authenticity of declarations through the examination of the relevant books, records, business systems and commercial data held by persons concerned." It is seen as "one of the most effective trade facilitation strategies available to border agencies as it enables the immediate release of imported cargo through the subsequent use of audit-based regulatory controls" (Widdowson, Preece 2013, v).

The Serbian Customs Law (CL)[2] regulates PCA in the same manner. Article 35 thereof, entitled "Post-release control", prescribes that for the purpose of customs controls, the customs authority may verify the accuracy and completeness of the information given in a declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification, and the existence, authenticity, accuracy and validity of any supporting document and may examine the accounts of the declarant and other records relating to the operations

[1] World Customs Organization Revised Kyoto Convention (Chapter 2, Definitions, E3./F4.) Serbia has ratified this convention, *Official Gazette of the Republic of Serbia*, No. 70/2007.

[2] Carinski zakon [Customs Law], *Official Gazette of the Republic of Serbia*, Nos. 95/2018 and 91/2019. Official translation available at *https://www.mfin.gov.rs/UserFiles/File/zakoni/2019/THE%20CUSTOMS%20LAW.pdf*, last visited 10 February 2021.

in respect of the goods in question or to prior or subsequent commercial operations involving those goods after having released them. Customs authority may also examine such goods and/or take samples where it is still possible for them to do so.

Selective border control and PCA are indispensable for the normal functioning of international trade. Nonetheless, their normative framework and, especially, everyday application raise certain questions from an administrative law viewpoint. This perspective is important given that CL Article 17, para. 14 provides that unless otherwise provided for by the CL, the provisions of the law that regulate general administrative procedure shall apply to the proceedings carried out by the customs authority. Hence, the customs procedure represents a special type of administrative proceeding and should therefore be in accordance with the Law on General Administrative Procedure (LGAP).[3]

Research of PCA is scarce and focusses mainly on the issues of prevention of tariff evasion (Moïsé 2005, 22; European Court of Auditors 2017) and the obstacles and possibilities for increasing PCA efficiency, such as the improvement of risk management, as well as organizational, human and technical capabilities of the customs authorities to carry out PCA (Montagnat-Rentier, Parent 2012, 121; Sagareva 2013, 120–121; Hossain, Abu Yusuf 2019, 159; Gebreyesus 2020, 115–117).

The common trait of these research papers is their perspective: they all observe the PCA from the standpoint of the customs authority. In contrast, the angle of our research is different: we will concentrate on the difficulties the importers/exporters face during the PCA, i.e. we will try to shed light on certain regulatory and application issues that reduce the legal certainty and aggravate the legal position of the parties to the customs proceedings.

2. THE CUSTOMS ADMINISTRATION CASE-LAW

To understand the administrative law challenges we need to review the questionable case-law of the Serbian Customs Administration (CA). In particular, two cases[4] will be examined. These two cases are chosen for

[3] Zakon o opštem upravnom postupku [Law on General Administrative Procedure], *Official Gazette of the Republic of Serbia*, Nos. 18/2016 and 95/2018.

[4] In actuality, from a procedural point of view, there were more cases, because there were six consignments of one type of goods (encompassed by the first case) and three consignments of the second type of goods (encompassed by the second case).

three reasons. Firstly, they are paradigmatic of the issues, which should be analyzed, i.e. they are in no way exceptional.[5] Secondly, the author provided legal consultation in the mentioned cases, so he is quite familiar with them. Thirdly, the nature of the goods imported in these two cases differs with respect to the efforts required for their correct classification according to the Customs Tariff (see Section 7 *infra*).

In the first case, a company imported the *sticker collection albums FIFA World Cup South Africa 2010* and classified the albums and stickers under the same Customs Tariff number. There were several consignments of goods, none of which were controlled at the border. The importer's declarations were accepted and the goods released. After three years, the CA initiated a PCA. The type, quality and quantity of imported goods were found to be correct, but the classification was changed. Namely, the CA subsequently decided that the stickers should be classified under a higher Customs Tariff number due to the fact that the collection albums and stickers were sold separately. The customs declaration was amended and a higher customs rate was charged. The company was even prosecuted for a misdemeanor.

It is significant to emphasize that prior to the import of the goods, the CA issued two internal acts,[6] which clearly stated that albums and stickers should be classified together under the same Customs Tariff number and it was this number that the company used for the goods classification. Subsequently, the Ministry of Finance[7] issued an opinion,[8] stating that the stickers should be classified under a higher Customs Tariff number.

Consequently, there were nine customs declarations, nine administrative appeals, and, in the second case, three judicial lawsuits.

[5] For instance, the CA practice of changing the classifications in accepted customs declarations was the subject of two published judgments of the Supreme Court of Cassation – U 145/05, rendered on 2 November 2005 (*https://www.vk.sud.rs/sr-lat/u-14505*, last visited on 6 September 2020), and U 1926/05, rendered on 15 December 2005 (*https://www.vk.sud.rs/sr-lat/u-192605*, last visited on 6 September 2020). The author discussed this issue with a representative of an association of foreign companies, who confirmed that this CA practice is not uncommon. Unfortunately, most of these cases had no judicial review as a consequence, given that importers value good relations with the CA (ensuring fast release of goods) more than legal certainty.

[6] CA's acts UC 01/1.1 No. D-12592/1, adopted on 11 July 2006, and UC 148–11439–01–2/2010, adopted on 6 April 2010.

[7] The CA is an authority within the ministry [*organ uprave u sastavu ministarstva*]. It is not an internal organizational unit of the ministry, but it is dependent on the ministry, which oversees its work and acts as the authority of second instance.

[8] Opinion No. 413–00–1212/2010–04, 23 April 2010.

In the second case, a company imported *pneumatic tire protectors*. A tire protector is a special material added as an outer layer on pneumatic tires, with the aim of preventing tire rupture. For 10 years, the company imported the same tire protectors under the same Customs Tariff number. In the meanwhile, the law regulating the Customs Tariff was amended and the Government adopted a decree on harmonization of nomenclature. The vagueness of the amendments finally led to a decision of the Administrative Court[9] stating that during the relevant period of time (2006–2010), it was possible for the relevant goods to be legally classified in two Customs Tariff numbers and that choosing either of them did not represent incorrect classification. In spite of such a judicial decision, the CA changed the classification in the approved customs declaration and charged a higher customs rate for imported goods.

3. INFRINGEMENT OF THE ADMINISTRATIVE LEGAL PRINCIPLES

Certain aspects of customs proceedings — and in particular CA practices —contravene some of the basic principles of administrative proceedings contained in the LGAP and the principles of the functioning of the public administration proclaimed in the Law on State Administration (LSA).[10]

In addition to the principles mentioned in this section, in the two cases described in Section 2, the CA infringed *the principle of finality of administrative acts*. This violation is elaborated in Section 4 below.

3.1. The Principle of Truth

One of the basic principles of administrative proceedings in Serbia is the principle of truth. According to LGAP Art. 10, para. 1, the competent authority is required to correctly, truthfully and completely determine all the facts and circumstances significant for lawful and appropriate decision-making. This is to say that the administrative proceeding in Serbia is inquisitorial. The authority has to determine the complete and accurate state of facts in each and every case. In Serbian theory this principle is referred to as the principle of *material truth* (Tomić, Milovanović, Cucić 2017, 31–32).

[9] Administrative Court, Judgment No. 9 U 8944/2011, 3 November 2011, contained in the Paragraph Lex database.

[10] Zakon o državnoj upravi [Law on State Administration], *Official Gazette of the Republic of Serbia*, Nos. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018, and 30/2018.

Nevertheless, there are laws regulating certain special policy domains, i.e. certain special administrative proceedings, which apply the principle of *formal truth* (Stjepanović 1978, 577). An example is the procedure of the Business Registers Agency, which decides on the basis of the documents provided by the parties, without examining the accuracy of the facts contained therein.

The customs procedure is, obviously, based on the principle of formal truth. In a vast majority of instances, the CA does not check the accuracy of the data contained in customs declarations. Save for the cases where the risk assessment requires them to act, they just accept declarations and release the goods.

The issue arising here is a consequence of inadequate regulation of the principle of truth in the LGAP. The basic principle of administrative proceedings contained in the LGAP must be applied in all of the special administrative proceedings, including customs proceedings (LGAP Art. 3). The legislator's rigid approach to the regulation of the principle of truth in the LGAP has caused problems in all special administrative proceedings in which the complete determination of the facts in each case is not possible. This is certainly the case with customs proceedings, otherwise we would be forced to reverse to the apocalyptic scenario depicted at the beginning of this paper.

3.2. Transparency of Administrative Work

Article 11, para. 1 of the LSA proclaims that *the work of the state administration is public*, i.e. transparent.

Regrettably, the CA *does not publish its internal acts*, which are used for interpretation of the Customs Tariff. These acts are used by its employees on a daily basis for clearance of goods, particularly for classification of goods. Moreover, the CL gave these interpretative acts the strength of a formal source of law. Namely, CL Art. 24, para. 9, it. 1 stipulates that the customs authority shall revoke binding tariff information,[11] i.e. a guarantee given to the importer with respect to the Customs Tariff classification of a particular consignment of goods (CL Art. 23), if it is no longer compatible with the interpretation of any of the nomenclatures. Consequently, the interpretation of the Customs Tariff, i.e. CA internal (interpretative) acts, is given the same legal significance as the amendment of the law regulating the Customs Tariff.

[11] Binding tariff information is a type of guarantee act, regulated by GAPA as well (Davinić, Cucić 2017, 232–234).

Nevertheless, the CA never publishes its internal acts, thus breaching the principle of transparency and decreasing legal clarity and certainty.

Furthermore, in practice, the only entities with access to these internal acts outside the CA are the *forwarders*. This breaches another principle of the functioning of public administration—*the principle of professionalism, impartiality and political neutrality*. Art. 8 of the LSA stipulates that in their work the state administrative authorities must act in accordance with the rules of their profession, impartially and politically neutral, and that they are obliged to provide all parties with equal legal protection in the process of realization of their rights, duties, and legal interests. Clearly, importers/exporters are not given equal legal protection in the clearance process. They are practically forced to use the services of forwarders because they do not have access to the internal acts clarifying the Customs Tariff classification.

In addition, the practice of supplying only forwarders with these internal acts could cause a potential problem in *Serbia's EU accession process*. Namely, in a case brought before the European Court of Justice by the European Commission against Italy,[12] the Court found that high remunerations for forwarders' services did not represent a charge having effect equivalent to tariffs (which are forbidden in pertinent EU legislation) because the use of forwarder services was not mandatory. The parties could have filled-in and filed the customs declarations themselves (Đorđević, Jovanović 2019b, 85). It is questionable whether engagement of forwarders in the customs proceeding in Serbia is truly optional. The CL does not require importers to use their services, but this might appear to be indispensable in a situation in which only they possess the CA internal acts necessary for correct classification of imported goods. This might arise as an issue in the process of harmonization of the Serbian legal system with the *acquis communautaire*.

Consequently, the lack of transparency with regard to the CA internal acts is aggravated by the fact that there is a vested interest of an entire industry of forwarders to maintain the *status quo*, i.e. not to have these essential interpretative acts publicly available.

3.3. The Principle of Aiding the Party

Article 8, paras. 1 and 2 of the LGAP provide that an administrative authority must *ex officio* take care that the ignorance of a party is not detrimental to its legal position. Furthermore, administrative authorities are obliged to alert a party when it learns and assesses that, on the basis of the

[12] ECJ, *Commission of the European Communities v. Italian Republic,* C-119/92.

facts of the case, a party has a legal ground to realize certain rights or legal interests.

Failing to notify the importer/exporter about the tariff misclassification of the goods represents a breach of this basic principle of administrative procedure (see Section 7 *infra*).

4. INAPPROPRIATE MANNER OF SETTING THE PCA TIME LIMIT

The CL does not prescribe an explicit time limit for PCA. The Ministry of Finance has issued an opinion,[13] stating that a PCA may be conducted at any time within the time limit set for keeping customs records. According to CL Art. 37, for the purposes of customs control, the person concerned is required to keep the documents and information required for customs formalities for at least three years.

Consequently, *the time limit for PCA is set indirectly, through the time limit for the records keeping*. This manner for setting the deadline can be found in other jurisdictions as well, e.g. in the US and the UK (Clark 2017, 62, fn. 3).

Nonetheless, the indirect determination of the deadlines for PCA is inappropriate because it raises more questions than it provides answers.

Is the CA allowed to conduct a PCA after the records keeping time limit has lapsed, provided that the person concerned has kept the records longer? What if the necessary information can be found in a third party's records (e.g. after three years the importer sold the goods to the company, which will keep the invoices and receipts for another three years)? What if the information necessary for the PCA is contained in the accepted customs declaration kept by the CA? This is precisely what happened in the two described cases. The classification of goods, which was changed in the PCA, was contained in the declaration. If the CA decides to conduct a PCA in all these situations, despite the fact that the records keeping deadline has lapsed, can the party raise a defense of the lapse of a statutory limit before the Administrative Court? Even if the Administrative Court wanted to accept this objection, on what legal grounds could it do so?

The mentioned issues lead us to the conclusion that the principle of legal certainty necessitates setting of an explicit time limit for PCAs.

[13] Opinion, No. 481-00–00024/2010–17, 30 April 2010, contained in the Paragraph Lex database.

5. VIOLATIONS OF ADMINISTRATIVE PROCEDURE RULES

In the two cases described in Section 2, the CA conducted a PCA, changed the classification of goods in the previously accepted customs declarations, and issued new decisions, charging additional tariffs. However, the CA rendered the new decisions without quashing the previous decisions, thus breaching relevant procedural rules. In particular, it violated *the principle of finality of administrative acts* (*načelo pravnosnažnosti*), contained in LGAP, and the *rules on removal of illegal customs administrative acts*, stipulated in the CL.[14]

5.1. Breach of Principle of Finality

Article 17, para. 14 of the CL prescribes that unless it is otherwise provided for by the CL, the LGAP provisions shall apply to the proceedings carried out by the customs authority. Accepted customs declaration (Art. 150 CL) represents an administrative act favorable for the party. It is a special type of administrative act called *note on the document* (*zabeleška na spisu*). Article 142 of the LGAP stipulates that in cases in which an administrative authority accepts a party's request and this has no influence to the public interest and the interests of third persons, the decision can consist only of the acceptance recorded as a note on the document.

The *principle of finality of administrative acts* is contained in LGAP Art. 14. According to this principle, a decision (administrative act) that is no longer challengeable before a higher administrative authority or before the Administrative Court—is final. If a final administrative act decides on the rights and/or duties of a party, it can be quashed (removed *ex tunc*), cancelled (removed *ex nunc*), or amended only in the cases provided by the law. This is to say that particular extraordinary legal remedies, either prescribed by the LGAP or by a law regulating special administrative proceedings (in this case the CL), must be used for the removal or amendment of such a final administrative act. Put differently, this is the principle of *ne bis in idem* in administrative proceedings. Before deciding again on a case, a previous decision regulating the case must be removed.

[14] These cases were decided on the basis of the previous Customs Law (*Official Gazette of the Republic of Serbia*, Nos. 18/2010, 111/2012, 29/2015, 108/2016 and 113/2017), but since the relevant provisions on the PCA and legal remedies (Arts. 14 and 103 of the previous Customs Law) did not change in the current CL, the provisions of the latter are referenced (Arts. 19 and 35 of the current CL).

Given that in the mentioned cases the accepted customs declarations were no longer challengeable by administrative appeal or judicial review, the CA had to utilize legal remedies prescribed by the CL or the LGAP to quash them. Instead, the CA simply rendered new resolutions in the same administrative matters, thus infringing the principle of finality.

5.2. Failure to Apply Adequate Legal Remedies

As noted previously, when issuing new decisions, the *CA applied only the provision regulating the PCA*. More problematically, the Administrative Court upheld this interpretation of the relevant law.[15] This would serve as an impetus to CA to pursue this incorrect and illegal practice of conducting PCAs. Finally, the entire matter is aggravated by the fact that an explicit time limit for PCA has not been set (see Section 4 *supra*). Thus, arguments for the amendment of the Administrative Court's legal stance must be provided.

Article 35, para. 3 of the CL stipulates that where "the post-clearance examination of the declaration, or of the clearance, indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, *the customs authority shall, in accordance with customs and other provisions in force, take the measures necessary and issue appropriate decisions* to regularize the situation and align the legal situation with the newly established circumstances."

It is clear from the wording of the cited provision that the accepted customs declaration containing incorrect or incomplete information, can be removed only on the basis of the legal remedies prescribed in the CL and the LGAP.

The Customs Law, indeed, states in Article 19 (Annulment of Favorable Decisions) that the customs authority shall annul a decision favorable to the holder of the decision if all the following conditions are fulfilled: 1) the decision was taken on the basis of incorrect or incomplete information; 2) the holder of the decision knew or ought reasonably to have known that the information was incorrect or incomplete; 3) if the information had been correct and complete, the decision would have been different.

Alternatively, though it would have been redundant, the Customs Authority was able to utilize certain extraordinary legal remedies from LGAP.[16]

[15] Administrative Court, case No. 7 U 3571/16, 10 August 2017. Author obtained this decision as a consultant in the relevant case.

[16] Improper classification of goods could have been treated either as an appearance of a new relevant fact or as an incorrect application of the substantive law. In

CA was not authorized to issue a new decision without quashing the previously accepted customs declaration. In other words, the provision regulating the PCA was not sufficient for the issuance of a new decision and charging an additional tariff.

This can be concluded from the *systematic interpretation of the CL*, i.e. the interpretation of the relation between articles 19 and 35 thereof. The wording of these two provisions indicates that they relate to the same form of illegality—clearance based on of incorrect or incomplete information. What was the purpose of Art. 19 if Art. 35 was sufficient ground for quashing an accepted customs declaration? Even if one were to claim that both provisions allow quashing of decisions, another logical problem would arise. This claim leads to the conclusion that in one situation (Art. 35) quashing requires only the existence of incorrect or incomplete information, while in the other (Art. 19), additional conditions are required: that the holder of the decision knew, or ought reasonably to have known that the information was incorrect or incomplete, and had the information been correct and complete-the decision would have been different.

Therefore, the only interpretation giving sense to both Art. 35 and Art. 19 of the CL is that Art. 35 is legal ground for the CA to alter or supplement the information contained in accepted customs declarations. This then serves as a basis for the application of Art. 19 or another legal remedy from the CL or the LGAP.

This was actually confirmed in the *Explanation of CA*[17] explicating the application of the provision regulating the PCA. The explanation, inter alia, states: "About each conducted PCA, the customs authority prepares minutes (...) The minutes contain information on the conducted control and the facts established during the control, with enclosed documents and evidence gathered during control, which *serve as a basis for the issuance of decisions in accordance with customs and other regulations, as well as decisions applying extraordinary legal remedies prescribed by the General Administrative Procedure Act*."[18]

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the former case, the CA could have reopened the case (LGAP Art. 176, para. 1, it. 1), while in the latter, it is authorized to use the legal remedy entitled Quashing of a Non-Appealable Decision (Art. 183, para. 2 LGAP). For extraordinary legal remedies in the LGAP see Koprić *et al.* 2016, 93–96.

[17] Explanation of CA, *Official Gazette of the Republic of Serbia* 01/3 No. D-12495/1, 30 September 2004,

[18] *Ibid.* Translated by author. Italics added.

Similarly, Article 7, section 5.3 of the World Trade Organization's Trade Facilitation Agreement states that the information obtained in the course of a PCA may be used in further administrative or judicial proceedings.

To sum up, the PCA is a fact-finding tool that serves as grounds for the application of relevant legal remedies.

6. LACK OF LEGAL CERTAINTY WITH RESPECT TO THE CLASSIFICATION OF GOODS

In the first case described in Section 2, the CA issued an internal act prescribing that collection albums and stickers represent one product for customs and tax law purposes. The Ministry of Finance later changed this interpretation of the Customs Tariff, deciding that the stickers shall be considered as a separate product and entail a higher tariff. Once this change occurred, it triggered a PCA of the accepted customs declarations and the payment of additional tariff.

Consequently, the importer, a company abiding by the CA rules, was controlled, additionally financially burdened, and even charged and later found guilt of a misdemeanor.

None of this would have happened, had the CA applied the relevant legislation.

According to Art. 3a of the Rulebook on the Manner of Realization of Actions and Measures in the Process of Control of Accepted Customs Declaration,[19] the CA "assesses whether a person obliged to pay the subsequently determined tariff, acted in accordance with the regulations, decisions and measures relating to the customs, published in a manner prescribed in Art. 4 of the Customs Act, and whether the person abided by the measures of the customs supervision and particular actions and orders of the customs authority and *shall not require such persons to pay the subsequently determined tariffs, which appeared by the time the person found out about it or by the time the person ought to have known that the information contained in the customs declaration was incorrect*."[20]

[19] Pravilnik o načinu sprovođenja radnji i mera u postupku kontrole prihvaćene deklaracije [Rulebook on the manner of realization of actions and measures in the process of control of accepted customs declaration], *Official Gazette of the Republic of Serbia*, Nos. 53/2004 and 95/2007.

[20] *Ibid.* Translated by author. Italics added.

This provision was subsequently added to the Rulebook (marked as Art. 3a) with the aim of preventing customs authorities of charging additional tariffs *if an importer relied on and complied with CA regulations and acts*. The intention of the legislator was to ensure legal certainty and to undertake its responsibility for changing the rules.

Such behavior by the CA is also not permitted under the CL. Namely, CL Art. 35, para. 4 stipulates that the provisions of the law governing the implementation of inspection supervision shall apply *mutatis mutandis* to the PCA.

The regulation application act [*akt o primeni propisa*] is defined in Art. 3, para. 1, it. 7 of the Law on Inspection Supervision.[21] The regulation application act is an act in the form of an opinion, explanation, answer to a question, recommendation or otherwise entitled act, relating to the application of a law or other regulation issued by a competent authority. According to Art. 31 of the Inspection Supervision Act, a supervised entity cannot be subject to corrective or repressive administrative measures if it acted in accordance with the regulation application act. Moreover, pursuant to the same provision, if the supervised entity, which complied with the regulation application act, is charged with a misdemeanor or a crime, it shall be considered that it acted in legal error.

In the case at hand, the importer (supervised entity) acted in accordance with the relevant internal act (regulation application act), thus it should not have been charged and sanctioned.

This case, along with the general lack of transparency, i.e. the failure of CA to publish its internal interpretative acts, shows a lack of legal certainty in customs proceedings.

7. CHANGE OF CUSTOMS TARIFF CLASSIFICATION

The guidelines for the application of the Revised Kyoto Convention state that a PCA should generally be conducted for compliance verification purposes in the areas of, inter alia, tariff classification (World Customs Organization 2000, 22). The possibility of the post-release control of the tariff classification is also recognized in theory (Clark 2017, 55).

The Serbian CA follows the same approach: it changes the tariff classification, as in the cases described in Section 2.

[21] Zakon o inspekcijskom nadzoru [Law on Inspection Supervision], *Official Gazette of the Republic of Serbia*, Nos. 36/2015, 44/2018 and 95/2018.

Nevertheless, one must ask oneself *whether changing the tariff classification*[22] *should be allowed and under what circumstances*. What should be the consequences? How should the conflict between this possibility and the need for legal certainty be resolved?

To begin answering these questions, one should start with the interpretation of the purpose of the PCA. Article 2, para. 1, it. 4 of the CL stipulates that the CA shall aim to maintain a *proper balance between customs controls and facilitation of legitimate trade*. Accordingly, the goal of the PCA is to enable the CA to release goods as soon as possible, while at the same time retaining the option of subsequently rectifing errors that might occur. This goal is unquestionably justified.

However, the consequent decrease of the quality of work and responsibility of the CA has questionable justification.

Namely, as was elaborated in the introduction, it is not possible nor opportune for the CA to control each consignment of goods. To be precise, it is not possible and opportune to control the reported type, quantity and quality of each consignment of goods. No customs authority in the world has the necessary human and technical resources for such an undertaking. The same presumably applies to the control of the classification of goods provided by importers/exporters in customs declarations.

Nevertheless, there are *two important differences between the control of the type, quality and quantity of goods,* on the one hand, and *the control of the classification of goods*, on the other. Firstly, the control of the former requires the actual border search of the transport vehicles and goods, while the latter necessitates only desk control of customs declarations. The second difference is in the realm of administrative law. Determination of the exact type, quality and quantity of imported or exported goods represents establishment of the facts of the case in administrative proceedings. Classifying the goods within the Customs Tariff represents administrative law decision-making, i.e. legal qualification of the established facts.

The fact that the classification of goods represents the legal qualification of the determined facts of the case has two consequences.

The first consequence is the application of the principle of finality (*ne bis in idem*), i.e. the duty of the CA to utilize adequate legal remedies to remove accepted customs declarations. Unfortunately, given the fact that the CA does

[22] The same applies to the matter of origin and preferential treatment of goods, but we focused here only on the tariff classification due to the fact that it was the subject of a PCA in the two cases mentioned in Section 2.

not respect the *ne bis in idem* rule of administrative procedure (see Section 5 *supra*), a major logical discrepancy arises. Specifically, the party that *obtained binding tariff information* (CL Arts. 23 and 24) *has better legal protection* than the party that actually imported/exported the goods. According to CL Art. 24, para. 11, if binding tariff information is revoked due to, among other reasons, the change of the tariff interpretation (i.e. change of internal acts), such information may still be used in respect to binding contracts that were based upon it and were concluded before it ceased to be valid or was revoked. We saw that when the interpretation related to the classification of collection albums and stickers changed, importers that had already cleared the products, were subsequently controlled, charged additional tariffs, and sanctioned for a misdemeanor.

The second consequence is the *de facto* introduction of a *notification system* in customs proceedings. This is a system in which the parties are responsible for compliance with the law and they notify the authorities of the way they interpreted and applied the law, while the administration retains the power to subsequently decide on the matter. In practice, by failing to properly apply the LGAP (as well as the CL), the CA operates essentially in a manner similar to a notification system. It transfers its responsibility for administrative law decision-making to the parties by not controlling the goods classification before the acceptance of customs declarations. Parties take on the risk of appropriate classification and must live with the fact that the CA can change its opinion, change its internal interpretative acts, and charge an additional tariff. One must also take into account the potential for abuse of power here. The administration, i.e. the State, could potentially use this possibility for gathering additional revenue when needed. All it has to do is change its interpretation of the Customs Tariff. This resembles the sword of Damocles over the importers' heads.

Classifying goods within a customs tariff is not always an easy task. For instance, the case law of the European Court of Justice demonstrates just how difficult this issue can be in practice (Đorđević, Jovanović 2019a, 50–61). Furthermore, the case described in Section 2, concerning pneumatic tire protectors can also serve as evidence. Classification in that case required very sophisticated knowledge of chemistry and production technology. The reason (as understood by the author) for re-classification of the goods was the different method of application of the protector to the tire. In one case it was a "cold process", while in the other it required heating of the protector. Be as it may, it would be unreasonable to expect the CA border employee to have the necessary knowledge for its proper tariff classification.

On the other hand, there are cases in which classification is not so difficult, yet the CA still resorted to re-classification. The other case described in

Section 2 can substantiate such an assertion. Namely, the CA changed the tariff classification of the stickers with the explanation that it realized from the contracts concluded after the release of the goods that the stickers and collection albums were sold separately. This is a completely different situation. Even children collecting stickers understand that the collection albums and the stickers are sold separately and that the total number of stickers exceeds the total number of empty slots in the collection albums. This is the whole point of collecting the stickers and swapping them.

Having presented criticism, we must change the standpoint and admit that even control of only the classification of goods in each and every customs declaration at the border is not feasible for the Serbian CA, taking into account its human and technical resources. Nonetheless, this problem has to be recognized and, in our opinion, *a better balance between the competing interests has to be found*. Shifting full responsibility to parties is not a sound legal choice. In the concluding section we will offer a potential solution, which might ameliorate the situation.

8. CONCLUDING REMARKS AND A POTENTIAL WAY FORWARD

The legislative regulation and the practice of the PCA in Serbia are in breach of several basic administrative law principles: the principle of truth, transparency of administrative work, the principle of aiding the party, and the principle of finality of administrative acts (*ne bis in idem*). The time limit for its realization is not defined properly. The CA fails to utilize adequate legal mechanisms (remedies) when removing accepted customs declarations that contain incorrect or incomplete information. The legal certainty is seriously threatened by the fact that the CA changes its interpretations of the Customs Tariff (internal interpretative acts) and then controls and sanctions the importers/exporters who had acted in accordance with the previous interpretation. All the mentioned infringements of the administrative and customs law stem from four issues: 1) the CA does not publish its internal acts, used for interpretation of Customs Tariff; 2) the CA changes its interpretations and does not take responsibility for the change; 3) the CA fails to use legal remedies prescribed by the CL and the LGAP when conducting PCAs; and 4) the time limit for conducting PCA is prescribed inadequately.

The solution for the first three issues is proper application of existing legislation. The CA should publish all its internal acts used in the interpretation of the Customs Tariff. If an interpretation has to change, e.g. because of a judgment handed down by the Administrative Court (CL Art. 24, para. 9, it. 2), the State should take responsibility and not quash administrative acts

(accepted customs declarations) on that basis. If necessary, the CA should only remove them for the future (*ex nunc*). When removing accepted customs declarations due to incorrect or incomplete information contained within them, the CA should use adequate legal remedies, prescribed by the CL and the LGAP.

As to the fourth issue, a strict time limit for the realization of PCA should be prescribed in the CL and it should be applied directly to the PCA. The shorter the time limit, the better for the parties and legal certainty.

These amendments to the practice and regulation of the customs proceeding would increase legal certainty and strike a finer balance between the engaged interest of the State and the parties.

Finally, the Serbian CA treats the classification of the goods contained in customs declarations as any other, factual information (type, quality and quantity of the goods) and does not control it before clearance, even when this is possible. We cannot equate this with mentioned breaches of law, since all customs authorities in the world acts in the same manner, and international conventions, such as the Revised Kyoto Convention, do not forbid such behavior. Nevertheless, we can point out this as an issue. Also, the lack of will to ameliorate the situation cannot serve as an example of good administration. Giving parties a false sense of legal certainty and then not refraining from changing the goods classification and charging additional tariffs, reminds us of an old Mickey Mouse comics, in which Scrooge McDuck, Donald Duck's wealthy uncle, *allows the audience to enter the cinema for free, but once the movie ends charges them to exit*.

How then might the customs authorities deal with the issue of classification, given their workload? One way is to rely on information and communication technologies (ICT) to compensate the deficiency of human resources. Namely, the Revised Kyoto Convention stipulates that the Customs shall use information technology and electronic commerce to the greatest possible extent to enhance Customs control (Standard 6.9 of the General Annex).

One solution is the *application of software* that would be largely filled out by the importers/exporters. The software would allow the parties to submit electronic customs declarations and at the same time assist them in the process.[23] In addition to the type of the goods, the software should contain information regarding particular makes and models of the

[23] This type of software is called a *legal expert system*. Among other things, legal expert systems help public authorities make decision, as well as parties in legal proceedings by providing legal advice or an estimate of success in a proceeding.

product. Each time a company wants to import/export a good, the system would indicate whether that particular product was already imported/exported and how it was classified. Additionally, the system should indicate whether the classification had been verified by the CA. If it had been, then the party would be protected as if abiding by a published interpretation of the Customs Tariff. If not, then the party would be aware of the risk that this entails. On the other hand, if a product is imported/exported for the first time, the software should raise a red flag to warn the CA to check and verify the classification of the goods as soon as possible. Furthermore, the software could help the CA by applying the algorithms prioritizing PCAs for particular consignments. Such an algorithm should take into account the fact whether the product was imported/exported for the first time, how many consignments there have been, what is their overall value, etc. Differently put, the software should give precedence to the cases in which the state stands to lose the most, if a party deliberately misclassified the goods to a lower tariff or in which the importer/exporter stands to lose the most due to unintentional misclassification.

Introducing such a software would *not require increasing human resources* and would allow for better use of the existing ones. In addition, it would *increase the level of legal certainty, decrease compliance costs, and abolish forwarders monopoly*.

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