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Customs and Monopolies Agency

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THE EPPO WORKING ARRANGEMENTS WITH CUSTOMS AND MONOPOLIES AGENCY (ADM)

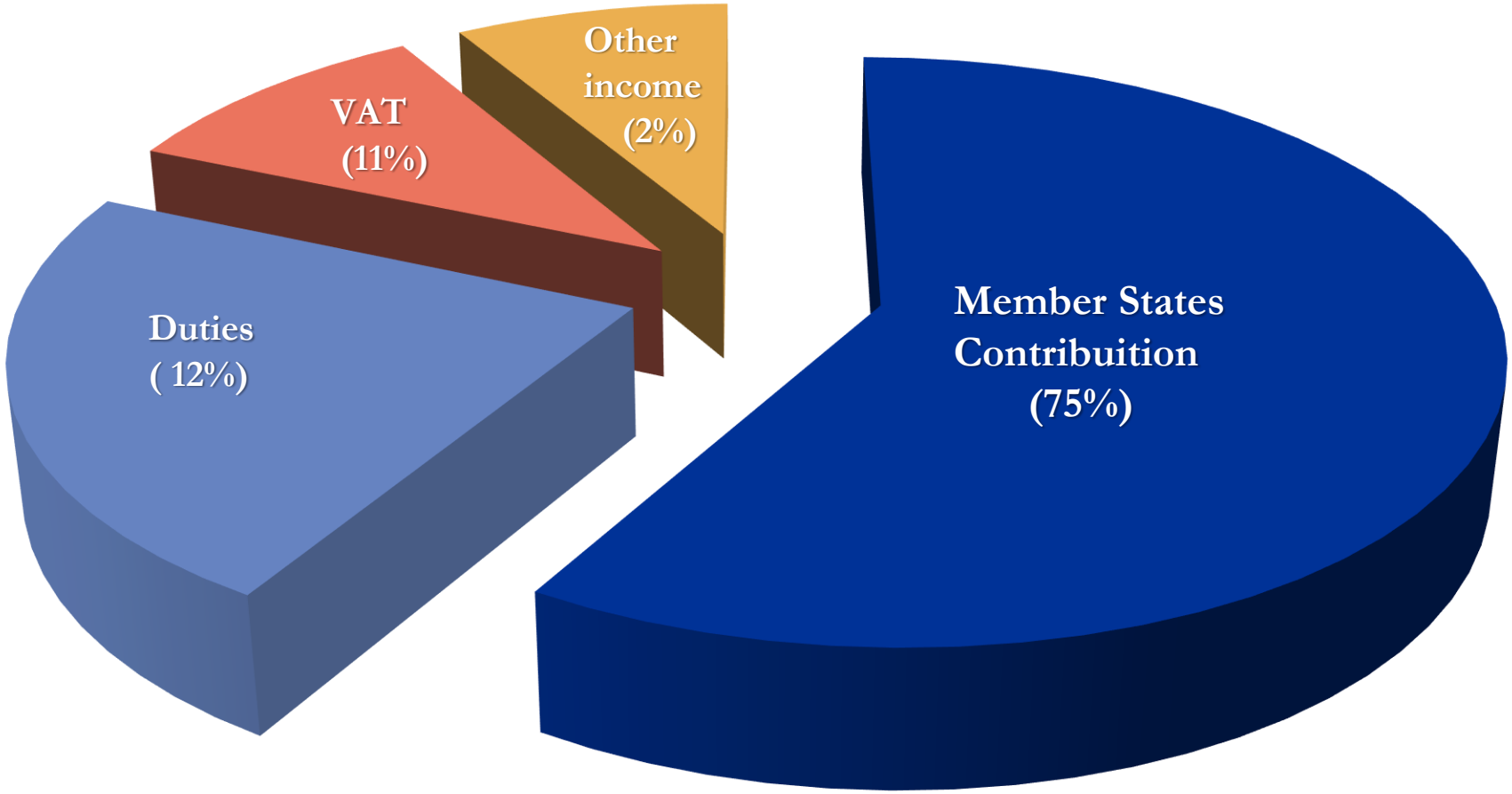
The European Public Prosecutor's Office

For the implementation of policies suitable for achieving its goals, the European Union cannot disregard the protection of financial interests which in other words means:

- proper revenue collection
- careful management of budget expenditure
- timely recovery of unduly paid sums

The European Court of Auditors,, in the special annual report no. 1 of 2019, highlighted that the approach according to which OLAF initiates administrative investigations after receiving information from other sources on alleged frauds, are often followed by criminal investigations at national level, which require a lot of time, reducing thus the chances of obtaining the prosecution of the crimes. Indeed, it follows that OLAF investigations result in the prosecution of suspected perpetrators of fraud in approximately 45 % of cases. On the other hand, as regards the recovery of EU funds, in some cases OLAF's final reports do not provide sufficient information to initiate the recovery of unduly paid funds. Therefore, the European Court of Auditors also considered that the establishment of the European Public Prosecutor's Office represents a step in the right direction for a more effective protection of the financial interests of the Union.

In this context, the European Public Prosecutor's Office was established, with the task of making the prosecution of crimes that damage the Union budget more efficient.


Other income (2%)
VAT (11%)
Duties (12%)
Member States Contribuition (75%)

The European Public Prosecutor's Office

The system of protection of financial interests is mainly based on the following articles of the TFEU :

- art. 86 which establishes “To combat crimes affecting the financial interests of the Union, the Council, acting through regulations according to a special legislative procedure, can establish a European Public Prosecutor's Office starting from Eurojust".

- art. 325 which requires the Union and the Member States to combat "fraud and other illegal activities affecting the Union's financial interests by means of measures ... which are dissuasive and such as to allow effective protection in the Member States". In paragraph 2 of the same article 325, the fundamental "principle of assimilation" is set out which requires member countries to adopt, to counter fraud that damages the financial interests of the Union, the same measures adopted to repress violations harmful to their own interests internal finances. Paragraph 3, on the other hand, provides for the "principle of collaboration", by virtue of which the States agree on action to protect the Union's financial interests against fraud, organizing with the Commission, intense and regular cooperation between the competent of the respective Administrations.

Regulatory acts adopted by the EU legislator

The Union legislator, pursuant to art. 86 of the TFEU, established the European Public Prosecutor's Office to protect interests finances of the Union and to this end has approved the following acts:

- **EU regulation n. 1939/2017 which established the European Public Prosecutor's Office**
- **EU directive n. 1371/2017 (PIF) which contains rules concerning the definition of crimes affecting the Union's financial interests, sanctions and penal measures**
- **Implementing Decision (UE) n. 856/2021 with which the European Commission has established that the functioning of the European Public Prosecutor's Office starts from 1st June 2021**

Regulatory acts adopted by the National legislator

- Legislative Decree n. 9/2021 of operational adaptation to Reg. UE n. 1939/2017
- Legislative Decree n. 75/2020 which implemented the EU Directive n. 1371/2017 (PIF)
- Legislative Decree n. 156/2022 corrective and supplementary to the Legislative Decree n. 75/2020

Member States that have not joined the European Public Prosecutor's Office

The European Union is composed of 27 MS of which 22 have joined the institution of the European Public Prosecutor's Office while two MS have not yet appointed their European Public Prosecutors (EPP) Delegati Europei (PED)

M.S. who have not joined.
Denmark
Ireland
Poland
Hungary
Sweden

S.M who have not Deputy European Prosecutors
Finland
Slovenia

Strengthenend cooperation on the establishment of the European Public Prosecutor's Office

On 3 April 2017, Belgium, Bulgaria, Cyprus, Croatia, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Czech Republic, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission of their wish to establish enhanced cooperation on the establishment of the EPPO.

Enhanced cooperation (art. 20 TEU and artt. 326-334 TFEU) is a procedure that allows a minimum of nine MS to establish cooperation in matters that do not fall within the exclusive competence of the EU.

Enhanced cooperation is designed to promote the achievement of the Union's objectives, protect its interests and to strengthen its integration process. They are open at any time to all Member States.

Differences between the European Public Prosecutor's Office and Eurojust

- **Functional**: the European Public Prosecutor's Office is an investigative judiciary that conducts investigations on its own while Eurojust is a body coordinating investigations conducted by national judicial authorities

- Competence *ratione materiae* : the European Public Prosecutor's Office is competent for crimes that harm the financial interests of the EU provided for by the PIF Directive, these crimes are not necessarily of a transnational nature, as they can also have a purely national character; Eurojust, on the other hand, is responsible for all forms of transnational crime, such as terrorist crimes, drug trafficking; migrant trafficking; crime in the nuclear and radioactive materials sector; racism and xenophobia etc.

- Competence by territory: Countries adhering to Eurojust are more numerous than those adhering to the European Public Prosecutor's Office *(Ireland, Hungary, Poland, Sweden and Denmark have not joined EPPO, Denmark, in truth, has not even joined the Eurojust initiative although, in October 2019 formed an agreement with Eurojust and has a representative at Eurojust)*

Eurojust does not exercise its competences regarding the forms of crime for which the European Public Prosecutor's Office proceeds, except at the request of EPPO (art. 3 Reg. EU 2018/1727 and art. 3 and 100 of the EU Reg. n. 1939/2017)

EU Directive n. 1371/2017 (PIF)

The protection of the financial interests of the Union must take place in a uniform way in all MS, therefore it essential proceed with a harmonization of the criminal law of the Member States

EU Directive n. 1371/2017 (PIF) represents the first step towards the harmonization of criminal legislation of the MS and the creation of a Union criminal law concerning crimes affecting financial interests of the Union.

In fact, he directive contains rules concerning the definition of offenses affecting the Union's financial interests, penal sanctions and measures

Principles introduced by EU Directive n. 1371/2017 (PIF)

- Concept of serious crime for VAT purposes = when the crime is committed in two or more Member States with a total damage of at least 10 million euros (art. 2 par. 2 PIF Directive)

- Concept of serious crime for the purposes of own resources other than VAT = when the damage or advantage exceeds 100 thousand euros (art. 7 par. 3 PIF Directive)

- Concept of non-serious crime = when the damage or advantage is less than 10 thousand euros (art. 7 par. 4 PIF Directive) in these cases the MS can also apply administrative sanctions

- Characteristics of criminal sanctions = effective – proportionate – dissuasive

- Punishability as attempted VAT declaratory offenses when the offense is committed in two or more Member States with a total damage of at least 10 million euros (art. 5 par. 2 PIF Directive)

- Determination of the penalty = PIF offenses must be punished with a maximum penalty including imprisonment and in case they are serious offenses the maximum penalty cannot be less than 4 years of imprisonment (art. 7 para. 2 and 3 PIF Directive)

Penal measures introduced by EU Directive n. 1371/2017 (PIF)

- Liability of legal persons for crimes relating to VAT and for smuggling that damage the financial interests of the EU (articles 9 of the PIF Directive - 25 quinquesdecies and sexiesdecies of Legislative Decree n. 231/2001)

- Confiscation by equivalent for crimes relating to VAT (art. 12bis Legislative Decree n. 74/2000) and for smuggling (art. 301 Tuld) which harm the financial interests of the EU (art. 9 PIF Directive)

- Confiscation by disproportionate for crimes relating to VAT (art. 12 ter D.Lgs n. 74/2000) and for smuggling (art. 301 Tuld) which harm the financial interests of the EU (artt. 9 Direttiva PIF)

Procedural Changes (Decreto Legislative Decree n. 9/2021 of operational adjustment to Reg. UE n. 1939/2017)

- Double track of crime reports
- Right of recall that PEDs can exercise within 30 days of presentation of the news of the crime
- Compilation *report crime*
- Single territory for criminal purposes (PEDs do not resort to letters of rogatory or the European investigation order but carry out investigative activities directly)

Calculation for exceeding the threshold envisaged for transnational crimes in the field of VAT falling within the competence of the EPPO

The articles 22 of the EU Reg. n. 1939/2017 and 2 of the PIF Directive in determining the competence of the European Public Prosecutor's Office in dealing with transnational crimes in the field of VAT, refers to the notion of overall damage.

Therefore, for the purpose of calculating the achievement of the 10 million euro threshold, it is not necessary to take the single tax period as a reference but to add up the tax evaded for all the tax years and in all the countries involved.

Jurisdiction in case of connection of crimes (principle of the crime + serious)

The art. 22 of the EU Reg. n. 1939/2017 provides that the European Public Prosecutor's Office is also competent for any other crime inextricably connected to criminal conduct falling within the scope of application of paragraph 1 of this article. Jurisdiction regarding these crimes can only be exercised in accordance with article 25, paragraph 3 of EU Reg. n. 1939/2017.

The jurisdiction by connection is realized only in the event that the so-called crime PIF is punished more severely than the national offence, unless the latter offense was instrumental in the commission of the PIF offense.

Pursuant to art. 12 c.p.p., there is a connection of proceedings in the hypothesis of competition or if several people with independent negligent conduct have carried out the event; in the event of formal complicity or continued offence; or in the event that the offense was committed to carry out or conceal another.

Jurisdiction of crimes (principle of greater damage)

The European Public Prosecutor's Office does not exercise competence when there is reason to assume that the actual or potential damage to the financial interests of the Union caused by a so-called crime PIF does not exceed the actual or potential damage caused to another victim (art. 25, paragraph 3 letter b EU Reg. n. 1939/2017)

This rule applies to revenue other than own resources from VAT.

The EPPO may, with the consent of the competent national authorities, exercise its competence in cases in which it would be excluded as a result of the application of the rule of major damage (provided for in articles 22, paragraph 3, letter b and 25 of EU Reg. n. 1939/2017), if the EPPO is in a better position to carry out investigations or prosecute.

Jurisdiction of offenses (criminal organization)

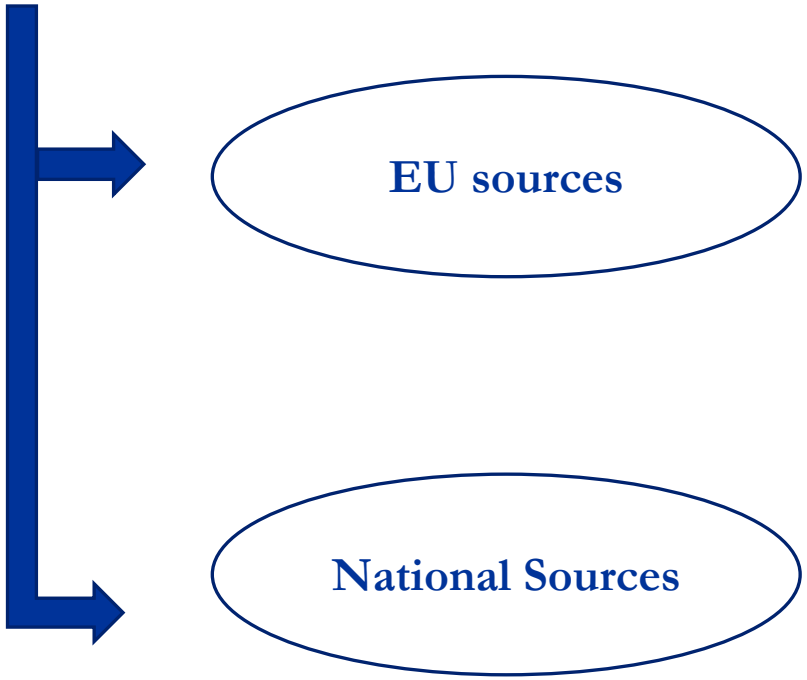
The European Public Prosecutor's Office is also competent for offenses relating to participation in a criminal organization defined in Framework Decision 2008/841/JHA, as implemented by national law, if the criminal activity of that criminal organization is centered on the commission of one of the offenses CD. PIF (art. 22, paragraph 3 lett. EU Reg. n. 1939/2017)

- "Criminal organization" means a structured association of more than two persons, established for some time, which acts in a concerted manner for the purpose of committing offenses punishable by a custodial sentence or a custodial security measure of no less than four years or a more serious penalty to obtain, directly or indirectly, a financial or other material advantage;

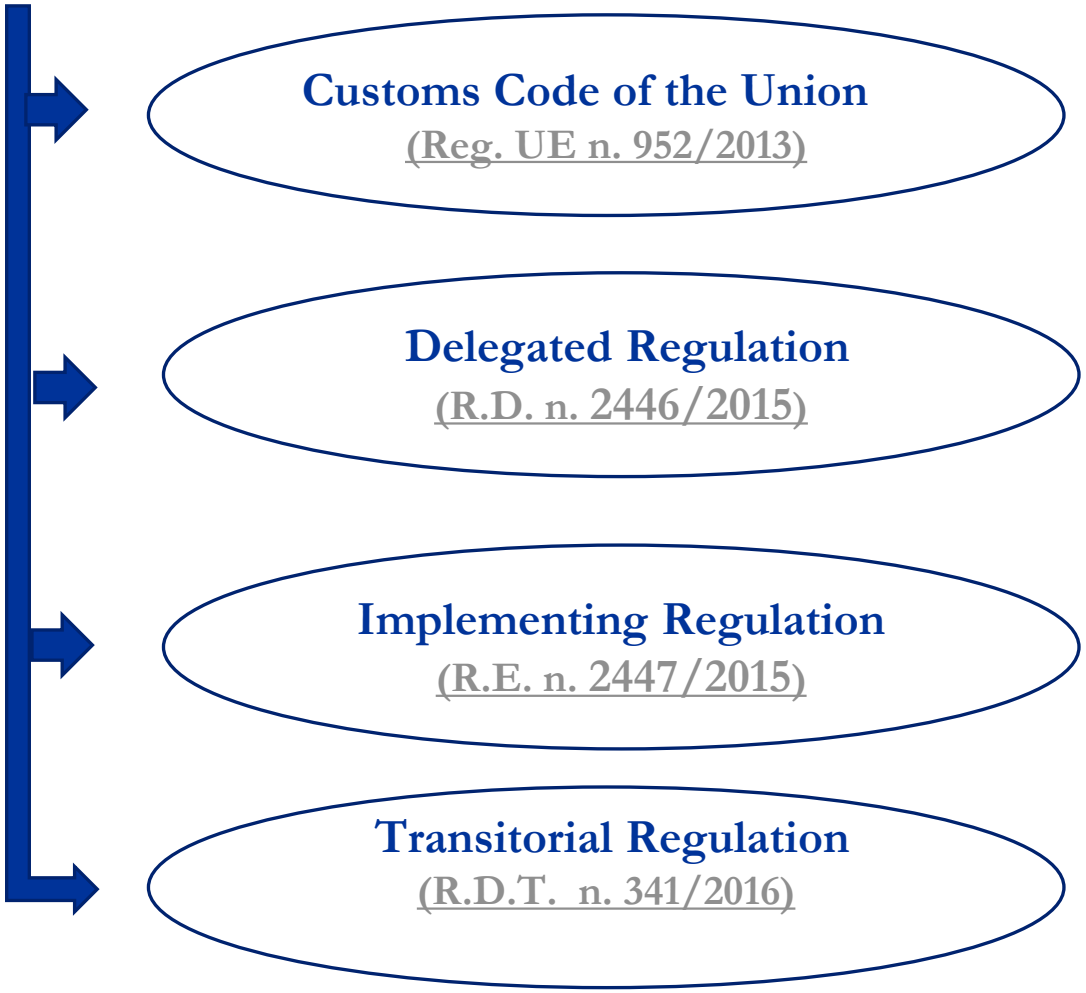
- By "structured association" we mean an association which was not formed by chance for the impromptu commission of a crime and which does not necessarily have to provide for formally defined roles for its members, continuity in the composition or an articulated structure.

Legal sources in customs matters

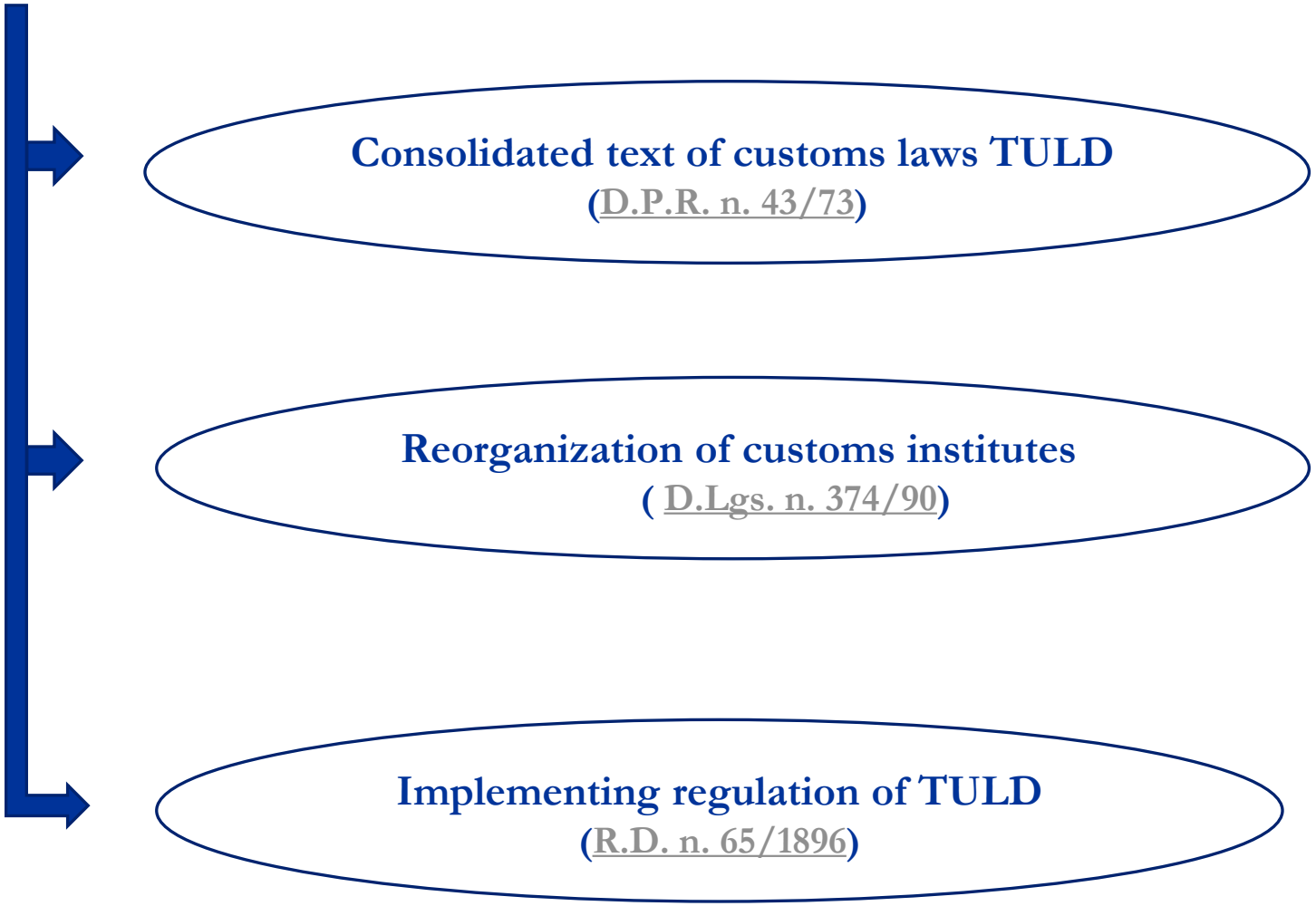
The legal sources are structured on two levels



Union Legal Sources



National Legal Sources



The institutional duties of Customs Authorities (Article 3 of the Union Customs Code)

Customs authorities have primary responsibility for supervising international trade so as to contribute to free and fair trade, the implementation of the external aspects of the internal market, the common commercial policy and other common Union policies relating to trade and security of the entire logistics chain.

The customs authorities implement measures aimed in particular at the following objectives:

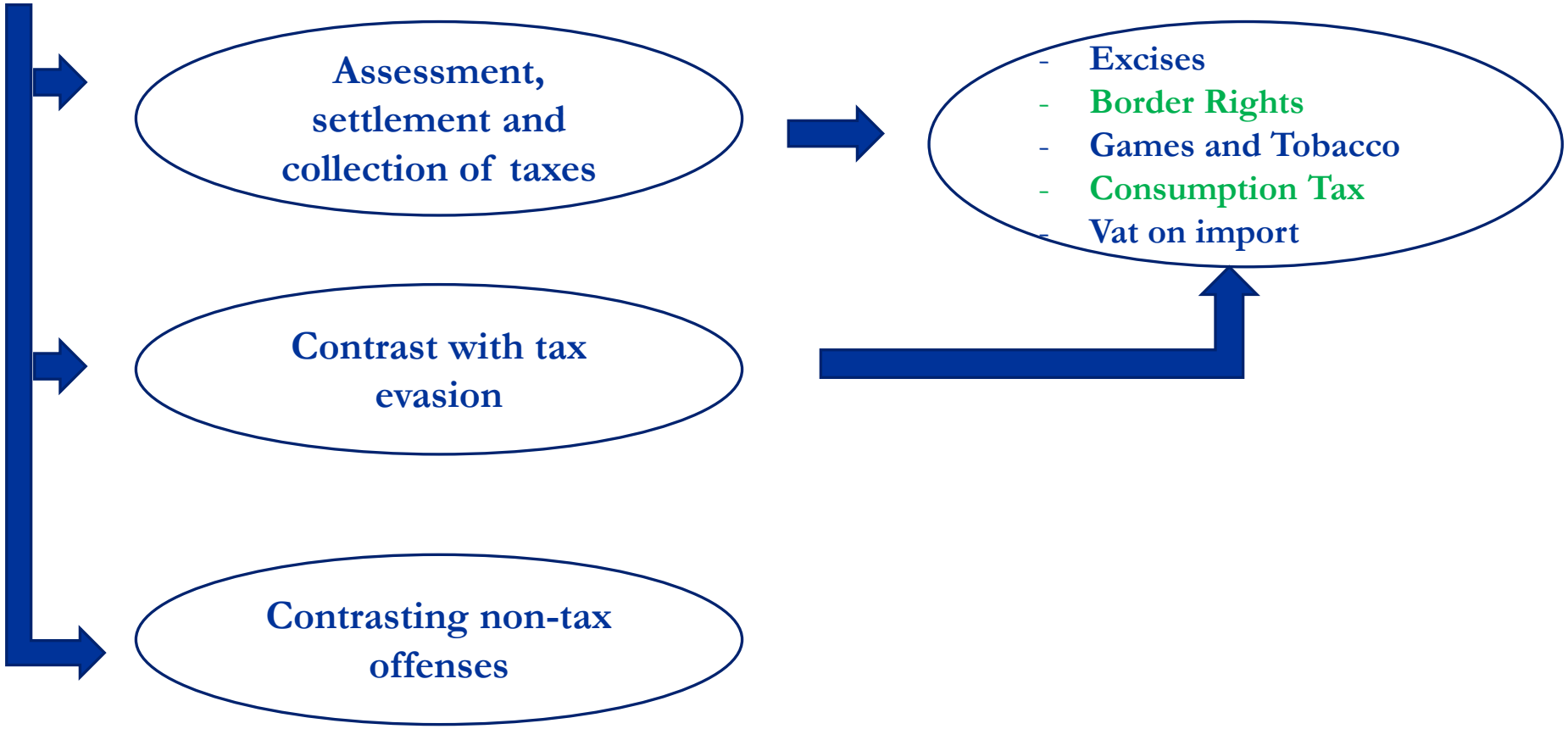
a) Protect the financial interests of the Union and its Member States

b) Protecting the Union from unfair and illegal trade while supporting legitimate business activities;

c) Ensure the safety of the Union and its residents as well as the protection of the environment, where necessary in close cooperation with other authorities;

d) Maintain an appropriate balance between customs controls and legitimate trade facilitation.

The institutional duties of the Italian Customs



Contrast to non-tax crimes

Currency controls (Reg. n. 1889/2005 and Legislative Decree n. 195/2008); Weapons, armaments and dual-use materials (EEC Reg. n. 428/09 and n. 961/10); Counterfeit goods (EU Reg. n. 608/13); Goods that violate the rules of Made in Italy (Law n.350/03 and 135/09); Protection of goods from false or misleading indications of origin (Madrid Agreement of 10/31/1958); Protection of unsafe products (EU Reg. n.765/08); Waste (Reg. n. 1013/2006 and Legislative Decree 152/2006); Psychotropic substances, narcotics and precursors (Presidential Decree n. 309/90); Artistic heritage (EEC Reg. n. 3911/12 and Legislative Decree n. 42/2004); Specimens of endangered fauna and flora protected by the CITES Convention (Reg. CEE n. 338/97).

Health checks

The EPPO and DNA- DDA Relations Office

The EPPO and DNA- DDA Relations Office is part of the Agency's Anti-Fraud Directorate and was set up to handle relations with the European Public Prosecutor's Office (EPPO) and coordinate the Agency's territorial structures, in consideration of the fact that the collection of the duty, the fight against smuggling and intra-community VAT fraud are among the priority institutional objectives of the Agency.

The establishment of the EPPO Office guarantees the maximum commitment in terms of effectiveness and efficiency of the Agency in carrying out the investigative activities aimed at the prosecution of crimes affecting the financial interests of the Union.

Cooperation agreement between European Public Prosecutor's Office and ADM

In addition to the execution of judicial police mandates, the European Public Prosecutor's Office and the Agency engage in the following activities:

a) promote discussion on interpretative profiles connected to issues of operational interest;
b) identify the cases generating damage to the Union's own resources that present significant profiles and greater recurrence for the purposes of the analyzes routinely carried out by the Agency;
c) deepen individual investigative contexts, with particular regard to fraud against the European Union and crimes against the EU's own resources;
d) agree on the organization of reciprocal training activities in matters of common interest, also through the planning of conventions, conferences and seminars, encouraging the participation of its representatives, also in order to carry out projects, studies, research and analyzes on topics of common interest;
e) share the possible distribution of joint press releases, in relation to the common planning or training activities undertaken at a central level;
f) further forms of collaboration to be developed in compliance with the powers assigned by current legislation.

Topic addressed

Application of administrative sanctions in the assessment of duties and VAT evaded in cases in which the European Public Prosecutor has opened a criminal proceeding (*ne bis in idem*)

Application of administrative sanctions in the assessment of duties and VAT evaded in cases in which the European Public Prosecutor has opened a criminal proceeding (*ne bis in idem*)

The ne bis in idem principle was born in the penal sphere as a safeguard placed to protect individual freedom, providing for the prohibition of double judgment or prohibition of double sanction. This principle in the European context finds its foundation in the following articles:

- art. 4 prot. 7 European Convention on Human Rights: << No one may be prosecuted or convicted under the jurisdiction of the same State for an offense for which he has already been acquitted or convicted following a final judgment in accordance with the law and criminal procedure of that State Status >>

- art. 50 Charter of Fundamental Rights of the European Union:<<No one can be prosecuted or convicted of a crime for which he has already been acquitted or convicted>>

The national penal provision which provides for the ne bis in idem prohibition is art. 649 c.p.p. : <<The defendant acquitted or convicted with a sentence or penal decree that has become irrevocable cannot be subjected to criminal proceedings again for the same fact, not even if this is considered differently for the title, for the degree or for the circumstances, without prejudice to the provisions of articles 69, paragraph 2 and 345>>

Principle ne bis in idem first jurisprudential orientation European Court of Human Rights

The European Court of Human Rights with the sentence nos. 18460/2010 (so-called Big Stevens) reaffirmed that the choice of a national legal system to apply an administrative sanction, with an afflictive and deterrent nature, and a criminal sanction for the same violation against the person is in contrast with the ne bis in idem rule . In practice, the Court does not absolutely exclude the possibility of competition between a tax penalty and a criminal penalty, however the criminal nature of a penalty does not depend on the classification conferred by national law, but on the nature of the penalty itself as well as on the degree of severity of the itself.

The European Court of Human Rights uses a notion When a sanction has a punitive, dissuasive and particularly afflictive nature, it has the nature of a criminal sanction regardless of the legal classification used by national legislation. With a dating sentence dated 8 June 1976, case no. 5100/71, Engel and Others v. the Netherlands, the ECtHR has enumerated the three alternative criteria that characterize a criminal sanction:

1) Qualification of criminal sanction in domestic law

2) Nature of the sanction which must be punitive and deterrent and not compensatory

3) Degree of severity of the fine

Principle ne bis in idem according to the jurisprudential orientation of the European Court of Human Rights

In 2016 the European Court of Human Rights with the sentences nos. 24130/2011 and 29758/11 (A and B v. Norway) better clarified its orientation, stating that the ne bis in idem principle is not violated in the event that a criminal trial is held despite the fact that the defendant for the same fact has already been administratively sanctioned with provision and/or final sentence on condition that the two proceedings are sufficiently connected both in terms of time and material (sufficiently closely connected in substance and time), so as to be considered a single integrated system.

The temporal link does not necessarily mean simultaneity of the procedures but that they are consecutive, to avoid uncertainty, delay and excessive length of the definition times.

The material connection instead exists when:

a) the two proceedings pursue complementary purposes, relating to the same conduct (the administrative proceeding must have a compensatory purpose, the criminal one a punitive purpose);
b) the predictability of the application of a cumulative sentence for the same conduct;
c) coordination and interaction of the two proceedings and therefore of the possibility of circulation of evidence;
d) the second sanction must take into account the one already inflicted to ensure proportionality between the conduct and the overall sanction

Principle ne bis in idem according to the jurisprudential orientation of the European Court of Justice

The European Court of Justice, invested by some Italian judges with a preliminary question regarding the interpretation of art. 50 Charter of Fundamental Rights of the European Union has pronounced important decisions (Joined Cases C- 524/15 Menci; C-537/16 Garlsonn; C- 596/16 Di Puma and C-597/16 Zecca).
In these judgments, the Court observed that the ne bis in idem principle may be subject to limitations, pursuant to art. 52 par. 1 Charter of Fundamental Rights of the European Union, provided that the two procedures (criminal and administrative):

a) respect the principle of proportionality;
b) have complementary purposes;
c) clear and precise rules are envisaged such as to make recourse to a two-track system of penalties foreseeable;
d) are such as to ensure coordination between the two proceedings

The Court of Justice cannot intervene on national events and therefore it is up to the national judge to verify compliance with the required requirements, bearing in mind that the application of the penal sanction should punish this crime in an effective, proportionate and dissuasive manner, with the consequence that a further sanction would involve between the seriousness of the offense committed and the sanctioning treatment applied.

Principle ne bis in idem according to the jurisprudential orientation of the Court of Cassation and the Constitutional Court

The Court of Cassation shared the principles set out by the European Court of Justice stating that it is up to the national judge to assess the proportionality of the cumulative sanctions, considering the penal sanction prevailing and admitting the opportunity not to apply the administrative sanction (Criminal Cassation sentence n. 45829/2018)

Even the Constitutional Court was faced with the question of the legitimacy of the constitution of art. 649 of the Code of Criminal Procedure, by contrast with the art. 117 of the Constitution, c. 1 , in relation to art. 4, Prot. 7 of the ECHR, raised by the Court of Monza, where it does not prohibit a criminal trial against a person who has already been definitively sentenced to an administrative sanction of a criminal nature (art. 13, c. 1 Legislative Decree . n. 471/97 and art. 10 ter - Legislative Decree n. 74/2000)

The Court with order n. 114/2020 declared the question of constitutional legitimacy inadmissible because the referring judge did not demonstrate the non-compliance of the contested discipline with the criteria set out by European jurisprudence.

Material connection between criminal and administrative proceedings (contrasting theses)

The reasons for the first thesis that supports the connection between the two procedures are:

1) Reward mechanisms (such as non-punishment) in the event of voluntary repayment of the debt and administrative sanctions (article 13 of Legislative Decree n. 74/2000)

2) The positive effects of debt payment on confiscation (art. 12 bis of Legislative Decree n. 74/2000)

3) The possibility of using the investigative findings carried out in criminal proceedings for tax purposes (article 63 of Presidential Decree n. 633/72)

Material connection between criminal and administrative proceedings (contrasting theses)

The reasons for the second thesis that supports the non-connection between the two procedures are:

1) Autonomy and separation of the two proceedings (article 20 of Legislative Decree no. 74/2000) : *<<The administrative assessment procedure and the tax trial cannot be suspended due to the pending criminal proceedings concerning the same facts or facts from which however, the verification depends on the relative definition>>*

2) Principle of special sanctioning in VAT matters (art. 19 Legislative Decree n. 74/2000): *<<When the same fact is joined by one of the provisions of title II and by a provision which provides for an administrative sanction, the special provision applies >>*

4) Reserve clause on customs sanctions (art. 303 of the TULD in the case of importation): *<<If the overall border duties due according to the assessment are greater than those calculated on the basis of the declaration and the difference in duties exceeds five per one hundred, the administrative sanction, if the fact does* not constitute a more serious offence, is applied as follows…>>

5) Lack of circulation of evidence between the two proceedings (evidence acquired in tax proceedings cannot be used in criminal proceedings because they were acquired without the defense guarantees provided for in criminal proceedings)

End of presentation

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