Custom Duties and VAT in the EU

1. General Introduction

In the EU, one of the main purposes of customs duties is to protect EU producers of goods from foreign competition (i.e. goods from non-EU countries) by levying a tax on imported goods (so-called safeguard duties); such a tax is therefore not levied on goods produced in the EU.

Custom duties are therefore only levied once - as part of an import of goods from non-EU countries. The purpose of generating revenue (so-called financial duties), on the other hand, is of secondary importance for the member states, as 75% of the duties levied go to the EU budget and 25% to the respective levying member state.

Another important aspect of the European customs tariff is the possibility for the EU to conclude preferential agreements with third countries in order to bring about a mutual reduction in customs duties and economic integration (free trade and customs union agreements). In addition, the EU grants autonomous tariff suspensions and tariff quotas for goods that are needed by EU producers (and which are not available in the EU or not in sufficient quantities), as well as autonomous tariff preferences for developing countries (trade instead of aid). None of this would be possible without the existence of a customs tariff for goods from non-EU countries.

Another additional purpose of customs law is to protect the security of the international supply chain. In particular, the institute of the "Authorized Economic Operator (AEO)" was created for this purpose, and risk analyses and risk management were implemented in customs law.

The purpose of VAT and special excise duty, on the other hand, is to generate revenue for the public budget. In the case of customs duties and VAT, this applies to all goods; in the case of special excise duties, it only applies to certain specific goods. In addition, VAT also covers services.

2. Incurrence of Custom Duty and VAT

In customs law, importation is not linked to the incurrence of a customs debt; rather, non-Union goods are subject to customs supervision when they are brought across the border. Only the customs debt concept of unlawful entry into the customs territory of the Union in Art. 201 of the Custom Code (hereinafter as: "**CC**") refers the import to the customs claim of the state, which, in accordance with the economic customs concept, is linked to the immediate or imminent entry of a good into the economic cycle.

Art. 203 CC regulates the withdrawal of non-Union goods from customs supervision. According to the prevailing opinion in Germany and Austria, EU VAT always follows the customs debt, even in the case of irregular customs debts. Accordingly, the EUSt is a type of customs duty. However, this traditional view is not tenable because the import of goods constitutes a transaction under the VAT Directive and the import must be taxable in the sense of actual domestic use. This is required by the excise nature of VAT, which does not provide for customs supervision or security, which is characteristic of customs law. Importation is the release for free circulation of goods, in the sense that the goods have actually entered the economic cycle for domestic use.

3. Deduction of Import VAT

According to Art. 15 Section 1 Subsection 2 UStG or Art. 12 Section 1 Subsection 2 lit. a) Austrian UStG, the right to deduct input VAT requires that the VAT has been paid. This is opposed by Art. 168 lit. e) of the VAT Directive, because according to this, the import VAT only needs to be owed. In the Veleclair case judgment (ECJ of 29.03.2012, C-414/10), the ECJ ruled that the German (and Austrian) requirement of payment of VAT contradicts the VAT Directive and is therefore inapplicable.

The VAT Directive does not require the import VAT to be paid before it can be reclaimed through deduction. Its core reasoning is as follows: "The rules on the deduction of import VAT are intended to relieve traders completely

of the VAT due or paid in the course of their economic activity. The common system of VAT therefore ensures complete neutrality as regards the tax burden on all economic activities, irrespective of their purpose and result, provided that these activities are themselves subject to VAT. In the light of the foregoing considerations, the answer to the question referred is that Article 17(2)(b) of the Sixth Directive must be interpreted as not allowing a Member State to make the right to deduct import VAT subject to the actual prior payment of that tax by the person liable to pay it, where that person is also the person entitled to deduct it." The deduction system is intended to avoid any burden, even if only temporary, which would occur if the import VAT could only be deducted as input tax after it had been paid.

This ruling has prompted the German legislator to amend Section 15 (1) sentence 1 no. 2 UStG and bring it into line with ECJ case law. Since, according to the court in the main proceedings, there was no tax evasion or attempted tax evasion, the sanction of requiring a new payment of the VAT already paid without this second payment giving rise to a right to deduct import VAT cannot be considered compatible with the principle of tax neutrality.

4. Import VAT Deduction Depending on the Right of Disposal

The current practice is that a trader may only deduct VAT as input tax if the third-country goods are intended to be used to carry out their own transactions in their domestic business area after being released for free circulation under customs and tax law, which presupposes power of disposal at the time of importation, i.e. when the third-country goods are released for free circulation.

This view contradicts EU law, which does not refer to an object of supply or to the power of disposal with regard to VAT. According to the ruling of the Hamburg Fiscal Court 5 K 302/09 of 19.12.2012 the taxable entrepreneur is generally granted the right of deduction if he is the debtor of the VAT and this is proven by the import duty assessment notice.