

## Goods in European Union Customs Law

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Goods are a key element of customs law in its broadest sense. In the legislative perspective of the European Union, customs law defines the rules and procedures for trade in goods with third countries. The duties and powers of customs authorities and economic operators carrying out import and export operations result from them. The aim of the publication is to analyze the role and significance of goods in trade in goods with third countries. The implementation of the objective aimed at the adoption of the research thesis that the main subject of the binding norms of the EU customs law is goods in its various aspects: legal, technical, physical, or economic characteristics.

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### Introduction

EU customs law is the consequence of a long-standing integration process aimed at introducing the principles of free movement of goods, capital, services, and persons into the existing legal order and standard of socio-economic life. These principles are the foundations of an EU internal market aimed at providing an area of prosperity and freedom, ensuring access to goods, services, employment, business opportunities, and cultural wealth.<sup>1</sup>

<sup>1</sup> [https://www.europarl.europa.eu/ftu/pdf/pl/FTU\\_2.1.1.pdf](https://www.europarl.europa.eu/ftu/pdf/pl/FTU_2.1.1.pdf) (accessed: 10.09.2022).

A fundamental principle of the EU internal market based on the theory and practice of the customs union is the free movement of goods (Lyons, 2001, p. 54). This principle is realized by the formation of a common EU customs territory<sup>2</sup> devoid, in the movement of goods between member states, of all customs duties, quantitative and qualitative restrictions, and instruments of customs formalism and customs control. It should be emphasized that the territories of individual mem-

<sup>2</sup> The Union customs territory is defined by Article 4 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 *laying down the Union Customs Code*, Official Journal of the EU 2013, L. 269, p. 1 as amended (hereinafter: UKC).

ber states are not identical with the customs territory of the European Union (Reiwer-Kaliszewska, Nowak, 2019, p. 230). In trade in goods, the principle of mutual recognition applies. It means that goods legally produced and marketed in one member state can be freely sold throughout the EU. However, this principle is not absolute.<sup>3</sup> In economic and trade relations with third countries, the determinant feature of the customs union is the Common Commercial Policy (CCP), based on uniform principles, which is an exclusive competence of the EU (in more detail: Kuś, 2011, pp. 111–115). Its scope includes, inter alia, changes in tariff rates, the conclusion of customs and trade agreements on trade in goods and services, as well as the commercial aspects of intellectual property, foreign direct investment, the harmonization of liberalization measures, export policy, and trade safeguard measures, including those taken in the event of dumping or subsidies.<sup>4</sup> To a large extent, it is implemented through the broadly defined customs law including, inter alia, the UKC, the Common Customs Tariff,<sup>5</sup> the system of customs exemptions<sup>6</sup> and the rationing and protection of EU producers and consumers, but also regulations on trade in goods introduced for reasons of public morality, public safety and order, human and animal health, protection of cultural goods, and intellectual property.

Analyzing the issue of the EU's economic and trade relations with the international environment, it seems justified to put forward the re-

<sup>3</sup> Deviations from it may arise, for example, from so-called necessary requirements.

<sup>4</sup> Article 207 of the Treaty on the Functioning of the European Union signed on 13 December 2007, Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union published in the Official Journal of the EU 2012 C 326, p. 47. (hereinafter: 'TFEU').

<sup>5</sup> Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987 L 256, p. 1, as amended.

<sup>6</sup> Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, OJ 2009 L 324, p. 23 with amendments.

search thesis that the main object of the applicable customs law regulations is the *goods*, sometimes colloquially referred to as *customs goods*. It is the commodity as an object of trade in goods with third countries, taking into account its specific nature, physical and chemical composition, degree of processing and classification, origin, value and destination that determines the level of customs duties, the possibilities of actual use by importers and exporters, as well as the application of instruments stimulating or limiting such trade. The second obvious thing about the recognition of goods as a subject of customs law is that the necessary element for this is their actual movement: import, export, transit in cross-border relations with third countries.

The purpose of the publication is to undertake a consideration of the role and significance of *goods* in EU customs law. In the authors' opinion, the best formula proving the validity of the thesis is the presentation and analysis of the basic instruments of customs law shaped depending on the type of goods traded with third countries. It is worth emphasizing that the problems related to the analysis of *goods* and the differentiation depending on their types of customs law instruments have not yet been addressed too widely in doctrinal considerations. In carrying out this analysis, the thesis posed can be supplemented by a research question: to what extent do the changing socio-economic conditions, in particular the IT-digital progress, influence the change in the approach to the *commodity* itself and the customs law instruments applied to it. This question is so timely because in May 2023, the EC presented proposals for a significant reform of the EU customs union. The EU customs data centre will become the new central digital environment for businesses importing goods into the EU (Arends-en, 2024, p. 1).

The publication uses an analytical and descriptive method and draws on national and foreign scientific literature, EC documents as well as primary and secondary EU law acts and Polish regulations applicable in the field of customs law.

## Concept and classification of goods as traded with third countries

EU customs law can be broadly generalized as rules for trade in goods with third countries (Witkowski, 2016, p. 86). Customs law is regarded as a set of norms and procedures concerning international trade in goods, the rights and obligations of economic operators, as well as a system of laws and obligations of governmental bodies or international economic integration organizations that ensure the implementation of these norms in order to protect and promote the economic and social interests of the member state or member states in the organization (Czyżowicz, 2004, p. 15).

The *goods* and their movement between the EU customs territory and third countries are explicitly referred to already in the Preamble of the UKC, further specifying that its subject matter is the general rules and procedures applicable to goods brought into or out of the EU customs territory.<sup>7</sup> The key subject matter of customs law is, therefore, *goods*. Goods do not have a legal definition in EU customs law. The CJEU jurisprudence indicates that a good is a tangible, movable object intended for circulation to the public, including economic and commercial circulation. It expresses the social relationship between the seller and the buyer, is intended for exchange and has the properties of satisfying a specific social need.<sup>8</sup> In the broadest sense, a commodity should be understood as all movables, energy, real estate, crops (Kocierz, Misiarz, 2013, p. 14). A good is a movable thing, it has a specific physical and chemical composition, specific characteristics allowing it to be the object of a transaction, the value of which is expressed in money – means of payment.<sup>9</sup> Develop-

ing this interpretation, the EC formulated the view that commercial goods are all goods of a commercial nature that are placed and ordered in the tariff schedule (Błasiak-Barnuś, 2006, p. 175). In view of the differentiation of goods under customs law, a distinction was made and defined: EU goods and non-EU goods.<sup>10</sup> The basis for this distinction is the *customs status*, which defines the legal position of a given good in terms of the instruments of customs law that can be applied to it, e.g. with regard to customs control, the application of customs procedures or the creation of customs duties.

Loss of customs status of EU goods occurs when EU goods are placed under the export procedure and, in accordance with the procedure, are brought out of the EU customs territory. The loss of the customs status of goods may also occur if EU goods are brought out of the customs territory of the EU, provided that the rules on internal transit do not apply, and have been placed under the external transit, storage or inward processing procedure, where permitted under customs legislation, and have been placed under the end-use procedure and subsequently abandoned to the State Treasury or destroyed and waste remains, as well as the declaration for release is invalidated upon release of the goods.<sup>11</sup>

The view seems justified that the presented treatment of goods adopted for the application of customs law does not fully exhaust its definition as regards trade in goods with third countries and the consequences of the implementation of import and export operations. In particular, this refers to the regulations on tax duties, levied and collected jointly with customs duties, and the provisions of transport law applied to the practical movement of goods in a cross-border space.

With regard to tax regulation, it can adopt a dualistic construction in defining the concept of goods, taking into account the interpretative modification related to the digital product. In the first (traditional) approach, goods are tangible movables: water, gas, and electricity, where they are

<sup>7</sup> Art. 1(1) UKC.

<sup>8</sup> <https://mfiles.pl/pl/index.php/Towar> (accessed: 3.09.2022).

<sup>9</sup> Judgment of 10 December 1968 in Case 7/68 EC v. Italy [1968] ECR 423, after: P. Dąbrowska, E. Gromnicka, Ł. Gruszczyński, B. Nowak, A. Pudło (2010). *Swobodny przepływ towarów*. Warszawa: Instytut Wydawniczy Euro-Prawo, pp. XIV-6.

<sup>10</sup> Art. 5 para. 22 and 23 UKC

<sup>11</sup> Art. 154 UKC.

offered for sale in a limited volume or in a specific quantity.<sup>12</sup> Almost analogously, the concept of goods is regulated in Polish domestic law, and it is specified that these are things and their parts, as well as all forms of energy.<sup>13</sup> In turn, the Civil Code<sup>14</sup> states that *things* are only material objects.

Similarly, it is presented in another national regulation, indicating that goods are finished goods or services produced by a specific entity and owned by it, intended for resale in an unprocessed state, located in warehouses or sales points.<sup>15</sup> In the second aspect taking into account technological and IT developments, tangible movable things that contain digital content or a digital service or

are interconnected with such a content or service in such a way that the absence of this digital content or service would prevent these goods from fulfilling their function are considered as goods, adopting for them the term goods with digital elements.<sup>16</sup>

In the case of goods with digital elements, digital products,<sup>17</sup> as well as digital services,<sup>18</sup> it should be mentioned that they are treated together, possibly in connection with their material form. This applies, for example, in certain considerations of the classification of goods according to the Combined Nomenclature or the determination of customs duties in special procedures, e.g. processing in the form of the outward processing procedure.

With regard to transport legislation, it is worth noting that legal differentiation of *goods* will be possible on the basis of their identity. Dangerous and perishable goods, among others, will be clearly distinguished, resulting in increased obligations for the person trading in them. Dangerous goods are subject to special procedural and control regimes. They are understood to be substances (including a mixture, solution, waste) or an object falling into one of several hazard groups (classes) of dangerous goods, as defined in the transport regulations. which may by themselves or under the influence of external circumstances cause a danger to human life, health or property. These groups of goods include, among others, explosives, spontaneously combustible, flammable, corrosive, poisonous, highly oxidizing radioac-

<sup>12</sup> Article 2(5) Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the sale of goods amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, Official Journal of the EU 2019, L 136, p. 28 as amended.

<sup>13</sup> Act of 11 March 2004 on Value Added Tax, consolidated text, Journal of Laws 2022 no. 935.

<sup>14</sup> Article 45 of the Civil Code; a contrario, intangible goods cannot be given such status, despite the fact that sometimes these goods (e.g. works) are covered by a civil law relationship. At the same time, it is pointed out that the externalization of intangible goods, e.g. in the form of a floppy disk or a disc, constitutes only their corpus mechanicum. For the above-mentioned reasons, also rights are not tangible property, even though they may also be subject to civil law transactions (e.g. assignment of rights). A human being, as a human being, including parts of his or her body, cannot be classified as a thing. Human corpses are also not things. On the other hand, human organs, detached from the body, skeletons, human blood or human biological samples, until they are combined with the body of another human being, may qualify as such. Money, as a means of payment, qualifies as a *sui generis* thing. Indeed, the value of money does not derive from its physical properties, but from the determination and guarantee of that value by the State. On the other hand, numismatic items may be things, as they are material objects and have a specific value in themselves. Also the so-called digital currencies, even though we classify them as property, do not constitute things, if only because they are not material goods. For more details see the Commentary to Article 45, in: Balwicka-Szczyrba, Sylwestrzak, 2022 (electronic version).

<sup>15</sup> Act of 29 September 1994 on accounting, consolidated text OJ 2022, no. 227.

<sup>16</sup> Article 2 para. 5 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the sale of goods amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ 2019, L 136, p. 28 as amended.

<sup>17</sup> Digital products are products that are exclusively available electronically. These include e-books, how-to guides, podcasts, videos, print files, templates, graphics, workout plans, menus or online courses, which the buyer receives almost unlimited access to from any device.

<sup>18</sup> An electronic service is a service provided electronically over a telecommunications network using information technology, the provision of which is automated and requires little human intervention.

tive, compressed gases.<sup>19</sup> Perishable goods, on the other hand, have specific characteristics that are usually a consequence of their origin. They mainly include goods and products of animal and plant origin, which require specific climatic conditions during their transport and storage. These can be food products: meat, fish, dairy products, fats, preserves, soft drinks, beer, wine – and non-food goods flowers, as well as refrigerated blood samples, human organs.<sup>20</sup>

### Goods in the process of determining customs duties in trade with third countries

EU customs law provides the basis for the assessment and collection of customs duties on goods brought into the EU customs territory. Such goods may be introduced either legally or illegally. In the absence of any evidence that goods have been brought into the customs territory legally, the customs authorities are entitled to consider that goods have been brought into the customs territory illegally.<sup>21</sup> Illegal introduction is the importation of goods by disregarding the successive steps of the procedure provided for in the UKC.<sup>22</sup>

The concept of *customs duties* is commonly equated with *customs*, although *de lege lata* the legal definition in the UKC only refers to the concept of *customs duties*, which are duties payable on the import (import duties) or export (export duties) of goods (Kuś, 2017, p. 159). It should be noted that

<sup>19</sup> Dangerous goods as defined in the European Agreement of 30 September 1957 concerning the International Carriage of Dangerous Goods by Road (ADR), signed in Geneva, Annex to the OJ of 2002, No. 194, item 1629 as amended.

<sup>20</sup> Perishable goods as designated by the Agreement of 1 September 1970 on the international carriage of perishable foodstuffs and on the special means of transport for such carriage (ATP), current text OJ 2015, item 667.

<sup>21</sup> Judgment of the WSA in Warsaw of 10 December 2015, reference V SA/Wa 2416/15.

<sup>22</sup> Judgment of the WSA in Lublin of 19 November 2015, reference III SA/Lu 934/15.

currently only import duties are collected, which represent the EU's own revenue.<sup>23</sup> As much as 80 per cent of the collected customs duties go to the general budget of the EU and only 20 per cent remains with the customs administrations that collected these duties. The funds remaining in the budget of the member state collecting the customs duties should be allocated to the day-to-day needs of its customs administration.

In view of the subject matter under consideration, it should be noted that the basis for the determination and assessment of the amount of customs duties is the *goods* and how they are handled in trade with third countries. It is the latter, in accordance with the applicable legislation, that determines their financial dimension. The person liable for the goods is obliged to pay these duties. It is worth noting that, due to the nature of the goods and the circumstances of their entry into the EU customs territory, there may be a complete waiver *in potestate legis* of the creation and assessment of customs duties. This applies to the situation of illicit means of payment and narcotic drugs and psychotropic substances, which are not strictly supervised by the competent authorities due to their use for medicinal and scientific purposes.<sup>24</sup>

Therefore, the goods are a key element in the determination of customs duties. Their amount is determined based on the calculation elements, which are the tariff, the origin of the goods and the customs value of the goods.

A customs tariff is a structured list of goods identified by digital tariff codes<sup>25</sup> with associated, dependent tariff rates and tariff measures.<sup>26</sup> It is the primary technical tool used by a state, an in-

<sup>23</sup> Articles 1 and 2 of the Council Decision of 7 June 2007 on the system of the European Communities' own resources, OJ 2007 L. p. 17 as amended.

<sup>24</sup> Art. 83(2)(a) and (b) UKC.

<sup>25</sup> Technically, the EU tariff is divided thematically into XXI sections, which in turn are subdivided into 97 divisions.

<sup>26</sup> From a practical point of view, it is essential for the tariff user to have usable versions of the tariff in the form of the Integrated Tariff of the European Communities (TARIC).

clusive international organization, to set customs duties. Its basic element is the classification of individual goods traded with third countries based on the Combined Nomenclature, which was created for the Common Customs Tariff by modifying the Harmonised Commodity Description and Coding System – HS.<sup>27</sup> Goods traded with third countries can be described and classified by a single eight-digit tariff code. With this in mind, it is necessary to strictly apply the special classification rules laid down in the Common Customs Tariff – the General Interpretative Rules of the Combined Nomenclature. This is a very important principle because it has been assumed that the titles of sections, chapters, and subdivisions are only indicative (Radzewicz, 2008, p. 313), whereas when classifying goods for the purposes of, inter alia, determining and collecting customs duties, it is necessary to analyze a broader spectrum of items and notes to sections and chapters, provided that they do not contradict the interpretative rules. The importance of the interpretative rules is particularly evident in the case of so-called complex and specific goods (e.g. goods in an incomplete or unfinished state, mixtures or combinations of materials or substances, goods with packaging, and packaging materials). A customs tariff element is any other nomenclature which is wholly or partly based on the Combined Nomenclature or which adds further subdivisions to it and which is established by Union provisions governing specific fields for the application of tariff measures relating to trade in goods. Adopting a broad interpretation, one would also have to treat as its module the measures often referred to in doctrine as paratariff measures, i.e. regulations concerning the introduction of separately protective customs duties

<sup>27</sup> The CN nomenclature has expanded the HS by an additional two digits (to eight). The structure has remained the same as in the HS (at the six-digit level the CN is compatible with the HS nomenclature) it is more precise and allows a more accurate classification – the assignment of goods to a given digit code. Compared to the HS, the CN nomenclature more than doubles the number of classification groupings of approximately 5000 HS headings to more than 10,000 CN.

of an anti-dumping,<sup>28</sup> anti-subsidy,<sup>29</sup> and safeguard<sup>30</sup> nature. The EU customs tariff also consists of tariff rates and tariff measures. These include, inter alia, conventional or normal autonomous tariff rates, preferential tariff measures laid down in agreements concluded by the EU, preferential tariff measures adopted unilaterally by the EU and autonomous measures providing for a reduction in or exemption from customs duties for certain goods, as well as preferential tariff treatment for the aforementioned measures from which certain goods may benefit by reason of their nature or end-use. The construction of the customs tariff and its practical application clearly indicates the importance of the goods and their classification in the Combined Nomenclature for the treatment in trade with third countries. This applies not only to the determination and assessment of customs duties, including protective instruments such as anti-dumping or anti-subsidy duties, but also to the application of other trade policy instruments in the form of prohibitions and restrictions on such trade.

The globalization and internationalization of international economic cooperation, despite recent significant turbulence in the form of, inter alia, the COVID-19 pandemic and Russia's military aggression in Ukraine, has resulted in a systematic increase in the importance of the second calculation element, which is the origin of the commodity. This concept denotes the economic affiliation of a particular commodity to a particular country or part of a country or region (Kuś, 2020, p. 419). Guided by the level of integration of economic and trade ties between countries, the origin

<sup>28</sup> Regulation of the European Parliament and of the Council of 8 June 2016. 2016/1036 on protection against dumped imports from countries not members of the European Union, OJ 2016, L 176, p. 21.

<sup>29</sup> Regulation of the European Parliament and of the Council of 8 June 2016. 2016/1037 on protection against subsidised imports from countries not members of the European Union, Official Journal of the EU. 2016, L 176, p. 55.

<sup>30</sup> Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (recast); (OJ EU, L of 19 May 2015).

of a commodity was divided into non-preferential origin and preferential origin. Rules of origin indicating the place of acquisition of a particular good were introduced to determine them precisely. The non-preferential origin rules apply to the EU tariff, non-tariff measures adopted by separate provisions of EU law and applicable to trade in goods, and to the preparation and issuing of certificates of origin (Adler, 2020, p. 149). The non-preferential rules of origin of goods are intended to indicate the origin in its entirety of a given good from a particular country or region. Products which have undergone their last substantial processing or working in the territory of the country, which has resulted in the manufacture of a new product or which has constituted a substantial stage of manufacture, are also considered to be goods originating in the country concerned. These processes should be carried out in an enterprise prepared for them. In practice, it can be said that for there to be a change in the origin of the goods, there should be a so-called tariff jump, so that goods undergoing processing or working were used for a different tariff heading and products resulting from the process were used for another.<sup>31</sup>

With regard to the preferential rules of origin of goods, it can be assumed that they are based on general assemblies intended to indicate that the goods in question were obtained on the territory of a specific country with which the EU has signed a relevant agreement introducing, *inter alia*, rules of preferential treatment for goods,<sup>32</sup> or alterna-

<sup>31</sup> Minimum operation as indicated, *inter alia*, in Article 34 of Commission Delegated Regulation (EC) No 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, OJ 2015, L 343, p. 1 as amended.

<sup>32</sup> The rules for identifying the preferential origin of goods are part of the so-called additional protocols. They supplement the free trade agreements signed by the European Union, such as Switzerland, the countries forming the European Economic Area with the EU, *i.e.* Norway, Iceland and Liechtenstein, as well as Chile, Mexico, South Africa, Algeria, Tunisia, Morocco, South Korea, Japan, Canada, Ukraine, Georgia, Moldova, etc.

tively, these rules have been introduced unilaterally as part of a long-standing general system of customs preferences related to trade in goods with third countries (Laszuk, 2017, p. 77). In the first case, the rules for identifying the preferential origin of goods are an element from the so-called Additional Protocols. The EU is party to many free trade agreements. The lists of goods as well as the specific requirements in the protocols on rules of origin are not the same, so for the purpose of determining the preferential origin of goods it is necessary to apply the relevant FTA (Milczarczyk-Woźnak, 2020, p. 28). Analyzing the texts of signed agreements on trade and economic cooperation constituting the basis for the introduction in mutual relations of customs preferences based on the adopted rules of origin of goods, it is possible to state their greater flexibility and tolerance. For example, this applies to the EU-Japan Economic Partnership Agreement<sup>33</sup> on cumulation.

Goods entering the EU customs territory for the purpose of being placed under a release procedure may benefit from preferential treatment under unilateral preferential measures adopted by the EU for certain countries or regions outside the EU customs territory. The broadest of such formula is the Generalised System of Preferences (GSP).<sup>34</sup> Preferential rules of origin are set directly by the EC (Oktaba, 2019, p. 33). The GSP system consists of 3 levels of customs liberalization – a general arrangement, applied to developing countries (DEV), and two levels of broader liberalization aimed at a specific modification of instruments related to sustainable development and good governance (the so-called GSP+) and a range of preferences for least developed countries (the so-called EBA).<sup>35</sup>

<sup>33</sup> EU-Japan Economic Partnership Agreement of 17 July 2018, Official Journal of the EU 2018, L. 330, p. 3.

<sup>34</sup> Regulation (EU) No 978 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ 2012, L 303, p. 1 as amended.

<sup>35</sup> Wider: <https://trade.ec.europa.eu/access-to-markets/pl/content/ogolny-system-preferencji-taryfowych-plus-gsp> (accessed: 10..09.2022).

For goods and their treatment in trade with third countries, correct origin marking will be crucial from the point of view of the person bearing responsibility for import and export operations. In particular, the former will be affected as it has a direct impact on the amount of customs duties to be levied, due to the type and consequently the application of the tariff rate or measure. The origin of the goods may also result in the need for anti-dumping or anti-subsidy duties to be imposed on the goods in question and the possible application or not of import prohibitions and restrictions.

The last of the calculation elements relating directly to the good and directly stimulating customs duties is its customs value. The customs value is the sum of its utility resulting from the use, application or consumption of the material good in question, which will be expressed in monetary terms (Sawczuk, 2011, pp. 26–27). Under customs law, the customs value is defined as the value, the price of the good itself, as well as any costs, incidental charges, necessary to bring the good into the EU customs territory. In practice, it is used for the application of tariff and non-tariff measures in trade in goods with third countries. In the case of customs value, the subject of analysis is not the construction, the physical and chemical state of the goods, but elements related directly or indirectly to their actual price<sup>36</sup> and the elements forming the additional costs<sup>37</sup> and the influence of the relationship between the parties to the purchase-sale transaction underlying the import operation. In the matter of the commodity and the process of obtaining and distributing it, the methods of surrogate determination of customs value introduce new concepts of identical goods, similar goods.

<sup>36</sup> Cf. Article 70(3) UKC.

<sup>37</sup> “Related persons” is defined – Article 127(1) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015, laying down detailed rules for the implementation of certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ 2015, L 343, p. 558 as amended.

## Possibility of dealing with goods in trade with third countries

Customs law is the rules and procedures for the movement of goods with third countries. From the concept thus formulated, it is obvious that within the area of its regulation are legally prescribed ways of disposing of goods in economic and commercial relations between the customs territory of the EU and third countries. Terminologically they are defined in the formula of customs procedures.<sup>38</sup> By definition, they are the juridical basis for business activity balancing the conditions of the internationalized system of the world economy with the interests of EU and national business of individual EU member states.

Customs procedures are an important part of EU substantive customs law, being the procedural aspect of the treatment of goods in trade with third countries. Goods may be placed under them (in principle) at any time in accordance with the conditions laid down for them and their particular customs status.

The current customs law contains a closed catalogue of customs procedures (Kuś, Witkowski, 2018, p. 189), they include: the admission procedure,<sup>39</sup> the export procedure,<sup>40</sup> special procedures.<sup>41</sup> In addition, in view of the specific circumstances of placing non-EU goods under a customs procedure, other forms of disposing of the goods have been provided for in terms of a supplementary procedure option ensuring the fulfilment

<sup>38</sup> Art. 5(16) UKC.

<sup>39</sup> In the case of a release procedure, non-EU goods acquire the customs status of EU goods once the conditions of Article 201(1) and (2) are met. 2 UK.

<sup>40</sup> EU goods in principle can only be placed under the export procedure Article 209 para. 1 UKC. An exception is the possibility to place EU goods under a transit procedure, in the form of external transit and under a processing procedure in the form of outward processing.

<sup>41</sup> Special procedures are the possibility of dealing with goods under the transit procedure, the storage procedure, the end-use procedure and the processing procedure in accordance with the rules and procedures laid down in Title VII, Chapter I of the UKC.



of the obligations of the economic operator bearing responsibility for them. These include destruction of the goods and relinquishment of the goods to the State Treasury.<sup>42</sup>

### Goods in customs exemptions and restrictions on trade in goods with third countries

The key element for the construction of the current customs regulations and its practical application process is the goods and their handling in trade with third countries. The consequence of these two premises is, *inter alia*, the possibility of applying customs exemptions to goods imported into the EU customs territory, as well as the obligation to apply rationing in cross-border trade. Taking into account the nature of the import operation, we can distinguish 3 groups of customs exemptions, firstly, those applicable to economic turnover and secondly, those applicable to non-economic (private) turnover, as well as a third group of mixed exemptions, because they take place both in economic and non-economic turnover (Kuś, 2020, p. 445).

Goods may be subject to regulation in trade with third countries, most commonly understood as a permanent or temporary prohibition/restriction of such trade in specific goods of *an ega omens* nature or with a selected state or group of states. Reglementation is aimed at protecting the interests of a state or an international integration organisation. It is a traditional instrument in customs law for influencing the international environment, which is aimed at achieving an intended, socio-economically defined objective related to international economic and trade cooperation in the broadest sense.

The regulation of trade in goods with third countries is a non-tariff instrument, usually of an absolute or relative nature. The first group includes a complete, absolute prohibition of trade in a given

good, alternatively it may concern import or export of a specific good. This instrument is most often used against states that violate fundamental principles of international co-existence, expressed in the so-called *ius cogens* norms. These include, in principle, the prohibition of the use of armed forces in resolving conflicts between states, the prohibition of intervention in the internal affairs of other states, the prohibition of the killing of prisoners of war and the prohibition of genocide.<sup>43</sup>

In the case of restrictions of a relative nature, as the term itself suggests, we are dealing with a barrier which is not absolute. It can be removed as a result of positive action by the person intending to trade in the goods in question with a third country.<sup>44</sup>

These restrictions can be divided into 2 groups. The first is of an economic nature with a twofold division into barriers related to the necessity of obtaining permission to carry out an import-export operation and the second introducing the obligatory payment of additional public and legal dues.

The commodity and its specificities may be a source of additional non-tariff restrictions. They are most often aimed at protecting non-economic values related to morality, public safety and order, protection of human and animal health and life, protection of the natural environment, cultural goods and intellectual property (Witkowski, 2016, p. 18). This broad spectrum of values having a civilizational dimension, which is important for the existence of each state and nation, contributed to the construction of a system of regulations of the broadly understood customs law regulating

<sup>43</sup> These measures include sanctions imposed against Russia in connection with its actions destabilizing the situation in Ukraine, examples include the ban on the sale, supply, transfer or export, directly or indirectly, of iron and steel products and selected luxury goods e.g. caviar, truffles alcoholic beverages and tobacco products. See Council Regulation (EU) 2022/428 of 15 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's destabilising actions in Ukraine, Official Journal of the EU 2022, L 87 I/13.

<sup>44</sup> This action can usually be the obtaining of an import or export licence, or, in the case of restrictions of a financial nature, the payment of the required duties.

<sup>42</sup> Art. 197 UKC and Article 199 UKC.

the cross-border movement of goods posing real threats to them.

Non-economic non-tariff rationing is a complementary element, reinforcing customs surveillance and control systems in the case of trade with third countries in, for example, strategic goods or dual-use goods that may pose a threat to security and public order. These are, of course, not the only, but the most notable, examples of additional restrictions due to the type of goods and the direction of their import or export, the intended user (Tomczyk, 2017, pp. 19–20). In the list of non-tariff restrictions, measures for the protection of human and human life and health and for the protection of the environment deserve special emphasis. The following areas can be highlighted here concerning the marketing of medicinal products, human cells, tissues and organs, plant protection products and waste, dangerous goods, and products derived from endangered wild flora and fauna. This catalogue is supplemented by measures for the protection of monuments and cultural goods and a broad area of intellectual property rights relating to goods traded with third countries.

## Conclusion

Commodity has been a classic and fundamental outcome of international economic and trade cooperation for centuries. Its substance and structure have changed. Its physico-chemical composition has been modified and improved, and there is an increasing level of processing and technological sophistication of goods. Despite all the transformations, also concerning the circumstances of its cross-border movement, not only does it remain a key element of customs law, but it can be assumed that the role and importance of commodity in international trade in goods contributes to expanding the perception of customs issues. It takes the form of a kind of separation into a new, multifaceted specialty treated as the law of trade in goods. This view is reflected in the doctrinal considerations aimed at defining the concept of the law of trade in goods in cross-border rela-

tions, precisely in the context of paying attention to the essence of this trade – goods (Drwiłło, 2014, pp. 283–284).

Summarizing the considerations in this article, a few key conclusions from the analysis presented should be pointed out.

Firstly, *commodity* is an essential element of the law of foreign trade in goods. It is around commodity and the ways, types, and forms in which goods are traded that the EU and national legislators create and develop relevant regulations. These regulations are closely interrelated. Customs legislation applies uniformly throughout the customs territory of the EU, unless international agreements, customary practice in a particular geographical and economic area or provisions on the application of autonomous measures by the EU state otherwise. In view of the fact that there are no customs borders between EU member states, the need for uniform and identical application of customs legislation in all member states is obvious. Indeed, goods brought into the territory of any member state can, in principle, be moved without customs restrictions within the territory of other countries. Consequently, discrepancies in the interpretation and application of customs legislation could have a similar effect as discrepancies in the content of customs legislation between the individual states forming a customs union.<sup>45</sup> The UKC normatively justifies and prejudices the need for uniform application of customs regulations, which is only one element of the broader problem of interpreting European legal provisions. In this respect, one should not lose sight of this aspect of the analyzed issue, which is connected with the obligation to take into account, in the process of interpreting the acts of EU law, that the content of the concepts used by the EU legislator in their basis should take into account their ‘EU meaning and context’. Consequently, when concepts and terms not defined in EU law appear in legal provisions, the CJEU, as a rule, considers

<sup>45</sup> Cf. Article 2(1) of the UKC; judgment of the Supreme Administrative Court of 6 September 2017, case no. I GSK 1036/15.

it unjustified to rely on the understanding of a given concept or term adopted in the national legal order.<sup>46</sup>

Secondly, EU customs law treats as goods any object having material value which can be the subject of commercial transactions. Such a broad definition includes, inter alia, waste, certain intangible objects such as electricity. In the jurisprudential practice of the CJEU, the greatest doubts have concerned the distinction between goods and services. The same national regulation may contain within itself a potential restriction of both the free movement of goods and services. In addition, it should be pointed out that in the case of a good, also traded with third countries, there is increasingly the issue of cross-border commingling of goods with ‘embedded’ digital services. It can be assumed that this product is a kind of combination of a digital service to a final product, which is the result of the servitization of production. The issue of regulating the phenomenon of the circulation of goods combining a material form with a digital service is currently a kind of challenge for contemporary customs law and, more broadly, the law of trade in goods with third countries. As of today, these are fragmentary solutions relating to specific goods and production processes. There is no doubt that the development of IT civilization will result in more and more advanced considerations regarding the digitalization of products and their transferability in relations with third countries, for example in 3D technology.

Thirdly, EU customs law classifies *goods* in detail (e.g. in the customs tariff<sup>47</sup>) but also specifies them by indicating their specific characteristics and treatment (e.g. EU/non-EU goods, returned goods, perishable goods, dangerous goods, equivalent goods, preferential goods, defective goods, repaired goods, counterfeit and pirated goods, goods exported ‘at the same time or at about the same time’). In other words, the concept of *goods*

<sup>46</sup> Cf. the judgement of the Supreme Administrative Court of 11 June 2014, case no. I GSK 871/13.

<sup>47</sup> E.g. LED strips made of plastic should be classified under the CN code 9405403990 – cf. ruling of the WSA in Łódź of 6 February 2020, ref. no. III SA/Łd 858/19.

in EU customs law is merely a ‘base’ for the detailed specification of the substance of a number of different *goods* of interest to EU and national regulations. Thus, the concept of *goods* in EU law is not a monolithic concept; on the contrary, the number and diverse characteristics of the various forms of *goods* in EU law allow for detailed regulation of each of them.

Fourthly, as a general rule, every movement of goods in EU customs law gives rise to certain legal and financial consequences. However, it must be remembered that customs proceedings are characterized by their distinctiveness from tax proceedings and the provisions of the latter are only applicable to them accordingly and to a limited extent.<sup>48</sup> Any legal-financial issues may, therefore, relate to the obligation to pay customs duties and taxes (e.g. release of goods for free circulation), exemption from customs/taxes, the granting of a certain customs preference to goods (e.g. on the grounds of origin) or, conversely, the imposition of certain restrictions on the circulation of goods (e.g. import ban, quota, quantitative restriction). One has to bear in mind that an unlawful supply concerning goods that cannot be traded in the normal way (e.g. drugs, human organs) cannot be taxed.<sup>49</sup>

Fifthly, goods under EU customs law may also be of interest to various criminal groups. Hence, wide-ranging provisions of customs law (i.e. inter alia, the Fiscal Penal Code<sup>50</sup>) provide for various types of fiscal offences and fiscal offences against customs obligations and rules of foreign trade in goods and services.<sup>51</sup> The offences relate to *goods*

<sup>48</sup> Cf. the judgment of the WSA in Rzeszów of 24 January 2019, ref. I SA/Rz 953/18.

<sup>49</sup> Cf. judgment of the WSA in Warsaw of 22 April 2010, ref. III SA/Wa 2010/09. The CJEU, in ruling C-294/82 (Senta Einberger v. Hauptzollamt Freiburg) and in ruling C-289/86 (Vereniging Happy Family Rustenburgerstat v. Inspecteur der Omzetbelasting), held that the supply and import of drugs are not subject to VAT, as it is not a transaction carried out in the course of an economic activity.

<sup>50</sup> Act of 10 September 1999. Fiscal Penal Code; Journal of Laws 2022, item 859 (hereinafter: ‘Fiscal Penal Code’).

<sup>51</sup> Cf. Chapter 7 of the Customs Code: extortion of customs authorisation, customs smuggling, customs fraud,

directly (e.g. customs smuggling) or indirectly (e.g. lack of customs documents).

In summary, *goods* for EU customs law in their broadest sense are crucial in terms of defining the subject matter itself. Issues related to the concept, characteristics, and various possibilities related to the logistics and usability of *goods* within the

violation of the temporary clearance procedure, diversion of goods, removal of goods from customs supervision, customs fencing, unjustified duty drawback, violation of customs regulations, obstruction of customs supervision, lack of customs documents, lack of supervision.

framework of a range of EU and national regulations represents a multifaceted and interdependent relationship at both normative and socio-economic and political levels. This diversity of regulations and ways of dealing with *goods*, on the one hand, captures the specificity of different *goods* and procedures (which is legitimate), but on the other hand, results in an extraordinary degree of complexity of the rules and the possibility of different interpretations. And it should be remembered that “only the law of the jungle can flourish in the jungle of laws” (Masłowski, 2005, p. 699).

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