Law firm

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Newsletter in brief

- Case law in **transport law** :

❖ The Montpellier Court of Appeal has reiterated that a settlement offer made without acknowledgement of liability does not interrupt the time bar.

- **Customs** case law :

❖ The Court of Justice of the European Union (CJEU) has issued a ruling on the customs valuation of imports whose final price is not yet known at the time of customs clearance.

❖ The CJEU has ruled on the territorial scope of the VAT exemption for imports of 'small consignments of a non-commercial nature'.

❖ The CJEU also determined the possibilities for regularising (after declarative omissions) returns of Community goods exempt from VAT under the 'customs returns procedure'.

❖ The Criminal Chamber of the Court of Cassation reiterated its case law on the limited prerogatives of Customs in the event of vehicle inspections (former regime) and the prohibition on conducting free hearing in this context.

❖ The Criminal Chamber issued a ruling emphasising several points of its case law on Customs law criminal customs litigation (criteria for the adversarial nature of criminal investigation proceedings and the admission of 'good faith') and ruled that customs fines cannot be inflicted with "conditional sentencing".

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OUR NEWS

Stéphane Le Roy spoke at the annual conference of the Institut des Avocats Conseils Fiscaux (IACF) organised jointly by the VAT Commission and the Customs and Energy and Environmental Taxation Commission of the IACF, on the theme 'VAT and customs news: different perspectives', on 12 June 2025 at the Maison du Barreau in Paris. Stéphane Le Roy presented the limited possibilities for intervention by the World Trade Organisation in the context of the trade war initiated by the Trump administration.

Vincent Courcelle-Labrousse comments in the July issue of the AJ Pénal Dalloz review on the ruling of the Grand Chamber of the CJEU of 8 April 2025 (C-292/23) on the review of judicial acts of the European Public Prosecutor's Office.

TRANSPORT BY ROAD - NO EFFECT ON INTERRUPTING THE LIMITATION PERIOD OF A SETTLEMENT OFFER MADE WITHOUT ACKNOWLEDGEMENT OF LIABILITY

A private individual sued the mover/carrier of his furniture more than a year after their arrival for damages to his furniture during the transport.

The plaintiff had received several settlement offers from the mover/carrier and its insurers, and claimed that these offers had interrupted the one year time bar.

However, none of these offers contained an admission of liability.

Relying on the established case law of the Cour de cassation, in particular the decision of the First Civil Chamber of 19 September 2018 (no. 17-21.483), the Montpellier Court of Appeal recalled in a decision of 7 May 2025 (RG no. 23/04724) that a settlement offer does not in itself constitute an acknowledgement of liability interrupting the limitation period if no mention of this point has been included in the offer. The Court reiterated that the acknowledgement of liability must be express and cannot result from the absence of reservations in the settlement offer.

So if you are in talks to resolve the dispute out of court, it is wise to bear in mind the limitation period and not hesitate to take legal action to defend your rights. In the event of a settlement offer, negotiations on the amount of compensation should not overshadow the fatal chop of the time bar.

CUSTOMS VALUE - THE VALUATION OF IMPORTED GOODS UNDER PROVISIONAL VALUES

In a judgment dated 15 May 2025 (C-782/23), the Court of Justice of the European Union (CJEU) issued a decision clarifying the legal regime governing valuation when only provisional values are available at the clearance's date.

A Lithuanian company had imported fuels that were invoiced based on a provisional price. The final invoice depended on various parameters, including the values of petroleum products on international markets and exchange rate fluctuations. The contract was therefore structured to result in a final invoice.

The Lithuanian company had decided to declare these goods on arrival, not on a 'provisional value'.

It was based on a 'residual customs valuation method' provided for in Article 74 of the Union Customs Code, namely the price on the internal market of the European Union.

It then adjusted on the price actually paid. As the Lithuanian company had failed to make some of these adjustments, the authorities had adjusted its VAT liability.

The question arose as to which transaction value should be used, bearing in mind that this value, plus any customs duties, is the basis for calculating VAT on imports. The CJEU ruled out the application of subsidiary methods, including that of the Article 74. It held that the 'transaction value' provided for in Article 70(1) of the Union Customs Code, namely a valuation based on the 'price paid or payable', was the only applicable method.

The CJEU considered that it was necessary to proceed on the basis of the transaction value throughout, first in the context of the pro forma invoice, using a simplified declaration as provided for in Articles 166 and 167 of the UCC. The use of this procedure therefore made it possible to arrive at a normal declaration based on the price actually paid on the basis of the adjustment made by the final invoices.

Thus, the Court of Justice considered that "*the use of the simplified customs declaration procedure provided for in Articles 166 and 167 of the Union Customs Code makes it possible, first, to declare a customs value which, in accordance with the priority method of the transaction value, reflects the real economic value of the imported goods, that is to say, the price actually paid or payable for the acquisition of those goods, and, second, to satisfy the requirement for accuracy and completeness laid down in Article 15(2)(a) of that code, in particular by informing the customs authorities at the outset that imported goods are declared provisionally for a value that does not correspond to their transaction value.*"

The CJUE hereby ruled that "*Article 70 of the Union Customs Code must be interpreted as meaning that, where, at the time when goods are imported into the customs territory of the European Union, only their provisional price, which appears on a pro forma invoice, is known, with the sales contract stipulating that their final price will subsequently be fixed by a final invoice on the basis of certain predetermined objective factors the value of which is beyond the control of the parties and unknown to them at the time of acceptance of the customs declaration, such as an average of the exchange rate of certain currencies or of the price of certain products in a given period, the customs value of those goods must be determined by applying the transaction value method provided for in that article, by using, as a general rule, the simplified customs declaration procedure provided for in Articles 166 and 167 of that code.*"

VAT – EXEMPTION ON SMALL SHIPMENTS"

In a judgment dated 8 May 2025 (C-405/27), the CJEU ruled on the interpretation of Article 143(1)(b) of Directive 2006/112/EC of 28 November 2006 on VAT (the 'VAT Directive'), which exempts the final importation of certain goods, including those covered by Directive 2006/79 *on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries.*

A Polish service provider, who imported 'small consignments of no commercial value' between individuals from third countries into Poland, had questioned the Polish authorities.

He wanted to verify that the fact that the recipient of the consignment was not established in Poland but in another Member State did not pose any difficulty in benefiting from the VAT exemption in Poland. The Polish authorities replied that the exemption did not apply in this case. The Court of Justice, on the contrary, considered that the texts do not distinguish between Member States in which the recipient is located. The CJEU noted that the Regulation on customs exemptions (No 1186/2009 of 16 November 2009) rules in the same way.

The CJEU ruled "*not only from a literal interpretation but also from a contextual and teleological interpretation of Article 143(1)(b) of Directive 2006/112 and Article 1 of Directive 2006/79*" to find out "*that the exemption from VAT provided for in those provisions applies irrespective of whether the consignee of the consignment resides in the Member State of importation or in another Member State*."

VAT – INTERACTION WITH THE 'RETURN SYSTEM'

In a judgment dated 12 June 2025 (C-125/24), the CJEU also interpreted Article 143(1) of the VAT Directive, but this time in conjunction with Articles 86(6) and 203 of the Union Customs Code.

The dispute concerned a Swedish horse owner who had participated in competitions organised in various countries.

After transporting two of his horses to Norway for this purpose, he re-entered the Union by crossing the border between Norway and Sweden without presenting them to customs. The Swedish authorities intercepted the transport.

Swedish law would have allowed for VAT exemption in transposition of Article 143(1)(2) of the VAT Directive if the owner had declared the horses to customs for release for free circulation under the 'returns procedure' and requested exemption from import duties for this purpose. This exemption also entailed exemption from VAT under the aforementioned Article 143.

The 'returns regime' allows Community goods that have been declared as temporarily exported to return to the Union without having to pay customs duties.

This procedure is important because Community goods have a 'Community status' which they lose when exported. When re-imported, these goods may be subject to customs duties unless it can be demonstrated that they are of Community origin.

Where a temporary export declaration has not been made at the time of departure, the goods must be presented to customs on their return and the conditions for the application of the 'returns procedure' must be justified in order to benefit from the exemption from customs duties granted by Article 203 of the Union Customs Code.

This is where the 'safety valve' provided for in Article 86(6) of the UCC comes into play in the event of an 'oversight':« *6. Where the customs legislation provides for a favourable tariff treatment of goods, or for relief or total or partial exemption from import or export duty pursuant to points (d) to (g) of Article 56(2), Articles 203, 204, 205 and 208 or Articles 259 to 262 of this Regulation or pursuant*

to Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty such favourable tariff treatment, relief or exemption shall also apply in cases where a customs debt is incurred pursuant to Articles 79 or 82 of this Regulation, on condition that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception." (quoted in point 23)

The question arose as to whether Article 86(6) could 'rescue' the owner of the horses even though the formal conditions for the application of Article 203 were not met because the goods had not been presented to Customs in order to benefit from the 'returns procedure'.

If this were the case, Article 143(1)(e) would allow Member States to exempt VAT "*the reimportation, by the person who exported them, of goods in the state in which they were exported, where those goods are exempt from customs duties*".

In its judgment of 12 June 2025, the CJEU ruled in favour of a non-restrictive application of Article 86(6), on the grounds that "*Article 86(6) would be largely deprived of practical effect if it were to be interpreted as not applying in a situation such as that at issue in the main proceedings, on the ground that the formal conditions required for the entitlement to relief from customs duty are not satisfied. It must be stated that, as the European Commission pointed out, in essence, in its observations, the application of Article 79(1)(a) of that code and, therefore, the application of Article 86(6) thereof, specifically presupposes non-compliance with such conditions.*" (point 33)

According to the CJEU " *unless it constitutes an attempt at deception, the fact that returned goods have not been presented to customs as required by Article 139(1)(a) of the Customs Code or have not been the subject of the declaration for release for free circulation provided for in Article 203 of that code does not preclude, under Article 86(6) of that code, the entitlement of those goods, by virtue of their return to the territory of the European Union, to the relief from customs duties provided for in Article 203*." (point 34)

The Court adds, instructively: "*that reading is supported by recital 38 of the Customs Code, which states that 'it is appropriate to take account of the good faith of the person concerned in cases where a customs debt is incurred through non-compliance with the customs legislation and to minimise the impact of negligence on the part of the debtor*."

The CJEU has focused 'specifically' on the fact that the owner "*disregarded formal obligations such as the presentation to customs and the declaration for release for free circulation of horses upon their reimportation into the territory of the European Union does not preclude, unless an attempt at deception is established, the application, in respect of that transaction, of the VAT exemption provided for in Article 143(1)(e) of the VAT Directive*."

The Court of Justice provides an interesting point for the Swedish referring court to verify that the owner has not engaged in 'an attempt at deception': the local court will have to verify that the owner's " *failure to comply with such formal obligations, assuming that failure to be established, is the result of mere negligence on her part which does not call into question her good faith*." (point 38)

These are valuable indicators for determining the conditions for applying the 'returns system' in relation to VAT, but also for customs duties.

VEHICLE'S SEARCHES RIGHT AND 'FREE HEARING'

In a ruling dated 28 May 2025 (No. 24-81.295), the Criminal Chamber of the Court of Cassation reiterated the limits imposed on the prerogatives of the administration in the context of vehicle searches.

In this case, the driver of a vehicle had been stopped for a check during which cash was discovered, followed by a 'free hearing' (provided for in Article 67F of the Customs Code) from 5:50 p.m. to 9 p.m. From 9:40 p.m. to 11 p.m., the seizure was notified to the person concerned, who was still present.

According to the defendant, the procedure was irregular on the grounds that he had been detained for too long. The Court of Appeal had considered that the person concerned could not be placed in customs detention since the customs offence of transferring capital without declaration was not punishable by imprisonment. This therefore fell within the scope of the 'right of visit' prior to its reform by Law No. 2023-610 of 18 July 2023 (see our Newsletter No. 49 July-October 2023).

The Court of Appeal rejected the plea of nullity on the grounds that the person concerned had agreed to accompany the officers to the customs office and had remained on the premises to complete the formalities for the seizure of the sum discovered. In the Court of Appeal's view, the hearing "*could be conducted under the conditions provided for in Article 67F of the Customs Code, in particular with regard to the rights to be notified, in this case those provided for in Article 61-1 of the Code of Criminal Procedure*."

The Court of Cassation quashed the decision on the grounds that "*It appears from its findings and the minutes of the customs proceedings that the person being inspected, who was asked to accompany the customs officers to their premises, where he was kept at their disposal, was formally questioned about his personal situation, in particular his financial situation, and the origin of the funds being transported, which the customs officers were not authorised to conduct, even under Article 67 F of the Customs Code, during this visit and which led to the person concerned being detained beyond the time strictly necessary to carry out the inspection*" (point 12).

Case law had already censured these practices (13 June 2019 appeal no. 18-83.297, see our Newsletter no. 30 January-August 2019, 18 March 2020 appeal no. 19-84.372, see our Newsletter no. 36 September-December 2020).

However, in a customary rescue measure by the criminal division, it was ruled that the appeal judgment "*does not warrant censure since the judges based their finding of guilt on other elements, subject to adversarial debate, in particular the material findings contained in the reports and the summary statements made by the defendant during the inspection of the vehicle*."

RESPECT FOR THE 'RIGHT TO BE HEARD' IN CUSTOMS CRIMINAL PROCEEDINGS – CRITERION OF 'GOOD FAITH' – NO 'CONDITIONAL SENTENCING' FOR THE CUSTOMS FINES

In a ruling dated 14 May 2025 (No. 23-86.694), the Criminal Chamber ruled on three instructive points in customs criminal litigation.

1. The Criminal Chamber rejected the defendant's argument that the customs procedure had not been adversarial at the stage of drafting several reports of notification of the offence on 12 July, 4 and 24 August 2010. The judges found that "*the person who was fined was given the opportunity to provide evidence in support of his defence during the hearing phase, as well as at the end of each report in a section provided for this purpose, and that the company's representative also made comments in each of the aforementioned reports*." (point 10). According to the Court of Cassation, the Court of Appeal "*did not base its ruling that the adversarial principle had been respected with regard to the 2010 reports solely on the fact that comments had been made, but, within the scope of its sovereign power of assessment, noted that the defendants in this case had been given sufficient time and full knowledge of the facts to make their views on the disputed exports known.*" (point 14).

The defendants complained that they had not had enough time and had not been fully informed of the ins and outs of the Customs authorities' position.

Furthermore, the defendants pointed out, regarding other reports of offences dated 24 May and 12 September 2011, that the legal basis for the offences had changed during the investigation, without the company having been asked to comment on the new legal basis for the notification. As previously, the Court of Appeal had held that the company had been able to submit its observations.

The Criminal Division ruled: "*Secondly, since it is not necessary for the charges to be included in the offence notification report and since the adversarial principle only requires that observations be taken on the facts that are the subject of the proceedings, the argument criticising the grounds of the contested judgment, whereby the latter dismissed the complaint that the incriminating texts appearing in the letters of notification of the results of the investigation sent by the customs authorities to the defendants differed from those appearing in the 2011 offence notification reports, is ineffective*." (point 15)

Given the complexity, not to say obscurity, of customs texts, the discussion of the legal classification of the facts is an essential step and a right for the taxpayer.

This procedure concerned export operations covered by a licence. The irregularities did not give rise to taxation, but the facts were punishable under criminal law (as with any customs irregularity).

The preliminary adversarial procedure in the event of taxation, known as the 'right to be heard' (provided for in Articles 67A et seq. of the Customs Code), was therefore not applied, as no duties were involved. The adversarial nature of the procedure was based on these statements in the box at the bottom of each report/hearing entitled 'statement by the person concerned'.

Unlike the procedure now in place for potential taxation, the Court of Cassation has never required the administration, in cases subject only to criminal prosecution, to implement an adversarial procedure analogous to the 'right to be heard' in three stages (notification of the results of the investigation/audit, observations by the taxpayer, response to the observations in a 'definitive position of the administration'). Case law on this matter is not very restrictive for the administration.

We commented on a ruling of 9 November 2022 (No. 21-85.747) by the Criminal Chamber in which it theorised the reasons why it considered that a prior adversarial procedure was not necessary in cases not subject to duties and taxes (Vincent Courcelle-Labrousse Dalloz AJ Pénal January 2023 pp.40-41).

2. The Court of Cassation revisits the criteria for 'good faith' on the part of the defendants, which is a justifying factor requiring acquittal, provided that its application is recognised.

In this case, it concerned the use of export licences that had been granted to a company in the same group but used by another subsidiary managed by the defendants.

The administration had considered that the exports were irregular, since they were carried out under cover of a licence issued to a legal entity other than the exporter. Transparent discussions had taken place with a European Commission official who had provided a confirmatory response, which the Court of Appeal had dismissed as "*insufficient to establish the good faith of the defendants*".

The Court of Appeal, approved by the Criminal Chamber, thus held that "*proof of good faith in customs matters results from the steps that could have been taken by companies and managers to effectively ensure the regularity of exports, and that the particularly high number of offences and the sums involved show that these are not simply misunderstandings but negligence that excludes good faith.*" (point 22)

This decision illustrates the severity of case law on the concept of 'good faith', which is becoming very difficult to uphold (among others, 7 September 2022 No. 21-85.236 published in the Court of Cassation's Bulletin, see our Newsletter No. 44 July-October 2022, 5 April 2023 No. 22-83.427, see our Newsletter No. 48 May-June 2023).

3. The Criminal Chamber upheld an argument raised this time by the customs authorities. The Court of Appeal had granted a suspension of the customs fines it had imposed on the defendants, as a "conditional sentencing" (i.e. the fines are not enforced if the sentenced person does not reoffend within 5 years).

However, pursuant to Article 369 of the Customs Code, the Criminal Chamber stated that "*it follows from this text that customs fines cannot be suspended*". The appeal ruling was therefore quashed (point 26), but the cassation was limited to the penalties.

This solution is open to criticism. The Court takes advantage of the "mixed character" of customs penalties, which are both criminal and compensatory, resulting from case law as old as the customs administration itself.

It denies defendants the benefit of a measure that allows trial judges to take all circumstances into account. This ruling does not give defendants a chance to recover. The customs penalties are often much higher than fines incurred by the Criminal Code.

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