ECJ Judgment in Hamamatsu Case: An Abrupt End to Interaction Between Transfer Pricing and Customs Valuation?

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The impact of intercompany transfer pricing (adjustments) on the customs value of goods is increasingly attracting attention, particularly since the remarkable judgment of the EU Court of Justice in the Hamamatsu case. The authors discuss the interaction between transfer pricing and customs valuation in a general sense, with specific consideration of the impact of the Hamamatsu judgment. They subsequently propose new statutory or other guidance for aligning the setting of transfer prices and customs values more closely, based *inter alia* on a comparative law study of the position in the United States and Canada.

1 INTRODUCTION[1]

32 The judgment issued by the Court of Justice of the European Union ('ECJ', 'the Court of Justice' or 'the Court') on 20 December 2017 in the remarkable case of *Hamamatsu Photonics Deutschland GmbH* ('*Hamamatsu*')[2] essentially concerns the question of whether the customs value of goods imported into the European Union ('EU') can be determined on the basis of intercompany transfer prices which are adjusted retroactively. The Court of Justice appears to have answered this question in the negative.

Over the years, the effect that retroactive transfer pricing adjustments have on the customs value of goods has been regularly discussed in the literature and by international organizations.[3] This also applies to the use of transfer pricing documentation for customs valuation purposes. Despite uniform legislation on determining the customs value of goods in the EU, the Member States hold differing views on the issue. Although this is in itself remarkable, it should be noted that no preliminary requests for rulings on such issues had ever been submitted to the Court of Justice prior to the judgment in *Hamamatsu*, and neither has the EU legislator provided any statutory guidance.[4]

In common practice, a certain degree of influence between intercompany transfer prices and customs valuation has been and continues to be assumed, given that both require an 'arm's-length test' to be applied to transactions involving related or associated enterprises.[5] Despite the absence of statutory guidance and case law, the stance adopted in *Hamamatsu* can, in that sense, be regarded at the very least as remarkable, given that the Court of Justice seems not to have acknowledged this influence. In this way, the Court of Justice seems to have diverged both from common practice and from the recent guidelines published by the World Customs Organization ('WCO'). Moreover, the judgment also leaves room for diverging interpretations and thus gives rise to legal uncertainty as to the scope of the legal considerations set out in the judgment.

1. This contribution is an adaptation of a contribution previously published in Dutch.
2. ECJ EU 20 Dec. 2017, No. C-529/16 (*Hamamatsu*), ECLI:EU: C:2017:984.
3. Recent examples from the literature include J-M Salva, 'Customs Valuation and Transfer Pricing: ICC Proposals', EC Tax Rev. 2016 (5–6); Martijn Schippers, 'Retroactieve interne verrekenprijsaanpassingen en de douanewaarde', NTFR-B 2017/32 and J.M. Jovanovich, Customs Valuation and Transfer Pricing: Is it Possible to Harmonize Customs and Tax Rules?, London: Kluwer International 2017. A detailed overview of the many conferences, reports and research initiated by international government and other organizations over the past few decades can be found in: A. Bakker & B. Obuoforibo (eds.), Transfer Pricing and Customs Valuation – Two worlds to tax as one, Amsterdam: IBFD 2009, at 8–14.
4. In s. 5 we will discuss the European Commission's plans for legislation and guidance on this issue.
5. Customs law uses the term 'related companies', while the term 'associated enterprises' is used in the case of profit taxes. These definitions are included in Art. 127 of the IA- (*see* footnote 14) and Art. 9 of the OECD Model Tax Convention respectively. While the meanings of the two terms are in practice largely the same, the term 'related parties' would seem slightly broader. In this contribution we have assumed any references to related parties also to meet the criteria for associated parties.

Against this background, this contribution examines how intercompany transfer prices and the customs value of goods are determined, and the interaction between them, with a specific focus on the implications of the *Hamamatsu* judgment.[6] We introduce the subject in 33 section 2 by briefly discussing the basic assumptions applied when setting intercompany transfer prices and determining the customs value of goods, including differences and similarities, while also highlighting the importance of their interaction. In section 3 we move on to discuss the background to and outcome of the *Hamamatsu* judgment. In section 4 we analyse the Court of Justice's views against the background outlined in section 2 and the WCO guidelines. In section 5 we explain how Canada and the United States currently offer guidance for taking into account retroactive transfer pricing adjustments for customs valuation purposes, while also outlining our views on statutory guidance that could potentially be incorporated into EU customs law in the future. Lastly, we set out our conclusions in section 6.

2 SETTING INTERCOMPANY TRANSFER PRICES AND ESTABLISHING THE CUSTOMS VALUE OF GOODS

2.1 Intercompany Transfer Prices

Transactions between related enterprises require intercompany transfer prices to be set. As the prices for these transactions affect the profits allocated to the relevant companies, they also impact the taxable base. In order to ensure a balanced allocation of profits between countries, intercompany transfer prices have to be computed in accordance with the Transfer Pricing Guidelines (the 'Transfer Pricing Guidelines' or the 'OECD Guidelines') of the Organizations for Economic Co-operation and Development ('OECD').[7] The aim of these guidelines is to ensure that related enterprises set their intercompany transfer prices on an arm's length basis; in other words, at a level corresponding to the prices that would be charged by non-related enterprises. This involves performing a comparability analysis so as to allocate profits by attributing an arm's length remuneration to the relevant

6. The influence of intercompany transfer prices (and any adjustments in such prices) on customs valuation is also important for VAT purposes, given that Art. 85 of the VAT Directive establish the taxable amount for imports of goods by reference to the corresponding customs value. As this contribution does not examine VAT in any more detail, we refer for any further discussion of VAT in the context of transfer price adjustments to the Value Added Tax Committee (Art. 398 of Directive 2006/112/EC), Possible VAT implications of Transfer Pricing, Working Paper No. 923 – Question Concerning the Application of EU VAT Provisions, TAXUD.c.1(2016)1280928; VAT Expert Group, Possible VAT implications of Transfer Pricing, VEG No. 065, taxud.c.1(2017) 1513583 and VAT Expert Group, Draft article on topic for discussion – Possible VAT implications of Transfer Pricing, VEG No. 071, taxud.c.1(2018)341072 – EN.

7. The OECD Guidelines are formally known as the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The standards set in the OECD Guidelines are widely accepted internationally.

enterprises that is commensurate with the functions performed, assets used and/or risks assumed.

The OECD Guidelines provide various methods for determining transfer prices, with a distinction being made between traditional transaction methods and transactional profit methods.[8] If an intercompany transfer price is later shown to result in the net margin attributed to the related enterprise not complying with the arm's length principle (because, for example, the indirect costs turn out higher than budgeted, or turnover differs from the budget), the intercompany transfer price has to be retroactively adjusted in order to align the enterprise's margin with the principle of arm's length pricing. Whether the adjustment results in an actual payment being made between the relevant enterprises will depend on the type of adjustment, on national and international legislation, and on the facts and circumstances of the specific situation.[9]

2.2 Customs Valuation

2.2.1 Statutory Framework for and Purpose of Determining the Customs Value of Goods

Alongside the origin of imported goods and their classification in the Combined Nomenclature (which determines the applicable customs duty rate), customs valuation represents an important element of the way in which import duties payable are determined. These three elements are used to determine the import duties payable if the customs debt is determined on an ad valorem basis.[10]

Within the EU, customs legislation has been made uniform in the Regulation laying down the Union Customs Code ('UCC'),[11] which succeeded the Community Customs Code ('CCC')[12] on 1 May 2016. Further legislation concerning customs matters can be found in the Delegated Act ('DA-UCC')[13] and the Implementing Act ('IA-UCC').[14] The rules laid down in the UCC for determining the customs value of

8. Although the OECD originally had a preference for the traditional transaction methods, these are hardly ever used in practice, and the Comparable Unit Price ('CUP') method is used only very occasionally.
9. The type of transfer price adjustment may affect whether a retroactive adjustment of intercompany transfer prices has to be taken into account for customs valuation purposes. *See* s. 4 and Martijn Schippers, 'Retroactieve interne verrekenprijsaanpassingen en de douanewaarde', *NTFR-B* 2017/32.
10. Determining import duties on an ad valorem basis means that duties payable are set at a percentage of the value of the goods.
11. Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code, *OJ* L 269, 10 Oct. 2013, at 1–101.
12. Council Regulation (EEC) No. 2913/92 of 12 Oct. 1992 establishing the Community Customs Code, *OJ* L 302, 19 Oct. 1992, at 1–50.
13. Commission Delegated Regulation (EU) 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* L 343, 29.12.2015, at 1–557.
14. Commission Implementing Regulation (EU) 2015/2447 of 24 Nov. 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament

goods are based on the internationally accepted Customs Valuation 34 Agreement ('CVA')[15] of the World Trade Organization ('WTO'), with a more detailed interpretation being provided in the non-binding WCO instruments. The system set out in the CVA aims to introduce a fair, uniform and neutral system of customs valuation excluding the use of arbitrary or fictitious customs values. For this purpose it prescribes six methods to be applied hierarchically. The primary and also preferred method for customs valuation is the transaction value method, which in practice is used for around 90 to 95% of the importations.[16]

The transaction value is 'the price actually paid or payable for the goods [...]', excluding or including certain elements stipulated in the legislation.[17] Various conditions have to be met if the transaction value is to apply, including the key requirement for a related buyer and seller not to allow their relationship to influence the price. This test requires the declarant to demonstrate that the price has not been affected by the parties' relationship based on the 'circumstances surrounding the sale'. While the CCC provides some explanation of how this test should be performed,[18]/[19] this is no longer the case under the UCC.[20] However, the price is assumed not to have been influenced, providing the transaction value very closely approximates one of the three test values referred to in the legislation and is established at the same or almost the same point in time.[21] Given that information on these test values is often unavailable, the common practice is to use transfer pricing documentation to demonstrate that the price has not been influenced by the relationship between the parties.[22]

While, as mentioned earlier, the EU has not provided any statutory guidance on using transfer pricing documentation for customs purposes, the WCO, by contrast, has adopted instruments providing guidance of this nature.

2.2.2 WCO Commentaries and Case Studies

The WCO's Technical Committee on Customs Valuation ('the Technical Committee') has published various instruments detailing how the circumstances of a sale

and of the Council laying down the Union Customs Code, *OJ* L 343, 29.12.2015, p. 558–893.

15. WTO Customs Valuation Agreement, formally known as the Agreement on the Implementation of Art. VII of the General Agreement on Tariffs and Trade 1994.
16. WCO Guide to Customs Valuation and Transfer Pricing (June. 2015, updated in 2018), p. 6.
17. Arts 70, 71 and 72 UCC.
18. Annex 23, Commission Regulation (EEC) No 2454/93 of 2 July. 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *OJ* L 253, 11 Oct. 1993, p. 1 ('Commission Regulation 2454/93 implementing Council Regulation 2913/92').
19. This explanation has much in common with the note to Art. 1(2) CVA, point 3.
20. The Customs Expert Group is planning to reintroduce the contents of Annex 23, Commission Regulation 2454/93 implementing Council Regulation 2913/92; *see* the minutes of the third meeting of the Customs Expert Group – Valuation held, 6 Oct. 2017, TAXUD/E5/XX/XX Ares(2018)767354.
21. Art. 134(2) of the IA-UCC.
22. WCO Guide to Customs Valuation and Transfer Pricing (June. 2015, updated in 2018), p. 9.

should be analysed. Commentary 23.1[23] and Case Studies 14.1[24] and 14.2[25] specifically address the use of transfer pricing studies for examining the circumstances of a sale. As these WCO instruments show, transfer pricing studies can constitute a valuable source of information for establishing whether the relationship between a buyer and seller has influenced a transaction price.[26] This applies even in the case of *transactional profit* methods where the profitability of specific business activities are assessed on an aggregated basis.

In Case Study 14.1, XCO, a manufacturer in country X sells goods to its wholly owned subsidiary, ICO, established in country I. The intercompany transfer prices applied were based on the Transactional Net Margin Method ('TNMM'), with a comparability analysis of eight distributors selected for the similarity of their functions performed, assets used and/or risks assumed to those of ICO. The transfer pricing study was reviewed by the tax authorities in countries X and I and Advance Pricing Agreements ('APA') were negotiated. As ICO had no test values available, it submitted transfer pricing documentation to demonstrate that its relationship with XCO had not affected the prices used for establishing the customs value of the goods being imported. The Technical Committee concluded that the information contained in the documentation showed that the transfer prices had not been influenced by the parties' relationship. It should be noted in this regard that no transfer pricing adjustments were made in the year in question. It is unclear, however, as to whether the Technical Committee took this aspect into account in its analysis.

In Case Study 14.2, XCO, a manufacturer established in country X, sells luxury bags to its subsidiary ICO, a distributor established in country I. The intercompany transfer prices were determined using the Resale Price Method ('RPM').[27] The comparability analysis performed, comprising eight distributors comparable to ICO, found the range of arm's length gross margins 35 earned by the selected companies to be between 35% and 46%, whereas ICO earned an actual gross profit margin of 64%. ICO, however, had not made any transfer pricing adjustments in this regard and, for customs valuation purposes, the transaction value of the imported items assumed a price within the gross profit margin range. The Technical Committee

23. Commentary 23.1, Examination of the expression 'circumstances surrounding the sale' under Art. 1.2 (a) in relation to the use of transfer pricing studies (Adopted, 31st Session, 29 Oct. 2010, VT0774E1c). According to Commentary 23.1, the facts and circumstances of a situation always have to be considered in order to establish whether transfer pricing documentation can be used to demonstrate that the price applied in a specific case has not been influenced by a relationship between parties.
24. Case Study 14.1, Use of transfer pricing documentation when examining related party transactions under Art. 1.2 (a) of the Agreement (Adopted, 42nd Session, 22 Apr. 2016, VT0920E1c).
25. Case study 14.2, Use of transfer pricing documentation when examining related party transactions under Art. 1.2 (a) of the Agreement (Adopted, 45th Session, 23–25 Oct. 2017).
26. *See* specifically point 8 of Commentary 23.1.
27. As indicated earlier, the traditional methods, and particularly the Resale Price Method and Cost-plus Method, are rarely if ever used in practice. One of the reasons for this is that gross margins are influenced by many different factors that are difficult to quantify. This case study nevertheless provides valuable insight into how prices between related parties can be influenced.

consequently concluded that the import price had not been settled in a manner consistent with the normal pricing practices of the industry in question. As the transfer prices were thus regarded as having been influenced by the parties' relationship, they should be redetermined by application of an alternative method of valuation. While the Technical Committee does not comment on whether the result would have been different if the transfer prices had been adjusted, it would seem to be hinting in that direction.

Lastly, Commentary 4.1[28] states that the transaction value method should not be rejected solely because certain provisions in a sales contract may affect sales prices at a later date. We regard this as correct, given that contracts between non-related parties may also contain such provisions, including, for example, adjustments made in the form of bulk discounts.

2.3 The Importance of the Interaction between Transfer Pricing and Customs Valuation

The past few decades have seen a significant increase in international flows of goods, with more and more of these flows involving intercompany transactions. Increasing numbers of transactions consequently have to be examined for compliance with the circumstances of the sale test/arm's length principle, both with regard to customs valuation and transfer pricing purposes. As a result, the question of the extent to which transfer prices influence the customs value of goods will arise increasingly frequently. Providing insight into this question may provide opportunities for aligning the two in advance and thus obtaining certainty on the financial implications, while also promoting legal certainty, saving time and possibly also avoiding finable or punishable offences.

3 HAMAMATSU PHOTONICS DEUTSCHLAND GMBH, C-529/16

3.1 Introductory Comments

As mentioned earlier, the Court of Justice issued its judgment in *Hamamatsu* on 20 December 2017. The fact that the Advocate General ('AG') had not previously issued an opinion suggests that, despite the potentially considerable economic repercussions for businesses and governments, the Court of Justice did not regard this case as technically complicated. The referring court, the Finanzgericht München, nevertheless provided a detailed discussion of the case in its order for reference.[29]

28. Commentary 4.1, Price review clauses (Adopted, 3rd Session, 23 Mar. 1982, 28.560).
29. Certain elements in the order for reference are discussed in more detail in s. 4. The referring court's decision (in Dutch) can be found (checked on 12 Dec. 2018) on: www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2016/c-zakennummers/c-529-16-verwij zingsbeschikking.pdf.

3.2 Facts and Request for a Preliminary Ruling

Hamamatsu is established in Germany and is part of a worldwide group with a Japanese parent company. It imported goods into the EU (via Germany). These goods were purchased from the Japanese parent at intercompany transfer prices agreed with the German tax authorities in an APA. This APA set the arm's length range for these prices on the basis of the Residual Profit Split Method (RPSM), with an upper and lower limit for profitability (the target operating margin). If the actual profit is outside this target range, the transfer price should be adjusted.

During the relevant period Hamamatsu declared over 1000 shipments, comprising various products purchased from its parent company. The items were classified dissimilarly, with the applicable duty rates ranging from 0% to 6.7%. At the close of the accounting period, Hamamatsu's profitability turned out to be lower than had been agreed in the APA. The intercompany transfer prices were therefore adjusted downwards and a credit note was issued. Hamamatsu subsequently received a credit payment from its parent. As Hamamatsu believed that the customs value of the imported goods, and consequently the import duties, had been set too high, it applied for a refund of the excess duties paid. An apportionment formula was used to attribute this refund to the various import duty rates. However, the price reduction was not allocated to the individual products imported.

The German customs authorities rejected the application for a refund, claiming that the transaction value could be determined only for individual products and not for 'mixed consignments'. As the Finanzgericht München in the appeal procedure was uncertain as to whether Hamamatsu was entitled to a partial refund, it decided to refer to the EU Court of Justice for a preliminary ruling on the following two questions (in the author's words):

> Can a transaction value be based on an initial transfer price if that transfer price is subsequently subject to a flat-rate adjustment calculated using an apportionment mechanism, regardless of whether the end-of-year adjustment leads to a refund or additional payment of import duties?
>
> If so, can the customs value be reviewed or determined using a simplified method?

3.3 Court of Justice's Judgment

36 The Court of Justice began its response to the first question by referring to the objectives of the customs valuation system (see section 2.2), from which it follows that the customs value have to reflect the real economic value of the goods at the time they are imported. If the transaction value method is used, the applicable price is the price that is paid or payable. The Court of Justice considered that this price can, if necessary, be adjusted at a later date in order to avoid arbitrary or fictitious customs values being set. According to the Court of Justice, this reflects the

fact that all aspects comprised in the economic value of the imported goods have to be taken into account.

The Court of Justice went on to state that while the CCC permitted customs authorities, either at their own initiative or at the declarant's request, to amend the declaration, any subsequent adjustments of transaction values had so far been limited to specific situations provided for in the CCC. In this respect the Court referred specifically to the concept of 'quality defects or faulty workmanship in the goods'.[30] The Court then noted that the CCC does not impose any obligation on importers to apply for corrections of transaction values which are subsequently adjusted upwards and neither does it contain any provision enabling customs authorities to prevent enterprises applying only for downward adjustments. For these reasons, the Court of Justice considered that a subsequent adjustment of the transaction value, such as that at issue in *Hamamatsu*, could not be taken into account for customs valuation purposes. More specifically, the Court stated that the customs value is not permitted to be based on a transaction value consisting of an amount initially invoiced and a flat-rate adjustment made after the end of the accounting period, without it being possible to know whether that adjustment will be upwards or downwards. The Court consequently ruled that the transaction value method should be rejected and an alternative method should be used for customs valuation purposes.

In view of the response to the first question in the preliminary request for a ruling, there was no need for the Court of Justice to answer the second question raised.

4 ANALYSIS OF THE *HAMAMATSU* JUDGMENT

4.1 Various Possible Interpretations

The fact that the judgment can be interpreted in various ways creates uncertainty as to its implications and the extent of its potential applicability in circumstances that are of a different, but similar nature. And the situation is not helped by the fact that the Court of Justice provided only a minimal explanation of the reasons for its decision and the AG did not issue an opinion. Put briefly, we believe that the judgment can be interpreted as follows:[31]

30. The concept of 'defective goods' allows market participants to apply downward adjustments of prices underlying customs values if, after being imported, goods are found to contain a defect caused by something arising before importation. The UCC lays down more detailed conditions in Art. 132, Commission Implementing Regulation.
31. The first two possibilities are recognized in: Martijn Schippers, Noot bij: HvJ 20 Dec. 2017, *NLF* 2018–1, 0035 (Bepaling van douanewaarde bij invoer met toepassing van verrekenprijzen), at 71–75. ECLI:EU:C:2017:984. We note that some authors argued that the ruling does not give rise to different interpretations, *see* for instance D. Rovetta, L.C. Beretta and A. Smiatacz, The Court of Justice of the European Union Judgement in the *Hamamatsu* Case: Defending EU Customs Valuation Law from

(1) The transaction value based on the price originally invoiced by Hamamatsu is rejected because of the actual or possible retroactive adjustment of the intercompany transfer prices. Accordingly, an alternative valuation method has to be applied ('Transaction value method under pressure').
(2) The transaction value is the originally invoiced price, but no retroactive adjustments, either upwards or downwards, are permitted ('No more retroactive intercompany transfer pricing adjustments').
(3) The transaction value based on the price originally invoiced by Hamamatsu is rejected owing to the specific facts and circumstances of the case ('Limited interpretation of the *Hamamatsu* judgment').

We will now examine these three possible interpretations in more detail, while also indicating the extent to which we regard a particular interpretation as desirable and analysing the extent to which the interpretation accords with the customs valuation system laid down in the UCC and instruments published by the WCO.

4.2 Option 1: Transaction Value Method under Pressure

If an intercompany agreement between two enterprises, combined with a transfer pricing study, allows an originally invoiced intercompany transfer price to be adjusted retroactively in order to align the related enterprises' net margins with the arm's length principle, the *Hamamatsu* judgment could be interpreted to mean that a transfer pricing study is wholly inappropriate for demonstrating, for customs purposes, whether transfer prices have been influenced by the relationship between the parties. If that is the case, test values would then have to be applied. As discussed earlier, however, the information required for applying test values is in practice often unavailable, with the result that an alternative customs valuation method would then have to be used.

37 If the above interpretation reflects the Court of Justice's actual views, it is conceivable that it was not the *possibility* of a transfer price adjustment that was of primary importance, but rather the question of whether such adjustment was *actually* made. If the Court of Justice was indeed concerned only with whether a price had *actually* been adjusted, an exception could possibly apply in situations where the customs value of goods was based on an initial transfer price, but where no adjustment was made because the transfer price remained within the arm's length range. In those cases, transfer pricing documentation would remain relevant for reviewing the circumstances of the sale and, therefore, for establishing the customs value.

Given that, in practice, many of the prices applied between related parties are based on margins set as part of a transfer pricing study and used in budgets can be adjusted retroactively, this interpretation could result in the transaction

the' Transfer Pricing Folly' in Customs Matters, Global Trade & Customs Journal, Volume 13, Issue 5, p. 189. Based on our reasoning set forth in s. 4 of this contribution we cannot agree with this opinion.

value method becoming less important (regardless of whether the above 'exception' applies). As this interpretation, however, would appear to put pressure on the use of the transaction value method as the primary and preferred method of valuation, we would regard this as a strange development,[32] as we will explain in more detail below.

Although EU customs law does not contain statutory provisions allowing transfer pricing methods to be used for determining customs values, neither does it contain any statutory provisions specifically prohibiting their use. As discussed in section 2.2.2, however, there is international pressure to use transfer pricing studies to establish customs values, given that a kind of arm's length principle applies both to transfer pricing and the determing the customs value for customs valuation purposes. A transfer pricing study can be important when reviewing the circumstances of a sale and so as to determine if the relationship between the buyer and seller has influenced the price.[33] The WCO states, for example, in its 'Guide to Customs Valuation and Transfer Pricing', that transfer pricing documentation provides useful information on the circumstances of a sale as it can contain information on:[34]

- the commercial relations between the buyer and seller;
- the way in which the price in question was arrived at.

The WCO does not regard it as an insurmountable problem that transfer pricing studies commonly include an arm's length test at an activity level (and so taking account of functions performed, assets used and/or risks assumed) while it is important for customs valuation purposes to determine whether prices have been influenced for each product separately. This is because the CVA states with regard to reviewing the circumstances of a sale that (authors' underlining):[35]

> *[...] As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) <u>in sales of goods of the same class or kind</u>, this would demonstrate that the price had not been influenced.*

Differences in 'timing' can also be resolved, by which we refer to the fact that margins on intercompany transfer prices are set annually and then implemented, in line with budgets, into individual product prices for a specific period rather than for each individual import of goods. This should not give rise to problems, provid-

32. It follows from point 1 in the preamble to the CVA that 'The primary basis for customs valuation under the Agreement is "transaction value" as defined in Art. 1.' The Court of Justice has also ruled on various occasions that the transaction value method is the primary valuation method. That is also evidenced in para. 26 of the *Hamamatsu* judgment and the case law referred to there.
33. The WCO also acknowledges this in Commentary 23.1 and Case Studies 14.1 and 14.2. *See* s. 2.2.2.
34. WCO Guide to Customs Valuation and Transfer Pricing (June. 2015, updated in 2018), at 60–61.
35. Note to Art. 1(2) CVA, point 3.

ing the concept of a 'representative period' is respected.[36] We would also note that it is precisely by taking retroactive intercompany transfer pricing adjustments into account that import prices are shown not to be influenced by the relationship between parties.

Our general view is that transfer pricing studies should be regarded as a suitable basis for reviewing the circumstances of a sale. And, moreover, they even represent a suitable basis, given the circumstances, for establishing customs values. We would consequently view it as strange for customs authorities in the EU to focus primarily on this interpretation ('Transaction value method under pressure').

4.3 Option 2: No More Retroactive Intercompany Transfer Pricing Adjustments

The *Hamamatsu* judgment raises the question of whether it is possible to base customs values on intercompany transfer prices without taking retroactive adjustments into account. For a variety of reasons we regard this interpretation as inappropriate.

Firstly, it is precisely by account being taken of retroactive transfer pricing adjustments that intercompany prices are shown not to be influenced by the relationship between parties. This is because a related enterprise ultimately has to attain an arm's length remuneration that is based not on budgeted figures, but instead on the figures actually achieved. And it should make no difference in this respect whether the adjustment is upwards or downwards, given that any such distinction would disregard the neutrality that the customs valuation system seeks to achieve, while also seeming to us to be inequitable. In that sense, the fact that it was unclear
38 in the *Hamamatsu* case whether the retroactive adjustment of the price would be upwards or downwards does not appear to us to have played a role in the Court of Justice's judgment. This view is supported by the Court of Justice's confirmation on several occasions, including in this specific case, that the customs value must reflect the economic value of the imported goods, with account being taken of all the aspects comprised in the economic value of the imported goods. This, too, confirms our view that account has to be taken of retroactive adjustments of intercompany transfer prices. And this applies regardless of the fact that the final customs value was not established from the start, given that the Court of Justice has ruled with regard to the inclusion of royalty payments that the full value of these payments should be included in the customs value even if the amount of the payment, being based on a percentage of turnover, is not known until the end of the year.[37] This view is further supported by Case Study 14.2, from which it follows that if an intercompany transfer price is not set at arm's length because no retroactive transfer price adjustment is applied, the price paid or payable and based on the

36. *See* Annex 23 Commission Regulation 2454/93 and the notes to Art. 1(2) CVA, point 3.

37. ECJ EU 9 Mar. 2017, No. C-173/15 (*GE Healthcare GmbH*), ECLI: EU:C:2017:195, paras 29 and 86.

intercompany transfer price should be regarded as having been influenced by the relationship between the parties.[38] From this it follows, in our view, that the WCO is pointing towards retroactive adjustments of intercompany transfer prices being included for customs valuation purposes.

Secondly, not taking account of retroactive adjustments of intercompany transfer prices could lead to abuse in that parties could potentially set their initial transfer prices too low by attributing excessively high profits to the buyer. The transfer prices would have to be adjusted retroactively to bring them in line with the arm's length range. Not taking such adjustments into account for customs purposes would then result in artificially low customs values.

In summary, we consider it unlikely that the Court of Justice's *Hamamatsu* judgment should be taken to mean that the transaction value can be based on an initially applied price without account being taken of any subsequent adjustments. It is precisely because retroactive adjustments of intercompany transfer prices are taken into consideration that prices can be shown not to have been influenced by the relationship between transacting parties and abuse can be prevented.

4.4 Option 3: Limited Interpretation of the *Hamamatsu* Judgment

Based on the facts and circumstances of the case, including the transfer pricing method applied, the Court of Justice ruled in *Hamamatsu* that a transaction value 'composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period' cannot form the basis of the customs value.[39] If, however, this pronouncement is viewed separately from the facts of the case, it could be taken to mean that, following the judgment, transfer pricing studies would no longer be able to be used for customs valuation purposes or that a customs value would not be able to take retroactive adjustments of intercompany transfer prices into consideration. The question, however, is whether this judgment should indeed be attributed such a wide interpretation. On the basis of the following facts and considerations we assess whether a more limited interpretation would be appropriate:

(1) The absence of legal certainty for customs authorities;
(2) The absence of a contractual obligation;
(3) The use of the RPSM as the transfer pricing method.

The Court of Justice has stated that customs legislation does not impose any obligation on importers to request an adjustment of the transaction value if the transfer price is subsequently adjusted upwards, while neither does it contain any provision to safeguard against the risk that importers will submit such requests only in the event of downward adjustments. The Court of Justice referred in this regard explicitly to the legislation (i.e. the CCC) 'in the version in force'. The Court of Justice would thus seem to mean that, in the circumstances prevailing in the *Hamamatsu*

38. *See* s. 2.2.2.
39. ECJ EU 20 Dec. 2017, No. C-529/16 (*Hamamatsu*), ECLI:EU: C:2017:984, dictum.

case, the CCC provides insufficient certainty that both upward and downward adjustments in transfer prices will be taken into account when determining transaction values.[40] In this case, Hamamatsu had not availed itself of the opportunity to submit a simplified customs declaration or to enter into an agreement with the customs authorities on determining the customs value based on a transfer price or taking account of subsequent adjustments in transfer prices.[41] In view of the considerations expressed by the Court of Justice, the absence of an agreement on the latter would seem to constitute an important reason for the transfer price adjustment not being able to be taken into account by Hamamatsu for customs valuation purposes. The Court of Justice apparently saw no opportunities (or additional opportunities) in the CCC for taking account of retroactive adjustments of intercompany transfer prices while also offering certainty to customs authorities
39 that both upward and downward price adjustments will be included. As, however, we discuss in section 5.3, the UCC would seem to offer such opportunities.

In addition, the referring court also noted in the order for reference that the prices of the individual goods had not been determined unambiguously in the relevant commercial contracts.[42] As it is generally assumed that transaction values can be retroactively adjusted only if this is provided for contractually,[43] the Court of Justice may have meant that retroactive adjustments of intercompany transfer prices should not be taken into consideration for customs valuation purposes on the grounds that it was not clear in advance (i.e. at the time of the goods being imported) that the price could be adjusted upwards or downwards. The Court of Justice may have taken the view that insufficient provision for this had been made in the intercompany agreement. In this regard the ECJ may have taken into consideration that it is impossible to specify, at the time that the goods are being imported, whether a transfer price will be adjusted and, if so, whether any such adjustment will be upwards or downwards.

Lastly, the question arises as to whether the use of the RPSM as a transfer price method influenced the Court's judgment. This method of calculating transfer prices assesses the profitability of all the enterprises involved in a specific activity and so not the profitability of each individual transaction.[44] However, customs values are established on a transaction basis. This caused complications in requests for

40. As stated earlier, the CCC (and now the UCC) does not contain legislation explicitly allowing a retroactive adjustment in an intercompany transfer price to be taken into consideration for customs valuation purposes. In a limited number of cases (specifically in situations involving defective goods and discounts), however, the legislator does provide statutory guidance, which the Court of Justice seems to have taken into account in its judgment.
41. *See* s. 5.3.
42. *See* at 11 of the order for reference (in Dutch) (checked on 12 Dec. 2018): www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2016/c-zakennummers/c-529-16-verwijzingsbeschikking.pdf.
43. *See* e.g. Arts 130 and 132 of the IA-UCC and Commentary 4.1, as discussed in s. 2.2.2.
44. This also applies to the TNMM.

refunds, given that excess duties paid could not be attributed to individual import transactions. The idea, however, that the use of the RPSM as such was of primary importance in the *Hamamatsu* judgment would seem unlikely, given what is set out in Case Studies 14.1 and 14.2.[45] As these case studies show, the WCO has no objection in principle to the use of transactional profit methods for determining customs values. Furthermore, retroactive adjustments of intercompany transfer prices are equally possible when traditional transaction methods are used. The limited extent to which the Court of Justice considered the transfer pricing method in this case could also, therefore, extend to any other transfer pricing method and would consequently not seem to have a wider impact for this specific method.

As explained in sections 4.2 and 4.3, we regard it as unlikely that transfer pricing adjustments should no longer be taken into consideration for customs valuation purposes. The facts and circumstances underlying the Court of Justice's judgment in *Hamamatsu*, as discussed above, would seem to confirm that its pronouncements on this occasion apply only in identical cases. We would point out, however, that it does not explicitly follow from the considerations and pronouncements of the Court of Justice that the judgment in this case has only limited scope. Whether this notion will attract broad-ranging support among EU Member States remains, therefore, to be seen. This is for example reflected by the statements of various EU Member States in the minutes of the Customs Expert Group.[46]

4.5 Final decision of the Finanzgericht München

The referring court, the Finanzgericht München, delivered its final ruling on 15 November 2018 in the *Hamamatsu* case.[47] The Finanzgericht München seems to have concluded that the German Customs Authorities have rightfully rejected the refund of customs duties following the Court of Justice's judgment in *Hamamatsu*. Moreover they also seems to have concluded that the German Customs Authorities correctly established the transaction value on the basis of the initially invoiced transfer prices (option 2 as described in section 4.3). This is remarkable as this would mean that apparently the Finanzgericht München is of the option that the transaction value has not been influenced by the relationship between Hamamatsu Japan and Hamamatsu Germany. This is rather doubtful in the *Hamamatsu* case as the initially invoiced transfer prices have in fact been subject to a

45. For more details, *see* s. 2.2.2.
46. Fourth meeting of the Customs Expert Group (Valuation section), 12 and 13 Apr. 2018, TAXUD/E5/MN/aga/Ares(2018)3622733. For example the Customs Expert Group argues that '[...] when it is declared (and accepted) that the relationship did not influence the price, if the operator lodges a normal ("definitive") declaration, no adjustments deriving from a transfer price arrangement will be possible [...]' and '[...] in any case, flat-rate adjustments are not permitted'.
47. Finanzgericht München of 15 Nov. 2018, 14 K 2028/18. It is noteworthy that the option of appeal has been granted by the Finanzgericht. Under German procedural rules, the appeal to the higher fiscal court (Bundesfinanzhof) has to be explicitly granted by the lower court (Finanzgericht). The option to appeal is usually only granted if the ruling itself leaves ground for a different interpretation.

retroactive adjustment. This indicates that the relationship between Hamamatsu Japan and Hamamatsu Germany has been of influence for establishing the price paid for the imported goods. Moreover, by still allowing Hamamatsu Germany to use the transaction value method, the conclusion of the Finanzgericht München seems to deviate from the conclusions drawn in Case Study 14.2 (see section 2.2.2).

5 FUTURE STATUTORY GUIDANCE IN THE UCC AND LESSONS LEARNED FROM CANADA AND THE UNITED STATES?

5.1 Introduction

40 As explained above, we believe that transfer pricing documentation can continue to be used and that transfer pricing adjustments can be taken into account for customs valuation purposes, obviously only insofar as the transfer prices relate, at least in part, to the imported goods and the adjustment influences the price actually paid or payable and is made within the prescribed three-year period.[48]/[49]

The question, however, is how such statutory guidance is and could be incorporated into the UCC in order to provide greater legal certainty on the interaction between intercompany transfer prices and the customs values. We elaborate on this aspect in more detail below, firstly by taking a look at customs law in Canada and the United States. Just like in the EU, the CVA has been incorporated into local customs law in both Canada and the United States. However, both these countries also provide guidance on how intercompany transfer prices and retroactive adjustments of such prices should be taken into account for customs valuation purposes. Could the EU, therefore, learn from these countries' experience?

5.2 Lessons Learned from Canada and the United States?

5.2.1 Canada

In Memorandum D13-4–5[50] ('the Memorandum') the Canada Border Services Agency ('CBSA') sets out guidelines on using transfer pricing documentation which takes account of retroactive adjustments of intercompany transfer prices for customs valuation purposes.

48. Depending on the type of transfer price adjustment, this can relate to the price paid or payable for the imported goods. If, e.g. a transfer price adjustment results from the introduction of a new group business model, it has to be questioned whether this can be directly allocated to the imported goods.
49. Martijn Schippers, *Retroactieve interne verrekenprijsaanpassingen en de douanewaarde, NTFR-B* 2017/32.
50. Canada Border Services Agency, Transaction Value Method for Related Persons (17 Sept. 2015), Memorandum D13-4–5.

The CBSA accepts, for customs purposes, that prices paid or payable for imported goods are derived from one of the transfer pricing methods specified by the OECD, unless information on prices is available that relates more directly to the specific imports. The Memorandum also provides a non-limitative list of methods that can be used to determine whether the price applied to imports between related parties has been influenced by the parties' relationship.

In the Memorandum the CBSA explicitly states that if a transfer price agreement[51] is in effect between a seller and related purchaser at the time of the goods being imported, the CBSA considers this transfer price to be the 'uninfluenced' price paid or payable for the goods. In order, however, for the price to retain its uninfluenced status, any subsequent adjustments to the price, whether upwards or downwards, must be declared to the CBSA for customs valuation purposes, and the duties payable will then be adjusted accordingly.

5.2.2 United States

In Ruling HQ W548314 ('the Ruling'), the United States has devised a five-factor test that is used to determine whether the customs values of goods imported into the United States should take account of retroactive adjustments of intercompany transfer prices.[52] It also provides a reconciliation programme so that, at a later date, importers can report information that was not yet known at the time of the goods being imported.

Providing the five conditions in this test are met, retroactive adjustments of intercompany transfer prices, both upwards and downwards, will be taken into account for customs valuation purposes. These five conditions are:

(1) A written 'Intercompany Transfer Pricing Determination Policy' is in place prior to importation and the policy is prepared taking IRS code section 482 into account;
(2) The U.S. taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return;
(3) The company's transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted;

51. The transfer pricing documentation may be contained in a transfer pricing agreement, a study, a report or an APA. This documentation can be used even if it has not yet been signed, providing the importer can demonstrate that the documentation existed at the time the goods were declared for import and the price paid or payable was based on this documentation.
52. US Customs and Border Protection, Notice of Revocation of a Ruling Letter HQ 547654 Relating to Post-Importation Adjustments; Transfer Pricing; Related Party Transactions; Reconciliation, Customs Bulletin and Decisions, Vol. 46, No. 23 (30 May. 2012), (checked on 12 Dec.. 2018) on: www.cbp.gov/bulletins/Vol_46_No_23_Title.pdf.

(4) The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,

(5) No other conditions exist that may affect the acceptance of the transfer price by CBP.[53]

The circumstances surrounding the sale must be reviewed to establish whether the initial intercompany transfer price used to determine the price that is paid or
41 payable was influenced by the relationship between the buyer and seller. The
five-factor test also allows importers to apply the transaction value method if the customs value is based on an intercompany transfer price which is adjusted retroactively. The test performed in this respect seeks to establish whether a retroactive price adjustment is in line with the transfer pricing documentation. Depending on whether the transfer price adjustment is downwards or upwards, customs duties paid will then be refunded or reassessed.

The reconciliation programme also allows importers to supplement their import declarations at a later date by adding any missing information. As far as customs values are concerned, any such information can be reported up to twenty-one months after the date on which the goods were imported. The Ruling explicitly states that the reconciliation programme aims to provide practical guidance on taking transfer pricing adjustments into account for the customs valuation purposes.

5.3 Future Statutory Guidance in the UCC

As mentioned earlier, the UCC does not contain any guidance on dealing with transfer pricing adjustments for customs valuation purposes, and this should be seen as a missed opportunity.[54] Nevertheless, inspired by customs legislation in Canada and the United States and in view of certain ongoing developments within the EU, we see the following existing and future opportunities for providing practical, statutory guidance on the interaction between transfer pricing adjustments and customs valuation:

(1) Establishing guidelines;

(2) Simplified returns and flat-rate setting of customs values;

(3) Binding Value Information ('BVI');

(4) Price-setting approach;

(5) Real-time monitoring.

Following the example set in the Canadian Memorandum D13-4–5 we would welcome any move by the European Commission to include guidelines in the Compendium of Customs Valuation texts[55] and to state that transfer pricing documentation

53. The CPB stands for the U.S. Customs and Border Protection.

54. Martijn Schippers, *BEPS and Transfer Pricing but what About VAT and Customs?*, EC Tax Rev. (2016/3).

55. The Compendium of Customs Valuation texts (which has been revised to take account of the introduction of the UCC) includes guidance adopted by the European Commission with regard to customs

may be used for analysing the circumstances surrounding a sale. This also applies with regard to guidance on when retroactive adjustments of intercompany transfer prices should be taken into consideration for determining the customs value since this would promote both legal certainty and uniformity within the EU.

The EU currently allows simplified customs declarations to be filed.[56] And just like in the case of the United States' reconciliation programme, information can also be added to the declaration at a later date. In the EU, however, such information, in principle, has to be added within ten days after the declaration has been filed, and this makes the system impractical for determining the customs value in the event of transfer pricing adjustments.[57] If this ten-day period were to be extended, and this is currently being considered at an EU level, the question arises as to whether this would actually be the most suitable method in view of the administrative burden it places on importers.[58]/[59] It would be more practical to adopt a 'flat-rate approach', as provided for in Article 73 UCC. With the customs authorities' permission, customs values can be determined on the basis of specific criteria if the price paid or payable is not quantifiable on the date on which the customs declaration is submitted.[60] As the flat-rate value would also seem to equate to the final value, retroactive adjustments would no longer have to be taken into account. Although this would seem to reflect the Court of Justice's concerns in the *Hamamatsu* case, it would also seem to be at odds with the line laid down in Case Study 14.2 and the idea that it is precisely the fact that retroactive intercompany transfer prices are taken into consideration that ensures that the price paid or payable for imported goods is not influenced by a relationship between parties. Whether such a facility would actually prove feasible consequently remains to be seen. It should be noted that the Customs Expert Group has considered Article 73 UCC in the past

valuation.

56. Art. 166 UCC.
57. This seemed to be different under the CCC; *see* Martijn Schippers, 'Retroactieve interne verrekenprijsaanpassingen en de douanewaarde', *NTFR-B* 2017/32.
58. Under a transitional provision, as contained in Art. 146(4) DAUCC 2015/2446, it is possible to allow a period in excess of ten days (*see also* point 17 in the Commission Delegated Regulation (EU) 2016/341 of 17 Dec. 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards transitional rules for certain provisions of the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446), *OJ* L 69, 15 Mar. 2016, at 1–313). The Customs Expert Group has also adopted a proposal adding para. 3b to Art. 146 DA-UCC 2015/2446. This allows customs authorities the opportunity to permit market participants to submit a supplementary declaration for the 'customs value' component no later than two years after submitting their initial declaration; *see* 21st meeting of the General Legislation Section of the Customs Expert Group, 12 Mar. 2018, TAXUD.A2/(2018) 2466417.
59. The International Chamber of Commerce considers the additional administration involved in 'leaving open' an import declaration to place an excessively heavy burden on businesses; *see* WCO Guide to Customs Valuation and Transfer Pricing (June. 2015, updated in 2018), at 67.
60. Permission then has to be requested under Art. 73 UCC in conjunction with Art. 71(1) CDRDA-UCC 2015/2446.

as a solution for dealing with transfer pricing for customs valuation purposes.[61] However, the current prevailing opinion amongst its members seems to be that: 'Article 73 UCC is not applicable, and the only possibility is to use the 42 simplified declaration.'[62] This is, in our view, a peculiar opinion of the Customs Expert Group, because Article 73 UCC also explicitly refers to amounts which are to be included in the customs value in accordance with Article 70(2) UCC (read: the price paid or payable), which is different from its predecessor under the CCC that only referred to the elements of the transaction value.[63]

Parties seeking to establish goods' tariff classification and origin can currently request a Binding Tariff Information ('BTI') ruling respectively a Binding Origin Information ('BOI') decision. The information provided is binding both on the requesting party and on the customs authorities and so creates certainty. However, the legislation does not currently seem to provide BVI, although this issue is being endorsed internationally and discussed at an EU level.[64] A BVI instrument could be a way to offer applicants certainty on whether the customs value can, in a specific situation, be based on transfer pricing documentation and, if so, how retroactive adjustments of intercompany transfer prices should be accounted for.[65]

Another possibility would be for the at arm's length price to be determined on the basis of information that is available in advance, such as financial forecasts and information on market conditions; in other words, by adopting a price-setting

61. Twentieth meeting of the Customs Code Committee (Customs Valuation section), 3 and 4 Mar., TAXUD/B4/ARES(2016)5 569169. Under the CCC, the Customs Expert Group was referred to as the Customs Code Committee (Customs Valuation section).
62. Fourth meeting of the Customs Expert Group (Valuation section), 12 and 13 Apr. 2018, TAXUD/E5/MN/aga/Ares(2018)3622733.
63. Article 156a of the Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code *OJ* L 253, 11 Oct. 1993, at 1–766.
64. *See* Art. 3(9)(a)(i) of the Bali Package and the Commission Implementing Decision of 17 Feb. 2017 concerning the adoption of annual work programmes for 2017 for the Customs 2020 and Fiscalis 2020 programmes and on the financing of the programmes for expenditure to be committed by DG Taxud from the 2017 budget lines 140201 and 140301, Brussels, 17 Feb. 2017, C(2017) 826 final. It can also be argued that Art. 35 UCC already allows a BVI to be issued (*see* Martijn Schippers, *Retroactieve interne verrekenprijsaanpassingen en de douanewaarde*, *NTFR-B* 2017/32).
65. The introduction of a BVI, as being promoted internationally, and the BVI discussed in the lead-up to the UCC would seem to offer certainty only in the case of amounts added or deducted as referred to in Arts 71 and 72 UCC (*see* Martijn Schippers, 'Retroactieve interne verrekenprijsaanpassingen en de douanewaarde', *NTFR-B* 2017/32, at 30). If a BVI were to be introduced in the EU, it is recommended that this should also provide certainty on how an adjustment in transfer prices should be taken into account for customs valuation purposes. We would add a critical note on the BVI, however, as the fact that it would be binding on all customs authorities in the EU would undermine the sovereignty and ability of individual Member States to negotiate agreements on customs valuation. We would also note that while certain EU Member States currently allow individual agreements ('rulings') with national tax authorities, these rulings are not binding on all customs authorities in the EU. The question arises, therefore, as to what extent certainty can be derived from such rulings. *See* G.J. van Slooten, 'Een "inlichting" is pas een "inlichting" als deze bindend is', *WFR* 2018/4.

approach.[66]/[67] The transfer price would reflect the commercial nature of the transaction *exante* and would not subsequently be tested against *ex post* developments. No retroactive adjustment would therefore be needed. The idea behind this approach is that non-related parties will ensure they agree an arm's length price, but will not adjust this price retroactively. As adopting this method would relieve importers of a substantial administrative burden, it would in that respect be welcome. However, further research is needed to ascertain whether it would also prove feasible from a customs valuation perspective.

The final possibility we see would involve real-time monitoring.[68] Digitalization and the increased amounts of legislation on the exchange of data, including internationally, as well as compulsory reporting, are increasingly enabling importers to monitor and also adjust their transfer prices on an ongoing basis so as to ensure they remain in line with the arm's length principle. If customs values are based on fluctuating transfer prices, no retroactive price adjustments will be applied, and there will no longer be any need to take account of retroactive adjustments in transfer prices. We would point out, however, that such a system will, in practice, be more difficult in situations requiring profits to be split between more than two parties. This possible solution therefore requires further research to ascertain whether it will be feasible for and indeed welcomed by governments and businesses alike.[69]

6 CONCLUSION

The question is how to move forward. For the time being, the Dutch and Belgian customs authorities seem to be assuming that the *Hamamatsu* judgment should be assigned a 'limited interpretation', as discussed in section 4.4. Sweden, however, sees the judgment as constituting confirmation that retroactive adjustments of intercompany transfer prices should not be taken into account for customs valuation purposes. For reasons of legal certainty and uniformity we would welcome an announcement of official views of the Customs Expert Group within the not too distant future, together with some practical (statutory or other) guidelines to facilitate the interaction between transfer pricing and customs valuation. In that respect, the *best practices* applied by Canada and the United States could serve as useful points of reference.

66. Paras. 3.69, 3.71 and 6.194, OECD Guidelines.
67. More details on the price-setting approach, *see* S. van der Ham & K Ruëtz, *German Insights on Price-setting Versus Outcome Testing Approach*, Int'l Tax Rev (checked on 3 Aug. –12 Dec. 2018) www.internationaltaxreview.com/Article/3354495/German-insights-on-price-settingversus-outcome-testing-approach.html.
68. This is more common in VAT. Spain, e.g. has devised a system under its SII Legislation whereby invoices have to be submitted to the Spanish tax authorities within four days after being issued.
69. This gives rise to certain privacy-related issues, while also presenting businesses with various administrative and IT challenges.