

Colombia

ARTICLE 4: PROCEDURES FOR APPEAL OR REVIEW

Customs administrative decisions, like any other public administrative decision issued by the Colombian government, can be challenged by filing administrative judicial appeals in a timely manner. This includes administrative procedure acts (those intermediate acts that promote a final decision act), preparatory administrative acts (those that enable a subsequent act) and execution acts (those acts necessary for a final act).

The administrative legal resources are:

Appeal for Reversal, which is filed with the same official who made the Customs administrative decision to clarify, modify or revoke it.

Appeal, which is filed with the immediate hierarchical superior to clarify, modify or revoke a decision. It should be noted that there is no appeal of the decisions of the Director General of the National Tax and Customs Directorate (DIAN).

Complaint appeal, which is filed when an appeal is rejected. This administrative appeal is filed directly with the superior of the official who made the administrative decision, by means of a document with a copy of the ruling that denied said appeal attached.

The above is contained in articles 74 *et seq.* of Law 1437 of 2011, namely Code of Administrative Procedure and Administrative Litigation (Spanish abbreviation "CPACA"). In this code, the terms and presentation of the above-mentioned administrative resources are regulated in detail; the requirements that said resources must meet; the grounds for rejection; completion and admission of legal evidences; among other aspects.

In the following link you will find the code mentioned above.

<https://www.suin-juriscol.gov.co/viewDocument.asp?id=1680117>

As an additional comment, we would like to point out that, in Colombia, appeals against Customs administrative decisions can only be filed by the interested Customs users. Exceptions to this are lawyers who may act as unofficial agents to file administrative appeals on behalf of said Customs users or third parties linked to a Customs administrative process (e.g. insurance companies). The above is regulated in article 651 of Decree 1165 of 2019.

Finally, it should be noted that the Customs administrative acts become officially valid in the following contexts: 1. When there are no administrative appeal proceedings against them. 2. When the term to file an administrative appeal has expired, and none has been filed, or they are not presented in due form. 3. The day after an express waiver of administrative appeal. 4. The day after the validity of an act that accepts the withdrawal of the appeal filed is made official. No appeal will proceed against an act that has accepted withdrawal of an appeal. 5. When the appeals filed have been definitively decided. The aforementioned is regulated in Article 709 of Decree 1165 of 2019.

Relevant government agencies:

- Dirección de Impuestos y Aduanas Nacionales -DIAN. (National Tax and Customs Directorate). Customs Authorities. Link.

<https://www.dian.gov.co/aduanas/Paginas/Inicio.aspx>

- Ministerio de Comercio Industria y Turismo. (Ministry of Commerce, Industry and Tourism) Link.

<https://www.mincit.gov.co/>

- INVIMA Instituto Nacional de Vigilancia de Medicamentos y Alimentos. (“National Institute for the Surveillance of Medicines and Food”) Link.

<https://www.invima.gov.co/>

- ICA Instituto Nacional Agropecuario. (National Agricultural Institute). Link.

<https://www.ica.gov.co/>

- SIC Superintendency of Industry and Commerce – Technical regulations - certificates of compliance with technical standards . Link

<https://www.sic.gov.co/reglamentos-tecnicos>

- Ministry of Defense (importation of war material). Link

<https://www.mindefensa.gov.co/irj/portal/Mindefensa>

- Ministry of foreign relations. Link

<https://www.cancilleria.gov.co/>

- Ministry of Justice. Single Normative Information System (“Juriscol”). Link

<https://www.suin-juriscol.gov.co/>

- Andean Community. Link

<https://www.comunidadandina.org/>

- World Customs Organization. Link

<http://www.wcoomd.org/>

- World Trade Organization. Link

<https://www.wto.org/>

- ALADI Asociación Latinoamericana de Integración. Link

<https://www.aladi.org/sitioaladi/>

- Ministry of Health and Social Protection / National Narcotics Fund (“Fondo Nacional de Estupefacientes”). Link

<https://www.minsalud.gov.co/salud/MT/Paginas/fondo-nacional-de-estupefacientes-fne.aspx>

Relevant private agencies and industry groups :

- National Association of Industrials (Spanish abbrev. “ANDI”). Link
<https://www.andi.com.co/>
- The National Association of Shipowners and Maritime Agents (Spanish abbrev. “ASONAV”). Link
<https://www.asonav.org>
- National Trade Council ((Spanish abbrev. “CGN”). Link
<https://cgn.org.co/>
- Colombian Federation of Logistics Agents in International Trade (Spanish abbrev. “FITAC”). Link
<https://fitac.net/>
- Latin American Conference of Express Transport Companies (Spanish abbrev. “CLADEC”). Link
<https://cladec.org.co/>
- Colombian Association of Flower Exporters (Spanish abbrev. “ASOCOLFLORES”). Link
<https://asocolflores.org/es/>
- Association of the Automotive Sector and Its Parts (Spanish abbrev. “ASOPARTES”). Link
<https://asopartes.com/>
- Colombian Federation of Road Freight Transporters (Spanish abbrev. “COLFECAR”). Link
<https://www.colfecar.org.co/>

CASE STUDY

The facts on which this case study is based are the following:

1. A customs user XXXX with a continuous high level of imports makes a request t the Sub-Directorate of the Authorized Economic Operator (hereafter “AEO”) to become officially qualified as an AEO, based on the provisions of Decree 3565 of 2011 (arts 9 *et seq.*).
2. Article 6 of Decree 3568 of 2011 establishes the conditions that must be met to request and maintain authorization as an AEO, among which is the condition described in numeral 6.1.6, in which the interested party must : “(...) *obtain a favorable rating from DIAN, in accordance with the verifications carried out in the development of the application of the Risk Management System*”

referred to in article 583 of Decree number 1165 of 2019 and other regulations that modify it, add to it or substitute it”.

3. Based on the provisions of Article 583 of Decree 1165 of 2019, through the risk management system, DIAN may use risk management practices and procedures to prevent or combat the use or destination of trade for purposes that threaten national security or Customs provisions. In this sense and based on the elements of risk management indicated in Article 584 of Decree 1165 of 2019, DIAN may determine for importers and foreign trade operators, a rating with low, medium or high risk, which will serve to issue a favorable or unfavorable view about said importers and foreign trade operators (in this case, the user XXXX requesting an AEO qualification).

4. In this case and when verifying the conditions for the user XXXX, the OEA Sub-Directorate determined a breach of the condition stipulated in section 6.1.6 of Article 6 of Decree 3568 of 2011, which concerns obtaining a favorable rating from DIAN's risk management system. The Tax, Customs and Exchange Compliance Risk Coordination of the Sub-directorate of Risk Analysis and Programs sent the risk profile of said customs user which was not considered favorable for the AEO program in accordance with current customs regulations.

5. Among the elements which resulted in an unfavorable risk profile for the applicant XXXX, are, amongst others, those indicated in Article 584 of Decree 1165 of 2019: *"(...) ELEMENTS OF MANAGEMENT RISK. The risk management system identifies, among others, the risks related to: 1. The people involved in the logistics distribution chain and the characteristics of the foreign trade operation. 2. The status of the payment obligations required in tax, customs or exchange matters, sanctions and other credits in favor of DIAN. 3. Those derived from non-compliance with tax, customs, and exchange obligations. 4. Those related to the evasion of the payment of customs taxes due to distortion of the elements of the customs value of imported goods, of the preferential treatments derived from the application of the rules of origin and of aspects related to tariff nomenclature. 5. The economic solvency to carry out foreign trade operations and the origin of the funds. 6. The economic solvency necessary to ensure compliance with its tax, customs, and exchange obligations. Based on the risk management system, it will be classified as low, medium or high risk. This qualification will serve to issue a favorable or unfavorable view of customs users. In no case will a favorable view be issued based on a high-risk rating. Likewise, the risk management system will serve as one of the instruments to define the scope of control regarding foreign trade operations, in any of its stages."*

6. Consequently and in accordance with the provisions of paragraph 5 of Article 6 of Decree 3568 of 2011 *"(...) When the qualification referred to in section 6.1.6. of this article is unfavorable, the applicant will be personally notified by the DIAN office that issued it. Against this qualification, the appeals for reversal and appeals will proceed before said area and their hierarchical superior respectively, in accordance with the provisions of the Law 1437 of 2011. The filing of appeals will suspend the processing of the application for authorization as an AEO. Once the decision has been adopted, the corresponding administrative procedure will continue"*, **This resolution was challenged by user XXXX through the filing of an appeal for reversal and an appeal.**

7. In this case, it is important to consider Article 130 of Law 2010 of 2019 that provides: *"INFORMATION ON THE RISK MANAGEMENT SYSTEM OF THE SPECIAL ADMINISTRATIVE UNIT DIRECTORATE OF NATIONAL TAXES AND CUSTOMS. The information and procedures*

administered by the Risk Management system of the Directorate of National Taxes and Customs (DIAN) are confidential. This special reservation will be opposable to individuals and all public entities and can only be lifted by order of a competent judicial authority.” In accordance with this standard, the guidelines, information, procedures, and other instruments generated by DIAN through the Risk Management System to identify possible risks of non-compliance with tax, customs, and exchange obligations and to contribute to the macroeconomic and financial stability of the country, has the nature of confidential information, since it compromises public interests and national security.

8. Based on the above, it is concluded that the information that is part of DIAN’s Risk Management System is protected by the legislator in the above-mentioned rule.

9. As indicated above, the AEO Sub-Directorate issued an unfavorable risk rating through Resolution, which was challenged by user XXXX through the filing of an appeal for reversal and subsidy appeal, the former before the AEO Sub-Directorate, the latter before the Customs Directorate. The argument was based on and alleged a lack of transparency in the Resolution and a lack of motivation in the decision of not approving user XXXX as an AEO. All of the above was also allegedly in violation of the due process laid out in Article 29 of the Political Constitution.

10. Based on the Colombian administrative procedure established in Law 1437 of 2011 (Articles 74 *et seq.*), the AEO Sub-Directorate responded in time to the appeal for reversal, previously verifying its opportunity in the filing by user XXXX and compliance with the legal formalities of the appeal. The AEO Sub-Directorate responded by confirming the unfavorable risk rating resolution it had issued, alleging strict compliance with the aforementioned AEO laws, especially Article 130 of Law 2010 of 2019, also cited above. For this reason, the AEO Sub-Directorate’s decision respected constitutional due processes.

11. With the rejection of the appeal for reversal, user XXXX filed an appeal before the hierarchical superior of the AEO Sub-Directorate, the Customs Directorate. This directorate, based on the Colombian administrative procedure established in Law 1437 of 2011 (arts 74 *et seq.*), responded to the appeal in time, previously verifying its opportunity in the filing by user XXXX and compliance with legal requirements. The Customs Directorate responded to the appeal, confirming the decision to reject the appeal for reversal by the AEO Sub-Directorate, indicating the same reasons as those given by the Sub-Directorate.