Colombia

ARTICLE 5: OTHER MEASURES TO ENHANCE IMPARTIALITY,

NON-DISCRIMINATION AND TRANSPARENCY

In Colombia, Customs administrative actions related to control are carried out within the framework of a risk management system in order to promote the security of the logistics chain and facilitate international trade. For such purposes, conduct of a fraudulent nature, smuggling and money laundering are neutralized. With the help of other authorities, the prevention of environmental risks, health, border security and the control of weapons of mass destruction will be strengthened. This requires cooperation, mutual assistance and the sharing of information between Customs authorities, and between Customs authorities and the private sector.

The above can be found in decree 1165 of 2019 (namely the Customs Statute) and more specifically, Articles 582 *et seq*. The link to this decree is indicated in the case study under Article 1 of the TFA.

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.