



## Customs Fraud and the Role of Post-Clearance Customs Control in Detecting It

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**Abstract:**

*The facilitations introduced in customs procedures, in line with the global economic system based on lifting customs barriers and reducing tax burdens, have been met by some economic operators with customs fraud practices affecting both economic customs regimes, customs declarations, and invoices, in order to evade the payment of customs duties and taxes with the aim of improving their financial positions. This has negatively impacted the national economy by impoverishing the public treasury. This prompted reliance on the mechanism of post-clearance customs control pursuant to special procedural legal texts, with the aim of creating a balance between the speed of releasing goods and imposing control targeting both legal and natural persons later at their premises through accounting audit, examination, and physical inspection.*

**Keywords:** Customs fraud – forged declaration – customs control – customs audit.

## **La fraude douanière et le rôle du contrôle douanier a posteriori dans sa détection**

### **Résumé :**

*Les facilités introduites dans les procédures douanières, conformément au système économique mondial fondé sur la suppression des barrières douanières et la réduction des charges fiscales, ont été utilisées par certains opérateurs économiques pour se livrer à des pratiques de fraude douanière affectant à la fois les régimes douaniers économiques, les déclarations en douane et les factures, afin d'échapper au paiement des droits et taxes douaniers dans le but d'améliorer leur situation financière. Cela a eu un impact négatif sur l'économie nationale en appauvrissant le Trésor public. Cela a conduit à recourir au mécanisme de contrôle douanier a posteriori conformément à des textes juridiques procéduraux spéciaux, dans le but de créer un équilibre entre la rapidité de la mainlevée des marchandises et l'imposition d'un contrôle ciblant à la fois les personnes morales et physiques ultérieurement dans leurs locaux par le biais d'un audit comptable, d'un examen et d'une inspection physique.*

**Mots clés :** *Fraude douanière – déclaration falsifiée – contrôle douanier – audit douanier.*



## Introduction

The facilitations introduced in customs operations, aiming to implement various provisions of international agreements that seek to lift customs barriers and reduce tax burdens, did not receive a positive response from many individuals and economic operators, who resorted to customs fraud intended to prevent the enforcement of the regulatory laws applied by the customs administration, particularly every act whereby the offender seeks to evade payment of customs duties and taxes. These fraudulent practices take multiple forms, such as fraud in economic customs regimes, fraud in invoices, and fraud in customs declarations, among others. They have had negative repercussions on the national economy, and even more, they have impoverished the public treasury.

All these circumstances motivated the legislator to search for a control mechanism capable of creating a balance between flexibility in customs procedures and the speedy release of goods on one hand, and on the other hand, imposing customs control that targets natural and legal persons through auditing and examination of goods, records, documents, and accounting systems. This is embodied in post-clearance customs control, whose provisions are subject to Law 79/07 on Customs as well as Executive Decree 18/188, which defines the modalities of deferred and post-clearance control by the customs administration.

It is worth noting that customs control in general does not mean customs investigation, as the two are not subject to the same provisions.

The subject of this study is of great importance, considering that the global economic system calls upon states to lift customs barriers and reduce tax burdens to ensure smooth trade without complex restrictions. However, at the same time, the issue of customs fraud has become a threat to customs flexibility policies. Therefore, control has become an inevitable necessity, even demanded by the World Customs Organization. This raises the following problem: **What control procedures has the legislator adopted to limit the phenomenon of customs fraud?**

To answer this problem, the descriptive-analytical method was adopted, which helps to monitor and describe customs fraud by clarifying its concept and elements, in addition to analyzing the legal texts concerning procedural provisions by presenting the updates, highlighting the shortcomings, and arriving at the results.

## **1. The Nature of Customs Fraud**

Customs fraud is considered an unlawful act aimed at evading the payment of customs duties and taxes, constituting a punishable offense whenever its elements are present. These elements are distinguished by their particularity in terms of the legal, material, and moral structure. Furthermore, the specificity of customs fraud lies in the various methods used by the economic operator to evade tax burdens. All this will be addressed in this section.

### **1.1. The Concept of Customs Fraud**

The simplification of customs procedures, ensuring the speedy release of goods and the reduction of tax burdens, has driven some economic operators to resort to fraudulent



methods in order to improve their financial positions, thus evading fiscal obligations and their components.

### ***1.1.1. Definition of Customs Fraud***

The concept of fraud can be derived from international agreements, such as the Nairobi Convention, which established a set of principles for customs legislation and criminalization, and which contributed effectively to fostering cooperation among states to combat and investigate customs violations. It defined it as any customs deception by which a person defrauds customs interests during import or export, as well as the application of prohibitions and restrictions provided for in customs legislation, or obtains any benefit by breaching this legislation.

As for the Algerian legislator, he considered customs fraud as a customs offense, adopting a broad definition through Article 240 bis of the Customs Law: *“Any violation of the laws and regulations enforced by the customs administration, which the law provides for its suppression, is deemed a customs offense.”*

Others have considered fraud to be an illegal act that contravenes the laws and regulations entrusted to the customs administration for enforcement, with the aim of evading the collection of taxes and duties, ignoring them, or evading the application of restriction and prohibition measures stipulated in the legislation.

From the above, it can be concluded that customs fraud is any violation of the laws and regulations in force with the aim of obtaining a preferential status, primarily through evading the payment of duties and taxes, while benefiting

from exemptions. It takes various forms and constitutes a customs offense that entails penalties, knowing that fraud is based on three elements.

### ***1.1.2. Elements of Customs Fraud***

Customs fraud has been increasingly on the rise due to its use by many economic operators to evade fiscal burdens, employing various methods. Therefore, the legislator intervened with substantive provisions suited to the nature of these deceptions, beginning with the formation of the elements on which customs fraud is based: the legal, material, and moral elements.

#### **▪ The Legal Element of Customs Fraud**

It is well established that the legal element is fundamentally based on the principle of legality, which is defined as the restriction of criminal unlawfulness to the provisions of criminal law that define crimes and penalties. This principle means “no crime, no punishment, and no security measures except by virtue of a legal provision,” which translates the Latin expression *nullum crimen, nulla poena sine lege*. Thus, the source of unlawfulness is the legal text, known as the “criminalization text.” In criminal law, it encompasses the Penal Code, its supplementary laws, and special penal laws. This principle is enshrined in Article 1 of the Penal Code.

According to some, the principle of legality of crimes and punishments means that no act or omission can be considered a crime unless the law stipulates it, and no penalty can be imposed unless the law provides for it. The penal rule is the instrument through which the legislator



expresses his will in identifying phenomena and clarifying the consequences thereof.

Accordingly, the acts committed by a violator of customs legislation and regulations, whether positive or negative, cannot be described as crimes unless the law stipulates them and prescribes penalties. Judges are bound to apply these legal provisions, without extending their authority to the domain of criminalization or punishment. Thus, every violation of the legislative and regulatory provisions governing customs law constitutes a customs offense, classified in accordance with the provisions of criminalization and punishment stipulated in the Customs Law and its supplementary laws. No act can be described as a misdemeanor or customs offense unless a legislative or regulatory provision imposes the duty or prohibition violated and prescribes a penalty for it.

What distinguishes the legal element of customs fraud is the legislator's reliance on the mechanism of legislative delegation, whereby the executive authority substitutes for the legislative authority, which is originally competent, in issuing legal texts and other regulatory technical texts to address urgent changes. This is intended to outline and define the features and elements of customs offenses, within the framework of constitutional powers. The executive authority's direct contact with the field grants it the advantage of understanding the dynamics and changes within customs activity, including recurrent customs crimes committed by many parties, especially economic operators. Its intervention in legislation thus assists the legislative authority in its work and exposes many criminalized acts, based on the system of legislative delegation.

- **The Material Element of Customs Fraud**

The material element is reflected in the criminal behavior, manifested in any activity, conduct, or act. It has two forms: positive, represented by an act, and negative, represented by abstention or omission. Both cause harm to legally protected interests and rights or expose them to danger—this is the general understanding in criminal law.

It is evident that positive conduct is widely present in the various forms of customs fraud, usually associated with deceit and fraudulent methods aimed at evading payment of duties and taxes, which is the predominant tendency among economic operators. Of particular note is Article 219, clause (h) of the Customs Law: *“Failure to respect the prescribed routes and times without legitimate justification, as well as fraudulent acts observed during transit, which result in altering or neutralizing the effectiveness of sealing, security, or identification means for goods.”*

Also, Article 325, clause (l) of the Customs Law: *“False declarations concerning type, value, or origin of highly taxed goods, by resorting to fraudulent acts as defined in Article 5 of this law, or otherwise.”*

As for negative conduct in fraud, it is deliberate behavior where a person adopts a passive attitude toward a legal obligation imposed by law, consciously refraining from performing it. This consists of failing to comply with obligations or procedures prescribed by the legislator. In customs law, negative conduct appears in terms such as “delay in fulfilling the obligation,” “failure to present the document,” or “non-compliance,” etc.

It is noteworthy that in the provisions of criminalization and punishment in the Customs Law, negative conduct



largely predominates in what are known as “office crimes,” i.e., those detected during verification and inspection operations. Examples include Article 319, clause (g): *“Failure to comply with the obligation to submit the detailed declaration within the period specified in Article 76 of this law,”* which reflects a passive conduct of not submitting the declaration on time. Another example is Article 325, paragraph (y): *“Failure to present a legal document, authorization, or certificate as defined in Article 21(2) of this law.”*

From these behaviors results the criminal outcome: the effect caused by the criminal act of violating customs laws and regulations, which harms the public treasury by evading legally imposed duties and taxes. However, the legislator did not stop at requiring harm to occur for the crime to be complete. Instead, this crime is distinguished by its material element, classifying it as a crime of danger rather than a crime of harm. Thus, the criminal act does not need to reach the point of destroying or diminishing the protected interest (harm), but rather it suffices that it merely threatens it (danger). This is the prevailing nature of customs offenses in general, where state interests are jeopardized by an offender’s failure to comply with legal requirements, even without producing tangible external harm, since engaging in risk-inducing behavior suffices to fulfill the material element of customs fraud.

#### ▪ **The Moral Element of Customs Fraud**

According to general rules, committing the material aspects of a crime is not sufficient to hold the principal offender or accomplice accountable, even if the material element constitutes the core of the crime. The psychological

factor, which forms the link between the offender and the act, must also exist, and it is reflected in the moral element.

In general criminal law, this is well established. However, the specificity of customs criminalization has led the legislator to depart from the general rules of crime, which require proof of intent by the public prosecutor, and instead to adopt the classification of such acts as *material offenses*. The Algerian legislator followed this path, influenced by Latin legal systems, where economic laws—particularly customs law—recognize material offenses.

This is clearly expressed in Article 281 of the Customs Law: “Judges may not acquit offenders on the basis of their intent, nor reduce tax fines.” Also, Article 303 of the Customs Law: “Any person in possession of goods subject to fraud shall be held liable for fraud...”

This same approach was adopted by the Tunisian legislator, who also sufficed with the material behavior in establishing the customs offense.

## **1.2. The Most Important Methods of Customs Fraud**

Fraud has begun to be used in different ways in order to mislead the control process imposed by the Customs Administration, and its methods have become varied. It has penetrated the economic customs systems due to the advantages they provide for the benefit of the economic operator. Fraud has also come to affect every document related to customs clearance, including the customs declaration and invoices, with the aim of evading the payment of customs duties and taxes. Therefore, within this section, we shall address the most important fraud methods of various types.



### ***1.2.1. Customs Fraud Affecting Economic Customs Systems***

The customs legislator has defined economic customs systems based on their functional performance as systems that enable the storage, transformation, use, or movement of goods with suspension of customs duties and internal consumption taxes as well as all other duties and economic restrictions subject to them. The World Trade Organization has also defined them as those customs procedures that apply to goods placed under customs supervision. This highlights the interest of international organizations in them due to their importance in facilitating customs procedures. This international orientation imposed itself on Algeria, pushing it to shift from monopoly to openness, which led it to adopt diverse and flexible economic customs systems in terms of functional performance to align with the needs of the economic operator.

However, these facilities were among the reasons that enabled customs fraud to penetrate them. Beneficiaries of these systems began to use fraudulent methods, particularly reductions or substitutions applied to goods placed under customs supervision, or diverting goods from their preferential purpose. For example, goods may be declared as destined for storage while they are actually transported for consumption. Fraud may also affect the factory system under customs supervision, which benefits companies and enterprises from the suspension of duties, taxes, economic restrictions, and administrative procedures whenever it concerns operations such as the extraction, assembly, or transportation of crude oil or bituminous minerals, etc. However, a beneficiary of this system may use these

materials for purposes other than those for which suspension of duties and taxes was granted, in which case the latter become immediately payable.

### ***1.2.2. Fraud Affecting the Detailed Declaration***

It is certain that every import or export operation is supposed to pass through customs offices supported by a detailed declaration in accordance with Articles 31 and 75 of the Customs Code. However, the offender, while following these procedures, resorts to fraud in the prepared declaration using various forms, including failure to declare the goods and falsification of the customs declaration.

- **Failure to Declare Goods**

One of the main actions considered under failure to declare goods according to customs legislation and regulation is operations that occur during passage through customs offices. The offender may use fraudulent methods by hiding goods in specially prepared compartments or in cavities, which constitutes failure to declare goods. It may also take the form of reductions or substitutions made to goods under customs supervision. These operations occur when presenting goods before the customs authorities, which then receive the summary declaration pending the detailed declaration, as is the case with goods placed in warehouses and customs clearance areas. An example is goods declared as destined for export to benefit from duty reductions, part of which is then withdrawn to be directed and sold in the domestic market. This act is stipulated and punished under Article 325, paragraph “A” of the Customs Code.



### ▪ **Falsified Declaration**

The purpose of this practice is to pass goods through customs offices with a declaration that does not contain accurate facts and data. The declarant is obliged to ensure that his declaration matches his goods. Fraud here affects the basis on which duties and taxes are calculated. Value in this case refers to the transaction value, which is the actual price paid when the goods were sold. Fraud may also affect the type of goods by altering the name or position under which they appear in a particular heading of the customs tariff, thereby affecting the imposed duties and taxes. Falsification may even extend to the origin of the goods in order to benefit from preferential status under international agreements. This method is widespread due to the difference in duty and tax rates imposed on the same commodity originating from two different countries.

#### ***1.2.3. Fraud Affecting Invoices***

It is legally required that invoices be drafted and compliant in both form and substance. However, this document has become a known means of committing fraud with the aim of obtaining preferential status or customs reductions, taking various forms such as falsified invoices and fictitious invoices.

### ▪ **Falsified Invoice**

A falsified invoice is one prepared without initiating any actual delivery or service, with the aim of: reducing tax bases for various taxes and duties, concealing operations, transferring and laundering capital, embezzling funds from assets, and financing illegal or legal operations. It may also

be used to benefit from certain advantages such as the right to deduction in the area of value-added tax or obtaining loans from banking institutions to finance investment projects. Consequently, these invoices are submitted within the customs clearance file in order to evade legally imposed obligations.

- **Fictitious Invoice**

This refers to invoices with no real existence, prepared solely to mislead customs officials into believing the legitimacy of commercial transactions while the reality is otherwise. This practice often occurs based on an agreement between the supplier and the buyer, whereby the supplier issues two invoices: one with a reduced value presented before the Customs Administration and to the importer, and another containing the actual transaction value used to settle the deal with the importer. This is known as “double invoicing.”

It is certain that invoice fraud, in all its forms, is often detected during post-clearance control through the exchange of information between Algerian and foreign customs aimed at verifying the authenticity of invoices used at the time of export. This mechanism is provided for under Article 258 of the Customs Code.

## **2. Post-Clearance Customs Control as a Mechanism for Detecting Customs Fraud**

Customs control has been generally adopted in international agreements, including the Convention on the Simplification and Harmonization of Customs Procedures (Kyoto), which included many provisions, particularly those in Chapter VI of General Annex 6-6, which emphasized the



need for customs control systems to include audit-based control procedures. Such control may take the form of deferred customs control or post-clearance control, both of which are stipulated in the Customs Code and framed by Executive Decree 18/188. The present study is limited to post-clearance control in terms of its concept and procedures.

## **2.1. The Concept of Post-Clearance Customs Control**

The flexibility now characterizing customs clearance procedures may open the door to customs fraud. Therefore, the legislator sought to create a balance by activating the role of the Customs Administration in curbing any manipulations economic operators or beneficiary institutions may resort to in order to evade fiscal burdens, through post-clearance customs control. What is its concept and what objectives does it aim at?

### ***2.1.1. Definition of Post-Clearance Customs Control***

The customs legislator generally provided for customs control in Article 5 of the Customs Code as: “all measures taken to ensure compliance with the laws and regulations in force that the Customs Administration is entrusted with enforcing.” It then precisely defined post-clearance control in Article 02 of Executive Decree 18/188 regulating the methods of conducting deferred and post-clearance control as: “the act by which the customs services carry out an examination covering the books, records, accounting systems, and commercial data held by persons or institutions directly or indirectly concerned with customs

clearance of goods, in order to verify the accuracy and correctness of customs declarations.”

Others have defined it as the control adopted by the Customs Administration to measure the extent of compliance of persons and institutions with laws and regulations and to detect various customs offenses by visiting their premises in an intelligent manner based on prior programming and targeting in the selection of institutions and persons subject to control. It should be noted that the new information system has adopted a special unit called the Post-Clearance Control Unit, which is complementary to deferred control due to the impossibility of conducting thorough control at first instance in terms of detailed declarations, documents, and goods inspection.

### ***2.1.2. Objectives of Post-Clearance Customs Control***

Post-clearance customs control targets both natural and legal persons connected with customs operations. Among its main objectives is that it does not obstruct economic activity, as the legislator sought to reduce the slowness of customs operations that previously took a long time. It therefore comes after the release of goods and their transfer to premises belonging to their owner, which constitutes a privilege that relieved him of many burdens. In addition, post-clearance control ensures the legality of persons and institutions in accordance with applicable laws and regulations, as well as the investigation and detection of violations of customs and foreign exchange regulations and the movement of capital to and from abroad, in addition to detecting any other offenses linked to customs clearance and foreign trade. It also aims to safeguard the rights of the public treasury by exposing various forms of customs fraud,



leading to a reassessment of customs duties and taxes payable to the state.

## **2.2. Procedures of Post-Clearance Customs Control**

Given its importance, the legislator entrusted post-clearance control to customs officers holding at least the rank of Control Officer, in order to exercise investigative powers after the release of goods and based on the documents held by natural and legal persons directly or indirectly linked to customs operations, to verify whether they match the customs declaration. Post-clearance control is carried out at the premises of persons and institutions, as provided for in Article 08 of Executive Decree 18/188.

As for its timing, it occurs after the release of goods since it is a subsequent control, as provided for in Article 92 bis 01 and confirmed in Article 01 of the same Decree. Regarding the procedural rules governing the conduct of post-clearance control, it can be concluded that this process goes through several stages: the preparatory stage, the documentary review stage, and finally the fieldwork stage of conducting post-clearance control.

### ***2.2.1. Preparatory Stage of Post-Clearance Customs Control***

Conducting post-clearance customs control requires preparatory measures, materialized through a well-devised plan covering the natural and legal persons subject to control. This procedure falls within the annual program, approved before December 31 of the year preceding the year concerned by control. The program must specify the persons and institutions scheduled for control, the customs operations to be reviewed, as well as the selection criteria

and risk indicators linked to those persons, institutions, or customs operations.

It should be noted that officers in charge of this procedure do not act spontaneously but rely on criteria to identify suspicious operations and targeted operators, taking into consideration the nature of goods and their origin. This includes the likelihood of counterfeit brands, the type of customs system applied, and the operator's reputation with the tax authorities and customs litigation services.

For instance, in 2021, 13 notifications were issued concerning 138 monitored economic operators and 43 suppliers considered high-risk, as they were operators with a history of disputes with the Customs Administration and suppliers previously reported for customs violations. In the same year, 102 warnings and fraud notifications were issued to direct operational monitoring for the effective fight against smuggling, money laundering, cross-border crimes, and various serious forms of illicit trade in goods. This notification mechanism also concerns fraudulent transactions aimed at the unlawful transfer of foreign currency.

Moreover, the new customs information system (ALCES) now includes an integrated risk management unit, which operates using a selective mechanism for customs control after analyzing fraud indicators, alongside information that may be obtained from various national institutions and bodies.

### ***2.2.2. Documentary Review Stage***

Based on this preliminary data gathered in the preparatory stage, the process may move to the stage of documentary review for all those directly or indirectly



involved in customs operations. This may even extend to reviewing documents related to auditors and audit reports prepared by customs services, as well as those prepared by external auditors and accounting examination results drawn up by tax services. This grants customs officers, entrusted by the legislator with this investigative role, a significant advantage. These officers, who must hold at least the rank of Control Officer, have sufficient expertise in examining documents and detecting falsified documents and false declarations.

### ***2.2.3. Fieldwork Stage of Post-Clearance Control***

After compiling the documents, customs officers move to the fieldwork stage by notifying the party subject to control with a notice delivered by registered letter or by any electronic means at least 10 open days prior to the first intervention. This notice must include essential details such as the scheduled date of the first intervention and the nature of the operations subject to control.

The control is naturally conducted at the premises of the persons or institutions under review, granting officers the right to inspect the goods in the presence of the concerned party. If necessary, samples may be taken in cases where the type, value, or origin of the goods cannot be established, with non-damaged samples returned to the declarant after examination. Technical expertise may also be sought for goods to obtain clearer technical or scientific clarifications. In all cases, the declarant has the right to contest the results obtained.

Ultimately, once investigative and field inspection procedures are concluded, the process culminates in drafting

a customs report in accordance with legal requirements, outlining the instances of fraud for referral of the offender to the competent judicial authorities.

## **Conclusion**

From the foregoing, it is concluded that the reforms adopted by Algeria, aimed at liberalizing trade and opening external exchanges, placed it under the necessity of seeking a new dynamic capable of fulfilling these requirements. Consequently, the economic operator has been granted facilities in the fields of import and export. However, these privileges have also led to the use of various customs fraud methods affecting economic customs systems, customs declarations, etc.

To confront these manipulations, the legislator relied on post-clearance customs control, which takes place after the release of goods and their transfer to premises belonging to the owner, based on accounting examination, review of customs documents and records, and inspection of goods.

### **The most important recommendations reached are as follows:**

- To enhance the performance of post-clearance customs control, it is necessary to rely on digitalization, which simplifies the processes of inspection, auditing, and record control in a faster manner.
- To create a communication network through the customs information system and other state institutions and administrative bodies (tax



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authorities, commerce, judicial authorities, etc.), with the aim of coordinating the exchange of information and documents to confront various forms of customs fraud.

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