

EU Harmonization of Customs Penalties: Work on the EU's Foundations

Timothy Lyons

After a house has been standing for some time its occupants are unlikely to investigate its foundations too closely. That is as true for the house of the EU as for any other.

The EEC Treaty, Article 9, declared that the Community was 'based upon' a customs union. Now, the Union Customs Code, recital (9), says that the Union 'is based upon a customs union'. Customs rules form part of the foundations of the Union. The absence of some degree of harmonization of customs penalties means that there is a flaw in the foundations. That is no small matter.

I PRESSURE ON THE MEMBER STATES

From an economic point of view many have argued that the creation of any customs union is a second best solution to the problem of tariff barriers.¹ The best solution, according to a large number of economists, is for countries simply to drop their tariff barriers unilaterally. Why then found the EU on the theory of the second best?

The answer, at least to a significant extent, lies in the pressure to integrate which a customs union exerts on its members. In order to function, a customs union requires national administrations, national judicial systems and national legislators to cede authority to the requirements of the union in question and it requires a level of integration economically.

The pressure which the customs union places on Member States in relation to customs penalties is merely one example of the pressure on Member States which a customs union is intended to exert. It is only to be expected that the pressure will feel uncomfortable. A proposal to legislate in relation to administrative penalties in 1998 was not proceeded with because the time was not

'politically ripe'.² Is it too much to ask that the fruit of customs union can be expected to ripen after fifty years?

Pressure on Member States may come not just from the EU. It may come from the WTO as well. The sanction for breaching a regulation is an important part of the regulation itself. A customs union with markedly different customs penalties arguably does not have 'substantially the same duties and other regulations of commerce' as GATT 94, Article XXIV.8 requires.

When the UK minister called the Commission's proposal for the harmonization of customs sanctions a 'legitimate aspiration'³ she may well have been engaging in some English understatement.

2 PRESSURE ON THE EU

The Member States are not the only actors under pressure. The EU institutions are under some pressure too. At a formal level they will want to ensure that their position in the WTO is beyond challenge, especially in these times. The references to the WTO in the Commission's Staff Working Document concerned with the harmonization of penalties shows they had the WTO in mind.⁴

That source of pressure has not gone away. In more recent times, the continued interest of the WTO in customs penalties is shown by the provisions of the Trade Facilitation Agreement of 2017.

There are other sources of pressure on the EU institutions. For example, they must respect those areas of national law in relation to which the EU does not have competence. At a political level they must craft a proposal

Notes

¹ See e.g. E. Berglas, 'The study of customs unions is a study in the theory of second best.' *Preferential Trading Theory: The n Commodity Case*, 87 J. Pol. Econ. 315, 328 (1979).

² Working Document TAXUD/ 121/ 2005 *Harmonisation of Administrative Penalties on the Basis of the Modernised Customs Code* 18 Feb. 2005, at 3.

³ The report of the European Scrutiny Committee on the Draft Directive on the Union legal framework for customs infringements and sanctions at para. 5.11, <https://publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxviii/8309.htm>.

⁴ Commission Staff Working Document, Impact Assessment, Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, Parts 1/2 and 2/2 SWD(2013) 514 final, Brussels, 13 Dec. 2013, at 5–6, 13, 16–18, 31, 39, 46, 51, 54–55.

which is likely to prove a basis for sensible discussion. That is not necessarily easy.

With that in mind, it is worth noting, briefly, the terms of the proposal put forward by the Commission in 2013 ('the Proposal').⁵

3 THE COMMISSION'S FRAMEWORK

Article 1.1 of the Proposal states that it provides 'a framework' for violations of EU customs legislation. At first sight, that may be thought not to be especially ambitious. Member States are not asked for uniformity. Nevertheless, even a framework has proved difficult to establish.

The framework requires Member States to establish a threefold division of customs infringements. There are to be those arising irrespective of any element of fault (Article 3), those committed by negligence (Article 4) and those committed intentionally (Article 5).

Those committed irrespective of any element of fault, within Article 3, constitute a long list of sixteen categories of basic obligations. It begins with the obligation to ensure the accuracy and completeness of information provided in declarations and supporting documents and ends with a failure to pay within time limits. It does not follow that, because these matters are fundamental, traders will find them easy to observe.

The list of infringements committed by negligence, in Article 4, consists of eleven breaches. It starts with a failure, in relation to goods in temporary storage, to export or place them under a customs procedure within the time limits set out in the Union Customs Code, Article 149. There follow various failures relating to matters such as transit, free-zones and warehousing.

There are seven categories of intentional customs infringements in Article 5. They range from the provision of false information and the production of false documents to the failure to comply with certain obligations. Article 6 states that incitement, and the aiding and abetting of infringements within Article 5, as well as certain attempted infringements are to be customs infringements.

4 SANCTIONS FOR INFRINGEMENTS

Articles 9–11 then set out the limits on the sanctions to be applied in relation to the categories of infringements contained in Articles 3–5.

Article 9 states that, for strict liability infringements, a pecuniary fine is to be from 1% to 5% of the value of the goods, or from EUR 150 to EUR 7,500 where the infringement does not relate to specific goods.

Article 10 requires that, for negligent infringements, the limits of the pecuniary fines for the respective categories are to be up to 15% of the value of the goods or up to EUR 22,500. Article 11 specifies that, for intentional infringements, the limits are up to 30% of the value of the goods or up to EUR 45,000.

There are supplementary provisions concerning error on the part of customs authorities, the liability of legal persons and the determination of the type and level of sanctions.⁶ Article 13 contains a series of provisions on limitation. Its first provision states that the limitation period for proceedings concerning customs infringements under Articles 3–6 is set at four years and starts to run on the day on which the customs infringement was committed.

The directive does not deal with criminal law matters and does not specify whether criminal or non-criminal sanctions are to be applied to an infringement.

5 CONCLUSION

The contributions to this issue show the variety which exists amongst Member States' provisions on customs penalties and the varying extent to which, for example, Member States rely on the criminal law. They also indicate those areas which are likely to generate most debate.

The requirement of the Proposal to establish strict liability infringements, the link it requires between the penalty to be imposed, and the value of the goods in question rather than the duty at stake and the exercise of Member States' discretion in relation to infringements all seem likely to attract particular concern.

It will, however, always be easy to criticize any proposal for an EU framework for customs penalties. If Member States wish to prevent one ever being implemented then they may well be able to do so. The question they must address is whether or not they wish to act positively and complete the foundations of the EU. The world will listen to their answer with considerable interest.

Notes

⁵ Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions COM (2013) 884 final, 13 Dec. 2013.

⁶ Arts 7, 8 and 12.