

EU Harmonization of Customs Infringements and Sanctions Is Needed but the EU Must Proceed with Caution

Despite its being necessary to complete the EU customs union, the harmonization of customs infringements and sanctions remains a long overdue task of the EU legislator. Sanctions for infringements of what is essentially a body of EU law, namely EU customs law, cannot continue to vary according to the EU Member State of import if a customs union is to remain worthy of its name. Harmonization is, moreover, needed since, as is proven by the various contributions in this issue, the sanctions applicable to customs infringements may differ substantially among EU Member States, which could lead to unwanted market distortions.

Harmonization of this element of the EU customs union will be a challenging task precisely due to those substantial differences which set apart the regulatory frameworks of each EU Member State. Harmonization will have to achieve a difficult balance between the EU Member States with the strictest, possibly even too strict, sanctions regimes, and those EU Member States with sanction systems, which may, although only in comparison with the former, appear to be more lenient. Any harmonization efforts may also require amending areas of national law which are very sensitive for EU Member States, such as criminal and even constitutional law, as is also shown by the various contributions included in this issue.

Despite these challenges, stakeholders have voiced their support for the harmonization of sanctions applicable to customs infringements. However, such support is not unconditional. Harmonization must take a global approach, rather than addressing only some of the pieces, in order to form a coherent sanctions system, and must take certain minimum guiding principles into account.

First, it is necessary to harmonize both criminal and administrative sanctions for customs infringements. This will ensure that customs infringements are not sanctioned only as criminal acts, which is unfortunately the case in some EU Member States, and that the scope of application of criminal and administrative sanctions is uniformly defined throughout the EU.

Second, any harmonization proposal must include enforcement procedures, such as inspection and audits, since harmonization of a sanctions regime can fail in its objective if such enforcement procedures continue

to vary among EU Member States. Precise and uniform rules must also exist concerning issues such as time limitations, how the latter can be interrupted, as well as on the duration of investigations, among other elements. The importance of procedural harmonization should not be underestimated since for example in some EU Member States audits can remain open for very long periods of time, depriving traders of any legal certainty, in some cases for years.

Third, customs infringements cannot lead to a criminal offence in all cases. The intervention of criminal law must, as in any other area, be exceptional and sanction only the most serious infringements. Criminal law must therefore only apply when an element of negligence or intent can be proved, and provided that predetermined high thresholds of evaded duties are met. Even administrative sanctions must only be imposed in cases of negligence or intentional infringements, and when certain thresholds of evaded duties, lower than those reserved for criminal acts, are met.

Fourth, it follows from the above that any attempt to introduce a system of strict liability, whereby customs infringements would automatically and in all cases result in a sanction, regardless of any intent or negligence, must be disregarded, as strict liability is now excluded in the majority of EU Member States. Although it is not a substitute for a sanction, it is worth recalling here that when the customs authorities identify an infringement, which may have repeatedly occurred over a long period of time, any duties due as a result of that infringement can be retroactively collected for the previous three years. This may result in substantial customs claims, which the importer will not be able to recoup since the goods would have already been sold. A customs infringement will therefore have serious financial consequences for the importer, even if a sanction is not imposed. Sanctions can therefore remain the exception and should be reserved for the most serious infringements, which were committed intentionally or as a result of negligence.

Finally, the distortions created by having failed to follow a global approach in the past will need to be corrected. This is the case for example of the recently adopted Directive (EU) 2017/1371 on the fight against fraud to the Union's

financial interests by means of criminal law.¹ Fraud affecting the Union's financial interests will constitute a criminal offence when committed intentionally. Although customs infringements may not have been the main target of this Directive, some of those infringements will fall within its scope of application since customs duties are part of the Union's financial interest. The Directive has not however foreseen a threshold of evaded duties which must be exceeded for legal persons² to be criminally liable in case of intentional infringements. Any proposal to harmonize customs infringements must therefore correct this anomaly and ensure that customs infringements, even in cases of intent, remain subject to criminal sanctions only when certain thresholds of evaded duties are reached.

Only those VAT infringements exceeding a EUR 10,000,000 threshold³ fall within the scope of application of this Directive. There appears to be no reason therefore why a threshold should not also apply in the case of customs infringements. Moreover, the Directive foresees that when infringements involve damage or advantage of less than EUR 10,000, Member States 'may provide for sanctions other than criminal sanctions'.⁴ However, this threshold is limited to natural persons only and contrary to the case of VAT infringements, fails to exclude infringements which fall below this threshold from the scope of the Directive and simply allows each Member State to decide whether to do so. The Directive should be amended to ensure that criminal liability of legal persons is excluded unless a certain binding threshold of evaded duties is reached.

The 2013 Commission proposal⁵ for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions was a brave attempt to address an extremely complex matter. However, the compromise nature of the proposal satisfied neither the European Parliament, EU Member States (Council) or Industry.

The Commission proposal to introduce a system of strict liability was opposed by the European Parliament⁶ and Industry. The European Parliament also recognized the link between criminal and administrative sanctions, despite the Commission proposal covering administrative sanctions only, and acknowledged the need to focus on

infringements committed negligently or with intent. The European Parliament also recognized the importance of addressing other elements of an enforcement policy, such as supervision, control and investigation.

Other issues which may also need to be carefully addressed are, for example, the legal treatment of voluntary disclosures, which should constitute not a mitigating factor, as proposed by the European Parliament, but rather a factor granting immunity from fines; or settlements, which should be available in all, and not only some, EU Member States. However, contrary to what the European Parliament proposed, settlements do not need to be made public. It should be taken into account that any settlement will seek only and exclusively an agreement on the sanction, while duties due will need to be paid by the importer and will fall outside the scope of the settlement. There is in such circumstances no reason to treat settlements, which will concern only the sanctions, as public.

The disagreement between the Commission and the European Parliament, and perhaps most notably with the Council and therefore the EU Member States, on how to proceed has resulted in the Commission proposal being kept on hold with few developments having occurred on this matter lately. Industry has also expressed its strong opposition to the harmonization of customs infringements and sanctions in the terms originally proposed by the Commission. It may in these circumstances be preferable for the Commission to withdraw its proposal and prepare a revised one, which should, as suggested above, take a global approach. Any new proposal should moreover be preceded by an official public consultation with stakeholders on the harmonization of customs infringements and sanctions, which did not take place before the 2013 Commission proposal was published. Stakeholders are eager to work together with the EU institutions on this challenging but important development of the customs union.

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Notes

¹ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, EUOJ L 198, 28 July 2017, at 29.

² Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, EUOJ L 198, 28 July 2017, at 29: Art. 9 refers to legal persons, while Art. 7 refers to natural persons.

³ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, EUOJ L 198, 28 July 2017, at 29: Art. 2.2.

⁴ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, EUOJ L 198, 28 July 2017, at 29: Art. 7.4.

⁵ Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM/2013/0884 final.

⁶ European Parliament legislative resolution of 5 July 2017 on the proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, T8-0300/2017.