Customs Sanctions Harmonization in Europe: Why the Commission Is Taking the Wrong Approach

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Uniform customs administration remains difficult in the European Union (EU). Since 1979, the European Commission (hereinafter ‘Commission’) has been trying to reduce variability and uncertainty. Most recently, the Commission introduced a proposed Directive defining customs infringements and sanctions. Unfortunately, the proposed Directive seeks too much convergence too soon. It would lead to more infringements and sanctions, while imposing unfair or unclear standards and procedures in determining liability, calculating fines, classifying infringements, and sentencing. A recent draft report from the European Parliament addresses only some of these concerns. The Commission would do better to seek gradual ‘approximation’ of customs administration rather than aggressive ‘harmonization.’

I INTRODUCTION

Since 1979, the European Commission (hereinafter ‘Commission’) has been trying to harmonize customs infringements and sanctions in the European Union (EU). Harmonization would streamline customs legislation and procedures, and offer greater legal certainty to business. However, seeing itself as the guardian angel of the European project, the Commission is overreaching. Rather than pursuing a gradual path to harmonization, it now wishes to diminish diversity in all aspects of sanctions, which would interfere with the national legal systems in the twenty-eight Member States. Each Member State has its own (different) laws regarding procedures and judicial review, for example.

The Commission’s most recent effort towards harmonization is the proposed Directive for customs infringements and sanctions [COM(2013) 884]. Aiming at too much convergence too soon, the proposed Directive also misses an opportunity to clarify the regulation of sanctions and penalties. Further, it fails to resolve key issues of liability and fairness. In addition, it criminalizes honest mistakes. The Commission should consider a more gradual approach which respects the existing legal systems of Member States.

2 THE LEGAL CONTEXT OF THE PROPOSED DIRECTIVE

EU customs rules are breached by certain actions, which the proposed Directive places into categories. It also lists behaviours that should be considered as infringements, including actions that do not involve any element of fault and acts and omissions committed negligently or intentionally. Its purpose is to complement and facilitate the enforcement of the new Union Customs Code (UCC), which will take effect on 1 May 2016. The UCC replaces Council Regulation (European Economic Community) No. 2913/92, the Community Customs Code (CCC), and its implementing provisions (CCCIP).

The CCC and CCCIP were among the first pieces of true EU law. Since the creation of a common external customs tariff, the harmonization of customs sanctions as part of the Union Customs law has been an EU policy goal. As early as 1979, the Commission urged Member States to take the next step and consider harmonizing customs sanctions. In the 1980s, the introduction of the CCC generated more
discussion of harmonization, but studies conducted in 1982\(^4\) and 1991\(^5\) failed to produce consensus. Harmonization of sanctions failed again after 1998, when the Internal Market was completed. One problem which arose was the difficulty in differentiating between criminal and administrative sanctions in situations where the same offence might be treated differently in various Member States. As we will see, this problem has not gone away, and could hold back the proposed Directive as well.

On the case law side, the Court of Justice of the European Union (hereinafter ‘The Court’) has delivered several judgments concerning the validity of customs sanctions imposed by various Member States. The Court has repeatedly ruled that each Member State can choose its own set of penalties, but that these penalties must be fair and proportional, and must deter the violation. Further, the Court has ruled that Member States must introduce binding customs sanctions legislation (per Article 288(2) TFEU, ex-Article 249(1) EU Treaty).\(^6\) Thus, Member States do not have the option of letting violations of EU (customs) law pass. Member States must ensure that violations are penalized in an effective and proportionate way, with deterrent effect. The Court did not specify how Member States should do that.

The Court also ruled on whether the EU was competent to harmonize customs sanctions at EU level, or whether an EU Treaty would have to be altered to give it such competence. In case C-176/03\(^10\) (CDM v. Council), concerning environmental law, the Court decided that the harmonization of criminal law between Member States is possible for the purpose of promoting important goals of the EU Treaty. Arguably, the promotion of EU customs law is an important goal of the EU Treaty, and the Court reasoned that it was reasonable to apply the same reasoning. The Commission interpreted the judgments as a signal to harmonize sanctions in all Member States.

### 3 The Problem of Customs Sanctions Enforcement in the EU

There is no doubt that EU Member States currently administer customs enforcement differently. The Customs 2013 Program of the EU contained a comparative analysis of the systems of twenty-four Member States,\(^11\) and it found many differences:\(^12\):

- Of twenty-four Member States, sixteen provide for both criminal and administrative sanctions, whereas eight Member States provide only criminal sanctions.
- Member States that provide for both criminal and administrative sanctions use a wide range of financial thresholds to determine the nature of an offence. For instance, an offence of EUR 1,000 might be considered criminal in one Member State, and administrative in another. The thresholds vary from EUR 266 to EUR 50,000.
- Almost half (eleven out of twenty-four) of the Member States consider that an economic operator is liable for infringements of customs law, irrespective of intent, negligence, or elements of careless or reckless behaviour. The remaining Member States do not sanction an economic operator for a customs infringement without the presence of intent, negligence, or elements of careless or reckless behaviour. Out of those, only three Member States have a system of strict liability when discussing the ‘administrative’ sanctions.
- All Member States but one set time limits on the initiation of a sanction procedure, as well as on the imposition and execution of sanctions. However, these time limits vary from one to thirty years.
- An economic operator, who is also a legal person, can be held liable for a customs infringement in fifteen out of twenty-four Member States.
- Of twenty-four Member States, fifteen provide for settlement in matters of customs infringement.

The Commission understandably wishes to improve the administration of customs in the EU by fostering legal convergence, certainty, and uniformity. The Impact Assessment of the proposed Directive justifies the customs sanctions approximation effort by referring to the Charter of

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5. Case 68/88 of 21/09/89 ECR [1989] 2965: Two consignments of maize were exported from Greece to Belgium in May 1986, which, in fact, comprised maize imported from ex-Yugoslavia. The Greek authorities had declared them to comprise Greek maize, and the levy otherwise due to the Community had not been collected.
6. Proposal COM(2005) 608 final as of 30 Nov. 2005, at 9: ‘In order to reinforce consistency throughout the Internal market, a common framework for penalties in respect of infringements of the Community customs rules will be proposed to the Council and the European Parliament at a later stage.’
8. Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom.

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Fundamental Rights of the European Union. The Commission considers that lack of immediate action on customs sanctions harmonization would jeopardize the right to good administration (Article 41), as well as the freedom to conduct a business (Article 16), the right to private property (Article 17), the right to an effective remedy (Article 47), and the operation of the principle of proportionality in relation to criminal offences (Article 49). Many in Europe also consider that so-called ‘sanctions dissonance’ threatens the level-playing field that the EU Internal Market needs. The European Parliament (hereinafter ‘Parliament’) has produced two reports calling for further harmonization in the field of customs, including harmonization of sanctions. Without harmonization, those who breach the law in a Member State with more lenient provisions have an advantage. Lack of sanctions uniformity affects access to important customs simplifications and facilitations, as well as the granting of Authorized Economic Operator (AEO) status. Indeed, a criterion for AEO status is compliance with customs legislation and the absence of serious infringements.

In the World Trade Organization (WTO), the EU has also been criticized for the variety of customs sanctions and practices in its Member States. WTO members have complained that the EU is not complying with its international obligations in the sanctions area. This has given the Commission a fright. The EU wishes to protect itself from potential future legal disputes that could arise from the lack of sanctions harmonization. In 2006, the WTO’s Appellate Body heard its most important case challenging the effectiveness and, ultimately, the legitimacy of national customs sanctions. The United States accused the EU of being inconsistent in administering its customs laws via national legislation, violating Article X:3(a) of the General Agreement on Tariffs and Trade 1994 (hereinafter ‘GATT’). The United States also claimed that there was no adequate review and administrative action in customs matters as per the requirements of Article X:3(b) of the GATT 1994. The Appellate Body did not consider that the United States provided proof to substantiate its claims. Supporting a contention of the WTO Panel in the dispute, the Appellate Body also considered that Article X:3(b) does not require that a judicial, arbitral, or administrative tribunal reviewing customs matters govern the practices of agencies enforcing customs laws throughout a WTO member’s territory.

Although the United States did not win the case, the case raised concerns as to the viability of the current EU regime and triggered a debate about whether the EU should protect itself from a future potential claim.

4 Why the proposed Directive creates more problems than it solves

Unfortunately, the proposed Directive creates new risks in attempting to approximate customs enforcement. Overall, it sets a framework of infringements. It then provides for sanctions for those infringements without properly addressing diverse sanctions procedures and ranges. The following five changes are particularly risky:

(a) Strict liability is introduced, criminalizing honest mistakes.
(b) Customs authorities are exempted from all liability, which treats corporations unfairly or provides them with a loophole to avoid liability in cases of corruption.
(c) Fines will be calculated as a percentage of the value of the goods and not in relation to the evaded duties.
(d) In terms of procedure, no benchmark is defined for classifying an infringement as criminal (or administrative). Many of the listed infringements would thus be dealt with criminally.
(e) In terms of judicial review, Member States are given aggravating factors to consider when imposing sanctions, but no clear guidance on how these factors should be applied during the procedure.

These changes in customs legislation, if implemented, will lead to more infringements and penalties without resolving any fundamental problems. An alternative approach would be to give the Commission a more active but discreet role, for example of providing guidance. Harmonization could then follow more naturally.

4.1 Defining and Regulating Liability

The proposed Directive establishes strict liability in relation to a number of violations. This is a slippery slope. Criminal law has steadily discarded the use of strict liability, and substituted it with the (fairer and more proportional) doctrine of vicarious liability. Going to
strict liability will criminalize honest mistakes and impede development. Companies might be less inclined to invest if they fear prosecution through strict liability. Naturally, this might create insecurity in the market and unsettle investors – the opposite of what the Commission wants to achieve.

In seventeen clauses of Articles 3 and 4 (covering strict liability and negligence), the proposed Directive recognizes a plethora of actions as worthy of strict liability treatment. The strict liability clause of Article 3 is particularly aggressive: it defies (i) the presumption of innocence and (ii) the proportionality of the sanction that relates to the infringement.

In fact, clause 3(a) of the proposed Directive establishes strict liability when a person is lodging a customs declaration, exit summary declaration, re-export declaration or re-export notification to ensure the accuracy and completeness of the information given in the declaration, notification or application in accordance with Article 15(2)(a) of the Code. Establishing strict liability is doubtful in a situation where the accuracy and completeness of information arguably depends on circumstances, including the complexity of customs processes, the nature of the declaration, and details related to third parties – the accuracy of which cannot be guaranteed.

In a similar fashion, clause 3(b) of the proposed Directive extends strict liability even to (wrong or false) supporting documents. This type of liability is anachronistic, counterproductive, and counterintuitive to how the modern business world operates.

Claiming that these customs violations, which can occur as honest mistakes, are inherently dangerous seems to take the law a step too far. The right way forward would be to use a model of secondary liability for these violations: the agency or respondeat superior doctrine. This notion, more suitable for customs violations, is also known as the 'master-servant' concept of liability, where a ‘master’ is responsible for the actions of its ‘servant’, but not the other way around. The agent is following orders and should not be held strictly liable if it lacks the mens rea of committing the offence.

From a practical point of view, the proposed Directive ignores that fraud is the exception and that companies are, in principle, compliant. This creates the anomaly of no difference between purposeful negligent behaviour and mistakes committed in good faith. Criminalizing honest mistakes will also have adverse effects on the reporting of violations. Disproportional sanctions will lead to selective disclosure. Individuals will try to make sure they avoid personal liability and, ergo, refrain from disclosing even simple mistakes with no negative externality to the industry.¹⁶

### 4.2 The Role of Customs Authorities: A Case for Contributory Negligence?

The proposed Directive assumes strict liability of agents and corporations for a series of violations, yet recognizes an exception when the same acts are committed due to error by the customs authorities. Article 7 of the proposed Directive provides that ‘the acts or omissions referred to in Articles 3 to 6 do not constitute customs infringements where they occur as a result of an error on the part of the customs authorities.’

Is this proportional and fair? Why should corporations be held strictly liable for a violation, and the authorities not be held liable at all? In particular, several violations mentioned in Articles 3–6 of the proposed Directive can occur as a result of the negligence of a customs official. Omissions, inadequate declarations, wrong supporting documents, lack of timely removal, or wrong storage of goods are only a few examples of violations that officials may be aware of or even have an active role in. Officials might contribute to misinformation or to another error that leads to a violation.

On the other hand, one can also use Article 7 to exonerate a corporation, if the corporation can prove that the mistake at issue was due to error by the customs authorities. In that case, the corporation would be exempt from liability.

The appropriate level of liability for errors committed on behalf of the customs authorities would be contributory liability (also known as contributory infringement). This is defined as a form of liability of someone who is not directly breaking the law, yet who is making direct or indirect contributions to the infringing acts of others. Rooted in tort law, contributory liability includes both material contributions to the act, the enabling thereof, and knowledge of the act per se.

### 4.3 Establishing the Ranges of Sanctions: Are They Proportionate and Fair?

The proposed Directive calculates the amount of a projected fine as a percentage of the value of the goods, not in relation to the evaded duties. This ad valorem rule is referred to in Articles 9–11. This standard for setting fines creates unfairness, since corporations will have to pay more than the financial harm they caused. It also makes trading in high value goods especially risky, for example trading in duty free foods.

Under the proposed Directive, the sanction for an infringement in customs clearance of a high value material would hypothetically be much greater than the same infringement concerning a low value shipment. This

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would seem to penalize the value of products traded rather than the fault committed. As an illustration, pursuant to Article 11 of the proposed Directive, for the same offence, and with the same level of liability, the fine would be as shown in Table 1.

Table 1: Example of fine imposed under the proposed Directive

<table>
<thead>
<tr>
<th>Value of goods:</th>
<th>Total fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>EUR 1,000</td>
<td>EUR 300</td>
</tr>
<tr>
<td>EUR 10,000</td>
<td>EUR 3,000</td>
</tr>
</tbody>
</table>

This is not a fair and proportionate way to deal with offences. If the mistake remains the same, and particularly if the value of the goods could not have formed a part of the mens rea of the perpetrator, then why would we fine a corporation significantly more just because it trades goods of greater value? This amounts to inapt arbitrariness, which creates uncertainty, which violates the principle of legitimate expectations, which is a prerequisite for healthy trade activity. Moreover, this inconsistency does not serve the goals of the common market.

In other words, sanctioning a corporation according to the value of the goods instead of the custom duties due is disproportionate and distorts trade. Apart from the harm to the company, there is also harm to the market and consumers, since goods will become more expensive to offset disproportionate fines.

It would be advisable, instead, to set sanctions based on the custom duties due. If goods do not have an import duty, another measure could arguably be used.

4.4 The Choice Not to Define a Benchmark for Criminal Infringements and Why It Complicates Things More

The proposed Directive does not determine whether Member States are to apply administrative or criminal law sanctions with respect to customs infringements. This is a mistake, given that the proposed Directive boldly sets virtually all the particulars of sanctions, that is it establishes the list of behaviours that (i) should be considered as infringing Union customs legislation and (ii) give rise to pre-determined sanctions.

The Commission likely thought that if it were to set a benchmark for criminal infringement, it would be intervening in the legal sovereignty of the Member States, and therefore opted for a less aggressive proposal. But this choice to not establish a benchmark creates many problems.

If the proposed Directive takes effect, what will be considered a criminal violation in one country, for example Spain, may still be considered as a civil violation in another country, for example the Netherlands. This does not fix the inconsistency that the proposed Directive wants to remedy, nor does it lead to harmonization and safety of law. Rather, it maintains the uncertainty, since corporations will not necessarily know how customs violations are classified in the various EU Member States.

Criminal law provisions are a step up compared to administrative positions, and they convey a different level of condemnation of an illegal activity. Member States should therefore be cautious when enforcing criminal penalties for a given activity. The proposed Directive, by contrast, might encourage them to do so in many cases.

As the Commission is aiming for sanctions harmonization, it is only appropriate to set the benchmark for criminal violations at the lowest common denominator of what the Member States are currently using. Otherwise, and given the great range of thresholds currently in force, the law will end up criminally sanctioning a corporation for a violation of EUR 400, and imposing civil sanctions for a violation of EUR 20,000, depending on the country in question.

4.5 Is the Commission Authorized to Indicate Aggravating and Mitigating Factors Pertinent to a Judicial Review?

With the proposed Directive, the Commission also seeks to regulate the aggravating or mitigating factors that Member States should consider during sentencing. But is the Commission competent even to suggest which factors a Member State should take into account when imposing sanctions for infringements (see Article 25)? These areas should be left to the jurisdictional competence of the Member States – as the Commission has paradoxically done by declining to classify a violation as criminal or civil.

In the proposed Directive, Article 12 refers to aggravating or mitigating factors that Member States should maintain for the customs infringements referred to in Articles 3–6. The main aggravating factors provided in the proposed Directive are: (i) the infringement is serious and of long duration; (ii) an individual responsible is also an AEO; (iii) the amount of evaded import or export duty is significant; and (iv) the goods involved are subject to prohibitions of the second sentence of Article 134(1) UCC and of Article 267(3)(e) UCC, or pose a risk to public security.

The proposed Directive also specifies two mitigating factors: (i) the level of cooperation of the person responsible for the infringement with the competent authority; and (ii) previous infringements by the person responsible for the infringement.

Any factors recognized during the sentencing procedure should stay within the Member State’s competence and should not be a matter for the Commission to regulate. By entering this area of exclusive competence of Member States, the Commission is creating problems of compatibility with national legislation. Article 12 of the
proposed Directive thus creates the impression of an ambitious but incomplete work that seeks to entirely harmonize sanctions, yet only partly does so, leaving us in a more uncomfortable place than before.

5 WILL THE EUROPEAN PARLIAMENT SAVE THE DAY?

In February 2016, the Parliament issued a draft report on the Commission’s proposed Directive.\(^{17}\) This draft report attempts to address some of the issues mentioned above, namely strict liability, the proportionality of the fine, and the nature of the violation.

First, the report recognizes that only negligence or intention shall be punishable, and it removes the strict liability element that does not require any degree of fault. Defining negligence is crucial because it should not be sanctioned as a crime, even if objective circumstances are present. While not defining negligence, the report does suggest that if a person is unaware of the facts, or if he or she could not foresee them, then the person should not be sanctioned.

Second, the draft report claims that the amount of the fine cannot be based on the value of the goods. Instead, the sanction should be based on the amount of evaded duties, that is it should be linked to the financial consequences of the infringement. The report recognizes that a sanction based on the value of the goods might lead to a disproportionate result whereby a minor infringement in customs clearance of high value goods could have disastrous consequences for a company. The report also supports setting a fixed amount in certain situations, or setting a range with upper limits to provide the customs authorities with discretion.

Third, the report stresses the importance of defining criminal and non-criminal provisions since, for instance, provisions like incitement, aiding and abetting are criminally punishable in some Member States, but non-punishable under criminal law in seven Member States. This discrepancy will cause problems in the implementation of the Directive. The report clarifies that only non-criminal matters should be addressed, whereas it introduces a threshold which allows Member States to introduce criminal sanctions.

The draft report of the Parliament sufficiently addresses the matters of strict liability and proportionality, yet it fails to convincingly address the classification of crimes, and it entirely ignores the role of customs authorities and the issue of judicial review. Time will tell whether this report will be finalized, and also whether the Commission will accept these amendments. Even if it does, however, certain concerns will remain unresolved.

6 WHAT IS THE WAY FORWARD?

Due to the concerns discussed above, an actual ‘approximation approach’ would probably be a better choice for improving EU customs sanctions administration than what the Commission is practically trying, the ‘harmonization approach.’ An actual approximation approach would provide a gradual convergence that would naturally lead to eventual harmonization. It would allow structural differences (like the criminal/administrative divide) to be addressed first. These and other inconsistencies would be naturally bridged if EU Member States were to follow existing law and enforce the upcoming UCC diligently.

In this vein, one idea would be to create a body (perhaps to be called European Customs Agency) to oversee the implementation process related to the UCC and the proposed Directive in the Member States. This body would administer, monitor, and oversee domestic and EU legislation pertaining to customs. Through a process of institutional fermentation, rules and practices would converge. This means that harmonization would occur naturally through time, rather than abruptly. In order for such an organization to succeed, it would need to have its own administrative and criminal law provisions and courts. In a way, it would be a more developed version of the Customs Code Committee, which currently addresses differences of interpretation between the various national customs authorities of the Member States.

The solution to the current riddle probably lies in freedom for Member States as to the procedural aspect of customs violations, but in more uniformity in the definition and classification of these violations. To achieve that, some administrative body can ‘supervise’ how the legislation is enforced, and the EU can further classify the violations, as is due to happen through the UCC. In the future, harmonization will come as a natural result of this process, rather than as an artificial achievement.

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