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A Customs Union without Harmonized Sanctions: Time for Change?

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The creation of a customs union is much more difficult than is sometimes acknowledged. It affects the operation and independence of countries’ legislatures, their judicial systems and their administrations. The economic effects of a customs union have been described in dramatic terms by Leopold Kohr. He said that when two countries set up a joint customs administration and abolish the customs boundary separating their economies:

These economies become one as inevitably as the waters of two lakes after a dam separating them has been removed.¹

Many would think that overstates the position. Even the European Union (EU) has shown that there is a great deal to do to achieve integration of economies after the creation of a customs union. Nevertheless, the statement usefully counterbalances the more frequently encountered understatement of the effects of a customs union.

If one keeps in mind the extensive effects of a customs union, it is easier to understand why the creation of a customs union is more often seen as a process than an event. Mr Peter Kiguta, Director General, EAC Customs and Trade said in a briefing on the East African Community’s customs union: ‘ensuring smooth trade in goods is not a one off event, but a continuous process’.²

In September 2009, Mr Sindiso Ngwenya, as the Secretary General of the Common Market for Eastern and Southern Africa said: ‘The launch of the COMESA Customs Union has become an irreversible process.’³

I A LITTLE HISTORY

The EU itself is a good example of how a customs union can be fully established only over a long period of time. The date 1 July 1968 is generally taken as the date for the establishment of the customs union in the European Economic Community (EEC). Harmonized rules of origin⁴ and valuation⁵ were applicable from that time as well as an external tariff.⁶ Nevertheless, there was a good deal of subsequent work to be done in order to create a true customs union. Quite apart from the fact that customs controls at internal borders still existed and were not abolished until 1 January 1993,⁷ the law itself was very far from harmonized. A full history of the position is impossible to give here, but in 1969 a regulation on a transit regime⁸ and a directive on inward processing⁹ were passed (a harmonized inward processing system was not in place until 1984¹⁰). In 1979, there were regulations on

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¹ Customs Union: A Tool for Peace, Leopold Kohr, Foundation for Foreign Affairs, Pamphlet No. 8 (Washington DC, 1949), at p. 9.
post-clearance recovery\textsuperscript{11} and the repayment and remission of customs duty.\textsuperscript{12} Prior to their introduction, national law had governed these matters.\textsuperscript{13} By 1982, there was sufficient work left to do for the Commission to publish a lengthy document entitled ‘1982 Programme for the attainment of the Customs Union.’\textsuperscript{14} It acknowledged that:

Twenty-four years after the creation of the European Community, it must be admitted that full customs union is still a long way off.\textsuperscript{15}

Subsequently, there was some significant legislation including a regulation on customs reliefs in 1983.\textsuperscript{16} In 1988, a regulation creating a harmonized regime for free-zones and free warehouses was introduced\textsuperscript{17} and a regulation on customs warehouses was passed.\textsuperscript{18} Then, of course, came the Community Customs Code (CCC) in 1992.

Undoubtedly, the CCC ensured that customs law was harmonized in many areas. Nevertheless, it did not harmonize all customs law. Two areas of great importance were substantially governed by national law. First of all, there was the law governing appeals on which the CCC said relatively little.\textsuperscript{19} A proposal for a Directive harmonizing the provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in customs matters had appeared as long ago as 1981.\textsuperscript{20} It also left considerable scope for action at national level and was, in any event, withdrawn when the proposal for the CCC was submitted.\textsuperscript{21} The other area concerned customs infringements and sanctions. The proposal by the European Commission for a directive on the Union legal framework for customs infringements and sanctions (‘the Proposal’)\textsuperscript{22} has ensured that this area is in the spotlight now.

### 2. The Proposal to Harmonize Sanctions for Customs Infringements

The harmonization of administrative penalties is a matter that has long concerned the European Commission. A comparative study on customs infringements and sanctions had been carried over when it made a proposal on the harmonization of the right to appeal. In 1998, it drafted a specific regulation on administrative penalties after a second comparative study, but considered that ‘the time was not politically ripe’ for the proposal.\textsuperscript{23} Then, in 2005, it produced a working document on the subject which, as well as containing some draft provisions, noted that:

Divergent customs penalties have caused in many ways distortions to the internal market and have been very early recognised by the European Court of Justice as measures having equivalent effect to quantitative restrictions…\textsuperscript{24}

That acknowledgement is significant and having regard to it, it is not surprising that the present proposal is more detailed. Member States are required, by 1 May 2017, to establish three categories of acts or omissions. There are, first of all, to be those that constitute strict liability customs infringements, i.e., infringements arising irrespective of any element of fault. Second, there are to be infringements committed by negligence. Third, there are to be infringements committed intentionally.\textsuperscript{25} Limits are then set on the sanction that may be imposed for each type of infringement.

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 7500 where the infringement does not relate

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**Notes**


\textsuperscript{14} COM(82) 50 final, 12 Feb. 1982.

\textsuperscript{15} COM(82) 50 final, 12 Feb. 1982, para. 3, p. 2.


\textsuperscript{19} See CCC, Arts 243–246.


\textsuperscript{21} See the Explanatory Memorandum to the Proposal for a Council Regulation (EEC) establishing a Community Customs Code and a Proposal for a Council Regulation determining the cases and the special conditions under which the temporary importation arrangements may be used with total relief from import duties COM(90) 71 final SYN 253, 28 Feb. 1990.


\textsuperscript{23} See Working Document TAXUD/121/2005 Harmonisation of Administrative Penalties on the basis of the Modernised Customs Code 18 Feb. 2005, s. 3 ‘Previous initiatives of harmonisation of customs penalties’ p. 3.


\textsuperscript{25} See Arts 3–5.
to specific goods. The same two categories of infringement are established for negligent and intentional infringements. 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. 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 including provisions governing incitement, aiding, abetting and attempt, error on the part of customs authorities, liability of legal persons, the determination of the type and level of sanctions and limitation and the power of seizure.

The directive does not deal with criminal law matters, although there is a Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law which will cover some customs infringements. Neither does the proposed legislation specify whether criminal nor non-criminal sanctions are to be applied to an infringement.

To the ordinary citizen running a business in the EU, it may well appear extraordinary that a customs union can exist without the sanctions for customs infringements being harmonized. It seems, however, that not every Member State is in favour of the Proposal. The Seimas of the Republic of Lithuania has passed a resolution endorsing the conclusion of a committee of the Seimas to the effect that the Proposal gives rise to a possible breach of the principle of subsidiarity. In my view, that conclusion gives insufficient weight, among other things, to the fact that the customs union and the common commercial policy are areas in which the EU has exclusive competence. Clearly if the EU is to achieve the objectives of having a customs union and an internal market and of satisfying its external obligations, action is necessary. In view of the fact, though, that the need for action appears to be questioned in some quarters it is proposed in this article to consider some of the consequences of keeping the law as it is and of not taking steps to harmonize the sanctions imposed in relation to customs infringements.

3 WHAT IF THE EU DOES NOT TAKE STEPS TO HARMONIZE SANCTIONS?

The consequences of failing to harmonize sanctions in the EU are likely to be so profound that the present state of affairs cannot surely be allowed to continue. In 2008, I said that:

Clearly, the existence of 27 national penalty regimes is inconsistent with the unicity which is implicit in the customs union.

The Commissioner responsible for the Customs Union used much stronger language calling into question the point of the customs union. He put it this way:

There is no point in a single set of rules if we do not also have a common approach to responding when they are broken.

When the Commissioner responsible for the customs union says that the customs law of the EU, which it has taken so long to harmonize, has ‘no point’ we should surely be shocked into taking notice. Not many people would have been prepared to go that far. Yet it is very strongly arguable that he was right. Hans Kelsen, at least, would have thought his conclusion entirely reasonable, if not inevitable. He famously said that: ‘Law is the primary norm which stipulates the sanction.’

If one were to take that view of law then that may have profound implications for the contention that the EU has a customs union not withstanding customs sanctions are not harmonized.

This whole area of debate is crucial for the EU as an institution. After all, the Union Customs Code says that: 'The Union is based upon a customs union…' Article 23.1 of the EC Treaty said that: 'The Community shall be based upon a customs union…' The EU’s customs union constitutes the foundations of the EU not just in a purely legal or technical sense. It does so financially because customs duty constitutes the EU’s own resources. It does so commercially, and as a result of that socially and environmentally. Whether or not there is any ‘point’, to
use the Commissioner’s term, to harmonizing customs rules without harmonizing sanctions is crucial also when one comes to consider the EU’s external obligations under General Agreement on Tariffs and Trade (GATT) 94.41 consider briefly the implications of not harmonizing sanctions in relation to the WTO. Then I look at some implications which are internal to the EU.

3.1 No Harmonization of Sanctions: WTO Consequences

GATT 94, Article X.3(a) states that:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

The laws, regulations, decisions and rulings which are in question are those of general application made effective by a contracting party pertaining to customs classification and valuation and:

- rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

In European Communities – Selected Customs Matters,36 the WTO’s Appellate Body had to consider the impact of Article X.3(a) on the lack of harmonization of certain penalties in the European Communities’ customs union. It concluded that the penalty laws of Member States could be examined under Article X.3(a) GATT 94.37 Nevertheless, the claim by the USA that the article was infringed was not made out on the evidence. The Panel emphasized the lack of evidence on a number of occasions and stated:

The United States has not provided concrete examples of the application of penalty provisions in Member States that demonstrate non-uniform administration of European Communities customs law. The United States referred only to a single sentence in the European Commission document ‘An Explanatory Introduction to the modernized Customs Code’...Clearly, this single sentence is not sufficient. Thus, the United States has not established that the mere existence of differences in penalty provisions among Member States, in and of themselves, has led to non-uniform administration of European Communities customs law.38

Given the lack of evidence, it is hardly surprising that the claim failed. It must be emphasized, though, that the Panel acknowledged that the claim could, in principle, be made. Were it to be made again with supporting evidence, the result may well be different.

Collecting the evidence may have seemed too onerous a task to be undertaken. Now, the implementation of the WTO’s Trade Facilitation Agreement could lead to evidence being acquired.39 There is, however, no need to wait for that. The EU itself has obtained a very considerable amount of evidence as to the distortions which are caused by non-uniform administration.40 That evidence is important to the EU in justifying the Proposal internally. It could be equally important in demonstrating the existence of non-uniform administration in the context of GATT 94. There is insufficient room here to examine the evidence which the EU has obtained. The Explanatory Memorandum to the Proposal does, however summarize some of the evidence in its Table 1.41 It explains that sixteen out of twenty-four Member States provide for both criminal and non-criminal sanctions; there are different financial thresholds to distinguish between criminal and non-criminal sanctions; the requirements for the establishment of liability are different; there are different applicable time limits ranging from one to thirty years; legal persons cannot be held liable in nine out twenty-four Member States; and a settlement procedure for customs infringements is available in fifteen out of twenty-four Member States.

The European Commission has clearly analysed this evidence in the light of GATT 94. It acknowledges that:

- from an international point of view, the different sanctioning systems existing in the Member States raise some concerns in certain WTO Member States regarding the compliance of the European Union with its international obligations in this field;

- within the European Union, the different enforcement of customs legislation makes the effective management of the customs union harder

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**Notes**

37 See para. 210 of the Panel Report available on the WTO’s website.
39 Article 3(3)(g) requires the publication of certain penalty provisions.
41 See pp. 2 and 3 of the Proposal.
42 The Explanatory Memorandum to the Proposal, pp. 3 and 4.
There is an implicit acknowledgement too that the EU’s compliance with GATT 94 is not as full as it could be. The Impact Assessment notes that one of the advantages of the preferred option for action in relation to sanctions is that: ‘EU’s compliance with obligations under WTO would be enhanced’ (bold in original).\textsuperscript{43} Even the EU appears to acknowledge, therefore, that there is room for enhancement, or some would say improvement. No one who reads the Impact Assessment and its Annexes could disagree.

As well as Article X of GATT 94, the definition of a customs union in Article XXIV.8 may be relevant. A customs union according to this definition is one in which:

substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.\textsuperscript{44}

The phrase ‘other regulations of commerce’ could give rise to extensive analysis. If Kelsen were to inspire a contention that the phrase encompassed the sanctions attaching or relating to regulations of commerce, as well as the regulations themselves, the EU may conceivably be in the position of having to defend the legitimacy of its customs union under GATT 94. It is impossible to explore the issues surrounding this matter further in the space available.

It will be seen that, in the context of WTO law, the consequences of not harmonizing sanctions may be serious for the EU. That is not to say that implementation of the Proposal as it stands would solve all potential difficulties. For example, in the first place, what is proposed is not a regulation but a directive which has to be implemented in national law. Sometimes litigation before the Court of Justice is necessary to determine whether or not a directive has been properly implemented. As we saw when discussing the history of the EU’s customs union, directives are sometimes followed after a few years by regulations. Whether that will be true in this case remains to be seen. In the second place, the Proposal would diminish not abolish divergences in national regimes. The compatibility of the Proposal with GATT 94 is, however, beyond the scope of this article.

3.2 No Harmonization of Sanctions: Internal EU Consequences?

The internal consequences for the EU in a lack of harmonization of customs sanctions are serious and extensive. What follows are brief references to some of them.

3.2.1 Customs Administrations

The Court of Justice of the EU has referred to the ‘unicity of the Community customs territory’. It is not to be undermined.\textsuperscript{45} The statements of the Court may have been made in the context of the imposition of charges having equivalent effect to a customs duty, but it is clear that unicity is an essential element of a customs union. Furthermore, it is not to be confined to matters of law. It should be administrative as well. That was recognized in the legislation setting out the objectives of Customs 2013, which expired on 31 December 2013. One of the objectives of Customs 2013 was to ensure:

the interaction and performance of the duties of Member States’ customs administrations as efficiently as though they were one administration, ensuring controls with equivalent results at every point of the Community customs territory and the support of legitimate business activity.\textsuperscript{46}

The Impact Assessment recognizes that the absence of an EU sanctions regime makes it impossible for the Member States’ customs administrations to act as one. It notes that:

The Member States’ customs administrations are prevented from ‘acting as if they were one’ because of the absence of a Union approach regarding the treatment of customs infringements and sanctions. This difference can create a lack of confidence between these customs administrations.\textsuperscript{47}

Only if the administrations act as one will they act coherently and the need for coherence is well recognized in the Customs 2020 programme. Its first operational objective is:

Without harmonization of sanctions, it would seem very difficult if not impossible to achieve that objective. The possible lack of confidence between administrations to which Customs 2013 referred is also important. As the Court of Justice of the EU has recently said in Opinion 2/13:\footnote{Opinion 2/13 of the CJEU, 18 Dec. 2014, Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, (Opinion 2/13) para. 191.}

the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.\footnote{The Customs 2020 Regulation, see supra n. 48, Art. 3.2(b).}

The administration of the customs union and the protection of the EU’s own resources increasingly rely on swift and efficient cooperation between customs authorities. No one can afford for the relationships between national administrations to be undermined. This is recognized by the Customs 2020 Regulation which has amongst the specific objectives it identifies: ‘ensuring modern and harmonized approaches to customs procedures and controls’\footnote{The Customs 2020 Regulation, see supra n. 48, Art. 3.2(c).} and ‘enhancing the functioning of the customs authorities’.\footnote{See Council Resolution on the EU Customs Action Plan to combat IPR Infringements for the years 2013 to 2017\footnote{Council Resolution on the EU Customs Action Plan to combat IPR Infringements for the years 2013 to 2017 by the Council of the European Union, Brussels 9 Dec. 2014 (OR.en) 16696/14, UD 280.} the Council said that it:

STRESSES the objective to strive for a high level of protection of the EU internal market by means of modern and harmonised approaches to customs controls and of customs cooperation, in particular to avoid trade diversion within the EU.\footnote{Council Resolution on the EU Customs Action Plan to combat IPR Infringements for the years 2013 to 2017, OJ C 80/01, 19 March 2013 and Second Early Summary Report on the Implementation of the EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017 by the Council of the European Union, Brussels 9 Dec. 2014 (OR.en) 16696/14, UD 280.}

It may be thought that a harmonized approach to customs controls ought to encompass the imposition of sanctions.

Legitimate traders will, of course, also suffer if customs authorities are hampered in fighting counterfeiting and infringements of intellectual property law. They are likely to suffer in a variety of ways if the EU continues to operate without a regime governing customs sanctions.

### 3.2.3 Commercial Operators

As we have just seen, the difficulties caused by of a lack of harmonization are confronted by commercial operators as well as customs administrations. Commercial operators bear the costs resulting from the failure of customs administrations to act as one. They are not treated equally throughout the internal market with the result that the internal market may be distorted to the disadvantage of compliant businesses. That may become particularly true now that businesses must operate in an internal market which links the status of authorized economic operator to an appropriate record of compliance with customs requirements.\footnote{See CCC, Art. 5a.2.} Furthermore, the imposition of widely differing sanctions for similar infringements particularly affects small operators. They will usually find it more difficult to control adequately the general risks inherent in international trade in any event. The situation existing in relation to customs sanctions exacerbates their difficulties. It is also possible that the commercial operators’ fundamental rights will be infringed.

### 3.2.4 Fundamental Rights

Assessment wisely refers to the provisions of the Charter of Fundamental Rights of the European Union (CFREU) in the context of the proposed legislation. The freedom to conduct a business (Article 16), the right to private property (Article 17), the right to good administration (Article 41), the right to an effective remedy (Article 47) and the operation of the principle of proportionality in relation to criminal offences (Article 49) may all be engaged. In relation to the option of doing nothing in relation to the harmonization of customs sanctions, the Impact Assessment says:

If the current different enforcement of customs legislation continues to exist, economic operators would not be treated equally throughout the Union. That would put at stake the right to good administration, as laid down in Article 41 CFREU. (Emphasis added.)

Also, some constraints on certain freedoms and rights provided by the CFREU (namely, the freedom to conduct a business and right to an effective remedy, Articles 16 and 47) would not be eliminated and, consequently, these rights would continue to be undermined. (Emphasis added.)

These statements appear to acknowledge that the present state of affairs is not compatible with the full application of certain provisions of the CFREU. Assuming this is so for the moment, any failure to harmonize customs sanctions would give rise to a serious state of affairs.

As well as the CFREU, there are also general principles of EU law and the rights enshrined in the European Convention on Human Rights to be taken into account. These cannot be explored here. It is sufficiently clear that there is a problem concerning fundamental rights and customs sanctions from what has been said in relation to the rights in the CFREU. The Court of Justice of the EU has recently made clear that these rights are ‘at the heart’ of EU law. They must not, to use the words of the Impact Assessment, be ‘put at stake’ or ‘undermined’.

4 Conclusion

So then, what if the EU does not take steps to harmonize sanctions? Its compliance with GATT 94 is open to continued question. The ability of its customs authorities to act as the customs union demands will continue to be hampered. Non-compliant businesses will be able to exploit the situation. Compliant commercial operators will continue to operate in a distorted internal market and customs administrations will not operate as one. In some cases, commercial operators may find their fundamental rights infringed. It is, therefore, very much to be hoped that action will be taken. No doubt, that action will face external and internal scrutiny. It will be hard to satisfy commercial operators, the governments of trading partners and the national administrations of Member States. Nevertheless, the attempt to do so is worth making.

Notes

56 See the Impact Assessment (referenced at supra n. 47) at paras 7.2.1.4, 7.2.2.4, 7.2.3.4 and 7.2.4.4.
57 Paragraph 7.2.1.4.
58 See Opinion 2/13 (referenced at supra n. 49) paras 37 and 179.
59 See Opinion 2/13 (referenced at supra n. 49) para. 168.