Study - Analysis and effects of the different Member States’ customs sanctioning systems

Main findings, observations and conclusions

13 October 2015
Background

International Trade & Customs are strongly related

• Customs is an important factor in the supply chain.
• Uniform application of customs regulations, formalities and procedures is wished for to create a level playing field for economic operators.
• Whereas the main legislation is already harmonised under the existing legislation, under the new legislation (UCC), execution in daily routine is to be further aligned – not least through a common ICT framework.
• In that respect it is also important that the enforcement is aligned.
• Part of that is the customs sanctioning system, which now is proposed to be harmonized.
EU Commission proposal for a Directive
COM(2013) 884, 13 December 2013

To harmonise the definition of customs infringements as well as the sanctions for such infringements

The main aim of the Commission with this proposal for a Directive is to achieve a common legal framework, aiming for:

• equal treatment of economic operators;

• effective protection of financial interest of the EU; and

• effective law enforcement in the field of Customs.
This Study

The purpose & goal of the Study

• A further evaluation and analysis of:
  • the differences in the Member States’ sanctioning systems, focusing on 5 main elements;
  • the economic effects of a non-harmonised sanctioning system;
  • a comparison of the findings of these two elements with the Directive;
  • the international context, i.e. the WTO commitments of the EU and a comparison with the US sanctioning system; and
  • the legal basis in EU legislation for the Directive.

• The goal of the study:
  • to establish the best solution for a harmonised framework for customs sanctioning systems and recommend the required steps to achieve that.
Analysis of the Member States’ customs sanctioning systems

Nature of the customs sanctioning systems

- Most Member States (16 out of 24) - legal system for customs infringements:
  - both criminal and non-criminal sanctions and proceedings
  - thresholds for applying either non-criminal or criminal sanctions largely differ between these member States
- The other 8 Member States - legal system for customs infringements:
  - only criminal sanctions and proceedings
Analysis of the Member States’ customs sanctioning systems

Type of sanctions applied

- a. Confiscation of the goods
- b. Disqualification from the practice of activities
- c. Judicial winding up order
- d. Disqualification from requiring authorisation
- e. Publicising judicial decisions
- f. Ban on access to public assistance
- g. Placing under judicial supervision
- h. Withdrawal of granted authorisation
- i. Obligation to adopt specific measures
- j. Suspension of granted authorisation
- k. Refusal to grant authorisation
- l. Revocation of granted authorisation

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Analysis of the Member States customs sanctioning systems

Further elements analysed

• Most Member States apply the instrument of settlement next to initiating a proceeding.

• Based upon the national criminal systems and culture, also large differences are in place regarding the application of mitigating and aggravating factors, and time limitations.

• A factor where the systems are more comparable is the definitions on the liability of persons.

• This is not the case for the liability of legal persons, where only 15 Member States have a system where a legal person can be held liable for a customs infringement (in certain cases only for non-criminal sanctions).
Analysis of the Member States customs sanctioning systems

Conclusion

• The desk top analysis confirms that the divergence among the customs sanctioning systems of the individual Member States is very large.

• Almost all aspects of the customs sanctioning systems show divergence. Only in the case of liability of (natural) persons there is more convergence.

• These divergences result mainly from the differences in the main criminal system and culture of the Member States. These systems are and always have been based upon national legislative systems.

• The differences also result from the position of the sanctioning system in the broader scope of enforcement.
“Cost” of non harmonisation – Economic analysis (1)

Main observations

• No empirical evidence exists to establish the “cost” of the largely divergent customs sanctioning systems.

• Certain specific consequences may result from this divergence such as:
  • inefficiencies (capability to apply simplifications);
  • risk of losing / not acquiring the AEO status;
  • legal cost resulting from the different Member States’ systems and interpretations (especially for SMEs).

• There is clear evidence in literature that illegitimate trade indeed will displace trade to achieve maximum benefit.

• For legitimate trade, no such evidence or suggestion has been found for location choice: where customs is a main factor, it is rather the customs framework and the overall operation thereof which matters.
“Cost” of non harmonisation – Economic analysis (2)

Main observations

• Non-harmonised sanctions – risk: to slant the playing field to the detriment of legitimate operators in severe sanctioning jurisdictions.

• However, equalising the sanctions without due regard to the optimal level of deterrence has uncertain welfare effects.

• Based upon the assessment of the economic cost:
  • An ex-ante model of compliance and enforcement for legitimate trade is preferable:
    • in the light of trade facilitation;
    • evidence from the practice in the US.

Overall conclusion - a distinction between illegitimate and legitimate trade is desirable, by applying an ex-ante model for customs sanctioning for legitimate trade.
Main observations

• Approach to align the customs sanctioning systems of the Member States is a logical step in the right direction in light of the large divergence between the Member States.

• Harmonisation could support the creation of a level playing field for the economic operators.

• To achieve such level playing field, it however is required to consider customs and customs sanctioning from a broad(er) perspective.
Assessment of the proposal for a Directive

Main observations

- Customs requires a further harmonisation on a broader basis which then also can include, at the appropriate moment, the customs sanctioning systems.

- If harmonizing the customs sanctioning systems first, the scope of the Directive also needs to include the other elements of enforcement.
Assessment of the proposal for a Directive

Main observations

• The present proposal does not make a clear distinction between application of criminal or non-criminal sanctions. A clear division however is desirable to:

  • Distinguish between legitimate and illegitimate trade;

  • Enable the application of a trade facilitation ex-ante model for dealing with customs infringements.

• Such a distinction could be made by applying the present Directive to deal with customs infringements for legitimate trade, whereby the “Directive for the fight against fraud to the Union's financial interests by means of criminal law” could be the basis for dealing with illegitimate trade.
Assessment of the proposal for a Directive

Legal observations

- The content of the Directive should be clear and unambiguous (lex certa) – on a number of points (definitions, wording) this is not the case.

- Although the Directive seems to be intended to focus on non-criminal sanctions, the basic criminal principles still need to be adhered to. Thus there is a need to:
  - Include the principle of no penalty with guilt (nulla poena sine culpa);
  - Ensure that the sanctioning system need to be proportional – a value based system is less fit to achieve this goal.

- Common elements of customs sanctioning as at present applied in the Member States should be included (e.g. settlement, sanctions other than pecuniary penalties).

- Further study is advisable on article 33 TFEU as a legal basis for the Directive as proposed.
Proposal for a Directive – International perspective

WTO perspective

• Looking at the WTO obligations of the EU from the perspective of the WTO complaints as filed by the US in 2004, the present study concludes that the current level of harmonisation within customs may give rise to some concern. This, however, is not limited to the area of customs sanctions but applies also on a much broader basis for customs.

• It is felt that harmonisation to meet this concern should rather be part of the much broader harmonisation as envisaged under the UCC and the related ICT framework.
Proposal for a Directive – International perspective

US sanctioning system

• US sanctioning system:

• an analysis of this system shows that:

  • the ex-ante approach as implemented by the US based upon the customs modernisation Act leads to the facilitation of legitimate trade, while

  • the sanctioning system is used as a measure of last resort for the unwilling-to-comply/illegitimate trade.
Customs sanctioning systems
- Model for the European Union

• There are clear grounds/valid reasons to harmonise the customs sanctioning systems of the Member States.

• Looking at the role and position of customs sanctioning systems in the broader field of customs, such harmonisation preferably should be part of the broader modernisation of customs taking in to account the ex ante compliance models and developments on ICT, also following that time line.

• In that respect, also looking at the US successful model, the suggestion is to create:
  • an ex-ante sanctioning model with administrative (non-criminal) penalties for legitimate trade, while
  • using the proposed Directive on the Fight against Fraud with the more severe criminal penalty system for sanctioning illegitimate trade.
Study – Recommendations (1)

• As a consequence, it is desirable that the scope of the present proposal is reconsidered to:
  • Be the basis for a last resort measure in an ex-ante compliance model for legitimate trade;
  • Make a clear choice towards administrative (non-criminal) sanctions only;
  • Include all the other elements which are part of the overall enforcement of regulations, such as supervision, control, investigation and prosecution – to be able to achieve harmonisation of the actual practice of sanctioning in the Member states.
On a mere legal level, a reconsideration of several elements of the present proposal should be considered, including:

- Adhering to basic principles of criminal law (nulla poena sine culpa);
- The proportionality of the sanctions to be applied (e.g. applying a duty-based sanctioning system rather than a value-based sanctioning system);
- Adhering to the principles of clear and unambiguous law (lex certa);
- Including commonly accepted elements of Member States’ sanctioning systems, including non-pecuniary sanctions and the option of settlement.
- Analysing the basis for such initiative in the framework of EU law (where article 33 TFEU may not be sufficient).
Thank you for your attention