25.4.2016

Mrs Vicky Ford
Chair
Committee on the Internal Market and Consumer Protection
BRUSSELS


Dear Madam Chair,

By letter of 29 February 2016 you asked the Committee on Legal Affairs pursuant to Rule 39(2) for an opinion on the appropriateness of the legal basis for the above-mentioned proposal.

The committee considered this question at its meeting of 21 April 2016.

I - Background

By letter of 29 February 2016 the Committee on the Internal Market and Consumer Protection (IMCO) asked the Committee on Legal Affairs, pursuant to Rule 39(2) of the Rules of Procedure, for an opinion on the appropriateness of the legal basis for the above-mentioned proposal.

The Commission's proposal is based on Article 33 TFEU, which concerns customs cooperation, giving competence to the Union to act on this matter on the basis of the ordinary legislative procedure.

The rapporteur for the proposal in the IMCO Committee considered that 114 TFEU, which relates to the approximation of laws for the establishment and functioning of the internal
market, would better reflect the objectives of the proposal and that align the proposal with the Union Customs Code\(^\text{1}\), which is also based on Article 114 TFEU.

**II - The proposal**

Although the customs legislation is harmonised and within the sphere of competence of the EU, the possibility to adopt legislative measures regarding sanctions and customs infringements remain in the Member States arena.

Under the Customs 2013 Program, the Commission carried an assessment of 24 Member States' national systems regarding customs infringements and sanctions.\(^2\) The Commission found a significant number of variances in the regimes and considered that those differences have negative implications. The consequences may be felt not only in the international level but also within the European space, since the different enforcement of customs legislation may turn the effective management of the customs union harder. Moreover, the impact of the different rules would also be felt on the economic operators and in the level playing field which is in the core of the internal market. These discrepancies are acknowledged by the Commission as justifications for the necessity of this legislative act in the paragraph 1.1 of the Explanatory Memorandum and in Recital 3 of the proposal.

According to the Explanatory Memorandum, in the proposal's impact assessment (2.2) the Commission pointed out that "(...) likewise the introduction of certain facilitations and simplifications in the Union customs legislation and the [Authorised Economic Operators'] access to them is a strong reason to further strengthen the cooperation between Member States."

The proposal entails a common list of acts and omissions that should be considered violations of the Union Customs Code (UCC) and other customs legislation, stipulating strict liability cases and infringements committed intentionally or by negligence (Articles 1 to 5 of the proposal). Article 6 elaborates on the incitement, aiding, abetting and attempt of the acts previously mentioned as infringements. Article 7 of the proposal relates to errors made by the customs authority and Article 8 refers to the liability of legal persons. Article 9 to 12 lay down the substantive limits of the sanctions and the principles that should guide its application. Article 13 and 14 are procedural provisions, dealing with limitation periods and with the suspension of the administrative procedure. Article 15 defines where the jurisdiction should be exercised. Article 16 refers to cooperation between Member States, obliging Member States to exchange information and enforcing the *ne bis in idem* principle, guaranteeing that no one should be facing proceedings for the same facts in more than one Member State. Article 17 obliges Member States to give the possibility of seizure of any instrument used in committing the customs infringements. Finally, the proposal includes provisions on report and review of the compliance and transposition of the Directive (Article 18 to 21).

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\(^2\) Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the UK.
III - The proposed legal basis

The proposed legal basis for this proposal is Article 33 TFEU, which reads as follows:

**CHAPTER 2**
**CUSTOMS COOPERATION**

**Article 33**
(ex Article 135 TEC)

*Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.*

The following Article 114 TFEU is proposed to be included in the legal basis (emphasis added):

**CHAPTER 3**
**APPROXIMATION OF LAWS**

**Article 114**
(ex Article 95 TEC)

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. (...)*

IV - Case-Law

According to the settled case law of the Court of Justice, "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure". The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

In principle, a measure is to be founded on only one legal basis. A dual legal basis can only be used if a measure simultaneously pursues a number of objectives or has several linked

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components, without one being secondary and indirect in relation to the other, subject to the condition that the procedures laid down for each legal basis are not incompatible.

V - Analysis

Article 33 TFEU has been included in the legal basis for other legislative acts adopted in the field of customs cooperation, such as the UCC and the Customs 2020 Regulation. There is no explicit definition of the notion of customs cooperation, but as it is collocated within Title II 'Free Movement Of Goods', Chapter 2 'Customs Cooperation' of the TFEU it has been used extensively in relation to the Customs Union, for instance as regards customs duties, prevention of fraud and checks on goods entering the EU customs territory. Article 33 TFEU is therefore the correct legal basis when working on a framework of cooperation between the customs authorities.

Article 114 TFEU is the legal basis for measures of harmonisation concerning the internal market. Harmonisation measures under this article require as a prerequisite that there are divergences in Member States legislation on this issue which could lead to a disruption of trade within the internal market. The article could be used when it is likely that such divergences of national legislation may arise, but the likelihood cannot be purely hypothetical. The Court has repeatedly used this formula in its case-law, while it has not actually defined "likelihood". Nevertheless, the Court has never accepted Article 114 TFEU as a legal basis for legislation where it has found that divergences in national law do not exist and are not likely to arise.

According to the Court's case-law, the measures referred to in Article 114 TFEU are intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition.

The Commission's proposal aims to correct the problems arising from the disparity of regimes governing the customs infringements and subsequent sanctions within the European market. As stated in the preamble of the proposal and in its Explanatory Memorandum, those differences arise in three dimensions: firstly, at an international level, where the EU has to guarantee the compliance with the international obligations to which it is bound; secondly, within the Customs Union framework, aiming at a more effective management of the Customs Union; an thirdly at an internal market level, where the Commission recognizes that the actual status quo does not ensure a level-playing field, where economic operators do not

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5 Case C-491/01 British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, ECR [2002], I-11453, para. 60.
act under the same conditions and rules. The proposal, therefore, does not only aim at strengthening customs cooperation, but also aimed correct the distortion of the internal market, using a uniform set of rules to be applied in all 28 Member States.

Most of the provisions in the proposal are indeed intended to set up a uniform list of administrative sanctions to the infringements and of which acts and omissions should be in fact considered infringements. Although some provisions strictly concern cooperation matters (Article 15(2) and Article 16), regarding the exchange of information as an example, most of the provisions are intended to approximate the national rules.

As recognized by the Court, it is possible to have a dual legal basis when both of the legal provisions are inherently linked to the legislative act. In this case, having regard to the aim and content of the proposed Directive, the objectives of attaining an more effective management of the Customs Union while ensuring that economic operators are being subject to the same rules, without advantages in more lenient Member States, cannot be separated.

The proposal in question is not limited to strengthening customs cooperation between Member States, it actively attempts to tackle a distortion in the internal market, created by the different national regimes. Therefore, Article 114 TFEU should be added to Article 33 TFEU. Both provisions are strictly linked, while one is not ancillary to the other.

It should be noted that in accordance with the procedure under Article 114 TFEU, the consultation of the European Economic and Social Committee is obligatory.

VI - Conclusion and recommendation

Articles 33 and 114 TFEU constitute the correct legal basis for the proposal.

At its meeting of 21 April 2016 the Committee on Legal Affairs accordingly decided, by 17 votes to 3, with no abstentions 1, to recommend that the appropriate legal basis for the proposal for a Directive of the European parliament and of the Council on the Union legal framework for customs infringements and sanctions should be Articles 33 and 114 TFEU.

Yours sincerely,

Pavel Svoboda

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1 The following were present for the final vote: Jean-Marie Cavada, Mady Delvaux, Lidia Joanna Geringer de Oedenberg, Axel Voss (Vice-Chairs), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Therese Comodini Cachia, Angel Dzhambazki, Rosa Estarás Ferragut, Enrico Gasbarra, Heidi Hautala, Sylvia-Yvonne Kaufmann, Gilles Lebreton, Dietmar Köster, Emil Radev, József Szájer, Cecilia Wikström and Josef Weidenholzer (pursuant to Rule 200(2)).